Arbitrating "Just Cause" for Employee Discipline and Discharge in the Era of Covid-19

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INTRODUCTION

The recent spread of the novel coronavirus (Covid-19) in the United States has led to economic recession, widespread industry shutdowns, and disruption in the lives of millions of American workers.[1] As of December 23, 2020 more than 18 million cases of Covid-19 have been reported in the United States.[2] From mid-March to mid-December of 2020, more than 71 million Americans filed for unemployment insurance.[3]

After exceptionally high spikes of unemployment in the initial response to the outbreak,[4] job security for many workers remains uncertain.[5] So too does workplace safety. Many Americans are fearful of returning to schools, shops, and offices where there is likelihood of infection,[6] yet may be anxious about losing their

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1. *See* James K. Jackson, Martin A. Weiss, Andres B. Schwarzenberg, Rebecca M. Nelson, Karen M. Sutter & Michael D. Sutherland, *Global Economic Effects of COVID-19*, CONG. RSCH. SERV. 1 (updated Dec. 23, 2020), https://fas.org/sgp/crs/row/R46270.pdf [https://perma.cc/KC6X-S3AK] [hereinafter *Global Economic Effects of Covid-19*].

2. *See* Johns Hopkins University & Medicine, Coronavirus Resource Center, https://coronavirus.jhu.edu/data/cumulative-cases [https://perma.cc/P75C-44BC] (last visited Dec. 23, 2020). The death count in the United States for Covid-19 related illness during this same time period had surpassed 300,000. *Id.*

3. *Global Economic Effects of Covid-19*, *supra* note 1, at 5.

4. *See, e.g.*, Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era,* THE WASHINGTON POST (May 8, 2020), https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/, [https://perma.cc/TWJ8-QBUF]. Many workers have since been reinstated and rates have declined to roughly 7% as of October 2020. Bureau of Labor Statistics., U.S. Dep't of Labor, *Civilian Unemployment Rate*, https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm# [https://perma.cc/3DKS-RTZG] (last visited Dec. 23, 2020).

5. A recent study has connected job insecurity and financial concern during the Covid-19 pandemic with increased symptoms of depression and anxiety. Jenna M. Wilson, Jerin Lee, Holly N. Fitzgerald, Benjamin Oosterhoff, Bariş Sevi & Natalie J. Shook, *Job Insecurity and Financial Concern During the COVID-19 Pandemic Are Associated With Worse Mental Health*, J. OCCUPATIONAL & ENVTL. MED. 62 (July 2020).

6. *See, e.g.*, Alexa Lardieri, *Majority of Americans Worry About Bringing Coronavirus Home From Work, Poll Finds*, U.S. NEWS & WORLD REP. (May 15, 2020), https://www.usnews.com/news/national-news/articles/2020-05-15/majority-of-americans-worry-about-bringing-coronavirus-home-from-work-poll-finds [https://perma.cc/N3EX-SF3Q]; Abha Bhattarai, *'It Feels Like a War Zone': As More of Them Die, Grocery Workers Increasingly Fear Showing up at Work*, THE WASHINGTON POST (April 12, 2020), https://www.washingtonpost.com/business/2020/04/12/grocery-worker-fear-death-coronavirus/ [https://perma.cc/3FL2-VF6F].

jobs or benefits because of refusal to work.[7] Others are uneasy about applying or enforcing workplace face mask policies,[8] or wonder whether they will be able to take extended leave for illness, to take care of sick family members, or for lack of childcare while many schools have moved to online learning for the duration of the declared pandemic.[9]

There are legal protections for workers affected by Covid-19.[10] Beyond the terms of a collective bargaining agreement, employees may look to Family and Medical Leave Act ("FMLA")[11] recently expanded by the Families First Coronavirus Response Act ("FFCRA"),[12] the Occupational Safety and Health Act ("OSH Act"),[13] section 502 of the Labor Management Relations Act ("LMRA"),[14] and section 7 of the National Labor Relations Act ("NLRA"),[15] among new Covid-19 specific rulings and state laws for relief. As the pandemic continues, more laws are likely to go into effect,[16] and many courts have already seen an uptick in pandemic-related labor and employment litigation.[17] Laws alone, however, may be insufficient to quash public fears of the virus.

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7. *See* Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, THE NEW YORK TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html [https://perma.cc/LP7M-6RAA].

8. *See* Alejandro De La Garza, *'We All Worry About it.' Grocery Workers Fear Confrontations With Shoppers Over Mask Rules*, TIME (May 26, 2020), https://time.com/5841124/grocery-workers-masks/ [https://perma.cc/6KWA-C3YB].

9. *See, e.g.*, Olga Khazan, *A Hidden Covid-19 Risk Factor: Your Boss*, THE ATLANTIC (June 1, 2020), https://www.theatlantic.com/health/archive/2020/06/sick-leave-covid-time-off/612361/ [https://perma.cc/6YD4-TQVS]; Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*, THE NEW YORK TIMES (July 2, 2020), https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html [https://perma.cc/UT4M-RJ9K].

10. *See, e.g.*, H. Dennis Beaver, *Covid-19 at Work: Your Legal Rights and Responsibilities*, KIPLINGER (May 29, 2020), https://www.kiplinger.com/article/business/t012-c032-s014-covid-19-at-work-your-legal-rights.html [https://perma.cc/E8H6-C77B].

11. 29 U.S.C. § 2601.

12. Pub. L. No. 116-127. The FFCRA is effective for qualifying employees from April 1, 2020 to December 31, 2020. *See* U.S. Dep't of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave [https://perma.cc/L4Y9-ZYVH] (last visited Dec. 23, 2020).

13. 29 U.S.C. § 651.

14. 29 U.S.C. § 143.

15. 29 U.S.C. § 157.

