

INCLUDING, BUT NOT LIMITED TO, PERSONAL INJURY,
DISABILITY AND DEATH: THE PROBLEMS OF UNIVERSITY
LIABILITY WAIVERS FOR COVID-19 PROTECTIONS

By: Kaitlyn Filip* & Kat Albrecht**

I. INTRODUCTION

On September 8, 2020, Graduate Student Instructors (“GSIs”) at the University of Michigan began what would be the longest strike in the forty-five-year history of the Graduate Employees’ Organization (“GEO”).¹ At the beginning of the 2020 academic year, hundreds of graduate instructors refused to teach.² They demanded the right to work remotely during the COVID-19 pandemic, demanded increased COVID-19 testing and contact tracing, and made additional demands around program milestones, financial support, and defunding the campus police.³ The eight-day strike was extremely disruptive to the workings of the university because graduate students are involved in teaching 3,500 of the college’s courses.⁴ The strikers were joined by research assistants, campus dining workers, and unionized construction workers and truck drivers who refused to work on campus during the strike.⁵ They also

* Kaitlyn Filip is a Law & Humanities Fellow at Northwestern University Pritzker School of Law and a JD-PhD Student in Communication Studies: Rhetoric and Public Culture at Northwestern University.

** Kat Albrecht is an Assistant Professor of Criminal Justice and Criminology in the Andrew Young School of Policy Studies at Georgia State University. She received her PhD and MA in sociology from Northwestern University. She received her JD from the Northwestern University Pritzker School of Law.

¹ See *History*, GRADUATE EMPS.’ ORG., <https://www.geo3550.org/about/history/> [<https://perma.cc/NFJ5-ADKF>].

² Lilah Burke, *Close to Open Revolt*, INSIDE HIGHER ED (Sept. 16, 2020, 3:00 AM), <https://www.insidehighered.com/news/2020/09/16/unrest-and-strikes-hit-university-michigan> [<https://perma.cc/T25T-THTE>].

³ *GEO’s Demands for A Safe and Just Pandemic Response for All*, GRADUATE EMPS.’ ORG. (Sept. 4, 2020, 2:34 PM), <https://www.geo3550.org/2020/09/04/geos-demands-for-a-safe-and-just-pandemic-response-for-all/> [<https://perma.cc/J8RG-WGMH>] (listing formal demands made by the GEO to University administration preceding the strike action).

⁴ Burke, *supra* note 2.

⁵ *Id.*

received support of over 700 faculty members⁶, 1,300 scholars⁷ and United States Representative Rashida Tlaib.⁸

Michigan's COVID-19 response was the subject of copious criticism and protest before the strike began.⁹ Students and faculty noted that the University of Michigan's testing program was deficient.¹⁰ There was limited testing of residence hall and Greek life students when they arrived on campus; the voluntary testing program capped at 3,000 tests a week for a school of over 48,000 students and thousands of additional faculty and staff.¹¹ The University also claimed that instructors were not being coerced into working in person, but would not write a policy to guarantee the right to remote work.¹² Graduate students felt coerced and misled in having to make decisions about in-person teaching in the early summer of 2020 when community spread was lower.¹³ Financial strain disproportionately affects low-wage instructors like graduate students who felt pressured to teach the twenty-five to thirty percent of Michigan courses being offered in person.¹⁴ Finally, Michigan was criticized for not being

⁶ *Faculty Letter Supporting GEO Strike*, GOOGLE DOCS (Sept. 10, 2020), https://docs.google.com/document/d/1YtYuQ2keYhrWU6kAn2D3anAfG40U0dwmIeI_MxTKFg/edit [https://perma.cc/YUL3-2EJC] (showing the Google Doc where faculty signatures in support of the GEO strike are displayed. According to the document, signers had to fill out a Google Form at <https://forms.gle/ioVrUYHHNHpJ2PaD9> to sign the letter. At the time of last access, there were 712 signatures on this form).

⁷ *Scholars Support GEO Strike*, GOOGLE DOCS (Sept. 16, 2020), https://docs.google.com/document/u/2/d/e/2PACX-1vT65tFXj_K2F793vC1K-VY1TG-bWUkyZsSBS4td3JmZV6Zzbq3W4JyIXc5Tq7T31E8BTDGyWiD0NbP/pub?fbclid=IwAR0K3q68cOdXW8mQcAA0Uk5Us2t_GNk1ZrEp17uCl-0leQuHigSjK5xWMpU [https://perma.cc/Y6SK-LA4G] (showing the Google Doc where scholars' signatures in support of the GEO strike are displayed. Scholars here are distinguishable from faculty in that they can be scholars affiliated with places other than the University of Michigan. According to the document, signers had to fill out a Google Form at https://docs.google.com/forms/d/1Kez3txXS-Kq5CCF432F6sYx8MMNQ_MP4wnPrqDm4q7s/closedform#responses to sign the letter. At the time of last access, there were 1,307 signatures on this form).

⁸ See Rashida Tlaib (@RashidaTlaib), TWITTER (Sept. 14, 2020, 5:42 PM), <https://twitter.com/rashidatlaib/status/1305638066401546247> [https://perma.cc/V647-EPVV] (showing Representative Rashida Tlaib's retweet of a news article about the GEO strike with the comment, "Union-busting via the courts is unbecoming of a leading public institution with a rich history of labor organizing. This is shameful. I stand with @geo3550 [the official Twitter account of GEO] and the mass student, faculty, & staff movement to demand safe working and living environments at U-M. #StrikeForSafeCampus").

⁹ See Lilah Burke, *Consultation Theater*, INSIDE HIGHER ED (Sept. 4, 2020), https://www.insidehighered.com/news/2020/09/04/university-michigan-faculty-say-administration-has-not-been-transparent?_gl=1*3rb5z3*_ga*MTUyNTUyMDUwNS4xNjMwMzYyMzM0*_ga_F07KT3P0SW*MTYzMTk5MMTUwN4yLjAuMTYzMTk5MTU1MS4w [https://perma.cc/ZP4G-FBB9].

¹⁰ *Id.*

¹¹ Burke, *supra* note 2; *Facts & Figures*, UNIV. OF MICH. (July 2021), <https://umich.edu/facts-figures/> [https://perma.cc/7H8M-XPKM].

¹² Burke, *supra* note 2.

¹³ *Id.*

¹⁴ Martin Slagter, *From COVID Testing to Cops, University of Michigan Graduate Students Explain Why They're Striking*, MLIVE (Sept. 8, 2020, 3:57 PM), <https://www.mlive.com/news/ann->

transparent with models of COVID-19 risks and estimates, declining to share data by claiming the data was not reliable, and not representing the concerns of faculty in the reopening plan.¹⁵

The strike was a risky move by GEO because public employee strikes in Michigan are illegal¹⁶ and the GEO's contract with the University of Michigan has a no-strike clause.¹⁷ The University has no legal obligation to continue to pay striking workers, exacerbating potential financial precarity.¹⁸ In response to the strike, the University of Michigan filed a complaint in Washtenaw County's 22nd Circuit Court alleging that the GSIs were in violation of both the Michigan Public Employment Relations Act and the GEO collective bargaining agreement. The University of Michigan asked the court to order striking members back to work via temporary restraining orders and preliminary injunctions.¹⁹ The strike continued until September 16, 2020, when GEO members voted 1,074 yea and 239 nay with sixty-six abstentions to accept the University of Michigan's bargaining offer. The accepted proposal created a stronger and more transparent COVID-19 testing program, enabled graduate students to appeal any decision requiring them to work on campus, and made improvements to proposed childcare subsidies.²⁰ Also on September 16, 2020, a faculty senate vote of no-confidence in University of Michigan's President Mark Schlissel narrowly passed 957 yea and 953 nay with 184 abstentions.²¹

arbor/2020/09/from-covid-testing-to-cops-university-of-michigan-graduate-students-explain-why-theyre-striking.html [https://perma.cc/7X6L-8VW4].

¹⁵ Burke, *supra* note 2.

¹⁶ MICH. COMP. LAWS ANN. § 423.202 (West 1947).

¹⁷ *GEO-UM Contract 2020-2023*, GRADUATE EMPS.' ORG., <https://www.geo3550.org/rights-benefits/our-contract/> [https://perma.cc/J5KL-KH9E] ("The Union, through its officials, will not cause, instigate, support or encourage, nor shall any Employee take part in, any concerted action against or any concerted interference with the operations of the University, such as the failure to report for duty, the absence from one's position, the stoppage of work, or the failure, in whole or part, to fully, faithfully, and properly perform the duties of employment."); *see also* James David Dickson, *UM Grad Student Employees Vote to Strike Starting Tuesday*, DETROIT NEWS (Sept. 7, 2020, 12:13 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/09/07/um-grad-student-employees-strike/5738469002/> [https://perma.cc/5B4R-Z6PD].

¹⁸ *See The Right to Strike*, NAT'L LAB. RELS. BD., <https://www.nlrb.gov/strikes> [https://perma.cc/QV6D-56HT] (explaining that backpay is possible for a successful strike but not guaranteed).

¹⁹ Leah Graham, Barbara Collins, Emma Stein & Liat Weinstein, *University of Michigan Asks Court to Issue Injunction to Halt Graduate Student Strike*, MICH. DAILY (Sept. 14, 2020), <https://www.michigandaily.com/section/administration/university-asks-court-issue-injunction-end-graduate-students-ongoing-strike> [https://perma.cc/6BJ9-CBJU]; Martin Slagter, *Full Complaint Details University of Michigan's Battle with Graduate Employees on Strike*, MLIVE (Sept. 15, 2020, 12:19 PM), <https://www.mlive.com/news/ann-arbor/2020/09/full-complaint-details-university-of-michigans-battle-with-graduate-employees-on-strike.html> [https://perma.cc/PE3U-5RBY].

²⁰ Rick Fitzgerald, *GEO Votes to Accept University's Offer, End Strike*, UNIV. REC. (Sept. 17, 2020, 4:39 PM), <https://record.umich.edu/articles/geo-votes-to-accept-u-m-offer-end-strike/> [https://perma.cc/T2HD-GGV9].

²¹ James Iseler, *Faculty Senate Reverses Schlissel No-Confidence Vote Finding*, UNIV. REC. (Sept. 19, 2020), <https://record.umich.edu/articles/faculty-senate-reverses-schlissel-no-confidence-vote->

The graduate workers at the University of Michigan are not the only graduate students fighting for expanded protections in light of the COVID-19 pandemic. Graduate students at Brown University won emergency funds for COVID-19 relief and those at the University of Illinois at Chicago won mental health counselling and expanded paid sick leave.²² Despite these victories, graduate student workers at some schools continue to feel forced to teach classes in person and uncertain about the existence of university policies to keep them safe.²³

Graduate students are not alone in encountering potentially unsafe working conditions. Nor are they alone in encountering what the bulk of this paper addresses: liability waivers and unclear data on COVID-19 transmission within the workplace. However, graduate students are in a legally unique situation. Although their unions have had success, they are not formally recognized by the National Labor Relations Board (“NLRB”) and are not technically considered employees.²⁴ As such, graduate students make a uniquely good case study for digging into the problems of workplace safety and guaranteed remote work during the COVID-19 pandemic. This paper analyzes employer liability during a pandemic—including the information that employers share—to look at worker protections both generally and through the lens of our specific case study.

The paper proceeds as follows. Part II looks at potential liability for companies during COVID-19 and how that liability might be waived. This paper concludes that the risk for companies without liability waivers is relatively low and that the waivers themselves are uniquely unenforceable. Part III looks at this liability scenario within the employment framework. This paper ultimately concludes that there is no additional liability risk for employers and that the waivers are likely less enforceable in the employment context. In Part IV, this paper takes a closer look at university liability waivers and data portals to

finding/ [https://perma.cc/R4LC-H7FK]. A faculty senate vote of no confidence is a means by which a university faculty can express opposition to the administration or an individual within the administration at a university. However, scholars report that such votes are larger symbolic or ineffective, more often serving to damage the relationship between the faculty and administration further. *See generally* Joseph Petrick, *No Confidence in No-Confidence Votes*, 93 *ACADEME* 52, 52 (2007) (describing no confidence votes as ineffective and offering an alternative process).

²² Danielle Douglas-Gabriel, *‘It’s Emotionally Exhausting’: Grad Student Workers Feel the Stress of the Pandemic*, WASH. POST (Sept. 3, 2020, 7:00 AM), https://www.washingtonpost.com/local/education/its-emotionally-exhausting-grad-student-workers-feel-the-stress-of-the-pandemic/2020/09/03/87ed6bc6-e7bb-11ea-970a-64c73a1c2392_story.html [https://perma.cc/R33B-WF24].

²³ *See id.* (showing comments made by Ohio State PhD student, Colin Sweeney, and others that describe the accommodations for remote teaching as so narrow as to exclude many graduate student workers, leaving them no option to avoid in-person teaching during the COVID-19 pandemic).

²⁴ The NLRB guidance on this issue changes between administrations. On March 15, 2021, the NLRB withdrew a 2019 proposed rule blocking undergraduate and graduate students from formal union recognition. *Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies*, 84 Fed. Reg. 49691 (proposed Sept. 23, 2019); *Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies*, 86 Fed. Reg. 14297 (withdrawn Mar. 15, 2021). At the time of this writing, no graduate student unions have been formally recognized.

examine a unique work environment. This offers a more complete picture of the issues at stake. Finally, the paper concludes with a call for increased worker protections for graduate students and workers, both in the pandemic context and beyond.

