October 7, 2020

Mr. Guy Ryder, Director-General
International Labour Office (ILO)
Route des Morillons 4
CH – 1211 Geneva
Switzerland

Email: ryder@ilo.org
cc: Karen Curtis, curtis@ilo.org; libsynd@ilo.org

Complaint to the ILO Committee on Freedom of Association
Against the Government of the United States of America

Dear Director General Ryder:

The AFL-CIO and the Service Employees International Union (SEIU) together file this complaint against the government of the United States of America (USG) with the ILO Committee on Freedom of Association. As described fully in this complaint, the laws, policies and practices of the USG violate the fundamental rights to freedom of association, to organize and to bargain collectively of our combined membership of 14 million workers (and of millions more who have no union representation but may want to form and join trade unions), all of which have led to the needless suffering and death of workers from COVID-19 in workplaces across the country. Moreover, the action or inaction by the USG in response to the pandemic have further violated these fundamental rights.

Sincerely,

Richard L. Trumka,
President, AFL-CIO

Mary Kay Henry
President, SEIU
COMPLAINT presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Service Employees International Union (SEIU) to the ILO Committee on Freedom of Association against the Government of the United States of America for violation of fundamental rights of freedom of association and protection of the right to organize and bargain collectively in the context of the COVID-19 crisis in workplaces across the United States

I. Introduction

This complaint is submitted to the ILO Freedom of Association Committee by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Service Employees International Union (SEIU) against the Government of the United States. The AFL-CIO is a federation of 55 trade unions that represent more than 12 million working men and women. The SEIU is trade union that represents almost 1.9 million workers in multiple industries.¹ The rights of workers they represent in the United States, and of millions more who have no union representation but may want to form and join trade unions and bargain collectively with employers, are directly affected by actions of the U.S. government described in this complaint in violation of ILO Conventions 87 and 98.²

This complaint arises in the context of a generalized failure by the United States government to address the Coronavirus pandemic in the United States. As one report notes:

One country stands alone, as the only affluent nation to have suffered a severe, sustained outbreak for more than four months: the United States . . . In no other high-income country — and in only a few countries, period — have political leaders departed from expert advice as frequently and significantly as the Trump

¹ The SEIU is called an “international union” because it also represents workers in Canada, as do many AFL-CIO affiliates who are also referred to as “international” unions. This should not be confused with global union federations associated with the International Trade Union Confederation.

² The United States has not ratified Conventions 87 and 98. But ratification is irrelevant to countries’ obligations as ILO members to fulfill these conventions. They are considered to be constitutional in nature, conventions to which all governments must adhere by virtue of membership in the ILO. This has also been expressed as “customary law above the conventions,” which all ILO members must uphold (see Fact Finding and Conciliation Commission on Chile, (ILO, 1975), para. 466.). Therefore, the ILO Committee on Freedom of Association has jurisdiction over complaints alleging violations of these conventions by the United States.
administration. President Trump has said the virus was not serious; predicted it would disappear; spent weeks questioning the need for masks; encouraged states to reopen even with large and growing caseloads; and promoted medical disinformation.³

This complaint focuses on one aspect of the U.S. government’s failed response to the pandemic: the response to the COVID-19 crisis as it affects workers and trade unions. The government’s actions have systematically violated ILO Conventions 87 and 98 on freedom of association, trade union organizing and collective bargaining.

A significant feature of the U.S. government’s failed response to the COVID-19 crisis in American workplaces is that the Occupational Safety and Health Administration (OSHA), the federal agency within the Department of Labor responsible for workplace health, has refused to issue regulations mandating testing, distancing, masks and other personal protective equipment, sanitation, disinfecting and hand-washing, or any other precautionary measure to address Coronavirus in the workplace. Instead, OSHA has issued only voluntary guidelines with no enforcement.⁴ A handful of states and local government entities have tried to fill this gap with enforceable regulations, but they do not have OSHA’s authority and reach.⁵

One recent analysis says, “Throughout the pandemic, OSHA has failed to act on thousands of coronavirus-related complaints, relying largely on self-reporting from companies seeking to forestall inspections.”⁶ Another thorough analysis concluded:

[T]he federal government has . . . used the pandemic as a rationale to roll back enforcement of existing workplace safety measures. Instead of seizing the opportunity . . . to ensure that the nation’s workers are not subjected to significant

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risks on the job, the Occupational Safety and Health Administration (OSHA) and other protector agencies have shrunk into the background.7

OSHA’s COVID-19 guidelines begin with this proviso making it clear to American employers that they have no obligations to comply with the guidelines:

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.8

In addition to its weak, unenforceable guidelines, OSHA has failed to bring together employers and unions in tripartite discussions to address the COVID-19 crisis, in violation of ILO Convention 150 ratified by the United States in 1995. That convention on labor administration calls for governments to ensure “consultation, co-operation and negotiation between the public authorities and the most representative organizations of employers and workers” on “conditions of work and working life and terms of employment.”9 Instead, OSHA has tacitly given employers the space to refuse to engage with unions on health and safety at a national policy level, rather than urging close cooperation with unions and workers, as those who best know their workplaces and what might be done to address health and safety risks.

A similar failure to comply with an ILO convention ratified by the United States arises in connection with Convention 144 on tripartite consultation, ratified in 1988. That convention calls on governments to ensure effective consultations [between representatives of the government, of employers and of workers] . . . on the re-examination at appropriate intervals of unratified Conventions to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate.”10

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9 See ILO Convention 150, Article 5.

10 See ILO Convention 144, Article 2; Article 5.
The U.S. government has disregarded its obligation under Convention 144, having fostered no effective tripartite consultation or re-examination of unratified conventions. Such conventions include numbers 155 on occupational safety and health, 161 on occupational health services, and 187 on the promotional framework for occupational safety and health, which are all relevant to the Coronavirus pandemic and its effects in the workplace.

OSHA’s failure to take action gives employers a free hand to ignore demands from workers for greater safety measures unless workers have been able to form unions and bargain collectively for health and safety protections. Where workers have bargaining rights with employers who respect them, they can gain protections in the COVID-19 crisis – not only for themselves, but for with potential victims with whom they come in contact. One recent study of the nursing home sector found that nursing homes where workers had union representation had a 30% relative decrease in the COVID-19 mortality rate compared to facilities without health care worker unions.11

The study explained:

[L]abor unions representing health care workers perform several functions that may reduce transmission. Unions generally demand high staff-to-patient ratios, paid sick leave, and higher wage and benefit levels that reduce staff turnover. They educate workers about their health and safety rights, work to ensure that such rights are enforced, demand that employers mitigate known hazards, and give workers a collective voice that can improve communication with employers. . . . [O]ur results suggest that unions may have reduced COVID-19 deaths among nursing home residents by successfully demanding PPE for health care workers. Amidst the COVID-19 pandemic, unions advocated for supplies and policies that protect staff and residents from infection.12

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12 Id. PPE is personal protective equipment.
In the retail food sectors, discussions between the United Food and Commercial Workers (UFCW) and Kroger supermarkets on behalf of the company’s 460,000 employees helped the union achieve the following economic benefits and safety protections during the pandemic:

- A $2 per hour pay increase for hourly frontline workers in retail stores, manufacturing plants, distribution centers, central fills, pharmacies and call centers;¹³
- Providing emergency paid leave;
- Additional cleaning and sanitizing protocols which include allowing associates to wash their hands and sanitize their registers every 30 minutes;
- Shortened store operating hours to provide ample time to allow restocking, cleaning, and to provide appropriate rest and relief for associates;
- Installing plexiglass partitions at registers across each store;
- Adding floor decals to promote physical distancing at check lanes and other counters;
- Financial assistance for childcare and other needs: Kroger will make $5 million available for those facing hardship, including lack of access to childcare and for those considered high-risk, due to COVID-19;
- Expanded health care services: access to mental health services and other benefits to support employees mental and physical well-being during this stressful time.¹⁴

Contrast this to the situation in the non-union Whole Foods supermarket chain owned by Amazon, where management takes harsh action to avoid dealing with unions.¹⁵ This employer fired a worker for attempting to track the virus outbreak in Whole Foods stores, since management refused to give any information to employees.¹⁶

Airline unions have successfully bargained over Coronavirus issues in that sector, gaining significant health and safety protections and pay and benefit guarantees for employees, especially for flight attendants who come in close contact with passengers. The unions were also able to effectively lobby the U.S. Congress for financial aid to avoid large-scale unemployment

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¹³ The $2 per hour pay increase was a temporary measure which has since been rescinded.


in the industry – an avenue of representation not open to workers who have no union representation.\textsuperscript{17}

Where workers have unions, they have representation and protection. However, various elements of U.S. labor law and decisions by U.S. labor law authorities have made it more difficult, and sometimes impossible, for workers in the United States to defend their health and their lives through organizing and bargaining, in violation of ILO Conventions 87 and 98. Many of these elements of U.S. labor law and decisions that infringe workers’ rights predate the emergence of the COVID-19 crisis in the workplace. But the Covid crisis has exposed and intensified these pre-existing flaws in new ways, now exacerbated by Trump administration actions aimed squarely at workers’ rights in the pandemic.

Violations take place in three main areas of U.S. labor law and policy:

A. Exclusions

In contravention of Convention 87’s requirement that workers “without distinction whatsoever” shall have the right to establish and to join organizations of their own choosing,\textsuperscript{18} many “exclusions” in the National Labor Relations Act strip millions of workers of protection of the right to organize and bargain collectively. Such exclusion leaves them unable to bargain with employers to defend their health and lives in the face of COVID-19 in their workplaces. Moreover, decisions by the National Labor Relations Board (NLRB) and courts have gone beyond statutory exclusions to create new categories of workers excluded from protection, leaving millions more unable to organize and bargain over health and safety in the workplace in the COVID-19 crisis.