16. Note that at the time of this writing, the results of the 2020 election are likely to heavily influence the amount of new Covid-19 regulations that will be promulgated under the incoming Biden administration. *See, e.g.*, Amy Goldstein, *Biden Lays Out Plan to Combat Covid in First 100 Days, Including Requiring Masks on Interstate Buses, Trains*, THE WASHINGTON POST (Dec. 8, 2020), https://www.washingtonpost.com/health/biden-covid-100-days-plan/2020/12/08/16e0a47e-3965-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/G2HQ-RASW].

17. *See, e.g.*, *The First Wave of Covid-19 Workplace Lawsuits is Here*, ADVISORY BOARD, https://www.advisory.com/daily-briefing/2020/08/03/covid-lawsuits [https://perma.cc/2YF2-H7NK] (last visited Sept. 23, 2020); Tom Spiggle, *The Coronavirus is Causing More Employment Lawsuits*, FORBES, https://www.forbes.com/sites/tomspiggle/2020/09/22/the-coronavirus-is-causing-more-employment-lawsuits/#75e9d6234c78 [https://perma.cc/GQ6G-8R94] (last visited Sept. 23, 2020).

Managers are also adjusting to this new normal. Many will look to courts and to arbitrators for clarity on how to comply with a rapidly changing legal landscape. Yet, in unionized workplaces, a manager's right to issue new safety and attendance policies and to discharge and discipline employees who fail to follow those rules will have to contend with these new regulations and, if a grievance reaches the final stage of arbitration, with the traditional standard of "just cause."[18]

Recently, arbitrator Marc D. Greenbaum, deciding whether a hospital had "just cause" to discharge a grievant for repeated absences, explained a dilemma likely to be faced by many labor arbitrators in the weeks and months ahead:

> The nation is in the throes of a pandemic and unemployment claims are being filed at unprecedented rates. Denying the grievance will consign the grievant to a world where, for the moment at least, work is in short supply. At the same time, institutions . . . are stressed by having to care for increasing numbers of terribly sick people. . . . The unique context [of the pandemic] simply adds to the difficulty of deciding an already difficult case.[19]

Although there have been many attempts to theorize a consistent articulation of "just cause" and to define the proper boundaries of an arbitrator's authority under the provision, in many ways the phrase remains elusive and commentators divided: for some, the flexibility of "just cause" has helped to keep labor arbitration a "dynamic process,"[20] capable of shifting in response to crises and changes in labor-management relations,[21] while for others, the potential for broad discretion invites less predictability and fear of abuse.[22]

By analyzing the scope of the "just cause" provision and how it has been applied in past proceedings, including during global health crises such as the H1N1 and HIV/AIDS epidemics, this Note reassesses the limits of "just cause" during a current global health crisis that has the potential to fundamentally alter

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18. *See, e.g.*, LAURA J. COOPER, DENNIS R. NOLAN, RICHARD A. BALES, STEPHEN F. BEFORT, LISE GELERNTER & MICHAEL Z. GREEN, ADR IN THE WORKPLACE 305, 306 (4th ed. 2020) [hereinafter ADR IN THE WORKPLACE].

19. United Food & Commercial Workers Union, 2020 BNA LA 1202, 9 (2020) (Marc D. Greenbaum, Arb.).

20. Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, U. FLA. L. REV. 558, 632 (1983), https://repository.library.northeastern.edu/files/neu:332665/fulltext.pdf [https://perma.cc/3HCA-QC2D] [hereinafter *The Maturing Years*].

21. *See, e.g.*, Richard Mittenthal & M. David Vaughn, *Just Cause: An Evolving Concept, Working at the Margins of Just Cause: The Never-Ending Dispute over Arbitral Discretion on the Discharge Penalty* 32, 49–50 (2006), https://naarb.org/proceedings/pdfs/2006-32.pdf [https://perma.cc/RB5T-GKWL] [hereinafter *Just Cause: An Evolving Concept*].

22. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L. J. 594–623, 594 (1985) [hereinafter *Theory of Just Cause*] (arguing that because "just cause" is "not well understood" it has been applied with "inconsistent results" that fail to serve the interests of the parties).

labor relations and the role of the modern labor arbitrator. The ethical consequences of this expanding role are then considered.

Part I breaks down traditional theories for articulating "just cause" in light of changing historical conceptions of the limits of arbitral discretion. Part II applies the "just cause" standard to discipline and discharge grievances likely to arise from the current pandemic, including refusals to work for fear of Covid-19 infection, disputes concerning employer face mask and safety policies, and employee absence for personal or family illness. Part III evaluates how the public policy function of the labor arbitrator has expanded in response to major economic and social shifts in the past, and why the ethical and professional standards of labor arbitrators should be revised as a result. Finally, this Note concludes with how the current public health and labor crisis of the Covid-19 pandemic has the potential to expand the public role of the labor arbitrator in "just cause" discharge and discipline grievances. While additional arbitration issues are likely to arise in response to the Covid-19 pandemic, they are beyond the scope of this work.[23]

I. ARBITRAL DISCRETION IN DECISION-MAKING: WHO DECIDES WHAT IS "JUST"?

The protection from unjust discipline and discharge afforded by a "just cause" provision may be the single greatest benefit to an employee covered under a collective bargaining agreement ("CBA").[24] Nearly every such agreement today protects an employee against arbitrary workplace treatment by the requirement that there be "just cause" for discipline,[25] and many arbitrators consider the protection of such fundamental importance that it will be read into the agreement even where the contract contains no express "just cause" language.[26] There is rarely a clear definition of "just cause," however, within the terms of the contract.[27] As many arbitrators put it simply, "we know it when we see it."[28] Alternatively, an arbitrator may define "just cause" in equally vague terms by whether an employer's discipline was "reasonable" as compared to a penalty or discipline seen as "arbitrary," "excessive," or "discriminatory."[29]

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23. This Note will not, for example, discuss any concerns relating to holding virtual arbitration hearings during the pandemic. For an overview of this issue see Amy J. Schmitz, *Arbitration in the Age of Covid: Examining Arbitration's Move Online*, CARDOZO J. CONFLICT RESOL. (Sept. 25, 2020), https://ssrn.com/abstract=3699778 [https://perma.cc/WN4K-5BP7]. This Note intends to deal with specific issues in labor arbitration and therefore only indirectly considers such issues in the context of employment arbitration.