II. CONTRACTING AROUND COVID-19 LIABILITY GENERALLY

This section first outlines the potential tort liability issues facing companies if a worker or customer contracts COVID-19 in connection with that business. Then, this section discusses the possibility of contracting around that tort liability and the potential defenses to that contracting. Specifically, this section addresses the following questions: whether there is tort liability for businesses when an employee or customer contracts COVID-19, what measures and practices influence that liability, whether that business can contract around that liability via waivers, and what would nullify the enforceability of the liability waivers? This section of the paper concludes, ultimately, that there is very little legal liability for businesses that contribute to worker risk.

In 2020, as government officials and administrative agencies began implementing restrictions and guidelines on the operation of businesses, those businesses began deploying liability waivers en masse to insulate themselves from liability arising from the spread of COVID-19.²⁵ Over a year after the pandemic took hold in the United States' collective imagination and policy, it remains an open question whether businesses need to avail themselves of measures to insulate themselves from liability, and, if they do, whether liability waivers can and do perform the work companies want them to do.

The legal analysis in this section suggests two things. First, there is an incredibly small risk for companies to be held liable for spread of the virus given unique but not unlikely circumstances. Second, a liability waiver offers very limited and specific protections for a company from that risk in court. From this, this paper initially concludes that the legal function of the liability waiver is not to stand up in court, but to dissuade parties from taking legal action against the other party to the contract.

A. *The Questions of Negligence and Causation: At What Point Could There be Liability for Businesses?*

The law is unclear on the question of liability for businesses in the midst of a global pandemic. Although lawsuits have begun—notably on wrongful death of employees and nursing home residents—the pandemic has slowed the already slow process of obtaining relief in wrongful death cases.²⁶ Furthermore, the

²⁵ Mary Kate McCoy, *Liability Waivers For COVID-19 Are Popping Up Everywhere. What Do They Mean?* WISC. PUB. RADIO (June 22, 2020, 5:30 AM), <https://www.wpr.org/liability-waivers-covid-19-are-popping-everywhere-what-do-they-mean> [<https://perma.cc/UQ39-B7RZ>].

²⁶ See, e.g., Tom Polansek, *Tyson Foods Suspends Employees After Lawsuit Alleges Managers Bet on Workers Catching COVID-19*, REUTERS (Nov. 19, 2020, 2:17 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-tyson/tyson-foods-suspends-employees-after-lawsuit-alleges->

differences in public knowledge available between initial lawsuits filed in March 2020 and the timeframe of our liability waiver study represents a radically different landscape vis-a-vis assumption of the risk. As discussed in the introduction, different stages of the pandemic offer different risk parameters. Although potential COVID-19 liability is still an open question, we can analogize how liability works for businesses and corporations generally from cases involving other infectious diseases, such as tuberculosis and HIV, and from guidance from the Centers for Disease Control and Prevention (“CDC”) and the Occupational Safety and Health Administration (“OSHA”).

The standard of care for businesses in dealing with potential COVID-19 liability is cognizable with respect to what a reasonably prudent person would do to minimize the risk of foreseeable future harm.²⁷ This potential duty can include the duty to warn about that foreseeable risk.²⁸ This is not a blanket duty to warn and, at least in the university context, has not been established to require a customized warning.²⁹

In the case of individual liability, an individual who is aware that they have a contagious disease must take the necessary steps to prevent the spread of the disease.³⁰ The degree of diligence required is dependent upon the nature of the disease in question and the likelihood of contagion.³¹ This standard is more complicated for individuals who might not be aware they have the disease, for individuals who are indirectly connected to an infected third party, and for businesses.

Courts become incredibly specific about the nature of the duty in the business context. The Fifth Circuit Court of Appeals, for example, held that the duty to warn exists for a private business insofar as that business is specifically and knowingly subjecting workers to a danger that is relatively rare and location

managers-bet-on-workers-catching-covid-19-idUSKBN27Z2ZF [https://perma.cc/2B5D-PAWW]; see, e.g., Complaint, *Evans v. Walmart, Inc.*, No. 2020L003938 (Cir. Ct. Cook Cnty., Apr. 6, 2020) (receiving multiple continuances for COVID-19 related reasons); see Greg Land & Amanda Bronstad, *Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle*, LAW.COM (July 30, 2020, 5:37 PM), <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/> (last visited Sept. 26, 2021).

²⁷ *Randolph v. Ariz. Bd. of Regents*, 505 P.2d 559, 561 (Ariz. Ct. App. 1973) (holding that the University did not have an affirmative duty to customize warnings on infectious diseases where, here, the illness in question would disproportionately impact the black plaintiff).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Mussivand v. David*, 544 N.E.2d 265, 269 (Ohio 1989) (articulating this as the general standard of care in a case where a man with venereal disease had unprotected sex with a woman who then had unprotected sex with her husband); *Earle v. Kuklo*, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953) (holding that a landlord who knowingly rents property to tenants, that caused them to be exposed to tuberculosis, is liable for the tenants’ contraction of the disease); *Skillings v. Allen*, 173 N.W. 663, 663–64 (Minn. 1919) (establishing that a physician has a duty to report a child’s scarlet fever diagnosis to public health authorities as well as to that child’s parents who have a risk of contracting the disease due to their relationship to the child).

³¹ *Earle*, 98 A.2d at 109.

specific.³² The duty to warn in the business context is incredibly narrow despite the greater knowledge available to businesses compared to the individuals who interact with them.

Furthermore, in the case of infectious diseases, the causation issue is a massive challenge for defendants and is the place where most of the legal analysis within this paper centers. This issue is significantly exacerbated by COVID-19's highly contagious nature coupled with long incubation periods.³³ From a commonsense standpoint, it is incredibly difficult to determine a definitive source of an individual's particular infection. One can ascertain various probabilities based on travel routines, use of personal protective equipment ("PPE") by themselves and others, and known exposure to a person who has tested positive. However, the determination of a definitive source is nearly impossible outside of relatively closed bubbles—for example, prisons and nursing homes—particularly without widespread and coordinated contact tracing.

Establishing that a party is legally responsible for the transmission of a disease requires the plaintiff to establish their damages were possibly caused by the defendant's conduct or negligence.³⁴ The case of airborne respiratory illnesses has historically been distinguishable from asbestos exposure—whereby courts will consider particular sources as factors in the development of a resultant cancer—because courts understand asbestos-related diseases to be the result of cumulative exposure.³⁵ Given the substantially more prevalent nature of COVID-19, it seems likely a plaintiff's burden is even heavier absent a clear closed interpersonal bubble.

The question of liability in the workplace is often a question of industry standards and regulatory recommendations. Courts are generally reticent to supersede industry standards or guidance from regulatory agencies.³⁶ As long as businesses are engaging in precautions consistent with their competitors and those recommended by the CDC, WHO, or OSHA, liability is much more difficult to establish. Of course, it remains an open question of what liability may be at stake in conjunction with the flagrant disregard of regulatory recommendations and common sense.

Furthermore, in the employment context, there exists the question of

³² See *Crim v. Int'l Harvester Co.*, 646 F.2d 161, 164 (5th Cir. 1981).

³³ Betsy J. Grey, *Causal Proof in the Pandemic*, 10 WAKE FOREST L. REV. ONLINE 124, 147 (2020), <http://www.wakeforestlawreview.com/2020/10/causal-proof-in-the-pandemic/> [<https://perma.cc/EDK6-EHQ3>].

³⁴ See, e.g., *Miranda v. Bomel Constr. Co., Inc.*, 115 Cal. Rptr. 3d 538, 545–46 (Cal. Dist. Ct. App. 2010) (establishing that the defendant was entitled to summary judgment because plaintiff's damages were only *possibly* caused by the defendant's negligence).

³⁵ *Id.* at 546 (establishing that a case of Valley Fever potentially caused by the disturbance of soil in California cannot be tied to a specific construction company, unlike in asbestos cases).

³⁶ See, e.g., Michael R. Lied, *Expert May Rely on OSHA Standards and Industry Guidelines to Support Opinion*, A.B.A. (Dec. 17, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-evidence/practice/2020/experts-osh-standards/> (last visited Aug. 30, 2021).

workers' compensation exclusivity. In many jurisdictions, workers' compensation exclusivity stipulates that workers cannot sue their employer for harms if they are receiving workers' compensation for the same offense.³⁷ However, in California, workers' compensation generally does not apply in questions of illness potentially acquired through the workplace unless the job subjects the worker to heightened risk compared to the general public.³⁸ Therefore, employer liability pertaining to the spread of an infectious disease in the workplace is likely not an applicable issue except in the case of a person at heightened risk such as a healthcare worker.³⁹ Additionally, workers' compensation exclusivity would not apply where there is fraudulent concealment.⁴⁰ This becomes a potential issue in cases where employers are in some way concealing the existence of the injury or its relationship to the employer.

Finally, Congress has demonstrated intent to shield companies from liability in COVID-19 related lawsuits.⁴¹ This is in addition to industry-specific calls for legal immunity.⁴² All together, these factors illustrate how much discretion businesses have in determining the conditions of the workplace during COVID-19 and how little recourse individuals may have should those precautions prove to be insufficient.

B. Contracting Around COVID-19 Liability

All but three states allow for the use of liability waivers to contract around some degree of tort liability. The exceptions are Louisiana, Montana, and Virginia; liability waivers are not enforceable at all in these states.⁴³ In other

³⁷ Loretta F. Samenga, *Workers' Compensation: The Exclusivity Doctrine*, 41 LAB. L.J. 13, 13 (1990).

³⁸ *Bethlehem Steel Co. v. Indus. Accident Comm'n*, 21 Cal.2d 742, 743–44 (Cal. Dist. Ct. App. 1943).

³⁹ Here, the question of heightened risk is conceptually sticky. Essential workers who are expected to perform their essential job functions in public (and interacting with a nonzero volume of strangers) are at more risk from their job than the average remote office worker, but states thus far limit workers' compensation to first responders and there have been not yet been any successful challenges to this presumption.

⁴⁰ CAL. LAB. CODE § 3602(b)(2) (Deering 2021).

⁴¹ Natalie Andrews, *Mitch McConnell Wants to Shield Companies from Liability in Coronavirus-Related Suits*, WALL ST. J. (April 29, 2020, 11:12 AM), <https://www.wsj.com/articles/house-delays-return-to-capitol-amid-uncertainty-over-next-round-of-coronavirus-stimulus-11588091849> (reporting that Senate Majority Leader Mitch McConnell told Republicans that he wants to shield companies from COVID-related liability).

⁴² Maura Dolan, Harriet Ryan & Anita Chabria, *Nursing Homes Want to be Held Harmless for Death Toll. Here's Why Newson May Help Them*, L.A. TIMES (April 23, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-04-23/nursing-homes-legal-immunity-coronavirus-deaths> [<https://perma.cc/KP2R-NFNW>].

⁴³ Briana Clark, Cezanne Harrer, Katie Jacobs & Kimberly O'Donnell, *COVID-19 Liability Waivers and Minors – Reopening Considerations*, JD SUPRA (July 25, 2020), <https://www.jdsupra.com/legalnews/covid-19-liability-waivers-and-minors-86945/> [<https://perma.cc/H2PS-G58L>].

states, such as New York, liability waivers may not be enforceable in concert with an employer/employee relationship.⁴⁴ However, there are some instances—including employment relationships and arrangements that are not classified as employer/employee—where the use of liability waivers might successfully prevent litigation.⁴⁵

Before this sub-section examines the enforceability of these waivers, it is worth noting that there are several reasons why a company may want to institute liability waivers even if they are unlikely to be enforced or if they are unlikely to be held liable even without the use of the waiver. First, COVID-19 creates a profoundly uncertain legal situation. Even over a year into the pandemic, case law is thin on COVID-19 specific issues and analogous statutory guidance is non-existent. It makes sense that, given the opportunity, businesses would want to protect themselves from the uncertain prospect of legal liability. This protection comes at the expense of the long-term public interest of public health because of its focus on mitigating tenuous legal potentialities and damages over mitigating and preventing harms that might lead to legal responsibility.

Second, waivers work rhetorically to discourage lawsuits. Contracts, as agreements, do not require judicial intervention to be fulfilled; they only require judicial intervention to be enforced.⁴⁶ Plenty of unenforceable contracts are signed and fulfilled every day either because there is no dispute about their terms or because the disputes do not reach the courts. As the legal system operates in part on the assumption that keeping parties out of court is an efficient solution, liability waivers can have a chilling effect on pending litigation even if the waivers are not enforceable.

1. Contracting Around COVID-19 Liability for Customers

Liability waivers are familiar terrain in the landscape of interaction between businesses and customers. They are a regular feature of any activity that can be seen as remotely dangerous, from yoga classes to skydiving excursions. What is relatively new in the COVID-19 era is the use of liability waivers for protection against legal liability in the infectious disease realm where the activity connected to the waiver is not otherwise dangerous. As a result, the COVID-19 era ushers in the use of liability waivers in businesses that have not historically waived liability for customers: movie theaters, bars and restaurants, and, as we will discuss further, universities.