B. Failure by the NLRB to protect against anti-union discrimination and interference

In contravention of Convention 98’s requirement that workers shall enjoy adequate protection against acts of anti-union discrimination and protection against any acts of interference, recent decisions by the NLRB systematically reduce, rescind, and repeal rights and protections for


\textsuperscript{18} See ILO Convention 87, Article 2.
workers against employers’ anti-union discrimination and interference. These decisions have resulted in sharply restricted ability of workers – and sometime no ability whatsoever – to organize and bargain collectively to address the COVID-19 crisis in their workplaces. They have led to a multitude of cases in which employers fired workers for trying to form unions, using the Covid crisis as an excuse to get rid of them.19

C. Constriction and denial of collective bargaining rights

ILO Convention 98 requires that governments should encourage and promote collective bargaining between employers' and workers' organizations. In contravention of this norm, recent decisions by the NLRB and other government actions and decisions embolden and enable employers to force workers to return to unsafe workplaces against their will, without the ability to defend their health and their lives through collective bargaining.

As a result of these three areas of failure to adhere to Conventions 87 and 98, employers have engaged in widespread firings and threats of firing of workers who complain or protest over unsafe conditions or who refuse to return to unsafe jobs, and widespread refusal to consult with or bargain with workers and their representatives about COVID-19 related health and safety conditions in the workplace.

II. Exclusions

Section 2 of the NLRA excludes farm workers, household domestic workers, independent contractors, and supervisors from protection of organizing and bargaining rights and from recourse to the NLRB’s unfair labor practice procedures when employers dismiss them for union activity.20 Section 2 also excludes from the definition of “employer” in the Act “any State or political subdivision thereof,”21 meaning that workers employed by state and local governments have no protection under the NLRA. In addition to these specified exclusions written into the law

19 See Jessica Silver-Greenberg and Rachel Abrams, “Fired in a Pandemic ‘Because We Tried to Start a Union,’ Workers Say: Employees who were in unions or pushing to join them have been laid off and replaced by non-unionized labor – It’s part of a pattern stretching back decades, experts say,” The New York Times, April 28, 2020, at https://www.nytimes.com/2020/04/28/business/coronavirus-unions-layoffs.html.

20 See NLRA, Section 2 (3).

21 See NLRA, Section 2 (2).
decades ago, the NLRB and courts have extended the categories of excluded workers to employees deemed “managers” who do not supervise anyone.

These exclusions violate the “without distinction whatsoever” requirement of Convention 87, and it means that many excluded workers cannot defend their health and their lives in the COVID-19 affected workplace through union organizing and collective bargaining. Here are concrete examples:

A. Farmworkers

Farmworkers throughout the United States are being forced to work in COVID-19 affected fields and orchards, many becoming sick with the virus, and many dying from it. On March 19, 2020, the federal government defined farm laborers as “essential workers” whose employers can force them to report to work rather than stay at home for their health and safety. The result has been a tsunami of COVID-19 infections afflicting farmworkers.

As one recent report notes:

The coronavirus is exploding among America’s 2.5 million farmworkers, imperiling efforts to contain the spread of the disease and keep food on the shelves just as peak harvest gets underway.

The figures are stark. The number of COVID-19 cases tripled in Lanier County, Georgia, after one day of testing farmworkers. All 200 workers on a single farm in Evensville, Tennessee tested positive. Yakima County, Washington, the site of recent farmworker strikes at apple-packing facilities, now boasts the highest per capita infection rate on the West Coast. Among migrant workers in Immokalee, Florida—who just finished picking tomatoes and are on their way north to harvest other crops—1,000 people are infected.


Only eight of the 50 U.S. states have issued mandatory requirements for worker safety on farms – testing, masks, hand sanitizing and washing stations, distancing, more spacious living quarters etc.\textsuperscript{24} The federal government and twelve other states have issued only voluntary guidelines for COVID-19 safety in the fields, with no penalties for noncompliance. The rest of the states, including such agricultural giants as Texas and Florida, have taken no action at all on requirements or guidelines to protect farmworkers.\textsuperscript{25}

Denied protection of the right to organize and bargain by their exclusion from the NLRA, farmworkers are at the mercy of owners who can force them to return to work, fire those who do not want to work for fear of becoming sick or dying, fire any workers who try to form and join a union, and refuse to bargain with workers on workplace health conditions.\textsuperscript{26}

B. Independent Contractors

Misclassification of employees as purported “independent contractors” is widely recognized as an abuse of workers’ rights in the American workplace.\textsuperscript{27} It means that employers can escape minimum wages and overtime pay requirements, not provide health insurance and retirement benefits, not pay employers’ share of social security contributions, workers’ compensation insurance, and unemployment insurance, and many other protections for employees.

As one report notes:

> Even in the best of times, gig work offered few protections. But the virus crisis has increased the stakes of operating without a safety net. Most on-demand companies offset thin profit margins by offloading the risk onto workers who are classified as independent contractors . . . There is a lack of basic employee protections.


\textsuperscript{26} Eleven states have adopted farmworker collective bargaining laws with some measure of protection for organizing (Arizona, California, Hawaii, Kansas, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Oregon, and Wisconsin). The rest have no such legislation, leaving farmworkers in those states unprotected because of the federal exclusion under the NLRA.

\textsuperscript{27} See David Weil, \textit{The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done To Improve It} (Harvard University Press 2017).
protections. Take-home pay is volatile, and there is no minimum wage or overtime.\textsuperscript{28}

The exclusions clause of the NLRA means that employers can terminate employment of so-called independent contractors if they try to form unions and bargain collectively. As a result, millions of workers around the United States are unable to defend their health and their lives in the COVID-19 crisis through collective bargaining. Some employers are refusing to provide personal protective equipment to workers whom they classify as independent contractors, instead charging workers for the cost of such equipment because employers do not want to concede that these workers are employees with whom they should bargain collectively.\textsuperscript{29}

Some workers classified as independent contractors have tried to organize but face resistance by employers. When the city of Seattle enacted a local law in 2016 that would allow drivers for Uber and Lyft to form a union, the companies and the national Chamber of Commerce launched a lawsuit to thwart drivers’ organizing. Here is the anti-union law firm that represented the companies and the Chamber reporting “victory” in the case:

Jones Day represented the U.S. Chamber of Commerce in a lawsuit challenging a collective-bargaining ordinance enacted by the City of Seattle. The ordinance authorized for-hire drivers who are independent contractors to unionize, and it compelled ride-referral companies like Uber and Lyft to collectively bargain with those unions over fees and other contractual terms. The lawsuit contended that the ordinance, the first of its kind in the United States, authorized price fixing by drivers and therefore violated federal antitrust law.\textsuperscript{30}


C. State and Local Public Employees

More than half the states in the United States prohibit or substantially constrain collective bargaining by public employees employed by state and local governments. The Committee has already found, in a case on the prohibition of collective bargaining by public employees in North Carolina, that these measures violate conventions 87 and 98.

This means that millions of teachers, bus drivers, sanitation workers, health workers in public hospitals, office employees and other public sector workers have no ability to defend their health and their lives in the COVID-19 crisis through collective bargaining. For example, bus drivers in Gwinnett County, Georgia rallied for a “no mask, no ride” policy from county government officials after a co-worker died from the virus. But that’s all they could do – pray, plead, and rally. They cannot bargain collectively to gain such a policy.

Government officials in many states, especially those in line with the Trump administration’s contempt for public health experts and safe practices, are forcing employees to “work or be fired” in unsafe conditions with no ability to bargain collectively to ensure safer workplaces. Florida is the state with one of the worst outbreaks of the Coronavirus, but the Trump-aligned governor there insisted on reopening the economy, forcing state employees to work, and reopening schools. Many of these workers have formed unions, but their unions have no ability to bargain on their behalf – they can only plead for relief or file lawsuits.

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33 See, for example, Dana Goldstein and Eliza Shapiro, “‘I Don’t Want to Go Back’: Many Teachers Are Fearful and Angry Over Pressure to Return – Teachers say crucial questions about how schools will stay clean, keep students physically distanced and prevent further spread of the virus have not been answered,” The New York Times, July 11, 2020, at https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html.


Georgia Case Study

The United Campus Workers of Georgia Local 3265 (UCWGA), affiliated with the Communications Workers of America, is a members-only union of nearly 700 employees across job categories at public higher education institutions in Georgia. It is an active, rank-and-file based union advocating for the rights of university employees. But they are excluded from coverage of the NLRA, and under Georgia law, their union cannot engage in collective bargaining.

In mid-June, 2020, schools in the Georgia state university system announced plans for reopening for face-to-face learning in the fall of 2020. Concerned for their own and students’ safety, UCWGA initiated a petition with demands for a safe fall reopening plan including that no staff, student, or faculty member would be compelled to teach or learn face-to-face, and that no medical documentation would be required to teach or learn on-line. To date over 12,800 employees and other stakeholders have signed the petition.

At specific institutions, members of the union created their own petitions with similar demands and sent them directly to administration with a request to meet. Graduate student employees who are members of the union sent a letter to the Board of Regents about their concerns.


39 See UCWGA, Georgia Tech Health & Safety Petition, June 2020, at https://docs.google.com/forms/d/e/1FAIpQLSdf8nqISetg4uOjWNHqMlJLU-pmrdcmplsmKkzGz6q82Ag4Q/viewform.

Administrators from a few institutions agreed to meet with members of the union as part of a broad “stakeholder engagement” process, but these meetings were not collective bargaining negotiations, which are unlawful for public employee unions in Georgia. Instead, they became a forum for the administrators to explain, defend, and insist on their right to make unilateral decisions, rejecting union proposals on voluntary return to work and other safety measures. At other schools in the state university system, administrators simply refused to meet.

As plans to reopen continued unchanged in early August, UCWGA members across the state elevated their demands to public media appearances and actions. As of August 24, 2020, Georgia leads the nation in COVID-19 cases per capita. Meanwhile all 26 institutions in the system have reopened with students in dormitories, fraternities, and sororities, and in-person teaching, forcing employees to return to work at high risk of COVID-19 exposure. Already, in the first days of the return, positive COVID-19 diagnoses have emerged at Georgia colleges and universities.