24. *See* ADR IN THE WORKPLACE, *supra* note 18, at 305–06.

25. In addition to the common phrase "just cause," collective bargaining agreements may use language such as "for cause," "proper cause," "good cause," or "reasonable manner," which arbitrators consider to have the same substantive meaning. *See* ADR IN THE WORKPLACE, *supra* note 18, at 306 note 2.

26. *See, e.g.*, SFIC Props, Inc. v. Machinists, Dist. Lodge 94, Local Lodge 311 103 F.3d 923, 925–26 (9th Cir. 1996) (finding a just cause requirement implicit "in all modern day collective bargaining agreements").

27. *See, e.g.*, ADR IN THE WORKPLACE, *supra* note 18, at 307–08.

28. *See, e.g.*, *Just Cause: An Evolving Concept*, *supra* note 21, at 32.

29. *See, e.g.*, *Theory of Just Cause*, *supra* note 22, at 595.

Although a clear definition of "just cause" remains elusive, perhaps this is because it is always changing.[30] As members and a past president of the National Academy of Arbitrators have observed, the "elasticity" of "just cause" has allowed the concept to adapt over generations in response to the special needs and problems of the parties.[31] Cultural and social changes have also impacted application of the standard,[32] including changing court attitudes toward arbitration and, as in the current crisis, economic and health-related disturbances. As new public laws and community attitudes have shifted perceptions of worker rights, there has been much debate over the extent of arbitral discretion inherent in a "just cause" provision and about the proper role of the modern labor arbitrator: whether cabined by "a system of self-government created by and confined to the parties"[33] or tasked with fulfilling a more "public function."[34]

A. THE HISTORICAL ROLE OF THE LABOR ARBITRATOR

For much of its history, labor arbitration has been viewed as a purely private process.[35] Parties agree to submit disputes to an impartial decisionmaker by the terms of a collective bargaining agreement, which can be written to restrict the scope of arbitration and to limit the discretion of the arbitrator.[36] In 1955, Harry Shulman famously observed:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.[37]

Overcoming early judicial hostility, the Supreme Court, in the 1960's *Steelworkers Trilogy,* increasingly came to accept arbitration under this model of "industrial self-government" and to enforce arbitration awards as part and parcel of the collective bargaining process.[38] In *Enterprise Wheel*, Justice Douglas led

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30. *See generally Just Cause: An Evolving Concept*, *supra* note 21, at 32.

31. *Id.* at 33.

32. *Id.*

33. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

34. Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873, 881 (1985) [hereinafter *The Labor Arbitrator's Several Roles*].

35. *See, e.g.*, Clyde W. Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477–96, 477 (1965).

36. *See id.*

37. Shulman, *supra* note 33, at 1016.

38. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (describing the collective bargaining agreement as "an effort to erect a system of industrial self-government"); ADR IN THE WORKPLACE, *supra* note 18, at 18.

the charge for court endorsed labor arbitration, while clarifying that the role of the arbitrator "is confined to interpretation and application of the collective bargaining agreement; [the arbitrator] does not sit to dispense his own brand of industrial justice."[39] As another commentator has put it, writing from the perspective of management, "Who is to say what is fair or just? Certainly not the arbitrator!"[40]

Yet, as Professor Edgar Jones has argued in response, where "just cause" is involved, the grievance necessarily involves the arbitrator's own sense of justice including whatever biases he may hold, so that the arbitrator cannot help but "to dispense his own brand of industrial justice."[41]

In direct contrast to Shulman and Douglas' approach, Jones advocated for labor arbitrators to consider an award in light of changing community values about what is "fair."[42] Jones' theory, articulating a more extreme public policy function of the labor arbitrator, generally failed for lack of legitimacy given that an arbitrator has no authority to consider the interests of third parties nor to be swayed by sympathy to disregard the language of the collective bargaining agreement.[43]

Nevertheless, it has been increasingly accepted that when interpreting ambiguous terms such as "just cause," arbitrators, even if subconsciously, make value-judgments reflective of shared community beliefs.[44] Arbitrators, after all, "do not live in a vacuum," but may be expected to interpret what is "reasonable" to the facts of a dispute according to the standards of an industry as well as contemporary community values and attitudes.[45] Thus, as one arbitrator has concluded: "I see no way of escaping the realities which affect our institutions for the administration of justice. One cannot ignore the necessity of resolving disputes on the basis of judgment, or the elements of personality that affect human judgment."[46]

B. ARTICULATING A TEST FOR "JUST CAUSE"

To the extent, then, that a determination of "just cause" may be left to the unreviewable discretion of the arbitrator,[47] there has been much debate among

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39. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

40. Robert J. Mignin, *A Management Viewpoint*, Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, 55-64, 61, https://naarb.org//proceedings/pdfs/1989-23.pdf [https://perma.cc/8B4W-HDFM].

41. Edgar A. Jones, Jr., *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 UCLA L. REV. 675, 764 (1964).

42. *See The Labor Arbitrator's Several Roles*, *supra* note 34, at 884.

43. *See id.* at 893.

44. See *id.* at 892 ("An arbitrator . . . will have to apply some values in order to give concrete meaning to 'just cause.'").