The law is better equipped to protect customers than other types of non-company constituents. However, there is no reason to believe that the risk for company liability is higher when considering a company's potential duty to

⁴⁴ *Richardson v. Island Harvest, Ltd.*, 89 N.Y.S.3d 92, 93–94 (N.Y. App. Div. 2018) (holding that employers and employees have unequal bargaining positions due to the necessity of employment and the employee's relative lack of understanding and that there exists a public policy interest in preventing employers from contracting around their duty to maintain a safe workplace).

⁴⁵ That possibility has not yet materialized and looks increasingly unlikely.

⁴⁶ Individuals can and do make and fulfill promises that a court might not actually enforce. A roommate agreement is a potentially innocuous example of this: it might not be a contract before the courts, but it might look like one stylistically and behave as one socially.

protect customers versus employees or independent contractors in the case of a highly contagious illness. In fact, the ability to establish causation may be substantially more difficult for temporary visitors compared to more consistent workers.

2. Contracting Around COVID-19 Liability for Workers or Employees

Although this issue will be addressed more fully in the next section as the paper narrows in focus to the university workplace, it is worth flagging some of the unique issues involved in contracting around COVID-19 liability in the workplace here.

Because the COVID-19 pandemic is medically and discursively unique, the law around liability for businesses for their workers is itself also unique. The ways businesses must deal with COVID-19 is not particularly analogous to the ways businesses have addressed other pandemics or public health crises such as HIV, tuberculosis, H1N1, or Valley Fever. HIV, perhaps the closest analogue to the contemporary pandemic, was predominantly an issue of employee privacy.⁴⁷ There is simply not a body of law or scholarship that discusses infectious disease in the workplace.

The predominant issue that comes up when thinking about the use of liability waivers in the employment context during COVID-19 is the question of the exclusive remedy of workers' compensation. As is discussed in the following section, the exclusive workers' compensation remedy precludes certain tort claims from proceeding because they are best handled with the strict liability of workers' compensation.⁴⁸ Employers cannot be held responsible for workers' compensation twice.

C. Defenses to Contract: Unconscionability

This final sub-section discusses the ways a liability waiver might be unenforceable. Defeating a hypothetically enforceable contract would most reasonably be achieved with a claim of unconscionability. Ordinarily, unconscionability is an extraordinarily difficult legal argument. Courts evaluate

⁴⁷ See generally Jana Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 304 (1987). Public discourse on the HIV epidemic existed in an interesting pocket of employment discrimination law. It was an open question whether an employer could openly discriminate against an employee who was HIV+. The question mixed sexuality discrimination with disability discrimination and predated both the Supreme Court ruling on sexuality discrimination and the 1990 Americans with Disabilities Act ("ADA"). Following the passage of the ADA, HIV positive status is legally protected. There is a resounding lack of case law and legal scholarship on workplace liability for sex workers exposed to HIV during their jobs although pornography companies and sets have historically employed the use of HIV liability waivers as standard clauses within their contracts. P.J. Huffstutter, *See No Evil*, L.A. TIMES (Jan. 12, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-jan-12-tm-porn-story.html> [<https://perma.cc/E9JK-HFHJ>]. There is, unfortunately, a paucity of information available on the handling of HIV in the sex work industry.

⁴⁸ Samenga, *supra* note 37, at 13.

contracts for both procedural and substantive unconscionability.⁴⁹ Substantive unconscionability refers to the actual terms of the contract and procedural unconscionability references the procedures taken when entering into the contract.⁵⁰ In evaluating procedural unconscionability, courts consider bargaining disparity between parties, the contesting party's ability to understand the terms of the contract, prior course of dealing between the parties, and the contesting party's lack of meaningful alternatives.⁵¹ In evaluating for substantive unconscionability, courts look to the language of the contract for inordinate one-sidedness and unfair surprise.⁵²

Frequently, courts will find that a liability waiver is not procedurally unconscionable when the person signing the waiver is signing to engage in an activity that is known to be dangerous.⁵³ For example, a waiver signed by a customer immediately prior to skydiving—a dangerous activity—is not procedurally unconscionable and has become industry standard.⁵⁴

On some occasions, liability waivers for customers have been found to be unconscionable, and thus unenforceable, based on unequal bargaining power that created a “substantial opportunity for abuse.”⁵⁵ In *Ash*, a New York court declined to enforce a liability waiver between a public dental clinic and its patients because such waivers created a fundamentally inequitable system for lower income dental patients whereby care would be governed by different standards.⁵⁶

Some states operate under the assumption that employer and employee relationships are unique and that there is a public interest reason to not enforce liability waivers. New York courts, for example, tend to not enforce such liability waivers.⁵⁷ Employees require employment, they lack meaningful alternatives, they are less likely to understand liability waivers, and there is public interest in not contracting away the employer's duty to ensure safe work environments.⁵⁸

Offering a defense to contract may require more resources from a party, in time and court costs, than not doing so. However, that does not mean, as this paper has argued, that these contracts will not be de facto fulfilled. A contract

⁴⁹ Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

⁵⁰ *Id.*

⁵¹ See, e.g., *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403, 410 (Ill. App. Ct. 1980) (articulating Illinois rules for evaluating procedural unconscionability in the relationship between a buyer and a seller).

⁵² See, e.g., *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 267 (Ill. 2006).

⁵³ See, e.g., *Cahalane v. Skydive Cape Cod, Inc.*, No. 134251, 2016 Mass. Super. LEXIS 189, at *16 (Mass. Dist. Ct., July 20, 2016).

⁵⁴ *Id.*

⁵⁵ *Ash v. N.Y. Univ. Dental Ctr.*, 564 N.Y.S.2d 308, 311–12 (N.Y. App. Div. 1990).

⁵⁶ *Id.* at 312.

⁵⁷ See *Johnston v. Fargo*, 77 N.E. 388 (N.Y. 1906); see *Richardson v. Island Harvest, Ltd.*, 89 N.Y.S.3d 92 (N.Y. App. Div. 2018).

⁵⁸ *Johnston*, 77 N.E. at 390; *Richardson*, 89 N.Y.S.3d at 94.

does not have to be judicially enforceable to have an impact on legal proceedings. The next section of this paper considers some of the stakes of that legal reality and what it means to work under employer-controlled conditions with a presumption against legal recourse.

III. THE STAKES OF CONTRACTING AROUND COVID-19 LIABILITY IN THE WORKPLACE

Although the previous section includes some introductory material on the legal questions around COVID-19 liability in the workplace, this section offers a more comprehensive account. This paper looks to the bigger picture at how contracting works in the United States' workplace with particular attention to how employment contracts can and should be modified for employees, how they function under collective bargaining conditions, and what is at stake for independent contractors.

Each of these three subsections analyzes a different method of whether businesses can be held liable for exposure. Or, at least, the subsections analyze how each legally recognized category of work offers a different level of protection for the worker with respect to the terms of their contracts.

The occurrence of a global pandemic represents substantial changes in employment conditions. For healthcare workers, the pandemic has represented a sizable shift in the nature and burden of the job, including overwhelming working conditions that spill over into a worker's personal life.⁵⁹ For workers who have been able to work from home during the pandemic, the pandemic has represented a sizable shift in terms of hours, responsibilities, and resources.⁶⁰

⁵⁹ Mehrdad Eftekhari Ardebili, Morteza Naserbakht, Colleen Bernstein, Farshid Alazmani-Noodeh, Hamideh Hakimi & Hadi Ranjbar, *Healthcare Providers Experience of Working During the COVID-19 Pandemic: A Qualitative Study*, 49 AM. J. INFECT. CONTROL 547, 550–51 (2020); Katie Pearce, *COVID-19 Ushers in Decades of Change for Nursing Profession*, JOHNS HOPKINS UNIV. HUB (Oct. 19, 2020), <https://hub.jhu.edu/2020/10/19/nursing-changes-covid-19/> [<https://perma.cc/L37Z-Z8V6>].

⁶⁰ See Kathryn Vassel, *Here's How the Pandemic Has Changed Work Forever*, CNN BUS. (Dec. 21, 2020, 3:41 PM), <https://www.cnn.com/2020/12/21/success/job-change-remote-work-pandemic/index.html> [<https://perma.cc/JNP3-3225>]; see also Derek Thompson, *The Workforce is About to Change Dramatically*, ATLANTIC (Aug. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/just-small-shift-remote-work-could-change-everything/614980/> [<https://perma.cc/B2NE-PLN7>] (focusing on changes to the US workplace, largely focusing on office workers and issues related to remote work); Anne Helen Petersen, *You're Still Not Working From Home*, CULTURE STUDY (Oct. 11, 2020), <https://annehelen.substack.com/p/youre-still-not-working-from-home> [<https://perma.cc/3MHL-BNDR>] (focusing on how the cultural stress of the pandemic and the lack of real material support fundamentally alter a remote worker's orientation to work). Most at issue in the conversation about remote work is how the compensation structure does or does not accommodate the idea that the remote worker is functionally, when working from their home, funding the usual overhead of an office space (rent, electricity, heating and cooling, internet), but also in how oversight changes with a shift from physical shared spaces to anxiety over remote worker productivity and, in some cases, surveillance. Bobby Allyn, *Your Boss is Watching You: Work-From-Home Boom Leads to More Surveillance*, NAT'L PUB. RADIO (May 13, 2020, 5:00 AM), <https://www.npr.org/2020/05/13/854014403/your-boss-is-watching-you-work-from-home->

For essential workers who have continued to work in person, the pandemic has dramatically increased the job's level of danger given the increased potential exposure.⁶¹

As this paper will discuss, education workers work within a hybrid model. Educators working in both kindergarten through twelfth grade ("K-12") and university environments have inhabited the space between fully remote and fully in-person, often switching back and forth and sometimes with minimal notice.⁶² As the classroom experience remains ambiguous, so too does the research experience for graduate students and faculty. The nature of academic work is intensely bifurcated during a pandemic. Although conditions have broadly changed for all disciplines, academics in science, technology, engineering, and mathematics ("STEM") tend toward engaging in the most public-facing work. Lab environments are more difficult, if not impossible, to replicate remotely. As is discussed in the next section, this broad differentiation makes the question of graduate students as workers increasingly difficult; academics look even less like legally recognizable workers amid a pandemic.

Even beyond the responsibilities and roles of academics, universities, and, to some extent, K-12 schools, are incredibly varied environments. Universities house a wide variety of workers, including academics who have long done much of their non-teaching work remotely, administrators, residence and food service staff who maintain public-facing operations, and janitorial and security staff who continue to work in person even if universities are closed. Universities house a wide variety of pandemic-era work.

Graduate students typically tend to float between essential and non-essential categories of workers. Across and among institutions, there lacks standardization of whether graduate students will be responsible for teaching and performing other responsibilities in person.⁶³ This can remain ambiguous at

boom-leads-to-more-surveillance [https://perma.cc/ME6T-VLBW].

⁶¹ Jimmy O'Donnell, *Essential Workers During COVID-19: At Risk and Lacking Union Representation*, BROOKINGS (Sept. 3, 2020), <https://www.brookings.edu/blog/up-front/2020/09/03/essential-workers-during-covid-19-at-risk-and-lacking-union-representation/> [https://perma.cc/CQ4L-P3KT]; Clare Hammonds, Jasmine Kerrissey & Donald Tomaskovic-Devey, *Stressed, Unsafe, and Insecure: Essential Workers Need a New, New Deal*, UNIV. OF MASS. AMHERST (June 5, 2020), <https://www.umass.edu/employmentequity/stressed-unsafe-and-insecure-essential-workers-need-new-new-deal> [https://perma.cc/6492-DLJL].

⁶² Emma García, Elaine Weiss & Ivey Welshans, *What Teaching is Like During the Pandemic—and a Reminder that Listening to Teachers is Critical to Solving the Challenges the Coronavirus Has Brought to Public Education*, ECON. POL'Y INST. (Oct. 7, 2020, 1:54 PM), <https://www.epi.org/blog/what-teaching-is-like-during-the-pandemic-and-a-reminder-that-listening-to-teachers-is-critical-to-solving-the-challenges-the-coronavirus-has-brought-to-public-education/> [https://perma.cc/B8JW-E63L]; Michelle D. Miller, *Going Online in a Hurry: What to Do and Where to Start*, CHRON. OF HIGHER EDUC. (Mar. 9, 2020), <https://www.chronicle.com/article/going-online-in-a-hurry-what-to-do-and-where-to-start/> [https://perma.cc/KU8X-VSB4]; Kevin Gannon, *How to Make Your Online Pivot Less Brutal*, CHRON. OF HIGHER EDUC. (Mar. 12, 2020), <https://www.chronicle.com/article/how-to-make-your-online-pivot-less-brutal/> [https://perma.cc/QFK4-KYFW].

⁶³ Different graduate students may have different responsibilities including STEM student

the beginning of each academic term.

By and large, changes in working conditions are largely not a legal question. The differences across departments and institutions—and from year-to-year in many programs—is a difficult legal question: are graduate student workers cognizable as a single class, despite their substantial differences? The pandemic has also caused substantial changes to the graduate student working environment making some of these differences more apparent and eliminating other differences. However, the effect is broadly the same: employers have broad discretion in determining their employees' job duties.