Yanni Loukissas, a professor at Georgia Tech and a member of UCWGA, said:


I have participated in a number of actions in protest of the “return to campus” plan developed by Georgia Tech and its overseeing body, the Georgia University System Board of Regents. We believe that this plan does not adequately address the serious public health risks associated with the ongoing COVID-19 pandemic. These risks are a direct threat to workers at Georgia Tech, their families, and the surrounding communities. As I write this, one week into the start of the Fall 2020 semester, the state of Georgia and the city of Atlanta are high risk areas for the spread of the virus. Many scientific and medical experts, including those in the White House, have encouraged communities in Georgia to take extreme measures to protect vulnerable people. In my estimation, Georgia Tech has not followed that advice.\textsuperscript{44}

Professor Loukissas goes on to recount many actions that the union has taken to confront the dangers of a forced return to campus, such as meetings, petitions, demonstrations, social media efforts and others. But he reports that meetings with university administrators ended without resolution, and that administrators “seemed to have little understanding of our concerns or interest in addressing them directly.”\textsuperscript{45}

Rebecca Hill, a professor at Kennesaw State University in Georgia, says:

Faculty who wished to move classes online had to submit requests for accommodation, and faculty concerns about family members' vulnerability to the virus were not considered as sufficient legitimate reasons for faculty or staff to work remotely. Most staff have not been given the choice to work remotely, and must sit in offices every day. Given the information about COVID-19 transmission in indoor spaces over periods of time, and the current positive testing rate in Georgia, these policies do not adequately protect the health of staff and faculty.\textsuperscript{46}

But Georgia’s prohibition on public sector collective bargaining denies to university employees the right to negotiate over health and safety concerns or any other employment conditions. The union can request meetings, but at Kennesaw State such requests have been unavailing.

\textsuperscript{44} See statement of Prof. Yanni Loukissas, August 25, 2020 (on file with complainants; upon request, complainants will convey Prof. Loukissas’ complete statement to the Committee).

\textsuperscript{45} Id.

\textsuperscript{46} See statement of Prof. Rebecca Hill, August 26, 2020 (on file with complainants; upon request, complainants will convey Prof. Hill’s complete statement to the Committee).
according to Prof. Hill, who says, “The UCW chapter here has repeatedly asked for the university president to hold a “town hall” meeting where faculty, students and staff could ask questions and be answered in real time, and have not received any response or acknowledgment of these requests.”

Kentucky Case Study

The United Campus Workers of Kentucky (UCWKY), Local 3265 of the Communications Workers of America, is a members-only union of nearly 200 employees across job categories at the University of Kentucky. It is an active, rank-and-file based union advocating for the rights of university employees. But they are excluded from coverage of the NLRA, and under Kentucky law, their union cannot engage in collective bargaining.

On May 12, 2020 representatives of UCWKY, concerned about graduate employees whose university-sponsored healthcare plans would not cover all COVID-19-related healthcare costs, sent a letter to the president of the university requesting that, among other things, the institution “extend staff healthcare plan options” to ensure adequate healthcare coverage during the pandemic. The union also asked for a role in determining the safety measures the university would institute for in-person classes in the fall.

The UK administration met with the union three times between May and August, 2020. During the meetings the administration presented their position on healthcare to the union representatives and the union outlined their demands. While the administration did make small changes, such as offering a payment plan for adding a family member to the plan, overall they treated the meetings as a chance to defend their position and present the choices they had already made. They did not engage in substantive negotiations.

By June 16th, 2020 UK had announced its plans to return to some face-to-face instruction in the fall and bring many staff positions back to work on campus. In response the union demanded that all employees able to complete their work remotely be given that option. They further amplified

47 Id.

their demands that healthcare plans be extended to part-time employees, and asked for a voice in the health & safety discussions on campus.49

However, at the time of this statement, the administration is not meeting with the union and the union’s substantive proposals have not been adopted. As of August 31, 2020 the number of student cases at the University of Kentucky has risen to 760. Employees, students, and community members are deeply concerned for their health and safety.50

**D. Managers and Private Sector College and University Professors**

Complainants do not want to overfill this complaint with cumulative examples and cases of excluded workers, so we just note, before moving to workers who are covered by the NLRA, that many more categories of employees lack protection of the right to organize and bargain collectively to defend their health and their lives in the Covid crisis. These include millions of employees classified as “managers” even though they have no supervisory responsibility and are not high-level managers at all; they simply effectuate management policy set by genuine managers higher up in the enterprise hierarchy.51

Among excluded “managers” in U.S. labor law, in violation of Conventions 87 and 98, are professors in private sector colleges and universities, as distinct from public universities. Because of a Supreme Court decision, private sector professors are denied protection under the NLRA for union organizing and collective bargaining activity. Thus, they cannot bargain collectively on return-to-work health and safety conditions at universities that re-open for on-site classes.52

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49 See Nick Oliver, “Campus union calls for more precautions for UK faculty, staff,” *WKYT News*, August 11, 2020, at [https://www.wkyt.com/2020/08/12/campus-union-calls-for-more-precautions-for-uk-faculty-staff/](https://www.wkyt.com/2020/08/12/campus-union-calls-for-more-precautions-for-uk-faculty-staff/).


More recently, the NLRB ruled that all teachers employed by religious colleges and universities have no protection of the right to organize and bargain, even those with no involvement in religious instruction.\(^5\) They too are being required to return to classrooms with no ability to bargain for protection.

III. Workers covered by the NLRA: victims of anti-union discrimination and denial of collective bargaining rights

A. The Role of the NLRB

The NLRA covers private sector employees in the United States and is meant to protect their right to organize and bargain collectively. The NLRB is the government agency charged with protecting these rights. However, many employers are taking advantage of the COVID-19 crisis to violate these rights, and the NLRB is failing to protect them.

Even before the COVID-19 crisis arrived in American workplaces, the NLRB’s Trump-appointed majority rolled back, weakened, and nullified many organizing and bargaining protections. The pandemic has now exposed the magnitude of those reversals, which in many cases leave workers and their unions disarmed and vulnerable when they seek to organize and bargain in defense of their health and their lives in the workplace.

The NLRB usually changes labor law by deciding specific cases, thus creating new precedents and doctrines to overrule earlier decisions. Complainants do not want to overburden this complaint with detailed accounts of every case; suffice it to say that the Trump NLRB has systematically reversed earlier decisions that protected workers’ rights with new decisions that undermine those rights, effectively giving to employers their longstanding “wish-list” of changes in the law to expand employers’ power and reduce workers’ rights and protections. We offer a few key examples, and refer the Committee to analyses by labor law experts and related cases cited below.

B. NLRB actions weakening trade union rights since 2017 and before the pandemic

Many news articles and policy analyses have documented actions by the Trump-appointed NLRB majority to undermine workers organizing and bargaining rights in violation of obligations under ILO Conventions 87 and 98. Here is how one analysis by labor law experts characterizes the Trump board’s actions:

The Trump board has weakened workers’ rights to organize and engage in collective bargaining in every possible area—in the scope of workers covered under the law, in the definition of what activity is protected under the law, in workers’ ability to communicate with their co-workers about workplace issues, in workers’ ability to decide which group of co-workers to organize and bargain with, and in workers’ ability to strike to achieve their goals. At the same time, the Trump board has given employers new tools to restrict communications by workers and unions, and to undermine collective bargaining relationships by making unilateral changes and refusing to recognize incumbent unions.

To take one example among many as it relates to the COVID-19 crisis, in 2019 the Trump board reversed an earlier rule and decided that hospital management can ban union organizers from talking with hospital workers in the hospital cafeteria during their lunch break or before or after their shift, even though the area is open to the public and anyone else can enter the cafeteria and engage employees in conversation about any topic. As a result hospital workers, who face enormous risks and dangers caring for COVID-19 victims, now have restricted opportunities to communicate with union representatives about forming a union to defend their health and their lives through collective bargaining.

One thorough analysis reflects the view of two former NLRB lawyers who are “deeply saddened by the Trump NLRB’s distortions of the law and destructive management of the agency.” They conclude that “the NLRB has departed from its mission and historical practice . . . The results for workers have been dire. Millions of workers have lost (or face the threat of losing) the


56 See *University of Pittsburgh Medical Center (UPMC)*, 368 NLRB No. 2 (2019).
protections of federal labor law and, as a result, a voice in their workplaces at a time when it is so sorely wanted and needed.\textsuperscript{57}

These experts go on to note:

Since September 2017, when the Trump appointees first constituted a majority, the NLRB has:

- Explicitly reversed significant and often longstanding precedent in 20 cases—and has requested briefing about whether to change the law in only two of them.

- Applied its new legal standards retroactively in each of these 20 cases, paying only cursory attention to parties’ reliance interests and ignoring the uncertainty and unfairness that can result when the rules change while cases are pending.

- Significantly modified or misapplied existing law in over 40 other cases, effectively limiting the reach of decisions that were intended to safeguard workers’ rights and tacitly discouraging regional offices from pursuing cases involving those legal principles.

- Indicated that one or more Board members would consider reversing additional precedent in 38 other cases, offering what is generally considered to be an invitation for parties to present a case as a vehicle for changing the law.

- Initiated four rulemaking proceedings (and two that they’ve announced but not yet formally initiated) intended to reverse additional precedent and make it harder for a future Board to dislodge the current majority’s view of the law—all without holding a single hearing to allow public input about the proposed rules and, in one case without notice and comment.

Every single one of these cases and rulemaking proceedings involves a change (or proposed change) that will dispossess workers of their rights to organize and collectively bargain.\textsuperscript{58}

\textsuperscript{57} See Amanda Jarrett and Jessica Rutter, “Ringing the Alarm at the NLRB,” \textit{Onlabor} blog at Harvard Law School, February 6, 2020, at \url{https://www.onlabor.org/ringing-the-alarm-at-the-nlrb/}.