45. *Id.*

46. Gabriel N. Alexander, *Discretion in Arbitration*, ARBITRATION AND THE PUBLIC INTEREST 84, 98 (1971), https://naarb.org/proceedings/pdfs/1971-84.pdf [https://perma.cc/DRP3-EV26].

47. *See Theory of Just Cause*, *supra* note 22, at 596.

scholars either attempting to define a consistent profession-wide theory of the standard, or criticizing such theories as artificial constraints on the arbitrator.[48]

1. THE SEVEN FACTOR TEST

The most often cited theory of "just cause" is Carroll R. Daugherty's formulation, which has come to be called the "Seven Tests of Just Cause."[49] Daugherty's theory attempts to classify a "common law" of arbitration—built upon traditional causes of discharge and discipline in a given trade or industry, the practices established between management and labor, and past decisions of courts and arbitrators—into seven independent inquiries.[50] According to Daugherty, a "no" in response to any one or more of the following questions signifies that "just cause" for discipline does not exist:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?[51]

Daugherty anticipated that these tests would be applied flexibly.[52] Yet, absent a collective bargaining provision limiting the scope of an arbitrator's review for "just cause," an arbitrator applying the formula was to consider the evidence on all seven questions and their accompanying notes.[53]

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48. *See generally* ADR IN THE WORKPLACE, *supra* note 18, at 310–12.

49. *Id.* at 309. For a full account of Daugherty's tests as applied to discipline and discharge see ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS (revised by Donald F. Farwell, 3d ed. 2006).

50. *See* ADR IN THE WORKPLACE, *supra* note 18, at 309.

51. *Id.*

52. *See* Enter. Wire Co., 46 LA 359 (1966) (Carroll R. Daugherty, Arb.) ("The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision.").

53. *See id.*

Although the Daugherty tests are highly influential, the extent to which labor arbitrators in practice actually follow them, and whether they should, has been increasingly challenged.[54] Arbitrator Jack Dunsford, for example, thoroughly criticized the tests as not only "misleading in substance and distracting in application," but as misconstruing "the role of the arbitrator" by "superimposing artificial problems of the arbitrator's own making upon the real issues which are separating the parties."[55] Dunsford acknowledged that the seven tests were a product of Daugherty's work on the National Railway Adjustment Board, and as such, were primarily concerned with the due process rights of employees with "heavy deference" to managerial judgements.[56] However, Dunsford would question the tests' general applicability to private sector arbitration and would warn against accepting Daugherty's formulation as representative of how most arbitrators define and apply "just cause."[57]

2. FUNDAMENTAL UNDERSTANDING

A second influential and perhaps more practical theory for discipline cases put forward by Professors Abrams and Nolan is known as the "Fundamental Understanding" or "systematic" theory of "just cause."[58] The Abrams and Nolan theory is premised on the idea that both management and employees have agreed that wages and benefits will be paid in exchange for "satisfactory" work.[59] Work is "satisfactory" if it meets "four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully."[60] Arbitrators assess the appropriateness of discipline by this fundamental understanding between the parties, and by considering the legitimate underlying interests of both management and union.[61] For "just cause" to exist, the discipline must further at least one of three management interests:

1. Rehabilitation of a potentially satisfactory employee.
2. Deterrence of similar conduct, either by the disciplined employee or by other employees.
3. Protection of the employer's ability to operate the business successfully.[62]

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54. *See, e.g.*, John E. Dunsford, *Arbitral Discretion: The Tests of Just Cause*, Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators 25–50, 28 (BNA Books 1990), https://naarb.org//proceedings/pdfs/1989-23.pdf [https://perma.cc/8B4W-HDFM] [hereinafter *Arbitral Discretion*].

55. *Id.* at 28, 36.

56. *Id.* at 35–37.

57. *See id.* at 33.

58. *See Theory of Just Cause*, *supra* note 22, at 594.

59. *Id.* at 597.

60. *Id.*

61. *See id.* at 602.

62. *Id.* at 602–03.

Management considerations are then weighed against the union's interests in guaranteeing "fairness" of disciplinary proceedings.[63] Essentially, this interest ensures that an employee has been entitled to industrial due process, including notice and investigation of the issue, industrial equal protection, meaning that like-cases should be treated alike, and individualized treatment, allowing distinctions to be made based on the facts of the dispute including the employee's years of service and disciplinary record.[64] The Fundamental Understanding theory stands in opposition to the rigid criteria of the Daugherty test insofar as it proposes a structure for deepening understanding of the central concepts involved in a discharge and discipline dispute without substituting a checklist for an arbitrator's judgment.[65] As Abrams and Nolan acknowledge, "just cause" is "not a precise concept" and arbitrators must weigh the nature and severity of an offense causing unsatisfactory work alongside the interests of the management and union.[66]

II. DISCHARGE AND DISCIPLINE DURING A NATIONAL HEALTH CRISIS

Discipline and discharge grievances encompass the majority of cases brought to arbitration.[67] While there may be many reasons for an employer to discipline a worker, the most common cases concern insubordination, including refusal to perform requested work; on- or off-duty misconduct, including violations of safe work practices; and absenteeism.[68]

The arbitration procedure for each follows a similar pattern. An arbitrator or panel of arbitrators chosen by the parties will consider the nature of the offense to decide if there was "just cause" using a two-part inquiry: (1) whether the discipline was reasonable in light of the circumstances,[69] and (2) the "justness" of the penalty.[70] The extent to which an arbitrator may decide whether the disciplinary actions taken by an employer were appropriate and, if not, to adjust the penalty may be limited by the terms of the agreement.[71] Often arbitrators look for progressive discipline, which recognizes that workplace punishment should be imposed in gradually increasing degrees.[72] A more serious offense, however, such as a safety violation that puts a worker or fellow employees at risk may

63. *See id.* at 607.

64. *See id.* at 609.