This section examines whether workers have any rights with respect to their employment circumstances and whether they have any additional or modified rights due to COVID-19. Then it examines whether liability waivers may alter those rights and conditions. From this analysis, the section concludes that the rights landscape for workers during COVID-19 is especially bleak and that, although the liability waivers may not themselves be enforceable, they do not need to be enforceable for workers to have limited rights and remedies from increased exposure.

This ultimately raises several questions that are addressed in the remainder of this paper. First, what are the stakes and consequences of not holding employers accountable for the spread of a highly infectious and deadly virus in their workplaces? Second, what are the stakes of not even defining those employers as such in the first place? Third, what could and should be done to offer protections for vulnerable workers?

A. Revising Employment Contracts

Outside of the specific pandemic context, employers have a relatively high level of control over working conditions absent a collective bargaining agreement. Most law concerning employment contracts involves the question of whether there exists a contract that successfully rebuts the presumption of at will employment relationships.⁶⁴

Tort lawsuits against employers and coworkers are generally problematic in employment law. There is some room for maneuvering outside of the

requirements to be in in-person labs to do research. Teaching loads can vary by department: some graduate students are instructors of record, some act as teaching assistants, and some may have fellowships in lieu of teaching requirements. Expectations for how labs and classes are conducted can vary by the needs of the department or principal investigator.

⁶⁴ The at-will rebuttable presumption in employment law begins with the assumption that employers have the latitude to modify terms and conditions of employment at-will for legitimate, non-discriminatory reasons. Courts generally allow parties to contract around that presumption with contracts that define terms or specify that termination must be for just cause. *See, e.g.*, *Spacesaver Sys. v. Adam*, 98 A.3d 264, 280 (Md. 2014) (holding that a modified employment contract with a just-cause termination provision successfully rebutted the at-will employment presumption); *Hinkel v. Sataria Distrib. & Packaging, Inc.*, 920 N.E.2d 766, 771 (Ind. Ct. App. 2010) (holding that additional promises for job stability outside a fully integrated contract are not enforceable without additional consideration).

workers' compensation structure, but that is the presumptive mode of relief for workplace related injury in most situations.⁶⁵

In most non-discriminatory contexts, workers do not have access to remedies from their employers for harms caused by those employers. Worse, in most instances, employees do not have access to remedies in employment discrimination cases given the continued prevalence of mandatory arbitration provisions and the frequency with which summary judgment is granted in employment discrimination cases, particularly in federal courts.⁶⁶

Even in the case of workers who are classified as employees—whose positions have more security—there are real limitations because of the extraordinary nature of the pandemic. Furthermore, it is unlikely that COVID-19 can be considered an imminent danger in the way OSHA guidance articulates that workers can refuse dangerous work.⁶⁷ This guidance, which theoretically gives employees the right to refuse to work without fear of retaliation, only allows such a refusal upon meeting four conditions:

1. Failure of the employer to eliminate the danger when asked, if possible;
2. A refusal to work in good faith or with genuine belief that there is a reasonable apprehension of death or serious injury;
3. A reasonable person would agree that such a danger exists; and
4. There isn't enough time to complete an OSHA inspection.⁶⁸

Furthermore, it is currently unlikely that COVID-19 could legally be considered an imminent danger. It is not a hazard that is unique to the workplace. Its nature—being a highly contagious airborne virus with a very long incubation period combined with a country-wide failure to contact trace—creates a causation issue. There is a fundamental lack of recourse for workers either to

⁶⁵ Samenga, *supra* note 37, at 13.

⁶⁶ See generally Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 864 (2020) (arguing that mandatory arbitration provisions are particularly harmful in discrimination cases due to the dignitary harms at play in the tort of discrimination); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018) (focusing on the particular problem of secrecy in the employment discrimination case whereby mandatory arbitration is “less an ‘alternative dispute resolution’ mechanism than it is a magician’s disappearing trick or mirage”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519 (2010) (“Whatever the reasons, the greatest impact of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers”); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011) (“Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal.”).

⁶⁷ Occupational Safety & Health Admin., *Workers’ Right to Refuse Dangerous Work*, U.S. DEP’T OF LAB., <https://www.osha.gov/workers/right-to-refuse> [<https://perma.cc/L78Q-LLXE>].

⁶⁸ See *id.*

refuse to work under unsafe conditions without fear of retribution or to hold their employers accountable for mitigating dangers related to public-facing work.

In sum, pandemic-related liability waivers and indemnification agreements will likely be unenforceable. They can protect against negligence but not gross negligence or willful conduct.⁶⁹ It is unclear if an employer's failure to provide PPE, require masks, or inform employees about potential contact constitutes gross negligence or willful conduct. If it does, liability waivers would be unenforceable.⁷⁰ For COVID-19 purposes, the potential for viable negligence claims is very low. Therefore, pandemic related liability waivers and indemnification agreements will likely fail.

B. Concerted Activity and Collective Bargaining

The National Labor Relations Act ("NLRA") grants workers a right to refuse to work under unsafe conditions, as long as that refusal is part of concerted activity.⁷¹ The NLRB does not necessarily require workers to be protected by an officially organized and recognized union for the activity to count as concerted.⁷² Instead, the NLRB requires only that workers have an honest belief that working under certain conditions would not be safe or healthy.⁷³ This can be true even with safer activities or reasonable employer actions.⁷⁴

Furthermore, dangerous conditions might be sufficient to invalidate a no strike provision in an employment contract or collective bargaining agreement.⁷⁵ Therefore, even beyond a work stoppage, unionized workers may have additional recourse to strike. However, employers may still maintain the power here. OSHA, CDC, WHO, and industry guidelines and standards may undermine a worker's claim that the work environment is abnormally dangerous. In other words, although there is a relationship between the workplace and increased risk for public-facing employees during the pandemic, potential recourse is incredibly shaky.

Even though striking and refusing to work is generally protected, striking is a high stakes tactic. Employers are barred from permanently replacing employees who participate in a protected safety strike, but employers are not required to pay striking workers and can retain temporary replacements.⁷⁶ That said, striking is still an avenue uniquely available to unionized workers.

⁶⁹ See *Gross v. Sweet*, 400 N.E.2d 306, 310–11 (N.Y. 1979).

⁷⁰ See e.g., National Labor Relations Act, 29 U.S.C.S. § 157 notes to decisions IV.B.45. (LexisNexis 1947) (The NLRA protects concerted activity generally; concerted activity is action taken "with or on behalf of other employees" concerning the terms and conditions of employment).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974); *TNS Inc.*, 329 N.L.R.B. 602, 603 (1999).

⁷⁶ *The Right to Strike*, NAT'L LAB. RELS. BD., <https://www.nlrb.gov/strikes> [<https://perma.cc/JL5B-8DZL>].

Finally, the NLRB has historically been skeptical of employers requiring employees to waive their right to file charges.⁷⁷ The NLRB does not allow the barring of class action suits through waivers although they are loath to support the imposition of waivers that remove access to litigation or arbitration.⁷⁸ Although it is much more protective of class actions, it does not seem likely that the NLRB would be hospitable to the enforcement of liability waivers for workers who are protected with a union.⁷⁹

C. Independent Contractors

Independent contractors lack some of the presumptions afforded in the traditional employee/employer relationship. Namely, there is no longer a workers' compensation exclusivity question due to the lack of workers' compensation, and the company is potentially liable in the same way as in any other contractual relationship. However, when workers are classified as independent contractors, they are presumed to have more control over their own terms and conditions of employment when making a potential liability waiver.

Although an independent contractor—such as an office building cleaner or a dining service provider for a university—may have more room to claim liability in the case of COVID-19 exposure caused by their employer if they can establish causation, this one potential legal win is not the full story.⁸⁰ Independent contractors, specifically gig workers, have long fought their classification as independent contractors because it often comes with reduced hours, reduced wages, the reduced collective bargaining ability, and a lack of benefits including sick leave and other paid time off.⁸¹

Limited indemnification for a long-shot potential lawsuit pales in comparison to the benefits of employee status. Liability waivers are a symptom of a much larger problem brought to light by the risk of illness in the COVID-19 era.

⁷⁷ See *U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 388 (2006).

⁷⁸ *D.R. Horton, Inc.*, 357 N.L.R.B. 2, 4 (2012); *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 794 (2014).

⁷⁹ See *Murphy Oil USA, Inc.*, 361 N.L.R.B. at 794.

⁸⁰ In the janitorial and dining examples, the individual workers may very well be employees. Following the passage of California's Prop. 22 that affirmed gig workers' status as independent contractors, the status of Lyft and Uber drivers as independent contractors is relatively certain at the time of this writing. However, in January 2021, drivers and the Service Employees International Union (SEIU) sued in the California Supreme Court seeking to overturn that ballot measure, claiming that it puts illegal constraints on the drivers' power to organize. Chris Mills Rodrigo, *Drivers, Unions Sue to Strike Down California's New Rules for Gig Workers*, THE HILL (Jan. 12, 2021, 1:46 PM), <https://thehill.com/policy/technology/533854-drivers-unions-sue-to-strike-down-californias-new-rules-for-gig-workers> [<https://perma.cc/W6TA-UWJ6>].

⁸¹ Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH (July 31, 2019), <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/> [<https://perma.cc/W9FH-C7YV>].

D. The Specific Problem of the Graduate Student Worker

If liability waivers are a symptom of a larger problem, the problem gets even larger and messier when looking at graduate student workers. Graduate students' unique position within the university as neither students nor employees functionally throws away the analysis we have done up to this point. Graduate student workers fit into none of the above categories. As is discussed in the next section, this opens the door for a wide-ranging set of workplace issues that shed light on general legal inequities in employment and labor law.

IV. CASE STUDY: THE UNIVERSITY

This section of the paper narrows the focus to the case study of higher education to demonstrate how the COVID-19 pandemic has fostered precarious employment conditions for workers. Precarious employment leaves workers especially vulnerable to data opacity and so-called liability waivers as they attempt to make decisions about their health and employment during a global pandemic. First, this section presents a brief introduction to new challenges in higher education because of COVID-19. Second, we conduct a data audit of 102 schools' public-facing COVID-19 data to understand what information stakeholders actually have access to when they make decisions about risk. Third, the case study focuses on graduate student workers who have a robust legal history of trying to win legal status as workers and evaluate their position at the university during the COVID-19 pandemic. Fourth, this section presents examples of liability waivers that undergraduate students and graduate student workers are being asked to sign to be on campus where, in some cases, they are required to be present in-person to retain their employment. This section of the paper concludes with a brief analysis of the potential impacts of these waivers in the context of the current data-scape of COVID-19 and general precarity of graduate student workers.

The COVID-19 pandemic created undeniable effects on education, forcing schools to take unprecedented and untested actions very rapidly. As early as March 2020, half of the world's students were no longer attending school in-person.⁸² This included a vast majority of US colleges and universities who necessarily transitioned to distance learning.⁸³ With this vast change in university structure came significant consequences and novel challenges.⁸⁴

⁸² *Half of World's Student Population Not Attending School: UNESCO Launches Global Coalition to Accelerate Deployment of Remote Learning Solutions*, U.N. EDUC., SCI., & CULTURAL ORG. (Mar. 19, 2020), <https://en.unesco.org/news/half-worlds-student-population-not-attending-school-unesco-launches-global-coalition-accelerate> [https://perma.cc/2SSL-PL66].

⁸³ Nicole Johnson, George Veletsianos & Jeff Seaman, *U.S. Faculty and Administrators' Experiences and Approaches in the Early Weeks of the COVID-19 Pandemic*, 24 ONLINE LEARNING J. 6, 6 (2020).

⁸⁴ Though the principal concern of this article is the liability strategies and consequences of reopening schools at the college level, it should be noted that debates about whether schools should re-open at all dominated the discussion of American education at both the K-12 and postsecondary

Importantly, the consequences and challenges of COVID-19 are not felt equally across a university. Scholar Shaun Harper lists twelve of these challenges, which though not exhaustive, provide a useful framework for considering the interconnectedness of university systems and unequal burdens of harm during COVID-19.⁸⁵

These challenges include:

1. heightened risks for essential workers,
2. disproportionate job loss for employees of color,
3. violence directed at Asian students and employees,
4. the effects of travel bans,
5. trauma and grief support,
6. the impact of infected university members on vulnerable families and communities,
7. putting Black student athletes at higher risk,
8. heightened harm for underfunded institutions that traditionally serve people of color,
9. digital access inequity,
10. increasing housing and food insecurity,
11. racism in online education, and
12. the racialization of stakeholder feedback.⁸⁶

Each of these pose new complex liability challenges that all exist within the reality that students, employees, and teachers have contracted COVID-19 in massive numbers, sometimes fatally. By May 26, 2021, there have been over 700,000 COVID-19 cases at over 1,900 colleges.⁸⁷

levels. Debates attempted to weigh disease concerns with psycho-social impacts and possible mitigation strategies, with some notable authors treating school re-opening before vaccination saturation plausible with strict mitigation strategies. *See generally* Ronan Lordan, Garret A. Fitzgerald & Tilo Grosser, Editorial, *Reopening Schools During COVID-19*, 369 *SCIENCE* 1146, 1146 (2020); Vijesh S. Kuttiatt, Ramesh P. Menon, Philip Raj Abraham & Shilpa Sharma, *Should Schools Reopen Early or Late?—Transmission Dynamics of COVID-19 in Children*, 87 *INDIAN J. PEDIATRICS* 755, 755 (2020). However, other scholars quickly critiqued the feasibility of the mitigation strategies and the myriad of structural inequality concerns that would need to be addressed for successful online or in-person instruction. *See generally* Shelby Carvalho, Jack Rossiter, Noam Angrist, Susannah Hares & Rachel Silverman, *Planning for School Reopening and Recovery After COVID-19*, *CTR. FOR GLOB. DEV.* 3 (2020) (recommending policymakers directly weigh risks of strategic mismanagement including deaths, further closures, and additional waivers of COVID-19).