\textsuperscript{58} \textit{Id.}
This “Ringing the Alarm” report discusses and cites particular cases in more detail which we will not repeat here. We urge the Committee to review the entire report to gain the benefit of the authors’ analysis. As we have noted, those Board decisions that pre-date the emergence of the COVID-19 crisis in the American workplace continued to undermine workers’ organizing and bargaining rights, destroying their ability to defend their health and their lives through the exercise of rights guaranteed by ILO Conventions 87 and 98.

C. NLRB actions since the COVID-19 crisis began

The emergence of the COVID-19 crisis in American workplaces has not paused the Trump NLRB’s assault on workers’ organizing and bargaining rights. On the contrary, the Board is using the crisis to give employers even more power to violate these rights at a time when workers most need their protection to defend their health and their lives at work.59 As one report notes, “The National Labor Relations Board has taken a deregulatory approach to labor and workplace law under the Trump administration, and the agency has largely stayed on that management-side course during the coronavirus pandemic.”60

One management-side law firm noted that NLRB decisions are helping employers thwart union organizing efforts in the pandemic.61 Many employers have imposed “gag rules” prohibiting employees from talking about Covid 19 in their workplaces and threatening them with disciplinary action if they do.62

The NLRB cancelled and delayed many scheduled union representation elections, giving employers more time to press their anti-union campaigns and intimidate workers into voting “no

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union” for fear of job loss in the pandemic. Many employers who forced workers to report for work during an organizing effort required them to attend “captive-audience” anti-union meetings, while union representatives were unable to meet personally with workers in their homes or at meetings because of pandemic restrictions.63

U.S. labor law allows managers to launch fierce anti-union campaigns in the name of “employer free speech” that interfere with workers organizing rights in violation of conventions 87 and 98 – something that U.S. employers have openly acknowledged. The U.S. Council of International Business, the American employers’ representative to the ILO, says that “U.S. law and practice conflict with many of the requirements of the ILO standards . . . U.S. ratification of the convention would prohibit all acts of employer and union interference in organizing, which would eliminate employers’ rights under the NLRA to oppose unions.”64

Such campaigns always include “captive-audience” meetings (“captive” because workers are required to attend them) in which consultants and managers make speeches, show films and PowerPoint slides, and use other methods to attack unions and make implicit threats of dire consequences if workers join a union. The only limitation on captive-audience meetings is that they may not be held within 24 hours of an NLRB representation election.65

Many unfair labor practice charges have been filed by workers who were fired when they sought to bargain with employers on safety conditions in returning to work. Employers said they were fired for refusing an order to return to work.66 In another case, workers at a poultry processing plant in Delaware said that management forced them to attend tightly packed anti-union meetings with no social distancing or personal protection.67 Wilma Liebman, the former Chair of

63 Examples of these actions are provided and footnoted below.


65 See Peerless Plywood Co., 107 NLRB 427 (1953).

66 See Jessica Silver-Greenberg and Rachel Abrams, “Fired in a Pandemic ‘Because We Tried to Start a Union,’ Workers Say: Employees who were in unions or pushing to join them have been laid off and replaced by non-unionized labor – It’s part of a pattern stretching back decades, experts say,” The New York Times, April 28, 2020, at https://www.nytimes.com/2020/04/28/business/coronavirus-unions-layoffs.html.

the NLRB, said that the Board is “apparently taking advantage of the pandemic to excuse employers from obligations they would otherwise have under the statute” and to “ease or discard norms that provide some measure of integrity to agency procedure.”

An ominous March 2020 legal memorandum from the Trump-appointed NLRB General Counsel, who decides whether to advance unfair labor cases to trial before the Board’s independent administrative law judges, signaled that employers may be able to avoid a longstanding legal obligation to bargain with unions about proposed layoffs. Instead, the memorandum lets them act unilaterally to terminate employees and blame it on the pandemic.

In early August 2020, the General Counsel issued a new onslaught of memoranda ordering NLRB officials to dismiss charges that employers were using the COVID-19 crisis to violate workers’ rights. Indeed, the General Counsel’s moves attacked the very foundation of organizing and bargaining in the United States: workers’ right to engage in concerted activity for mutual aid and protection, and trade unions’ right to bargain over changes in terms and conditions of employment, including the right to obtain information necessary and relevant for bargaining:

- In *Memphis Ready Mix*, the GC said the concrete company could refuse to negotiate with the union over proposals for paid sick leave and hazard pay during the COVID-19 crisis;

- In *Marek Brothers Drywall*, the GC said the construction employer could dismiss a worker who protested the lack of supplies needed for employees to wash their hands as a precaution against the virus;

- In *Hornell Gardens*, the GC said a nursing home could dismiss workers who expressed concern about sharing protective gowns at work, and could threaten to block unemployment benefits and tell state authorities to revoke nurses’ licenses if they stayed home because of insufficient personal protective equipment and other safety measures;

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• In *ABM Business and Industry*, the GC said the facility management firm could refuse to give the union information the union requested about layoffs due to the pandemic;

• In *Crowne Plaza O’Hare*, the GC said that hotel management could refuse to give the union information the union requested on management’s claims that layoffs were a result of the pandemic.

These memoranda from the NLRB General Counsel cannot be challenged because they are an exercise of unreviewable “prosecutorial discretion.” Each of these decisions disarms workers and their unions in the face of management actions to violate their collective bargaining rights in the COVID-19 crisis. Since these memoranda also serve as instructions to NLRB regional authorities on how to handle similar cases, they have a cascading effect that will undermine workers’ rights in weeks and months ahead as the pandemic continues to ravage American workplaces.

**IV. Sector Case Studies**

**A. Meatpacking workers**

Meatpacking companies are a central focus of the Trump administration’s Defense Production Act executive order defining “essential” businesses and workers. Meatpacking workers have been among the most affected by the COVID-19 crisis, with plants and communities where they are located seen by many as “disaster zones.” As of the end of July, 50,000 meatpacking

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71 See NLRA Section 3(d), vesting in the General Counsel “final authority” over whether to issue an unfair labor practice complaint.


workers in the United States had contracted the Coronavirus – 10,000 of them at Tyson’s Foods, the nation’s largest processed chicken producer. Because of the demographic make-up of the meatpacking labor force, the overwhelming portion of affected workers have been racial and ethnic minorities.

Where meatpacking workers have unions to defend them, they are able to collectively bargain for workplace protections. But unions represent only 10 percent of meatpacking workers in the United States, and employers have a long history of aggressively resisting trade union formation. Many meatpacking workers who try to form trade unions and bargain collectively are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized for their exercise of the right to freedom of association. Labor laws that are supposed to protect workers’ freedom of association have fundamental gaps, and government agencies fail to enforce effectively those laws that do purport to protect workers’ rights.

Meatpacking companies have ignored advice from the U.S. Center for Disease Control not to pressure employees to return to unsafe workplaces. As one report notes:

> The CDC has no legal authority over the industry, so even in the grip of the pandemic, adherence to its directives was purely voluntary. . . The federal agency that does have the power to regulate conditions in meat plants is the Occupational Safety and Health Administration, part of the Department of Labor. But with its staff cut by the Trump administration and its inspection activity sharply curtailed, the agency hasn’t issued a single enforceable order for what meat plants should do to prevent workers from contracting COVID-19. As usual, meatpacking


companies are on their own, unencumbered by regulators they’ve assiduously kept at bay.\textsuperscript{78}

One alarming and insidious argument about COVID-19 in meatpacking factories puts the blame on workers themselves, with a racist twist about immigrant “cultures.” Here is an account:

In conservative circles, a different argument has emerged: Meatpacking workers are responsible for their own illnesses. “Living circumstances in certain cultures are different than they are with your traditional American family,” a Smithfield spokesperson told \textit{BuzzFeed News}—a comment that the company later disavowed. Wisconsin Chief Justice Patience Roggensack dismissed the spread of COVID-19 in Brown County, Wisconsin, home to a JBS plant, saying the workers who’d fallen ill weren’t “regular folks.” According to \textit{Politico}, Alex Azar, the secretary of Health and Human Services, told a group of lawmakers that workers were unlikely to be infected at meatpacking plants and that their “home and social” habits were spreading the virus. South Dakota Governor Kristi Noem may have been the first Republican to express that view publicly. “We believe that 99 percent of what’s going on today wasn’t happening inside the facility,” Noem told Fox News on April 13, while discussing an outbreak at a Smithfield pork plant where hundreds of workers had tested positive. “It was more at home, where these employees were going home and spreading some of the virus, because a lot of these folks that work at this plant live in the same community, the same building, sometimes the same apartments.”\textsuperscript{79}

The meatpacking sector has also laid bare the failure of the Trump Administration’s Occupational Safety and Health Administration to effectively intervene in the COVID-19 workplace crisis. As noted above, OSHA has refused to issue enforceable standards to address the virus in the workplace. This means that workers can only use the “general duty” clause of the OSHA law as the basis of a complaint. That clause calls for companies to provide a safe and healthy workplace when there are no specific standards on potential hazards.\textsuperscript{80} In September


\textsuperscript{79} See Eric Schlosser, America’s Slaughterhouses Aren’t Just Killing Animals: The industry practice of making hundreds of workers stand close together at a production line—with sharp knives and a fast line speed—endangers not only their safety, but also food safety and public health,” \textit{The Atlantic}, May 12, 2020, at https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/.

2020, OSHA finally took action: citing two giant, multi-billion dollar meatpacking companies, Smithfield and JBS, for a total of three violations and fining them a total of $29,000. Despite the trivial sum of money at stake, both companies said they would challenge the citations and fines, meaning it could take years before any final decision is made by the courts.

B. Health care workers

Health care workers face perhaps the gravest risk for COVID-19 in the workplace, since they come in close contact with patients suffering from the disease. In the early weeks of the pandemic, the U.S. government failed utterly to effectuate the provision of personal protective equipment (PPE) for health care workers. The problem persisted well into the summer.