65. *See, e.g.*, *Arbitral Discretion*, *supra* note 54, at 38.

66. *See Theory of Just Cause*, *supra* note 22, at 599, 601.

67. ADR IN THE WORKPLACE, *supra* note 18, at 305 (finding issues involving discipline and discharge the single largest category of cases decided by arbitrators).

68. *See generally id.* at 308.

69. *See, e.g.*, City of Portland, Bureau of Police, 77 LA 820, 826 (1981) (Axon, Arb.) ("The just cause test mandates that the punishment assessed be reasonable in light of all the circumstances.").

70. *See, e.g.*, *Just Cause: An Evolving Concept*, *supra* note 21, at 33 (breaking "just cause" into two elements, the first concerning the propriety of the penalty and the second the "justness" of the penalty).

71. *See generally id.* at 33.

72. *See, e.g.*, ADR IN THE WORKPLACE, *supra* note 18, at 308, 318.

warrant immediate discharge.[73] The burden is usually on the employer to show that a choice of disciplinary action was appropriate for the severity of the conduct.[74] The union, in turn, may defend the employee by pointing to mitigating circumstances or procedural deficiencies (including lack of notice or progressive discipline) as evidence that the discipline or discharge was unjust.[75]

Additional complexities arise when workplace health and safety issues are involved, given that all parties to arbitration have an interest in protecting the safety and health of workers while providing for efficiency in the workplace. Arbitrators both recognize a manager's right to create and enforce reasonable workplace safety and health rules, as well as an employee's right to refuse unsafe work or to allege that an employer has provided an unsafe work environment.[76] Often where these concerns are raised in defense to employer disciplinary action, an arbitrator will take into account federal and state laws and regulations setting safety and health standards, as well as past arbitration awards or court decisions.[77]

Nonetheless, these are often rapidly evolving and unpredictable issues.[78] As scientific knowledge develops, past rules governing health and safety may be revised or replaced with new regulations and policies.[79] Early response to the Covid-19 pandemic may be illustrative of this stiff learning curve. For example, the Center for Disease Control ("CDC"), World Health Organization ("WHO"), and even Congress and the White House have needed to monitor the effects of the novel coronavirus and adjust policies to scientific developments in real time.[80] On the other hand, predictions about a perceived health threat can prove false in reality. For example, many feared that the HIV/AIDS epidemic would pose a major threat to workplace safety and would create a wave of arbitration claims related to employees with AIDS who were unjustly discharged or employees who refused to work for fear of contracting the virus.[81] As scientific knowledge around the transmission and effects of the disease improved, however, and as workers were trained in procedures to stay protected in situations where there might be risk of AIDS exposure, these predictions generally proved unfounded.[82]

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73. Mark Thompson, *Safety and Health*, *in* THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS, 301, 317 (Theodore J. St. Antoine ed., 2005) [hereinafter THE COMMON LAW OF THE WORKPLACE].

74. *See generally id.* at 316.

75. *See, e.g.*, ADR IN THE WORKPLACE, *supra* note 18, at 308.

76. *See* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 308, 319, 323.

77. *Id.* at 303.

78. *See id.*

79. *Id.* (giving as an example changing workplace smoking rules as knowledge about the dangers of second-hand smoke has increased).

80. *See, e.g.*, Christopher M. Weible, et al., *COVID-19 and the Policy Sciences: Initial Reactions and Perspectives*, POL'Y SCI., 1–17 (2020).

81. *See* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 303.

82. *Id.*

The examples that follow attempt to provide insights for labor arbitrators applying existing health and safety considerations of a "just cause" discharge and discipline grievance to new grievances raised in relation to the spread of Covid-19. Part III will then turn to a deeper examination of the changing role of the modern labor arbitrator, and accordingly, new ethical obligations that should be adopted as a result of the pandemic.

A. REFUSAL TO WORK FOR FEAR OF CONTRACTING COVID-19

In a June 2020 survey of 1,044 American professionals, half reported that they would be afraid to return to their offices due to health concerns related to Covid-19.[83] Many employees throughout the nation—whether "essential workers" returning to hospitals, nursing homes, grocery stores, or warehouses; teachers contemplating school re-openings; or the thousands of employees furloughed in the initial months of the outbreak who have been asked to return to work—are reporting similar fears of returning to their workplaces during the Covid-19 pandemic.[84] As hospitalizations surge in much of the country[85] and scientific knowledge about the coronavirus continues to evolve, the question remains whether refusing to work for fear of the virus presents a reasonable defense against discharge or discipline in labor arbitration grievances.

Arbitrators have long applied the "work now, grieve later" principle, which holds that when there are disagreements in the workplace, an employee should continue to obey management orders even if believed to be in violation of the agreement, and may later turn to the grievance process for relief.[86] An exception to this principle exists where obedience would involve an unusual or abnormal safety or health hazard.[87] Section 502 of the Labor Management Relations Act[88]

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83. Korn Ferry, *Staying Home: New Korn Ferry Survey Shows Professionals Hesitant to Return to the Office as the Nation Begins to Reopen* (June 16, 2020), https://www.kornferry.com/about-us/press/staying-home [https://perma.cc/4GET-XAWD].

84. *See, e.g.*, Margot Roosevelt, Hugo Martín & Taylor Avery, *Workers Fear Returning to Work. Many are Resisting the Call*, LOS ANGELES TIMES (July 23, 2020), https://www.latimes.com/business/story/2020-07-23/la-fi-reopening-california-businesses-covid-19-fears [https://perma.cc/WS68-VSDY]; Dana Goldstein & Eliza Shapiro, '*I Don't Want to Go Back': Many Teachers are Fearful and Angry Over Pressure to Return*, THE NEW YORK TIMES (updated Aug. 13, 2020), https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html [https://perma.cc/KJV9-JKCT].