⁸⁵ *See generally* Shaun Harper, *COVID-19 and the Racial Equity Implications of Reopening College and University Campuses*, 127 *AM. J. EDUCATION* 153, 153–60 (2020) (describing each of the aforementioned themes at length).

⁸⁶ *Id.*

⁸⁷ *Tracking Coronavirus Cases at U.S. Colleges and Universities*, *N.Y. TIMES* (May 26, 2021),

Even so, financial and political pressures including furloughs, revenue loss, and student dissatisfaction have driven many universities to reopen even as COVID-19 cases continue to rise.⁸⁸ The largest part of this motivation is undoubtedly financial as the scale of current and potential financial losses are massive costing billions of dollars and potentially altering enrollments for years to come as students reject the notion of paying full price for online education.⁸⁹ Students and university workers have been critical of reopening plans even as students return to campus in droves. Students have expressed doubts that social distancing measures will actually be followed,⁹⁰ service workers worry about exposure with lack of rights to return to work post-COVID,⁹¹ and faculties at schools like Pennsylvania State University and Georgia Tech have published open-letters criticizing the lack of science-based evidence in mitigation strategies and limited input gathered from faculty, staff, and graduate employees.⁹² Work recently published in the *Indiana Law Journal Supplement* delivers the damning critique that “[t]he socially responsible decision is to deliver compassionate, healthy, and first-rate online pedagogy,” but universities in large numbers refuse to do so and must confront questions of liability for their role in spreading a deadly pandemic disease to their own students, employees, and faculty.⁹³

A. Data Transparency and COVID-19

There is currently no standard for how much data universities are required to make available to students and workers who are faced with decisions about returning to campus during the COVID-19 pandemic. While most universities provide some amount of data to the public, the quality, detail, and comprehensibility of that data varies dramatically. This lack of data transparency and data communication puts students and workers in a position where they are making important decisions that affect their health and even signing liability agreements testifying to acceptance of risks without having enough information to make informed risk decisions.

To better understand the landscape of COVID-19 data availability, we

<https://www.nytimes.com/interactive/2021/us/college-covid-tracker.html> [https://perma.cc/ETN9-FJJN].

⁸⁸ Jyoti Madhusoodanan, *University Reopening Plans Under Fire*, 369 *SCIENCE* 359, 359 (2020).

⁸⁹ Mark S. Wrighton & Steven J. Lawrence, *Reopening Colleges and Universities During the COVID-19 Pandemic*, 173 *ANNALS INTERNAL MED.* 664, 664 (2020).

⁹⁰ See Terry Nguyen, *Colleges Say Campuses Can Reopen Safely. Students and Faculty Aren't Convinced*, *VOX* (June 26, 2020, 9:17 AM), <https://www.vox.com/the-goods/21303102/college-reopening-fall-coronavirus-students-faculty-worry> (last visited Oct. 5, 2021).

⁹¹ Natalie Alms, *College Food Service Workers Worried About Coronavirus Risks*, *CAROLINA PUB. PRESS* (Nov. 9, 2020), <https://carolinapublicpress.org/39677/college-food-service-workers-worried-about-coronavirus-risks/> [https://perma.cc/F5S9-SJDE].

⁹² Madhusoodanan, *supra* note 88, at 359.

⁹³ Peter H. Huang & Debra S. Austin, *Unsafe at Any Campus: Don't Let Colleges Become the Next Cruise Ships, Nursing Homes, and Food Processing Plants*, 96 *IND. L.J. SUPPLEMENT* 25, 25 (2020).

conducted an audit of over 100 universities and their public-facing COVID-19 data offerings. We used school rankings from U.S. News and selected the top 100 ranked schools, which ended up being 102 schools due to tie-breaking procedures put in place by U.S. News.⁹⁴ We designed a sampling system to ensure that we studied the public-facing offerings of well-resourced institutions, but also to ensure that we analyzed the data offerings of a wide variety of school types: private schools, public schools, religious institutions, larger schools, and smaller schools. Importantly, we searched for each school's COVID-19 data using an extremely simple key word phrase "[Name of School] covid data." This likely means that schools have other data that we did not retrieve with our simple search. However, the goal of this university audit is not to be comprehensive, but rather to replicate what an average individual would find first if they wanted to know about COVID-19 cases at their university.

We found that all 102 schools had public-facing COVID-19 data. However, we also found that the specific information and presentation of that information varied wildly across schools in the sample. This means that some students and workers have a lot of public-facing information to use to make decisions while other students and workers have very little public-facing information to use in making the same decisions. Instead of pointing to schools that performed poorly in a given category, the following section highlights schools that were able to do a better job in that category both as evidence of feasibility and as a reflection of better data practices that should be implemented across all universities.⁹⁵ The problems across COVID-19 data can be grouped into four themes. First, this sub-section discusses the benefits of dynamic and updated data. Second, this sub-section evaluates the ways in which specific pieces of information can better assist affected groups in making informed decisions. Third, this sub-section describes the benefits of creating data dashboards that are accessible and understandable. Fourth, this sub-section analyzes how focus on effective visualization can assist translation of COVID-19 data to stakeholders. Lastly, this subsection emphasizes the particular conceptual challenge of graduate students in analyzing this data.

1. Dynamic and Updating Data

The first barrier to equipping university community members with the information they need to make informed decisions about risks is simply not providing usable data. Every school in this sample of 102 schools offered some public-facing data, but some offered data in very limited quantities with no meaningful context. Schools in this category might just list the number of COVID-19 positive cases in the previous semester or the number of positive

⁹⁴ 2021 Best National University Rankings, U.S. NEWS & WORLD RANKINGS (2021), <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Sept. 23, 2021).

⁹⁵ We also worried that pointing to a specific school as an isolated failure in a given category would distract from the larger landscape of failures in this arena. Unfortunately, data is so inconsistently and incompletely available that schools succeeding in a given area are rarer than schools failing in that area. Importantly, we do not mean to suggest that the schools we cite here as good examples in a particular category are excelling or not excelling in all other categories.

cases per week. However, without information about specific and historical time periods or with relevant comparison groups, such as the number of negative tests, this data is extremely difficult to place into a meaningful context. These data offerings were also often static and not easily updatable in a way that allows stakeholders to see changes over time. This leaves students and employees in the dark about how university risk mitigation strategies translate into changes in COVID-19 positivity rates. Static information about a dynamic pandemic—where medical guidelines and best practice suggestions are actively changing—disadvantages students and workers.⁹⁶ Without this information, there is no hope for a reasonable person to weigh the risks of being on campus.

A better presentation of data is seen by the dynamic and updating COVID-19 Response Dashboard presented by the University of Wisconsin-Madison.⁹⁷ Rather than projecting static and vaguely aggregated data, University of Wisconsin-Madison provides daily snapshots, weekly briefings, and aggregated historical data in chart form that makes it much easier to see what the current positivity rate is and how it has changed over time.⁹⁸ The University of Denver also provides daily information about the number of tests and number of positive tests and usefully plots daily data for the larger Denver County.⁹⁹ This gives students easy access to comparative information about the larger context of COVID-19 in the area on a daily basis.

2. Providing Data to Facilitate Informed Risk Decisions

Even schools that provided dynamic data varied widely in exactly what data they presented. In reviewing the sample, we generated several types of data that are not consistently presented but should be since they provide important information that facilitates decision making and risk evaluation. First, many universities did not sufficiently break down the types of roles at the university when displaying data results. Most common was a breakdown of students and staff. However, both categories conceal groups with extremely different levels of risk. For example, a faculty member teaching online classes and a campus dining hall worker have vastly different risk profiles even though they both fall into the category of staff. Similarly, many universities did not clearly distinguish between undergraduate students and graduate student workers even though the roles of these groups differ dramatically. Specifically, graduate students often teach courses and work in essential laboratory functions so they would have different levels of contact with the campus community.

⁹⁶ See generally Carlos del Rio & Preeti N. Malani, *2019 Novel Coronavirus—Important Information for Clinicians*, 323 JAMA 1039, 1039 (2020); Carlos del Rio & Preeti N. Malani, *COVID-19—New Insights on a Rapidly Changing Epidemic*, 323 JAMA 1339, 1339 (2020) (showing two articles published 2 months apart that explain rapid changes in medical recommendations surrounding COVID-19).

⁹⁷ *COVID-19 Response Dashboard*, UNIV. OF WIS. MADISON, <https://covidresponse.wisc.edu/dashboard/> [<https://perma.cc/7DLU-VNB4>].

⁹⁸ See *id.*

⁹⁹ *COVID-19 Dashboard*, UNIV. OF DENVER, <https://www.du.edu/coronavirus/dashboard> [<https://perma.cc/XKY5-F7RY>].

Harvard University is one school that did separate undergraduate student and graduate student worker test results, and their outcome data makes it clear why such a disaggregation is necessary. Image 1 is a screenshot taken of Harvard's data dashboard showing cumulative COVID-19 testing and cases since June 1, 2020.¹⁰⁰ Harvard provides test totals and positive test totals for each group.¹⁰¹ Calculating the different positivity percentages demonstrates that graduate positivity profiles and undergraduate positivity profiles are substantially different. Undergraduate students at Harvard University have a positivity percentage of 0.052%, but graduate student workers have a positivity percentage of 0.163% which is over three times more.¹⁰²

Image 1: Harvard University COVID-19 Dashboard¹⁰³

Cases & Testing: Cumulative Since June 1, 2020

Total positive cases	Total undergraduate student positive cases ⁶	Total graduate student positive cases ⁶	Total faculty, staff, or other affiliates positive cases ⁷
547	31	140	376
Total tests conducted	Total undergraduate student tests	Total graduate student tests	Total faculty, staff, or other affiliates tests
289,057	59,727	85,566	143,764

The University of California Berkeley accomplishes this task in a different way by hosting an interactive dashboard that allows users to select a role—graduate, undergraduate, faculty/staff, other—and then projects the data specifically pertaining to the selected groups.¹⁰⁴ More specificity across groups that we expect to have different levels of risk is another way that universities can help campus community members make more informed assessments of risk. It

¹⁰⁰ *Harvard University-Wide COVID-19 Testing Dashboard*, HARVARD U., <https://www.harvard.edu/coronavirus/testing-tracing/harvard-university-wide-covid-19-testing-dashboard> [https://perma.cc/V4PC-542B].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Coronavirus Dashboard—Testing*, UNIV. OF CAL. BERKELEY, <https://coronavirus.berkeley.edu/dashboard/> [https://perma.cc/WK9D-2GMU].

also helps alleviate role confusion. For example, at some universities, graduate student workers are recognized formally by the university as employees, but at others they are students. Data specificity can help solve that confusion.

Another type of information that stakeholders need to make informed decisions is more meaningful information about identified cases of COVID-19. Universities do need to weigh privacy concerns when dealing with individual medical data, but many universities do not differentiate in the public-facing data whether individuals who tested positive have been on campus. This leaves students and workers having to guess whom the data is referring to when the university already has access to that information anyway.

Some schools have balanced these concerns while still providing critical information. One example is the University of California Merced, Image 2, who gives the date of the positive test, some general affiliation information about the individual, whether they reside on or off campus, but most importantly the date that the individual was last on campus.¹⁰⁵ This information seems critical to deciding to come to campus because persons testing positive who have not been on campus are surely meaningfully different from those who have been on campus consistently and tested positive.

Image 2: University of California Merced Covid-19 Dashboard¹⁰⁶

Case Information

Last Updated: December 16, 2020

Reported Date	Affiliation	Residence	Last Day on Campus	Status
12/14/2020	Employee	Off Campus	5/22/2020	Active
12/14/2020	Student	Off Campus	3/17/2020	Active
12/14/2020	Student	Off Campus	12/13/2020	Active
12/14/2020	Student	Off Campus	12/1/2020	Active
12/14/2020	Student	Off Campus	N/A*	Active
12/14/2020	Student	Off Campus	N/A*	Active
12/13/2020	Student	Off Campus	12/11/2020	Active
12/13/2020	Student	Off Campus	12/8/2020	Active

¹⁰⁵ *Archived COVID-19 Case Information*, UNIV. OF CAL. MERCED (Dec. 16, 2020), <https://doyourpart.ucmerced.edu/archived-case-information> [https://perma.cc/MLR7-68T6].

¹⁰⁶ *Id.*

The University of California San Diego (Image 3) provides even more detailed information, giving specific worksite information, such as campus buildings where someone tested positive and the dates when a COVID-19 positive individual was present at that specific location.¹⁰⁷ This information would allow students to make specific updating decisions. For example, it would allow students to decide whether to avoid going to certain places or offices on campus as the COVID-19 situation on campus changes. This serves to provide community members with a more accurate tool for assessing personal risk.