Only 10 percent of health care workers in the United States are represented by unions. These workers are able to bargain collectively for health and safety protections over and above what regulations require. As noted earlier, nursing homes with unions have substantially lower rates of mortality than non-union nursing homes, both for workers and for nursing home residents.

The other 90 percent of health care workers are at the mercy of employers’ unilateral power over health and safety conditions in the workplace. Remember, the “at-will” employment system

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82 Id.


prevails in the United States, in which an employer can dismiss workers at any time for any reason. Only union representation brings a “just cause” standard for dismissal. Without representation and protection, many workers have been fired for protesting health and safety conditions, or even for simply requesting more protective equipment.86

Nursing homes in the U.S. have been hotbeds of the coronavirus, with more than 40% of COVID-19 deaths occurring among nursing home residents and staff.87 As set out in a petition filed in June by SEIU (together with the American Civil Liberties Union and several disability rights organizations), the U.S. Department of Health and Human Services (including three of its subsidiary agencies—the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, and the Center for Clinical Standards and Quality), “delayed the effort to monitor the extent of the problem, significantly curtailed the inspection and enforcement program, waived basic patient and staff protections, and failed to issue clear, robust COVID-19 specific infection prevention and control directions for those facilities to follow.”88

Of particular relevance to this complaint to the ILO, the Petition criticizes HHS for not prioritizing personal protective equipment (PPE) for nursing home workers,89 despite the fact that nursing home workers receive such low pay (median annual earnings in 2017 for nursing


88 Petition Of American Civil Liberties Union, Service Employees International Union, American Association of People with Disabilities, Autistic Self-Advocacy Center, Disability Rights Education and Defense Fund, National Council on Independent Living, Partnership for Inclusive Disaster Strategies and World Institute on Disability, submitted to the U.S. Department of Health and Human Services and three of its subsidiary agencies—the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, and the Center for Clinical Standards and Quality—June 23, 2020, p. 3.

assistants in nursing homes were $22,000\textsuperscript{90}) and often do not get full-time hours, and that they often end up with jobs in multiple nursing homes, which increases the risk that they either contract the coronavirus themselves or spread it from one nursing home to another.\textsuperscript{91} The Petition calls on HHS to remedy these failures and indicates that further legal action may result if they are not remedied.

**HCA in North Carolina**

Some health care companies are exploiting the COVID-19 situation to thwart employees’ union organizing efforts. In one egregious case, HCA Corporation, the largest for-profit hospital company in the United States, persuaded the NLRB to delay a representation election among 1600 nurses at the Mission Hospital in Asheville, North Carolina.

HCA took over the formerly nonprofit hospital in 2019 and began cutting staff to boost profits. Nurses undertook a union organizing effort with National Nurses United, a union that represents nurses at 19 of HCA’s 184 hospitals across the country. Other unions represent nurses at 18 other hospitals; 147 HCA facilities have no nurses’ union.

NNU filed for a union election in March. HCA management demanded a delay, arguing that “the election should not be scheduled prior to or during the time it and its healthcare professionals, including Registered Nurses, are dealing with the surge of COVID-19 patients and caring for those patients.”\textsuperscript{92}

But while management said nurses should not be distracted from care duties by a union election, it hired the notoriously anti-union Crossroads consultant group to hold mandatory “captive-audience meetings” during work time, requiring nurses to leave their care stations to listen to anti-union harangues from Crossroads consultants.


\textsuperscript{91} Petition, p. 5.

\textsuperscript{92} See Matthew Cunningham-Cook and Jonathan Michels, “Giant Hospital Corporation Takes Advantage of Coronavirus to Fight Nurses’ Union Drive,” The Intercept, May 6, 2020, at https://theintercept.com/2020/05/06/coronavirus-hca-healthcare-nurse-union-busting/.
Despite management’s anti-union campaign in the midst of the COVID-19 crisis, nurses voted by a more than 2-1 margin, 965-411, in favor of NNU representation.93 One day later, management announced it was paying a COVID-19 salary bonus to all hospital employees – except the nurses who had just chosen union representation.94

**Providence Health in Washington State**

Another example of a health care employer exploiting the COVID-19 crisis to resist union organizing arises in the Providence Health system in Washington State. Throughout 2020, technical and service hospital workers there have been organizing with the help of United Food and Commercial Workers (UFCW) Local 21 at hospital sites in Olympia, Centralia, and Walla Walla, Washington.

The COVID-19 crisis and its effect on workers’ organizing rights came to a head at the Providence St. Mary location in Walla Walla. Workers began organizing in March, just when Washington State became the first epicenter of the pandemic in the United States.95 To comply with state health advisories on social distancing, union organizers had to halt their most effective means of communication with workers, visiting them in their homes and inviting them to group meetings in union offices or other spaces.

Personal contacts and personal relationships are an essential element of effective workers’ organizing. Written material and social media lack this personal connection. But while the union’s hands were tied and representatives were unable to personally meet workers, hospital management at Providence St. Mary launched a campaign of in-person captive-audience meetings inside the workplace that put both workers and patients at risk.

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From May 18 to May 23, 2020 – still the midst of the pandemic and restrictions on in-person gatherings – Providence management held eleven one-hour captive audience meetings with groups of up to ten workers at a time forced to listen to management’s anti-union imprecations without any opportunity to hear from union representatives. This one-sided campaign had the desired effect: the union failed to achieve a majority in NLRB elections held on July 15 and 17.

Committee on Freedom of Association case on trade union access

The Committee on Freedom of Association has already found in a 1992 case that the imbalance in workers’ opportunities to hear from unions as well as management when workers seek to form unions violates Convention 87 (coincidentally, the United Food and Commercial Workers brought that case to the Committee). The Committee said that denying equal opportunity for workers to hear from union representatives inside the workplace violates requirements for “access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization.”

The imbalance noted by the Committee in the 1992 case is compounded under conditions of the pandemic. Not only are workers unable to hear from union representatives in the workplace. They are also unable to hear from union representatives in personal meetings away from the workplace, while management forces them into in-person captive-audience meetings to unleash attacks on unions. The violation of ILO freedom of association principles could not be more clear.

C. Construction workers

The U.S. government’s executive order on essential workers forced hundreds of thousands of construction workers to report for work in dangerous conditions or lose their jobs. Many construction contractors forced workers into construction sites before providing for personal

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96 Based on management’s schedule of meetings on Excel spreadsheet provided by UFCW Local 21, September 3, 2020. Complainants can supply this schedule to the Committee upon request.


protective equipment, hand washing, sanitized toilets, distancing requirements and other protective measures. As in other sectors, immigrants are especially vulnerable and affected.

Trade unions represent 14 percent of construction workers in the United States. Where they have bargaining rights, workers are able to negotiate for on-the-job protections in the COVID-19 crisis. But the vast majority of construction workers, many of whom are immigrants, especially from Latin America, have no voice in workplace safety without unions.

D. Warehouse workers

Hundreds of thousands of workers around the United States labor in warehouses where they work constantly in close quarters. The Coronavirus has hit warehouse workers hard, with thousands infected and many dying from the virus. Where warehouse workers have trade union representation, they have been able to negotiate for workplace protections.

But as in meatpacking and many other sectors, only about 10 percent of the warehouse labor force engage in collective bargaining. For the other 90 percent, organizing a union is a challenge, especially in the pandemic. Columbia Sportswear, which holds itself out as a socially responsible enterprise, engaged anti-union consultants to break a union organizing effort at its warehouse in Portland, Oregon.

The vast majority are at the mercy of employers like TMG, a printing and shipping warehouse in New York, which issued instructions to employees “If you don’t show up for work you will not be paid and after two days you will be considered to have abandoned your job.”


101 See Alleen Brown, “Columbia Sportswear Sought to Crush a Warehouse Union Drive as the Pandemic Approached: Workers at a distribution center in Portland, Oregon, say the company’s intimidation tactics left them afraid to speak up amid the coronavirus crisis,” The Intercept, May 20, 2020, at https://theintercept.com/2020/05/20/columbia-sportswear-warehouse-workers-union-teamsters/.
also discouraged TMG employees from wearing masks or gloves unless they were sick or had compromised immune systems.\textsuperscript{102} Six workers at the TMG warehouse died.\textsuperscript{103}

Warehouse workers’ vulnerability to COVID-19 is increasing as management pushes them to work harder and faster in close quarters to meet the surge in consumer demand for package deliveries. Without the ability to bargain for workplace protections, they are suffering the consequences of this intense speed-up. As one warehouse workers said, “When Covid started, they basically told us, ‘Try to socially distance,’ which is almost impossible in such close quarters. They keep sending us messages about positive cases. But at the same time, they are going full speed ahead like nothing is happening.” Another said, “There was a lot of cutting the corners when it came to health and safety because you’re constantly being told you have to meet these incredible numbers. Their demands kept getting more unrealistic as the pandemic went on, but at the same time, there were fewer and fewer workers to actually do the job.”\textsuperscript{104}

In high-profile cases arising out of the COVID-19 crisis, Amazon dismissed employees in New York and Minnesota for protesting against unsafe Covid conditions in company warehouses.\textsuperscript{105} In the New York case, a top company manager disparaged Christian Smalls, the fired worker leader in New York and an African-American, as “not smart or articulate” – a common racist code phrase.\textsuperscript{106} Remarkably, and to his credit, Amazon vice president Tim Bray resigned in


\textsuperscript{103} See Gabriel Thompson, “They Were Warned Not to Take Sick Days — Then Six Workers at Their Warehouse Died of Coronavirus” The Intercept, April 30, 2020, at https://theintercept.com/2020/04/30/coronavirus-warehouse-deaths-broadridge/.


protest of the company’s treatment of protesting employees, describing a “vein of toxicity” in Amazon’s corporate culture. He then co-authored an op-ed essay with UNI Global Union General Secretary Christy Hoffman in the New York Times asking Amazon CEO Jeff Bezos “will you finally let your workers unionize?”