85. *See* Lauren Aratani & Lois Beckett, *U.S. Braces for Post-Thanksgiving Covid Surge as 100,000 are Hospitalized*, THE GUARDIAN (Dec. 2, 2020), https://www.theguardian.com/world/2020/dec/02/us-braces-for-covid-19-surge-thanksgiving-holiday [https://perma.cc/P96W-V3GM].

86. *See, e.g.*, NORMAN BRAND & MELISSA H. BIREN, *Insubordination: Refusals to Perform Work or Cooperate*, *in* DISCIPLINE AND DISCHARGE IN ARBITRATION (2015). This principle was first articulated by arbitrator Harry Shulman. *See Ford Motor Co.*, 3 LA 779, 780–81 (1944) (Shulman, Arb.) ("[A]n industrial plant is not a debating society [and] production cannot wait for exhaustion of the grievance procedure.").

87. FRANK ELKOURI, EDNA A. ELKOURI, KENNETH MAY, PATRICK M. SANDERS & MICHELLE T. SULLIVAN, *Safety and Health*, *in* HOW ARBITRATION WORKS (2016) [hereinafter HOW ARBITRATION WORKS, *Safety and Health*].

88. 29 U.S.C. § 143. Under section 502 of the LMRA, employees may rightfully walk-off in response to an "abnormally dangerous" condition without violating a contractual no-strike agreement. *See* Larry Drapkin,

and section 11(c) of OSHA[89] also establish the right of workers to refuse hazardous work assignments where there is sufficient concern for health or safety.[90]

For the health and safety exception to the "work now, grieve later" principle to apply, the employee bears the burden of showing that the refusal was warranted either by objective evidence of unsafe working conditions or proof that an actual hazard exists.[91] Mere subjective belief of a safety hazard is often insufficient to overturn a disciplinary decision.[92] However, evidence of a genuine fear that the work would create risk of accident or disease may help to mitigate disciplinary penalties.[93]

Additionally, the alleged health hazard must be "unusual" in the sense that the perceived danger extends beyond the risks inherent in performance of the job.[94] For example, when a prison guard refused to wear a patrol coat on duty for fear of taking lice home to his pregnant wife, the arbitrator considered the fact that employees were regularly deloused and instructed to take showers with a chemical solution for lice as evidence that exposure to parasites was inherent to the officer's job and not an unusual safety hazard.[95] However, where an employee has a known medical condition that temporarily prevents ability to perform an assignment,[96] or where following an order would jeopardize the safety of others,[97] the exception is more likely to apply.

In the context of infectious disease, in one case, a grievant diagnosed with AIDS was discharged for refusing to perform certain job functions.[98] The arbitrator found that there was no "just cause" for discharge, but converted the penalty to an involuntary unpaid medical leave of absence with reinstatement conditional on a physician finding the grievant fit to perform his job duties.[99] Alternatively, in cases where employees refused to work for fear of the transmission of AIDS, the safety exception could apply if there was evidence to support the objective basis

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The Right to Refuse Hazardous Work after Whirlpool, INDUS. REL. L. J. 29, 30 (1980) [hereinafter *The Right to Refuse Hazardous Work*].

89. 29 U.S.C. § 651. OSHA provides a "narrow right" to refuse work where there is a "reasonable apprehension of death or serious injury and alternative remedies prove ineffective." *See The Right to Refuse Hazardous Work*, *supra* note 88, at 30.

90. *See* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 319.

91. *See id.* at 320.

92. *See* HOW ARBITRATION WORKS, *Safety and Health*, *supra* note 87, at 16.5.A.

93. THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 320–21.

94. *See* Madelyn C. Squire, Arbitration of Health and Safety Issues in the Workplace: Employees Who Refuse Work Assignments Because of Fear of AIDS Contagion, 44 ME. L. REV. 315, 330 (1992) [hereinafter *AIDS in the Workplace*].

95. *See id.* at 331 (citing *Dauphin County Prison Board*, 1989 BNA Unp. Lab. Arb. LEXIS 2982 (Mayer, Arb.)).

96. *See, e.g.*, Health Plus, 110 LA 618 (1998) (Duff, Arb.) (finding the fact that employers knew employee to be suffering with pains, blurred vision and arthritis was reason to mitigate a three-day suspension to written warning).

97. *See, e.g.*, *AIDS in the Workplace*, *supra* note 94, at 329.

98. *See* Bucklers Inc., 90 BNA LA 937 (1987) (Braufman, Arb.).

99. *See id.*

for such fear, such as if the employers were actively distributing misleading information about the virus and had failed to provide appropriate training for employees on how to protect against the risk.[100] Although, in reality, far fewer AIDS-related refusal to work cases reached arbitration than predicted,[101] the crisis notably produced a burst of scholarly commentary re-examining arbitral standards and the role of the labor arbitrator.[102]

The extent to which an employee may refuse to work for fear of contracting Covid-19 is likely to depend on the substantiality of the safety risk to the individual employee and how effectively the work may be accomplished outside of the workplace.[103] A worker at higher risk of infection due to age or underlying health conditions, or residing in an area with a high risk of infection, may be more likely to succeed in a refusal to work for a safety and health dispute than a worker whose fears are less objectively reasonable or less likely to cause actual harm.[104] Arbitrators, in keeping with the due process requirements of "just cause" as articulated under the Daugherty and Abrams and Nolan tests, will often require that an employee was adequately warned of the possible consequences of refusal to work or that an employer investigated the alleged hazard and health effects and implemented safety protocols to mitigate the spread of the virus before taking disciplinary actions.[105]

B. FACE MASK POLICIES AND OTHER WORKPLACE SAFETY CONCERNS

Similar grievances likely to arise from the Covid-19 pandemic concern employer safety rules and their enforcement. All employers have an obligation to provide a safe work environment for their employees.[106] In the absence of a negotiated agreement to the contrary, arbitrators will uphold the rights of management to establish and enforce reasonable rules for health and safety.[107] Such rules may be promulgated unilaterally or by negotiation, and may cover a broad array of workplace expectations.[108] For example, an arbitrator found "just cause" to discharge an employee who repeatedly failed to wear safety glasses, where the arbitrator noted, "the Company has a duty to protect the eye sight of all of its

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100. *See* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 322–23.