Image 3: University of California San Diego Covid-19 Dashboard¹⁰⁸

Potential Workplace Exposure	
Potential Workplace Exposure COVID-19 positive individuals were present at the following locations:	
UC San Diego Worksite Location	On-site infectivity dates
Eleanor Roosevelt College Asia Hall	1/10/21 - 1/13/21
Eleanor Roosevelt College Earth Hall	1/3/21 - 1/5/21 and 1/10/21-1/13/21
Muir College Tenaya	1/6/21 - 1/13/21
Warren College Douglas Hall	1/4/21 - 1/7/21 and 1/10/21 - 1/13/21
Muir College - Tamarack	1/9/21 - 1/12/21
Revelle Beagle Hall	1/9/21 - 1/12/21
Revelle Galathea Hall	1/9/21 - 1/12/21
Rita Atkinson Residences	1/3/21 - 1/5/21 and 1/9 - 1/12
Warren College Brennan Hall	1/9/21 - 1/12/21
Seventh College West Tower 1	1/9/21 - 1/11/21
Central Mesa Building 9226	1/5/21 - 1/7/21 and 1/9/21 - 1/10/21
Eleanor Roosevelt College North America Hall	1/3/21 - 1/5/21 and 1/8/21 - 1/10/21
One Miramar Street - Building 2	1/8/21 - 1/10/21
One Miramar Street - Building 4	1/9/21 - 1/10/21
Pepper Canyon East Apt - Bldg 400	1/8/21 - 1/10/21
Revelle Argo Hall	1/3/21 - 1/5/21 and 1/7/21 - 1/10/21

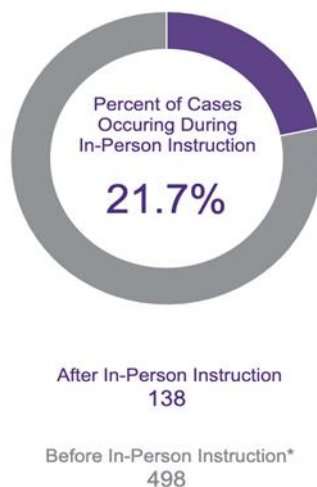
Note: If you were present at the same worksite during the dates listed in the table above, please review the information on how to get tested and the COVID-19 related benefits and resources that are available to you at: <https://blink.ucsd.edu/safety/resources/public-health/covid-19/notifications.html>

Finally, we also found that many universities did not make it clear how policy or instructional changes at the university itself may correlate with changes to the COVID-19 testing data. For example, many schools listed low positive rates without being expressly clear that the university was not open or was open in a very limited sense during those periods of low positivity. Without additional information, someone making a risk assessment would have a distorted view of the actual risk. Image 4, from the Clemson University COVID dashboard, is an example of leveraging data presentation to communicate instructional changes.¹⁰⁹

¹⁰⁷ UC San Diego COVID-19 Daily Dashboard, UNIV. OF CAL. SAN DIEGO, <https://returntolearn.ucsd.edu/dashboard/index.html> [https://perma.cc/5CP8-LJCE?type=image].

¹⁰⁸ *Id.*

¹⁰⁹ COVID-19 Dashboard, CLEMSON U., <https://www.clemson.edu/covid-19/testing/dashboa>

Image 4: Clemson University Covid Before/After In-Person¹¹⁰

This specific chart demonstrates how a change to in-person instruction has correlated with positivity rates. This is much more targeted and useful information for students deciding if they want to take in-person courses and graduate workers and faculty deciding if they want to teach remotely or in-person.

3. Presenting Accessible and Understandable Data

A third theme we saw across the sample of 102 schools' public COVID-19 data was a lack of accessibility and clarity in the way the data was presented. First, many of the dashboards were not easily translatable to mobile applications or the method for doing so was not clear. This is an accessibility issue in an era where forty-six percent of people primarily use their smartphones for internet browsing even if they have another device.¹¹¹ Schools also did not often provide clear pathways to finding information in more accessible forms. North Carolina State University was an example of a school who did provide clear and accessible pathways through clear and hyperlinked accessibility information at

rd.html [https://perma.cc/F5C3-BQWH?type=image].

¹¹⁰ *Id.*

¹¹¹ Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RSCH. CTR. (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/#:~:text=At%20that%20time%2C%20just%208,lower%20levels%20of%20broadband%20adoption> [https://perma.cc/4YPL-N9HW].

the very top of their COVID-19 dashboard.¹¹²

Universities were also inconsistent in defining key terms needed to understand the data presented in data dashboards, were unclear about what information was excluded from the dashboards, or obfuscated how updates to the way data is displayed on the dashboards may change the appearance and meaning of the results. A counter example is Worcester Polytechnic Institute's data dashboard that has a specific section called "Dashboard Definitions" where they define the terms on the dashboard, but also link to pages with more information about the meanings of "students in isolation" and "students in quarantine."¹¹³ The University of Massachusetts at Amherst also provides information about who created the dashboard and a list of updates to the dashboard, with the date and specific change.¹¹⁴ All of these data transparency sources serve to empower users of the data who are reliant upon the data to make important decisions about their health and well-being.

4. Leveraging Effective Visualizations

A fourth theme we identified across the sample was a need to provide effective visualizations. Some universities presented no visualizations of the data at all, leaving students to read a spreadsheet-style list of cases. This obfuscates trends in the data by virtue of making it appear that there are no trends at all. However, even universities that did include visual trends often did not focus enough on the readability of those visualizations. For example, if a school conducts 10,000 COVID-19 tests in a given week and three were positive, a stacked column chart would render the three positive tests nearly impossible to see. This becomes an issue if the same school the next week conducts 10,000 COVID-19 tests and sixty come back positive. The sixty positive cases will still be difficult to see, even though they represent a twenty-fold increase in positive cases. Brown University found a solution to this problem by reporting the number of positive tests in a side window adjacent to the trendline and in a floating box over the trend data rather than solely relying on a type of stacked chart.¹¹⁵ Universities should prioritize delivering information in an understandable format that facilitates accurate assessment of risk.

Some universities pursued another strategy of communicating risk information by literally putting a "campus risk-level" or "campus operation status" graphic on top of their data dashboard. Provided that the definition of

¹¹² *Protect the Pack: Data Tracking*, N.C. STATE U., <https://www.ncsu.edu/coronavirus/testing-and-tracking/> [https://perma.cc/N9XZ-GGM5].

¹¹³ *COVID Testing Dashboard*, WORCESTER POLYTECHNIC INST., <https://www.wpi.edu/we-are-wpi/health-and-safety/dashboard> [https://perma.cc/YZM6-DSGB].

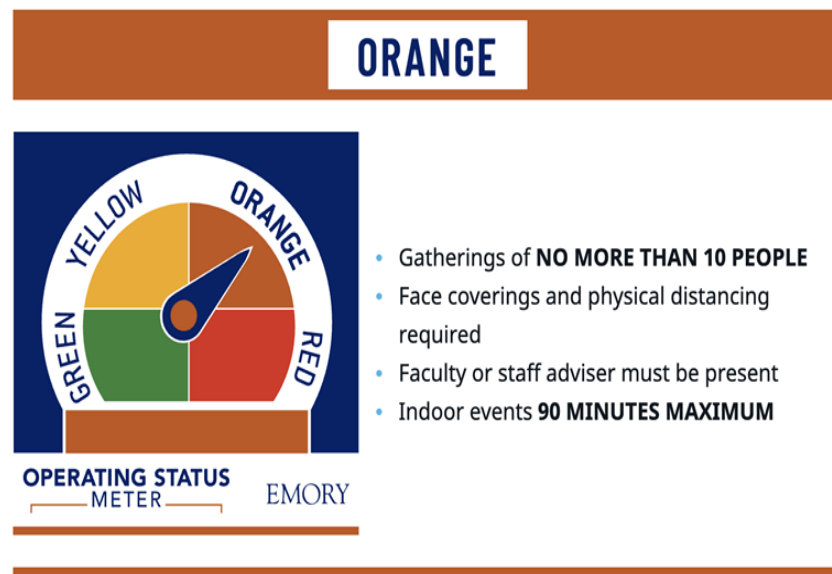
¹¹⁴ See *Biostatistics and Epidemiology Team Develops UMass Amherst COVID-19 Dashboard*, UNIV. OF MASS. AMHERST (Aug. 30, 2020), <https://www.umass.edu/sphhs/news-events/biostatistics-and-epidemiology-team-develops-umass-amherst-covid-19-dashboard> [https://perma.cc/DCZ4-HNWH]; *COVID-19 Dashboard*, UNIV. OF MASS. AMHERST, <https://www.umass.edu/coronavirus/dashboard> [https://perma.cc/DQN6-S9TU].

¹¹⁵ See *COVID-19 Dashboard*, BROWN UNIV., <https://healthy.brown.edu/testing-tracing/dashboard> [https://perma.cc/5B3H-E7WY].

these risk-levels is easily available, this can be another useful way to contextualize risk. Emory University, Image 5, displays a graphic risk-level, attaches it to a color classification system normatively associated with risk, and gives a bulleted list of what that risk-level means for quick and easy interpretation.¹¹⁶

Image 5: Emory University Operating Condition Status¹¹⁷

The current campus operation status is orange. The operating status is reviewed daily.



While the specific discussion here might make it seem that universities are all presenting data in useful and transparent ways, the opposite is true. Our audit of 102 schools' COVID-19 data exposed serious flaws in the ways that data is communicated to students and workers who are deciding whether to return to campus. We found that some schools were able to make strategic choices in their data presentation to be more transparent and informative about the state of COVID-19 on their campuses, which serves as evidence that such transparency measures are feasible. The presence of dynamic data, key types of information,

¹¹⁶ See *Operating Condition Status*, EMORY UNIV. (Sept. 2, 2021), <https://www.emory.edu/forward/policies-guidelines-protocols/operating-condition-status.html> [https://perma.cc/85WP-SZ9A].

¹¹⁷ *Id.*

accessible and understandable presentation, and optimal use of visualizations are important factors that contribute to how students and employees conceptualize COVID-19 risks. The data itself is an important part of the landscape of university liability and responsible communication of risk during the COVID-19 pandemic.

5. The Emphasis on Students

Questions of legal liability and campus safety have predominantly focused on undergraduate and professional students returning to campus rather than campus workers. Indeed, many universities have continued to offer students the option of whether to take classes online or in-person even as they mandate that staff, graduate students, and faculty return to campus, often without an individual-level choice. A professor at Georgia State explained in a Vox story about campus reopening that,

Right now, students can choose not to attend, but faculty and graduate students are required to teach . . . [f]or us to be exempt we have to show our human resources department that we're high risk. But even if I live with somebody at home who is high risk, that doesn't constitute an exemption.¹¹⁸

Importantly, colleges are not staffed only by tenured faculty with stable jobs and statistically higher salaries. Colleges rely heavily on adjunct and graduate student labor that is low-paid and often does not include health insurance.¹¹⁹ Current workplace regulations are largely ineffective to protect these workers. Moreover, many university workers might not be considered employees at all, including graduate students that teach classes, work in laboratories, and provide essential services to universities.

B. Graduate Labor is Legally Unique

Graduate students operate in a grey area of the university, where they are simultaneously both employees and students. Their entitlement to legal protections, healthcare, and salary are at the mercy of how the institution treats and defines them in a given situation. While graduate students are often ignored in narratives about higher education, they make up a substantial percentage of university students and workers.

There are approximately three million graduate students enrolled at institutions in the United States.¹²⁰ For comparison, there are more current

¹¹⁸ Nguyen, *supra* note 90.

¹¹⁹ Data from the Department of Education in 2018 shows that only 54% of college instructors are employed as full-time workers. See *Characteristics of Postsecondary Faculty*, NAT'L CTR. FOR EDUC. STAT. (May 2020), https://nces.ed.gov/programs/coe/indicator_csc.asp#:~:text=In%20fall%202018%2C%20of%20the,46%20percent%20were%20part%20time [https://perma.cc/88DV-5443].

¹²⁰ *Postbaccalaureate Enrollment*, NAT'L CTR FOR EDUC. STAT. (May 2021),

graduate students in the United States than there are residents of Wyoming, Vermont, Alaska, and North Dakota combined.¹²¹ These graduate students occupy a simultaneous space of education and labor, commonly teaching courses, staffing laboratories, producing research for the university, and taking their own courses. Importantly, graduate students often receive stipends to cover their living expenses during their five-to-seven-year academic programs. Nationally, students who receive funding earn between \$13,000 and \$34,000 which varies by program, discipline, school, and location.¹²² Graduate students use these stipends to cover costs like rent, student fees, and sometimes health insurance and research fees. Though graduate stipends are often insufficient to meet basic living expenses, many programs prohibit graduate students from holding other employment under the auspices of keeping them focused on their academic programs.¹²³

1. The Question of Graduate Student Worker Classification

While graduate students consider themselves full-time employees, most universities fund graduate students for only nine months and conceptualize graduate students as trainees instead of employees.¹²⁴ Furthermore, though graduate students are often compensated for their labor under the assumption they are part-time workers, a recent survey of more than 6,000 graduate students found that seventy-six percent work more than forty hours a week within the program, and over twenty percent report working more than sixty-one hours per week on average.¹²⁵ Graduate students have attempted to negotiate with universities for higher pay or medical care, but these efforts have been substantially impeded by a lack of legal clarity on the precise role of graduate students at the University.¹²⁶

https://nces.ed.gov/programs/coe/indicator_chb.asp [<https://perma.cc/Z3HR-MTNX>].