Amazon management said they fired the employees for violating internal company rules. Cases are proceeding at the NLRB, but recent decisions by the Trump board have given employers a much stronger hand in terminating employees allegedly for violating company rules when workers say they were fired for union activity.

Amazon exposed its real attitude when the company posted job openings to recruit staff for its “Global Intelligence Program” based in Phoenix, Arizona. The hires would be responsible for, among other things, collecting information about “labor organizing threats against the company.” Specifically, the job listing said:

[A]nalysts “must be capable of engaging and informing L7+ ER Principals (attorney stakeholders) on sensitive topics that are highly confidential, including labor organizing threats against the company, establish and track funding and activities connected to corporate campaigns (internal and external) against Amazon, and provide sophisticated analysis on these topics . . . analysts will work directly with Sr. Corporate Counsel to compile and provide assessments for use in court filings, up to and including restraining orders against activist groups; intelligence assessments are used by Legal to demonstrate to court of law that activist groups harbor intent for continued illegal activity vis-à-vis Amazon. . . Analysts are expected to close knowledge gaps by initiating and maintaining engagement with topical subject matter experts on topics of importance to

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109 See *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019); *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019); *Boeing*, 365 NLRB No. 154 (2017).


When the job postings were exposed, Amazon scrambled to delete them from its website. But the revelation was indisputable. Amazon’s grouping of trade unions with “hate groups” and “terrorism” says all one needs to know about the company’s respect for workers’ freedom of association.

Complainants invite the Committee to contrast this attitude and Amazon’s retaliation against workers and refusal to deal with unions in the United States with events in France. There, workers and unions were able to use legislation and collective action to force Amazon to bargain with them. The result was a negotiated agreement on safer conditions inside Amazon warehouses in France.\footnote{See Liz Alderman, “Amazon Reaches Deal With French Unions in Coronavirus Safety Dispute,” The New York Times, May 16, 2020, at https://www.nytimes.com/2020/05/16/business/amazon-france-unions-coronavirus.html.} This demonstrates the value of union organization and collective bargaining, rights that are supposed to be respected under ILO Conventions 87 and 98 but which the United States is failing to protect for American workers.

E. Fast-Food Workers

The NLRB had already made it easy for McDonald’s and other fast-food companies in the United States to violate employees’ organizing rights by claiming that workers are employed by franchisees, not by McDonald’s. Several workers who participated in lawful protests in 2014 as part of the “Fight for $15” movement were fired by McDonald’s franchise operators, and filed complaints over their treatment. In July 2018, before the evidentiary trial had been fully completed, an NLRB judge rejected as insufficient an attempted settlement of the case between McDonald’s and the Trump-appointed General Counsel that failed to impose any liability on McDonalds, the franchisor. The judge found “copious evidence” on the record that McDonald’s’ response to the protest was “formulated and implemented from its corporate headquarters.”\footnote{See Noam Scheiber, “Judge Rejects Settlement Over McDonald’s Labor Practices,” The New York Times, July 17, 2018, at https://www.nytimes.com/2018/07/17/business/economy/mcdonalds-franchise-nlrb.html.}

But in December 2019, on appeal to the Board, a majority of the NLRB Members appointed by President Donald Trump reversed the judge and approved the settlement. The General Counsel
and the Board imposed the settlement without involvement or consent of the fired workers who were seeking redress through the NLRB processes. Under the terms of the settlement, McDonald’s escaped any liability as a joint employer sharing responsibility with franchisees for unfair labor practices under the NLRA. As the dissenting Board member explained:

At the urging of the current General Counsel, the majority today disposes of a mammoth and important joint-employer case under the National Labor Relations Act—before it requires the Board to apply a precedent that both the majority and the current General Counsel have tried unsuccessfully to repudiate. Reversing the administrative law judge, the majority approves a series of informal settlement agreements (omitting a Board order) that do not impose joint and several liability on McDonald’s as a joint employer and that prevent a complete evidentiary record from being developed here.

It was a blatantly political decision based on pro-employer, anti-union, anti-worker bias in Trump administration policy. In fact, the Board’s imposition of the settlement has been challenged by worker advocates because one of the Trump-appointed NLRB members making the decision was for years a top partner in a law firm that represented McDonald’s in labor-related cases.

Since the COVID-19 crisis erupted, McDonald’s has resisted workers’ collective actions and requests for a voice in determining health and safety practices inside McDonald’s stores. In May, McDonald’s workers in Chicago, Illinois filed a lawsuit arguing that the company failed to provide accurate information about COVID-19 and how it spreads; failed to provide adequate supplies of gloves, masks and hand sanitizers; failed to enforce policies requiring employees and customers to wear masks; failed to monitor infections among employees and to inform employees if a co-worker became infected or had symptoms; and failed to implement proper social distancing measures to protect employees coming in contact with customers and other

114 See NLRB, McDonald’s USA and Fast Food Workers Committee, Cases 02–CA–093893 et al., 368 NLRB No. (December 12, 2019), at apps.nlrb.gov › link › document.aspx.

115 Id.


employees. McDonald’s workers in Oakland, California filed a similar suit against McDonald’s, stating that their managers told them to use coffee filters as improvised masks when they asked for adequate personal protective equipment.

These workers turned to a lawsuit for two reasons. First, the labor department’s Occupational Safety and Health Administration refused to issue an emergency standard on Covid-related health measures in the workplace. Second, McDonald’s workers have no recourse to collective bargaining at the corporate level because McDonald’s refuses to recognize, deal with, or even talk to workers’ representatives in the United States, in contrast to the company’s practice of negotiating with unions for itself and franchisees in much of the rest of the world, including most of Europe.

McDonald’s U.S. management for decades has been open about the company’s hostility to trade unions. In the 1970s John Cooke, the company’s then-head of U.S. labor relations, declared: “Unions are inimical to what we stand for and how we operate.” Michael Quinlan, who was McDonald’s CEO for ten years in the 1980s and 90s, said, “McDonald’s is basically a non-union company and intends to stay that way.” Now, because of the settlement relieving McDonald’s and other franchisors of any legal obligation to recognize or bargain with employee representatives, most fast-food workers are unable to organize and to defend their health and their lives at work through collective bargaining with the corporate employer that has the real power to negotiate and reach agreement on health and safety conditions.

Without the opportunity to form trade unions and bargain collectively with the corporate franchisor, McDonald’s workers have tried to use other legal mechanisms to gain health and safety protection inside their stores. McDonald’s workers at restaurants in Los Angeles, Monterey Park and San Jose, California filed complaints in May with state authorities arguing

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that the company’s handling of COVID-19 issues in stores throughout California put them in “imminent danger.” Also in May, McDonald’s workers and other fast-food employees in Florida joined a statewide strike over Covid safety conditions. In July, workers at McDonald’s and other fast-food companies across the United States held a one-day strike demanding safe conditions in the COVID-19 crisis. Some workers were fired after leading or participating in the strike.

F. Workers in U.S. airport economies

One of the sectors of the US economy most impacted by the COVID-19 crisis has been the aviation sector. In April, the US Transportation Security Administration reported record low numbers for air travelers screened. Overall, in April, 2020 the number of passengers screened was less than 5% of the numbers screened in April, 2019. Although passenger numbers have begun to rebound, numbers for August, 2020 remain at less than 30% of August 2019 levels. Unfortunately, despite action taken by the US Congress to limit the immediate impact of the crisis on workers in the aviation sector, the crisis has resulted in tens of thousands of layoffs and


126 See website of the Transportation Security Administration, “TSA checkpoint travel numbers for 2020 and 2019,” https://www.tsa.gov/coronavirus/passenger-throughput. April 2020 showed a total of 3,287,008 passengers screened, compared to 70,124,591 passengers screened in April 2019, which was 4.7%.

127 See website of the Transportation Security Administration, “TSA checkpoint travel numbers for 2020 and 2019,” https://www.tsa.gov/coronavirus/passenger-throughput. Through August 26, August 2020 had 18,137,531 passengers screened, compared to 63,435,437 in August, 2019, which was 28.6%.
reductions in hours for a largely contracted workforce that was already struggling with low wages and lack of comprehensive health insurance.

The policy response for aviation has only exacerbated the crisis. The bailout package in the CARES Act as passed by US Congress was intended to prevent involuntary layoffs and furloughs in the aviation industry, but there were inadequate safeguards and less money for aviation employers peripheral to the airlines themselves, and for workers employed by airline contractors. The Trump administration’s Treasury Department took months to deliver the money and failed to create a deadline by which contractors who received aid were required to spend the money.128 As a result, thousands of airport and airline service workers were laid off, and thousands more had their hours reduced.129 In the absence of clear directives within the legislation and the regulations to require negotiation with unions, employers – even in unionized workplaces – undertook layoffs unilaterally, and frequently in violation of language in collective bargaining agreements.

Under the Trump administration, this important piece of legislation that was intended to protect the livelihoods of working people through the crisis has instead been subverted to undermine workers' rights, including their right to organize and defend their interests. Key agencies established to protect workers have also been weakened. As noted elsewhere in this complaint, guidelines issued by the Occupational Safety and Health Administration (OSHA) in the pandemic, which could have imposed affirmative obligations on employers to address worker health and safety, including through robust consultation with worker representatives, were instead framed as purely voluntary. These failures have only been compounded and highlighted by discretionary decisions of the NLRB General Counsel that COVID-19 related health and safety issues are not a mandatory subject of bargaining.130


The Trump administration's concerted efforts across its agencies to take advantage of the crisis produced by this pandemic, to erode trade union rights, to empower employers to block workers' attempts to organize, and to encourage employers to ignore workers' united voices and even government guidance on health and safety have been sharply in evidence in airports.

**Courtyard Marriott Oakland Airport**

Workers at the Courtyard Marriott Oakland Airport petitioned the NLRB for a representation election on May 4, 2020. At the time, the majority of the workers were on furlough status because of the Covid 19 pandemic. “Furlough” in American employment terminology means workers are still considered employees and can expect to return to their jobs as business resumes. Indeed, starting in mid-March when the workers went on furlough, the employer maintained regular communication saying they are only on temporary furlough and to expect that they would be recalled when business resumed. Furloughed employees expecting to be recalled are normally able to vote in NLRB elections.