101. *Id*. at 303.

102. *See, e.g*., *AIDS in the Workplace*, *supra* note 94; John V. Garaffa, *AIDS: The Arbitrator's Role in the Post-Panic Period*, 7 OHIO ST. J. ON DISP. RESOL. 217 (1991–1992); Roger I. Abrams & Dennis R. Nolan, *AIDS in Labor Arbitration*, 25 U.S.F. L. REV. 67 (1990); Lucille M. Ponte, *AIDS Anxiety in the Workplace: A Review of Labor Arbitration Awards*, 23 SW. U. L. REV. 253 (1994).

103. *See, e.g*., *Covid-19: If You Think Your Working Conditions Put You at Risk*, Communications Workers of America, https://cwa-union.org/covid-19-if-you-think-your-working-conditions-put-you-risk [https://perma.cc/95HP-6HC3] (last visited Dec. 2020).

104. *See, e.g*., *AIDS in the Workplace*, *supra* note 94, at 331.

105. *See id*. at 335; THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 320.

106. *Id*. at 323.

107. *See id*. at 308.

108. *See id*.

employees," and the precaution was held to be reasonable to minimize risk of injury.[109]

As Covid-19, a contagious respiratory illness,[110] continues to spread throughout the nation, arbitrators may indirectly be tasked with defining what are "reasonable" workplace expectations between the parties on numerous health and safety concerns: from face masks and other personal protective equipment, to workplace ventilation, contact testing and tracing, and vaccine policies.

Of particular concern during the current crisis are face masks and other personal protective equipment ("PPE").[111] Arbitrators generally agree that managers may regulate the appearance of employees for safety and health reasons, and have consistently upheld workplace policies regulating the length of employees' hair and beards when doing so is clearly related to a health and safety issue.[112] Arbitrators have also upheld requirements that employees wear personal protective equipment related to their work duties or when reasonable to the work setting.[113] More complicated cases can arise when requiring employees to use respirators absent an external mandate.[114] While, in general, employer safety rules should be applied consistently, there may be reasonable grounds for making individual distinctions in the interest of health and safety, or where reasonable accommodations are required by the ADA.[115] All employees should have notice that a task requires following a certain safety rule before disciplinary action is taken,[116] and an employer may be expected to pay for all or part of the cost of safety equipment when it is required to be worn at work.[117] Arbitrators will also defer to OSHA regulations, which require that "a place of employment be free from recognized hazards . . . likely to cause death or serious physical harm."[118]

Current OSHA and CDC guidelines issued in response to the Covid-19 pandemic may provide direction for employers to identify risks in the workplace and

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109. Carrier Corp., 110 LA 1064, 1067 (1998) (Ipavec, Arb.).

110. *See, e.g.*, Centers for Disease Control and Prevention, *Similarities and Differences Between Flu and Covid-19*, https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm# [https://perma.cc/A3NG-P8RC] (last reviewed Jan. 27, 2021).

111. *See, e.g.*, Robert Gatter & Seema Mohapatra, *COVID-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17 (2020).

112. *See* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 312.

113. *Id.* at 315.

114. *See id.* at 312 (finding that arbitrators have allowed employers to impose restrictions on employees likely to use respirators but have not upheld broad restrictions covering all employees).

115. *See id.* at 310.

116. *See id.* at 317 ("Safety rules must be communicated to employees. Arbitrators also are reluctant to uphold discipline when there are doubts that employees were adequately informed of the requirements they faced.").

117. *Id.* at 315 (finding employers tend to be required to pay for the cost of safety equipment used only at work while employees may be required to pay for all or part of the cost of equipment that can be used outside the work setting).

118. *See id.* at 303–04.

to implement safety measures and trainings.[119] These can include procedures for reopening after a shutdown, managing workers with known or suspected exposure to the virus, or creating policies for PPE, testing and temperature checks, and social distancing in the workplace.[120] Employers should monitor and adjust their safety and health rules in compliance with new OSHA guidelines as they continue to be updated.

Employees who believe their workplace fails to comply with OSHA guidelines may report an OSHA whistleblower claim for a Covid-19-related workplace safety violation, and may also cite the workplace hazard as a defense against disciplinary action in arbitration, such as for refusal to work.[121] Arbitrators will distinguish between an unsafe environment that creates a mere discomfort or subjective fear from a hazard that poses an actual threat to health and safety.[122] For example, many arbitrators have found that issues concerning air quality and temperature of a workplace pose a discomfort rather than a hazard.[123] However, at least one arbitrator based this decision on the unlikelihood of the setting to cause respiratory illness,[124] which may influence how similar cases are decided related to Covid-19.

Employer-mandated vaccine policies, as most often applied in the context of healthcare systems, may also be justified in rare circumstances where an outbreak will have a significant impact on an employer's business and is necessary for the safety of all employees.[125] However, vaccination policies based on voluntary compliance are generally recommended.[126]

C. ABSENTEEISM STEMMING FROM THE EFFECTS OF THE PANDEMIC

Finally, regular employee attendance, one of the requirements of "satisfactory" work under the Nolan and Abrams framework, is a central concern to both employers and employees, and is a source of many discipline disputes.[127] Like

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119. *See, e.g.*, U.S. Department of Labor, *Guidance on Preparing Workplaces for COVID-19*, OSHA 3990-03 (2020), https://www.osha.gov/Publications/OSHA3990.pdf [https://perma.cc/MQ3H-YDYS].