¹²¹ See *State Population Totals and Components of Change: 2010-2019*, U.S. CENSUS BUREAU (Apr. 20, 2021), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html#par_textimage_1574439295 [<https://perma.cc/K2V5-45SE>] (presenting data of state populations that we used to make this calculation).

¹²² Colleen Flaherty, *Grad Students' 'Fight for \$15'*, INSIDE HIGHER ED (Oct. 26, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/10/26/graduate-student-assistants-campus-across-us-are-pushing-15-hour-what-they-call#:~:text=Nationally%2C%20stipends%20for%20funded%20students,minimum%2C%20not%20necessarily%20a%20target> [<https://perma.cc/BL6T-27P8>].

¹²³ Zeb Larson, *The Need for Outside Jobs in Grad School*, INSIDE HIGHER ED (July 3, 2019), <https://www.insidehighered.com/advice/2019/07/03/more-grad-students-should-be-allowed-take-jobs-outside-academe-opinion> [<https://perma.cc/ER5Q-P87F>].

¹²⁴ Flaherty, *supra* note 122.

¹²⁵ Chris Woolston, *Overextended and Stressed* (graph), in *PhDs: The Tortuous Truth*, NATURE (Nov. 13, 2019), <https://www.nature.com/articles/d41586-019-03459-7> [<https://perma.cc/UGN6-TC52>].

¹²⁶ Graduate student unions, particularly at private institutions, have largely relied on being informally recognized by the university. See, e.g., Dani Grace & Sarah Roach, *University Opposes Graduate Student Unionization Effort*, GW HATCHET (Mar. 9, 2018, 5:36 PM), <https://www.gwhatchet.com/2018/03/09/university-opposes-graduate-student-unionization-effort/> [<https://perma.cc/F5GU-YTBJ>]. The informal recognition is particularly necessary given the

In recent legal cases, University administrators have argued that graduate students who work as research or teaching assistants are still primarily students and not employees for the purposes of Section 2(3) of the NLRA because getting a doctorate requires research and teaching.¹²⁷ Essentially, endorsement of this legal argument would allow universities to entrench student status by simply mandating extra teaching service as a degree requirement. In 2001, the NLRB held in *Brown University* that both research and teaching assistants were “statutory employees,” after applying a 2000 NLRB board decision made in *New York University*.¹²⁸ This ruling seemed to establish that graduate students were in fact workers, entitling them to the right to unionize on the grounds that students were employees by providing teaching and research services for pay.¹²⁹ *New York University* itself was a break with longstanding legal precedent and the application to *Brown University* was considered a landmark decision for graduate workers. However, the *Brown University* decision was reversed in 2004 and the NLRB held that graduate students did not have the right to unionize under federal law.¹³⁰

This reversal was highly contentious, and even as *Brown University* was being used to legally justify the denial of union recognition for graduate students at New York University, *Brown University* was being criticized by then-NLRB Acting Regional 2 Director Elbert F. Tellem.¹³¹ While the actual decision went against the New York University students who had sued for union recognition, Tellem introduced language that laid the groundwork for overturning *Brown University* in 2016.¹³² On August 23, 2016 students at Columbia University won back their employee status and unionization rights despite significant pushback by universities.¹³³ Yale, Brown, Cornell, Dartmouth, Harvard, MIT, the University of Pennsylvania, Princeton, and Stanford filed amicus briefs opposing both graduate student unionization and employee status arguing that doing so would inevitably infringe on academic freedom.¹³⁴ While *Columbia*

NLRB’s frequent back and forth on the issue. See Ash Tomaszewski, *An Update on Graduate Student Unions and the NLRB*, ONLABOR (Feb. 23, 2021), <https://onlabor.org/an-update-on-graduate-student-unions-and-the-nlr/> [https://perma.cc/FPR6-3MCG].

¹²⁷ Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243, 246–47 (2004).

¹²⁸ See *Brown Univ.*, 342 N.L.R.B. 483 (2004).

¹²⁹ See *N.Y. Univ.*, 332 N.L.R.B. 1206 (2000).

¹³⁰ *Brown Univ.*, 342 N.L.R.B. at 500.

¹³¹ Steven Greenhouse, *N.Y.U. Teaching Assistants’ Unionization Hopes Get a Boost*, N.Y. TIMES: CITY ROOM BLOG (June 20, 2011, 12:49 PM), <https://cityroom.blogs.nytimes.com/2011/06/20/n-y-u-teaching-assistants-unionization-hopes-get-a-boost/> [https://perma.cc/TQ9Z-66QM].

¹³² *Id.* (criticizing the decision for being “premised on a university setting as it existed 30 years ago” when the role of graduate students and teaching assistants was different, with far less emphasis on their teaching roles).

¹³³ See *Columbia Univ.*, 364 N.L.R.B. 1 (2016); Noam Scheiber, *Grad Students Win Right to Unionize in an Ivy League Case*, N.Y. TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/24/business/graduate-students-clear-hurdle-in-effort-to-form-union.html> [https://perma.cc/66UU-JPJM].

¹³⁴ Abby Jackson, *America’s Most Elite Colleges Have Joined Forces to Bust a Union*, BUS.

University is presently intact, a 2019 rule proposal by the NLRB would strip the graduate students of both employee status and rights to unionization.¹³⁵ According to Cornell Law professor Risa Lieberwitz, this rule proposal is unusual, since it departs with the tradition of making decisions on a case-by-case basis, but the current NLRB board is extremely politically conservative and seems focused on overruling precedent that expanded employee rights to unionize.¹³⁶ Although this might not represent the future of graduate student labor under a Democratic administration, it does characterize one direction in which the pendulum can swing.¹³⁷

Therefore, despite decades of legal battles and the current existence of dozens of graduate student unions, graduate student legal status remains precarious and unclear. The presence of legal action and unions also belies the truth on the ground at many universities. Even at universities where graduate students have won some labor protections or wage gains, students are often unable to assert any power against supervisors or the university at large.¹³⁸ Their power is largely vested in the university who can choose to recognize the union or not at will.¹³⁹ This becomes particularly perilous in the COVID-19 era where graduate students must often choose between their health, the health of vulnerable family, or receiving their stipend payments or health insurance. In June 2020, a Boston University student shared an email from their university explaining how campus policies would affect graduate student teachers (see Image 6).¹⁴⁰

INSIDER (Mar. 2, 2016, 6:54 AM), <https://www.businessinsider.com.au/nine-elite-universities-filed-an-amicus-brief-against-allowing-graduate-students-the-ability-to-unionize-2016-3> [<https://perma.cc/5DTJ-44N5>].

¹³⁵ Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies, 86 Fed. Reg. 14297 (Mar. 15, 2021).

¹³⁶ See *id.*; Katie Langin, *Proposed Rule Deals Blow to Grad Student Unions*, 365 SCIENCE 1365, 1365 (2019).

¹³⁷ See Tomaszewski, *supra* note 126.

¹³⁸ The University of Michigan GEO example is salient here: despite their recognition, the University still can exert a great deal of pressure due to their broad ability to prevent strikes.

¹³⁹ In circumstances whereby a bargaining unit is not formally recognized as a union by the NLRB, the employer may still respect the unit. This is a legally precarious position as the NLRB is unlikely to enforce agreements or offer recourse in the event of employer violations. See *Your Right to Form a Union*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> [<https://perma.cc/RL3W-QMQV>].

¹⁴⁰ Ian Nurmi (@i_nurmi), TWITTER (June 23, 2020, 10:54 AM), https://twitter.com/i_nurmi/status/1275457100454465542 [<https://perma.cc/U686-782T>] (showing a tweet from the public Twitter account of Ian Nurmi, a PhD Candidate at Boston University, as linked in Nguyen, *supra* note 90).

**Image 6: Boston University Graduate Student Teaching Policy
(June 23, 2020)¹⁴¹**

Because PhD students with teaching assignments are both students and teachers, you are in a unique situation. The LfA model is predicated on in-person teaching and simultaneous remote participation, so all faculty and teaching fellows are expected to be on campus. However, there are some new additional policies for PhD students you should be aware of:

1. You must let your PhD program know before August 1 whether you will be able to return to campus by September 1. Although conditions could change, if you are returning to Boston from out of town, you should allow for a possible 14-day quarantine period upon return. You may take classes remotely during the quarantine period and you will receive your stipend during that time. .
2. Teaching fellows who are concerned about teaching on-campus and who are in a COVID-19 high-risk category, as defined by the CDC, who live with someone in a high-risk category, or are pregnant, may apply for a workplace adjustment for the fall semester utilizing the process outlined [here](#).
3. Continuing students with teaching service appointments for fall 2020 who are unable to return to the BU campus by September 1 will be expected to take a leave of absence. Medical insurance will not be provided by the university while a student is on a LoA. Alternatively, you may attend classes remotely without stipend support in the fall, and we will postpone your receipt of your fellowship to a later semester.

After acknowledging the dual role of graduate students as both teachers and students, the policy states that students unable to teach on campus must take an unpaid leave of absence with no medical insurance.¹⁴² Boston University later sent a second email saying that graduate students could retain their health insurance by enrolling as full-time students, though they would still not receive payment.¹⁴³ Graduate and undergraduate students who do return to campus are not just confronted with the obstacle of COVID-19, they are faced with new disease mitigation measures and changes in structure and format of teaching and research. They are also oftentimes greeted by a novel liability phenomenon: COVID-19 health liability waivers.

C. The Problem of University Liability Waivers

1. What They Say

Many universities have attempted to deal with COVID-19 elevated risks using pseudo-liability waivers that require students or workers to release the university from liability for illness or even death via COVID-19.¹⁴⁴ In some cases, students feel required to sign these waivers in order to access their emails

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Grace Ferguson (@fergusonreports), TWITTER (June 30, 2020, 3:36 PM), <https://twitter.com/fergusonreports/status/1278064914158850048> [<https://perma.cc/R7XK-PWTY>] (showing a tweet from the public Twitter account of Grace Ferguson, Campus News Editor at Boston University, as linked in Nguyen, *supra* note 90).

¹⁴⁴ Greta Anderson, *Colleges Seek Waivers from Risk-Taking Students*, INSIDE HIGHER ED (Aug. 3, 2020), <https://www.insidehighered.com/news/2020/08/03/students-asked-sign-liability-waivers-return-campus> [<https://perma.cc/E2NE-YBMA>].

or student accounts.¹⁴⁵ This section shares three examples of these liability waivers to demonstrate the facially legally binding documents that graduate and undergraduate students are being asked to sign in order to work.

One type of COVID-19 liability waiver identified was one that very bluntly reveals itself as a liability statement, requiring signers to acknowledge that they alone will bear the potentially fatal risk of COVID-19. Image 7 is a liability waiver from Wallace State University which specifically asks students to sign a statement saying:

I voluntarily agree to assume all the foregoing risks and accept sole responsibility for any injury to myself (including, but not limited to, personal injury, disability, and death) illness, damage, loss, claim, liability, or expense, of any kind . . . I hereby release, covenant not to sue, discharge, and hold harmless the College, its employees, agents, and representatives, of and from the Claims, including all liabilities, claims, actions, damages, costs or expenses of any kind arising out of or relating thereto.¹⁴⁶

If legally binding, this waiver would effectively render the University completely blameless and legally untouchable from any consequences arising out of COVID-19. And, strikingly, its language seems all-encompassing: as graduate students are not legal experts, this is likely sufficient to stymie any attempts at litigation following exposure.

¹⁴⁵ See *Pittsburgh Students Criticize Universities Pushing What Some See as COVID-19 'Liability Form'*, PA. CAP.-STAR (Aug. 13, 2020), <https://www.penncapital-star.com/covid-19/pittsburgh-students-criticize-universities-pushing-what-some-see-as-covid-19-liability-forms/>

[<https://perma.cc/FJ4P-MVHL>] (explaining that a COVID-19 waiver would pop up when students at Pittsburg University would log in to try and access their student email accounts. Savvy students were able to get around the pop-up and access their accounts).

¹⁴⁶ *Assumption of the Risk and Waiver of Liability Relating to Coronavirus/COVID-19*, WALLACE STATE CMTY. COLL., https://www.wallacestate.edu/Content/Uploads/wallacestate.edu/files/marketing/COVID-19_WSSC_Warning_Waiver_v1.pdf [<https://perma.cc/E3RN-M5H9>].

Image 7: Wallace State University Waiver of Liability¹⁴⁷

ASSUMPTION OF THE RISK AND WAIVER OF LIABILITY
RELATING TO CORONAVIRUS/COVID-19

The novel coronavirus, COVID-19, has been declared a worldwide pandemic by the World Health Organization. COVID-19 is extremely contagious and is believed to spread mainly from person-to-person contact. As a result, federal, state, and local governments and federal and state health agencies recommend social distancing and have, in many locations, prohibited the congregation of groups of people.