On May 7th, three days after workers filed for a union election, the employer fired all but three of the workers that would have been eligible to vote by sending them emails at night and blaming the pandemic, despite nothing having changed. The NLRB regional office then said it would hold an election with only the three remaining workers. The Union prevented the vote by filing an unfair labor practice charge asserting that the company dismissed workers in retaliation for their union organizing effort and asking that they be restored to furlough status and eligible to vote in the election.\(^{131}\)

The regional office has asked the General Counsel at NLRB national headquarters in Washington, D.C. how to handle the case – the same General Counsel who has issued memoranda and decisions favoring employers throughout the pandemic crisis. In sum, for nearly four months, workers still have no idea when they will have their jobs back or when an election might take place to gain collective bargaining rights. And the likelihood is at least many months more of delay.

**HMSHost Orlando Airport**

HMSHost is the largest food and beverage service provider for travelers in the world, a part of Autogrill, wholly owned by a holding company of the Italian billionaire Benetton family. In a 2019 analysis of workforce demographics at 27 airports in the United States, approximately 81% of HMSHost’s unionized employees were people of color and 41% were Black.

Over 800 employees of HMSHost at Orlando International Airport (OIA) in Florida were scheduled to vote in a union election representation election under US labor law on March 26 and 27, 2020. A substantial majority of the workers had signed union cards in February choosing Unite Here to represent them in collective bargaining.

Just 9 days before workers were scheduled to vote in Orlando, the government entity overseeing national labor law, the NLRB, postponed the in-person election due to the Coronavirus. The union petitioned the NLRB to convert the election to a mail ballot—the safest way to conduct an election during a global pandemic. HMSHost refused, preferring instead to continue its anti-union campaign, including captive audience meetings, in which groups of workers were forced to listen to anti-union speeches in violation of safety guidelines, crowded together less than six feet from one another.

The NLRB accepted the employer's position and has indefinitely delayed the vote. HMSHost’s stance was not surprising, given the company’s extensive anti-union campaign. Unite Here has filed unfair labor practice charges against HMSHost at the NLRB, alleging that HMSHost fired and threatened workers in retaliation for speaking out in favor of the union. Further, HMSHost has argued that only non-furloughed workers—a little over 10% of the workforce—should be allowed to vote in the NLRB election. Unite Here has charged the company with executing its Covid-related layoffs in a retaliatory fashion, targeting union activists. Here is an account by Rosanny Tejeda, an HMSHost worker at the Starbucks coffee concession at the Orlando airport:

I was a leader of the Union campaign at the airport. When HMSHost furloughed me almost six months ago, I was working full time to pay for the college courses I was attending to prepare me for Nursing School. Five workers in my airport Starbucks who were hired more recently than myself were retained and continue to work there, while I lost my livelihood and had to put my dreams on hold. I believe I was targeted because of my role in the organizing campaign. We were nine days away from voting in our Union election when the furloughs hit. Ever since it was postponed by the NLRB, HMSHost and the government have not

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allowed our vote to proceed. This means we have been denied the ability to bargain collectively about our working conditions and the right to return to our jobs. As a result, HMSHost has all the power, and recently sent over 700 of us a notice that they are ending our employment on October 15. To me, it seems like our Right to Organize disappeared with the onset of the COVID-19 Crisis.  

Other workers have had similar experiences across multiple HMSHost outlets at OIA. In case after case, the employer ignored seniority, continuing to keep new hires on the schedule while furloughing dozens of longstanding workers who vocally and visibly supported the union. Further, in the absence of union representation, the employer is also free to select which furloughed workers are recalled.

The NLRB’s acceptance of HMSHost’s arguments to limit and delay the vote effectively allows the company to prevent its workers from voting and gaining union representation at a time when it could mean the difference between life and death. The effect on workers’ organizing rights has been compounded by multiple failures of OSHA under the Trump administration to respond to the collective demands of workers regarding imminent risks to occupational health (and even public health) at airports.

While HMSHost was willing to place workers’ health and lives in jeopardy by forcing them to listen to anti-union messages, the employer made no effort to engage with or consult workers on the critically important training and reorganization of work spaces urgently needed in order to keep employees and passengers safe. This was in spite of affirmative efforts by workers – acting together without the legal protection of union representation – to demand key measures from their employer. On March 16, two HMSHost workers from OIA delivered a letter endorsed by dozens of their co-workers, demanding paid sick days, the commitment not to discipline workers who missed work, and the guarantee of continuity of pay if the airport closed or workers’ hours were reduced. There was no response to this letter.

On April 7, 2020, thirty-five workers took the extreme step of initiating an imminent hazard complaint with OSHA, providing evidence that HMSHost has exposed workers to hazardous working conditions. Subsequently, HMSHost workers in other airports – even in unionized workplaces – also reported similar problems. These include a refusal to consult with workers and their representatives on mitigating the impact of the pandemic on workers’ health and livelihoods, the failure to provide basic personal protective equipment, the lack of social distancing measures and the lack of training on safer work practices.

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133 See statement of Rosanny Tejeda, August 2020 (on file).
In response, OSHA under the Trump administration said it was not conducting inspections during the pandemic and chose to rely on the company’s assertions to make an interim determination that the issues had been resolved. As of the date of this filing, almost 5 months later, there has been no adequate response from OSHA. The agency privileged the interests of an employer acting unilaterally over the combined voices of workers, without regard to the consequences.

OSHA’s inaction belies its own guidelines. The agency has recognized that jobs such as airport food and beverage concession workers are at elevated risk of exposure for COVID-19, with frequent and close contact with members of the public. OSHA recommended that employers take specific steps to mitigate the risk of COVID-19 exposure to these workers, including physical barriers, use of PPE such as masks, and administrative controls to minimize face-to-face contact and enforce social distancing.134 However, as noted earlier, the agency gutted the value of this guidance by treating it as purely voluntary, rather than imposing an obligation on employers to implement it and to consult with their workers on the frontline of the pandemic.

HMSHost has taken advantage of the administration's license to ignore critical guidelines and workers' own analysis of risk. In their complaint, HMSHost workers at OIA provided evidence that HMSHost rejected every one of these recommendations. Quamaine Tisdale is an HMSHost worker at Chick-Fil-A at OIA. He said that gloves were made available at his outlet, but that a Host manager told him that they do not look “professional.” Jasmine McLaughlin, an HMSHost Starbucks worker until she was laid off on March 27, explained:

Throughout the day at Starbucks, my workstation was very close to the customers. I was regularly about two or three feet from customers. The counter is not wide and the customers come very close. I did not receive any training from Host management about how to stay safe when working. As for interaction with co-workers, sometimes there were seven workers at the same time at my Starbucks. The Starbucks is not big. We were on top of each other. It is impossible in this situation not to come into direct physical contact with other workers. I had multiple cashiers, so there were two people on each register. We did not clean or sanitize the register each time a different worker used it. No guidelines were given to us by Host about what to do about this.

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[O]ne of my coworkers was sick at work in the last week I worked. On one of the last few days, she was coughing and throwing up and saying she couldn’t breathe. She told me she felt sick and wanted to go home. She is pregnant and in her late 20’s. The manager of the store told me that I couldn’t let her go home. The manager said, “She has to understand that just because she is pregnant, she can’t just go home when she wants to. She calls out a lot and is close to being terminated.”

HMSHost overrode a key principle recognized by the ILO – the right of workers, individually and collectively, to assess dangerous working conditions and withdraw from them to prevent imminent harm to themselves or others. Despite the abundance of testimony and evidence, OSHA has yet to take action.

Similar urgent concerns have been raised by HMSHost workers at other airports – some of them covered by union contracts – including Atlanta, LaGuardia airport in New York City, and Houston. In a number of union locations, workers have won important measures both with respect to health and livelihoods, through the power of collective voice. These include, for example, a right to delay their return to work for reasons including their own health condition, their families' health, or childcare needs. The company has agreed to extend recall rights for these workers for up to two years. Where workers were covered by a union contract, they were also able to win from HMSHost a guarantee of 14 days of paid quarantine leave.

In some cases, including Atlanta and Houston, the unions' ability to negotiate key protections for workers has been limited by state “Right to Work” laws, which constrain the power of unions. More broadly, it reflects the tacit and explicit license that the Trump administration has granted to employers, even in this crisis where the lives of hospitality workers and those they serve are at stake, to attack, undermine and ignore workers' collective voice.

**Eulen America**

During the pandemic, Spanish-owned firm Eulen America laid off more than 1,300 contracted airport workers in New York and Florida\(^{136}\) despite pocketing more than $25 million in CARES

\(^{135}\) See statements of Quamaine Tisdale and Jasmine McLaughlin, August 2020 (on file).

Act money from the U.S. Treasury. Eulen is also a prime example of the ways in which some irresponsible airline contractors have consistently attempted to block workers’ right to organize, while building a troubling record of other legal and regulatory violations. In the United States, even prior to the pandemic, the NLRB has investigated charges against Eulen for violations of the NLRA and, at three different airports, NLRB Region Directors have found merit in charges that Eulen unlawfully fought workers’ organizing to improve their conditions and filed formal complaints against the company.

In response to Eulen’s repeated violations, workers at multiple US airports have engaged in strikes. In October, 2019, Eulen workers at JFK Airport walked off the job to protest the company coercing workers’ right to organize by intimidating, disrespecting, and spying on workers on the job. In September, 2019, workers at Ft. Lauderdale-Hollywood International Airport struck to protest the company’s alleged unfair labor practices and hostility against workers’ efforts to organize for better conditions. In addition, Eulen workers at US airports have filed a wide range of legal complaints. Workers have filed discrimination complaints related to alleged discrimination against pregnant workers, as well as claims of discrimination by age, race and national origin, and sex. Eulen has agreed to settle several cases, but there are still open cases for which Eulen has denied the allegations.

Eulen workers have also filed multiple complaints with regard to health and safety issues on the job. In one example, in April 2019, two members of Congress held a Congressional Roundtable at Miami airport to hear directly from workers after an alarming expose ran in a local TV station. At the roundtable workers testified regarding injuries sustained at work, vehicles in hazardous conditions, and trucks that transport workers and carry supplies for planes being roach-infested. Subsequently, as part of a referral, and formal complaint filed by workers, OSHA investigated Eulen at Miami International Airport (MIA) and issued citations which included eight violations as part of two inspections at MIA with an initial total fine amount of $77,898. In


138 See NLRB, Eulen America cases nos. 12-CA-113350; 05-CA-161072; 29-CA-178354
November 2019, Eulen entered an informal settlement agreement with OSHA, and penalties were lowered to a total of $46,739.140

U.S. law undermines efforts to raise standards for airport service workers

Unfortunately, efforts to improve standards for airport and airline contracted workers have been undermined by the legal framework for aviation in the United States. Airlines have repeatedly opposed efforts to raise standards for airport workers at the local level, citing the federal Airline Deregulation Act. 141

In 2017, the trade association representing US airlines, Airlines for America (A4A), lobbied the Los Angeles City Council in opposition to a local emergency response training for LAX workers. 142 The following year, A4A also filed lawsuits in Massachusetts and Washington alleging that state paid sick leave laws violate federal preemption under the Airline Deregulation Act. 143

The absence of paid sick leave creates a perverse incentive for workers to continue working with illnesses or risk losing wages or even their job. This is especially true for more precarious hourly and part-time employees and can obviously have deadly impact on workers and passengers, particularly during a pandemic. Yet even when paid sick leave is available, airlines have penalized workers for using it. In 2019, American Airlines sued New York City after the Department of Consumer and Worker Protection cited the airline for violations of its sick leave law. The agency alleged that the airline had been assigning disciplinary points for each sick day used by ground crew workers. 144

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140 See Occupational Safety and Health Administration, Inspections no. 1396157.015 and 1403303.015.


142 See Letter from A4A Vice President Rob DeLucia to LA City Councilman Curren Price, September 16, 2017 (copy on file).


144 Id.
Recent survey of California airport service workers shows failures of low-road contracting

The fissuring of the workforce and race-to-the-bottom with regard to wages and benefits has led, during the pandemic, to a dangerous reality for workers and passengers. According to a recent survey from SEIU, United Service Workers West, which represents thousands of airport and airline contracted workers in California, of those surveyed who had not been laid off at the time of the survey:

- Only 57% of workers reported that they had been trained on COVID-19 precautions;
- Only 51% of workers reported that they had been provide with all the necessary personal protective equipment to do their jobs safely;
- Nearly half of all workers reported that they were not, or were only sometimes, provided with a mask by their employer;
- More than half of cabin-cleaners surveyed said that they are not informed when a sick passenger has been on board the plane they are assigned to clean.145

Unfortunately, the major US airlines have used an aggressive interpretation of the US Airline Deregulation Act, as well as laws in some states which limit the ability of municipalities to pass local policies to raise standards for all airport workers, whether contracted or directly employed, to undermine labor standards for airport service workers. Until airlines accept responsibility for ensuring that these all workers, including those employed by contractors, have access to personal protective equipment, paid sick days and access to quality health insurance, and having their rights to form a union be protected and respected, these kinds of issues will continue to impact both workers and airline passengers.

V. Final Notes

The undersigned complainants could add many more already-documented violations and cases to this text. Moreover, we could continue adding ones to supplement the complaint, because the cases and violations like those cited here are still happening every day all over the United States. However, we do not want to overburden the Committee with an overly long and unnecessarily

cumulative complaint. Instead, we conclude this submission with three key points that we urge the Committee to take into account in its consideration of the complaint:

A. Forced labor and discrimination

In March 2020 President Trump invoked the Defense Production Act of 1950 (originally meant to compel manufacturing companies to produce weaponry in wartime) to declare a wide range of businesses and their employees “essential” in the Coronavirus pandemic. Guidance from the Trump administration suggests that workers deemed “essential” should forego quarantine and other public health precautions and remain at work even in the event of potential COVID-19 exposure. An April 28 executive order took aim at states that ordered meat and poultry factory closures because of widespread outbreaks in those facilities, authorizing the Department of Agriculture “to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.”

These executive orders gave a green light for employers to force workers to report for work and risk their lives or lose their jobs. This is tantamount to forced labor under ILO Conventions 29 and 105. It exploits workers’ vulnerability to compel them to work “when such exploitation ceases to be merely a matter of poor conditions of employment and becomes one of imposing work under the menace of a penalty . . . and for which the said person has not offered himself or herself voluntarily.”

The United States has ratified ILO Convention 105, which prohibits forced or compulsory labor as a method of mobilizing and using labor for purposes of economic development; as a means of labor discipline; or as a means of racial, social, national or religious discrimination. Although the


148 See, for example, Jeni Diprizio, “Employees say they were fired for quarantining themselves during coronavirus pandemic: They say their job required them going into homes,” ABC News Memphis, April 20, 2020, at https://www.localmemphis.com/article/news/health/coronavirus/employees-say-they-were-fired-for-quarantining-themselves-during-coronavirus-pandemic/522-38b0eef2-e691-4c37-961e-e2e0d9f4e170.

United States has not ratified Convention 29, it is one of the core conventions under the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which the United States is obligated to “to respect, to promote and to realise.” Indeed, the United States insists on incorporating these obligations, including for itself, in all its trade agreements.150

The U.S. government’s ordering workplaces to remain open or to reopen, without providing PPE and other protections that the government should ensure and thus pushing workers to labor in life-threatening conditions, was 1) for purposes of economic development, 2) provided to private employers a new and menacing means of labor discipline, and 3) had a discriminatorily disparate impact on racial minorities.

The COVID-19 crisis in the workplace has disproportionally affected Black, Latino, Native American and other racial and ethnic minority workers in the United States who were forced to return to work in unsafe workplaces or lose their jobs.151 In the meatpacking sector, for example, fully 87 percent of workers who suffered from COVID-19 were Black or Hispanic.152 The executive order forcing them to work or be fired amounts to forced labor “as a means of racial, social, national or religious discrimination” under Convention 105. Likewise, it has resulted in discrimination in violation of ILO Convention 111, which similarly prohibits discrimination “on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”153

Complainants recognize that Conventions 29 and 105, and Convention 111, are not normally within the purview of the Committee on Freedom of Association. Neither are Conventions 144 and 150 discussed earlier. However, this particular version of forced labor – “report for work in life-threatening conditions or you’re fired” – and the discriminatory impact on racial minorities are inextricably linked to the denial of trade union rights when workers do not have unions to defend them and to negotiate terms and conditions for returning to work in the Coronavirus

150 For the most recent example, see the U.S.-Mexico-Canada Trade Agreement (USMCA), Article 23 Labor, stating that “Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder” the ILO core labor standards, at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf.


153 See ILO Convention 111, Article 1.
pandemic, or when government policies and actions undermine unions’ ability to defend workers in the pandemic.

The discriminatory effects of the Trump administration’s COVID-19 policies in the workplace cannot be separated from the overall crisis of police killings and systemic racism that plague the United States alongside the Coronavirus. Workers across the United States have melded their protest movements to confront the discriminatory effects of the COVID-19 crisis and systemic, institutional racism in the workplace and in the wider society.\textsuperscript{154}

We urge the Committee to incorporate into its analysis of this complaint forced labor and discrimination elements of the Trump administration’s response to COVID-19 in the American workplace and to take them into account in the Committee’s findings on violations of Conventions 87 and 98. The Committee did this in another case in which it found that “. . . forced labour constitutes without any doubt a violation of basic ILO standards which guarantee compliance with human rights and, when applied to people who have engaged in trade union activities, a blatant violation of the principles of freedom of association.”\textsuperscript{155}

B. A reality check

The basic argument of this complaint is that

1) many features of U.S. labor law, in particular the exclusion of millions of workers from protection of the right to organize and bargain collectively, and

2) the Trump administration’s response to the COVID-19 crisis, especially NLRB decisions undermining workers’ organizing and bargaining rights, and executive


\textsuperscript{155}See ILO, \textit{Freedom of association - Compilation of decisions of the Committee on Freedom of Association} (Sixth edition 2018), paragraph 149.
orders and other actions that force workers to choose between their live and their jobs,

impede or nullify the ability of American workers to defend their health and their lives in the COVID-19 crisis in the workplace, all in violation of ILO Conventions 87 and 98.

We recognize that collective bargaining is not a magic bullet that can guarantee healthy and safe workplaces for union-represented workers in the pandemic. The virus does not distinguish between union and non-union workplaces. But organizing and bargaining rights give voice to workers in determining the conditions in which they labor. And they make rights enforceable, because collective bargaining agreements are not “guidelines.” They are legally enforceable contractual obligations. However, fundamental flaws in U.S. labor law and a U.S. government whose policies undermine organizing and bargaining rights to workers in the COVID-19 crisis deny workers the opportunity to reach contractually binding agreements with employers on health and safety at work, in violation of the United States’ obligations to adhere to Conventions 87 and 98.

C. Direct Contacts Mission

Finally, we ask the Committee to organize a direct contacts mission to meet (virtually, under current conditions) with workers, trade unions, employers, and government officials in the United States to examine the effects of the Trump administration’s response to the COVID-19 crisis in the workplace. Such direct contacts with workers, union representatives, employers and their representatives, and labor law authorities will provide the Committee with "on the ground" understanding of the issues.

Direct contacts will better inform the Committee's analysis by giving life to its review of documents in this case. A direct contacts mission will have the added benefit of bringing dramatic public attention to the work of the Committee on Freedom of Association in a country and a labor law community that, lamentably, have much to learn about the ILO and the authoritative role of the Committee on Freedom of Association.

Thank you for your consideration and attention in this matter.