Wallace State Community College ("the College") has put in place preventative measures to reduce the spread of COVID-19; however, the College cannot guarantee that you will not become infected with COVID-19. Further, attending the College, participating in College-led classes, trainings or labs could increase your risk of contracting COVID-19.

By signing this agreement, I acknowledge the contagious nature of COVID-19 and voluntarily assume the risk that I may be exposed to or infected by COVID-19 by attending the College and that such exposure or infection may result in personal injury, illness, permanent disability, and death. I understand that the risk of becoming exposed to or infected by COVID-19 at the College may result from the actions, omissions, or negligence of myself and others, including, but not limited to, College employees, other students, vendors or affiliates and their families.

I voluntarily agree to assume all of the foregoing risks and accept sole responsibility for any injury to myself (including, but not limited to, personal injury, disability, and death), illness, damage, loss, claim, liability, or expense, of any kind, that I may experience or incur in connection with my attendance at the College or participation in College activities ("Claims"). On my behalf, I hereby release, covenant not to sue, discharge, and hold harmless the College, its employees, agents, and representatives, of and from the Claims, including all liabilities, claims, actions, damages, costs or expenses of any kind arising out of or relating thereto. I understand and agree that this release includes any Claims based on the actions, omissions, or negligence of the College, its employees, agents, and representatives, whether a COVID-19 infection occurs before, during, or after participation in any College services.

 Signature of Student

 Date

 Print name of Student

 Signature of Parent/Guardian (if student under 18)

 Date

 Print Name of Parent/Guardian (if student under 18)

A second distinguishable type of liability document is one that includes large amounts of information on risk mitigation or assurances directed toward students, followed by a statement asking students to take on a voluntary assumption of the risks. Image 8, Excerpts from The University of New Hampshire's Informed Consent Agreement, demonstrates this.¹⁴⁸ The full

¹⁴⁷ *Id.*

¹⁴⁸ *Informed Consent Agreement for Students Participating in On-Campus Programming for the Fall Semester*, UNIV. OF N.H., <https://www.unh.edu/sites/default/files/departments/stud>

document is four pages long, with the liability statement coming at the very end.¹⁴⁹ Most of the document focuses on the university plan for risk mitigation, with a conclusion requiring students to “assume the risks associated with being at the University of New Hampshire including the risk of exposure to COVID-19.”¹⁵⁰ The document ends with a statement requiring the students to acknowledge a personal obligation to make the campus reasonably safe and a statement of universal consent for all university activities.¹⁵¹

**Image 8: Excerpts from The University of New Hampshire’s
Informed Consent Agreement¹⁵²**

**Informed Consent Agreement for
Students Participating in On-campus
Programming for the Fall Semester**

The University of New Hampshire (UNH) is looking forward to welcoming students, faculty and staff back to our campuses for in-person instruction. We will need the help, cooperation and participation of you and every other member of our university community to maintain a reasonably healthy and safe environment. While none of us can ensure each campus will be free from the risk of contracting COVID-19, by working together we can manage and mitigate the risk. We ask you to help reduce the risk of transmission by staying current on information about the virus provided by public health officials and experts. UNH has established and implemented public university-wide protocols [COVID-19 website page](#) designed to limit the spread of COVID-19 on its campuses and to help safeguard vulnerable persons on its campuses, in the **Town of Durham**, in the cities of **Manchester** and **Concord**, and in the wider community for the 2020-21 academic year.

ent_life/informed_consent_agreement_for_unh_students_july.16.2020.pdf [https://perma.cc/6G2R-GPYG].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Please Read Carefully Before Signing:

By signing below, I understand the **University of New Hampshire's** approach to on-campus learning during the COVID-19 pandemic. I understand that my decision to return to on-campus programming is voluntary. I understand that UNH cannot guarantee my health or immunity from infection. I understand there are risks of exposure to the virus from symptomatic and asymptomatic carriers. I recognize that the risks of exposure to COVID-19 include sharing space with others and engaging in interpersonal communications. I assume the risks associated with being at the University of New Hampshire including the risk of exposure to COVID-19. I affirm my obligation to cooperate in making the campus reasonably safe, and consent to attending all university activities.

Students at the University of New Hampshire School of Law chapter of the People's Parity Project initiated a letter writing campaign in response to UNH's waiver citing among their chief concerns lack of adequate information for students to make informed decisions, lack of time for students to make informed decisions, and a lack of trust between the student body and the administration.¹⁵³ UNH law students also expressed concern about the legal language in the agreement and its similarities to a liability waiver.¹⁵⁴ Despite this language, UNH made a statement saying the agreement is not a liability waiver and that students who sign retain rights to sue the university.¹⁵⁵ UNH claims what the agreement actually does is that,

By signing the Informed Consent Agreement a student agrees to partner with their institution to help keep the entire community healthy . . . student also acknowledges the coronavirus is a general public risk and the university system cannot guarantee they will not contract the coronavirus . . . The decision of whether or not to attend a university system institution in the fall resides with the student (and the student's family).¹⁵⁶

Students remain unconvinced.

Some universities have received backlash for COVID-19 liability waivers and have since amended the language surrounding injury, illness, permanent disability, or death. Notably, Penn State University has received criticism for both the wording of their document and the way it was deployed.¹⁵⁷ Titled "The

¹⁵³ *Open Letter to UNH Administration*, ACTION NETWORK, <https://actionnetwork.org/petitions/open-letter-to-unh-administration/> [<https://perma.cc/F9KJ-QRCM>].

¹⁵⁴ Anderson, *supra* note 144.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Jocelyn Grzeszczak, *Penn State Students Must Sign COVID Waiver Discharging Liability for 'Illness, Permanent Disability or Death'*, NEWSWEEK (Aug. 12, 2020, 2:01 PM), <https://www.>

Penn State COVID-19 Compact,” the original version of the document included requirements, guidelines, and a risk statement.¹⁵⁸ Students reported that they were unable to access their student accounts and important information about finances, registration, and medical insurance without agreeing to the Compact.¹⁵⁹

The original risk language of the August statement read, “I assume any and all risk of exposure to COVID-19 that may result from attending Penn State, or participating in Penn State activities, and I acknowledge that exposure or infection may result in personal injury, illness, permanent disability, or death.”¹⁶⁰ Notably, this compact was released only one month after the university announced that a Penn State student, 21-year-old Juan Garcia, died of respiratory failure from COVID-19.¹⁶¹ After receiving backlash about the wording, specifically that the university was availing themselves of all responsibility and blaming students for potentially long-term health effects, Penn State amended the risk language in the waiver to be more moderate.¹⁶² The revised language stated, “Even with the mitigation steps taken by Penn State and my compliance with this Compact, I acknowledge that Penn State cannot prevent the risks of exposure to COVID-19 that may result from attending Penn State or participating in Penn State activities.”¹⁶³ The full text of the amended acknowledgement is displayed in Image 9.¹⁶⁴ Though Penn State amended the risk statement, they did not amend the policy where all students must confirm the compact or clarify that the document in question contained none of the standard legal intentions of a liability waiver.¹⁶⁵

newsweek.com/penn-state-students-must-sign-covid-waiver-discharging-liability-illness-permanent-disability-1524695 [https://perma.cc/9USW-NDCU].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Penn State Provides Updated Compact Option for Students*, PENN STATE NEWS (Aug. 13, 2020), <https://news.psu.edu/story/628278/2020/08/13/campus-life/penn-state-provides-updated-compact-option-students> [https://perma.cc/LQG5-CU32].

¹⁶¹ *Penn State Student Dies of COVID-19 Complications in Allentown*, PENN STATE NEWS (July 2, 2020), <https://news.psu.edu/story/624840/2020/07/02/administration/penn-state-student-dies-covid-19-complications-allentown> [https://perma.cc/YXM7-FXTB].

¹⁶² *See Penn State Provides Updated Compact Option for Students*, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ *See The Penn State COVID-19 Compact*, PENN STATE UNIV. (Aug. 2020), https://studentaffairs.psu.edu/sites/default/files/SCovidCompact_Aug20.pdf [https://perma.cc/B2CS-7B2Z].

¹⁶⁵ *Penn State Provides Updated Compact Option for Students*, *supra* note 160.

Image 9: Excerpt from Penn State Covid-19 Compact¹⁶⁶

Carefully read the following statement. You must acknowledge that you understand what it says. In a world filled with important things, this one is really important; please treat it that way.

Acknowledgment

I acknowledge that the Centers for Disease Control, the Commonwealth of Pennsylvania, and the Pennsylvania State University have issued rules and precautions that may, or may not, be effective in mitigating the spread of COVID-19, and that it is my responsibility to follow these and other directives to protect myself and others from the substantial risks posed by this virus. Even with the mitigation steps taken by Penn State and my compliance with this Compact, I acknowledge that Penn State cannot prevent the risks of exposure to COVID-19 that may result from attending Penn State or participating in Penn State activities.

I acknowledge that the Penn State Student Code of Conduct outlines sanctions, including suspension or expulsion from the University, that may be imposed should I fail to comply with reasonable directives from University or other officials, including the requirements stated above. And I affirm that I will deliberately engage in practices that discourage the spread of coronavirus.

I understand that I must consult with the Office of Student Disability Resources, if I have a medical or other condition that may affect my ability to adhere to the commitments stated above, and that reasonable accommodations will be considered on a case-by-case basis.

If, at any point, I am unable to sustain these commitments to my fellow students and our community, I shall remove myself from the campus and complete the semester remotely. If I do not choose to take this step, I understand that I shall have forfeited the privilege of remaining on campus, and that the University may, in the interest of public health and safety, take administrative action to prohibit me from participating in any in-person campus activities, including residing in residence halls, attending classes, or joining any other pursuit that otherwise would be available to me.

In short, I recognize that I may forfeit my opportunity to continue as a student at Penn State if I fail to honor these critically important public health considerations with the sincere and earnest spirit in which they are expressed.

Finally, I understand that I am exempt from the terms of this Compact if I am enrolled in an entirely remote learning experience, will not be on any Penn State campus, and will not reside in communities surrounding any Penn State campus. However, I acknowledge that should I reside or visit any Penn State campus or surrounding community for any reason and for any period of time, all terms and expectations of this Compact will apply to me.

¹⁶⁶ *The Penn State COVID-19 Compact*, *supra* note 164.

2. What the Waivers Do

As Sections II and III of this paper elucidate, these agreements are almost certainly not enforceable in general. Additionally, these waivers are unenforceable because they are the product of an extraordinarily poor information environment. As this section has illustrated, graduate student workers fundamentally lack the information to make a meaningful and significant choice about what they are signing. Furthermore, graduate students lack meaningful alternatives as these waivers often work analogously to user agreements whereby graduate student workers must sign in order to participate in basic functions of their jobs, e.g., accessing email or student accounts, or to receive payment or benefits.

This type of waiver need not be judicially enforceable in order to have an impact on the parties who sign it. These types of waivers undoubtedly have a chilling effect on potential litigation. As graduate students must performatively sign away their rights before performing their jobs, they are unlikely aware of the rights they do still retain. They are also, as low-paid precarious workers, unlikely to challenge the official language of the documents that they do sign. Graduate student workers are signing away their rights functionally but not legally.

V. CONCLUSION AND POLICY RECOMMENDATIONS

From the foregoing set of data and issues, this paper concludes with three major recommendations. First, schools must take measures to increase their data transparency and accuracy. Second, graduate student workers must be recognized by the NLRB as workers. Third, there must be statutory protections against the flagrant use of liability waivers to preempt tort suits against companies and universities. Although some of these recommendations are particularly urgent amid the ongoing pandemic, these conclusions outlive it as well; risk will always be a part of the university and employment landscapes and these recommendations allow universities and employers to manage more effectively and ethically going forward.

First, as our analysis of university data collecting and sharing demonstrates, there are ways in which universities can and do provide adequate and accurate information to ensure all stakeholders can make fully informed decisions. To summarize our findings from Section IV, universities can, and in minimal instances do, take measures to provide dynamic and updated data about the campus cases and risk, provide accessible and understandable data to their stakeholders, and utilize effective visualizations. This allows not only for more informed decision making at the individual level—allowing for graduate student workers to decide, if applicable, whether to teach in-person or whether to take a leave of absence if possible—it is good public health practice in general.

Second, it is evident from the University of Michigan case described in the introduction that graduate student workers fare better when acting collectively.

Although many universities have recognized their graduate students as workers and have entered into collective bargaining agreements with those students, legal recognition would allow those agreements to function as more than polite promises. Graduate students do important work for the university and their classification and legal recognition as workers would emphasize that labor and ensure that their power comes not from their employer but from their status.

Finally, as this paper has demonstrated, the power of liability waivers comes not from their enforceability, but instead, from their use as a deterrent to future litigation. Because they exclusively originate from the party bearing more power to control the conditions of employment and originate from the party who is often more familiar with the law or better represented legally, they operate from a place of extraordinary bargaining disparity. As such, they ought not be able to function symbolically. Liability waivers ought to be affirmatively banned. As it stands, the burden of testing their enforceability falls to the individuals theoretically waiving their rights and protections: individuals with less bargaining power and less access to capital and legal resources. As a matter of both public policy and public health, courts and legislatures ought to focus on offering protections to those who are more vulnerable.