120. *See id.*; Center for Disease Control and Prevention, *Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html [https://perma.cc/HB3K-AVBH] (updated May 7, 2020); Center for Disease Control and Prevention, *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed Covid-19, Interim Guidance*, https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html [https://perma.cc/R67S-PZ5H] (updated Sept. 11, 2020).

121. *See generally* THE COMMON LAW OF THE WORKPLACE, *supra* note 73, at 323.

122. *Id.* at 324.

123. *See id.* at 324–25 (citing Soc. Sec. Admin., 73 LA 267 (1979) (Eaton, Arb.); Brownies Creek Collieries, 83 LA 919 (1984) (Chapman, Arb.); Anheauser-Busch Co., 72 LA 594 (1979) (Seidman, Arb.)).

124. *Id.* (citing Anheuser-Busch Co., 72 LA 594 (1979) (Seidman, Arb.)).

125. *See, e.g.*, Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 5 UTAH L. REV. 885, 887-88 (2017).

126. *See id.*

127. *See, e.g.*, *Theory of Just Cause*, *supra* note 22, at 613.

health and safety rules, employers will generally establish formal or informal attendance policies setting the basis for how they will enforce discipline and discharge.[128] One common example is the "no fault" policy.[129] Under this model, points are assigned for certain occurrences of tardiness or absence and steps for progressive discipline are taken as an employee accumulates points, regardless of the reason for an absence.[130] Even under a "no fault" policy, however, an arbitrator will consider whether there was "just cause" based on the circumstances, and may have authority to lessen or overrule the employer's penalty, particularly if there was inconsistency in the policy's application.[131]

In one recent case, a Grievant was discharged under a no-fault attendance policy when he called in sick on March 20, 2020 with chills and a headache.[132] At the time, the CDC had just begun to issue safety guidelines related to Covid-19, and the state was considering whether to issue stay-at-home orders.[133] The Company, after holding a meeting on March 13 to discuss symptoms and possible responses to the virus, posted a document on the bulletin board warning employees to stay home if they felt sick.[134] The Grievant was told that his absence on March 20 would not count for a point and that absences during the pandemic would be treated on a "case-by-case basis."[135] However, several weeks later, when the Grievant came to work late, he was discharged for exceeding the no-fault policy by a point total that included the March 20 absence.[136] Arbitrator Michael J. Bommarito reinstated the Grievant with seniority and backpay, and set his attendance points at the number he had accumulated minus the March 20 absence.[137] Bommarito explained that the Company's response to the pandemic had "put the Grievant in an impossible position":

> If he came to work, despite having COVID-19 symptoms, he might not only expose his co-workers to a dangerous virus, but he would also be acting contrary to the Company's oral and written directive to stay at home, thus subjecting himself to possible discipline or discharge for insubordination. On the other hand, if the Grievant stayed at home, and his absence was not excused under the No-Fault Attendance policy, the Grievant would be exposing himself to discharge under that policy. Just cause principles preclude the Company from mandating that the Grievant stay home and then discharging him for complying with that mandate.[138]

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128. *See* NORMAN BRAND & MELISSA H. BIREN, *Attendance*, *in* DISCIPLINE AND DISCHARGE IN ARBITRATION 3.1.A. (2015) [hereinafter DISCIPLINE AND DISCHARGE FOR ATTENDANCE].

129. *Id.*

130. *See id.*

131. *See id.*

132. *See* 2020 AAA LEXIS 216, 12 (2020) (Bommarito, Arb.).

133. *Id.* at 10.

134. *Id.* at 11–12.

135. *Id.* at 15–16.

136. *Id.* at 16–17.

137. *Id.* at 28.

138. *Id.* at 27.

It is likely that many more arbitrators will face cases similar to this one in the months ahead as the virus continues to spread, local stay-at-home orders continue in effect, and uncertainties over how to implement effective yet flexible attendance and work-from-home policies remain of general concern.[139] Arbitrators should be mindful of company policies and mitigating circumstances, but should also be aware of employee rights under new and existing statutes, including the Family and Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), and the newly effective Families First Coronavirus Response Act ("FFCRA").[140] The FFRCA, effective April 1, 2020 to December 31, 2020, for example, requires certain employers to provide employees with paid sick leave or expanded family and medical leave when the employee is unable to work because of quarantine or symptoms of Covid-19, having to care for an individual in quarantine, or while taking care of a child whose school or child care has been closed or made unavailable for reasons related to Covid-19.[141]

While the Grievant in this case would not have applied under the FFRCA, which has no retroactive effect, Arbitrator Bommarito's early example of a Covid-19-related grievance for employee illness and absence may serve as a warning to employers: namely, that when implementing new Covid-19 attendance policies, employers must uphold their own terms or an arbitrator will be likely to overturn or reduce the discipline.[142] Bommarito also faulted the Company for failing to investigate the reason for the Grievant's absence and whether it had to do with Covid-19 symptoms.[143] Calling to ask about an employee's symptoms when the employee uses a sick day for illness may seem an overreach of a manager's position. However, another arbitrator, writing at the height of the H1N1 epidemic found that such a call did not violate the terms of a collective bargaining agreement, but was rather, under the unusual circumstances of an outbreak, a "legitimate tool to reduce the possibility of sick employees prematurely returning to work to infect other staff and students."[144]

III. BEYOND THE TESTS: THE ETHICAL ROLE OF THE ARBITRATOR

While frameworks such as the Daugherty and Nolan and Abrams tests can help to conceptualize the "just cause" standard and to apply the traditional elements of

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139. *See, e.g.*, Gillian Friedman & Kellen Browning, *July is the New January: More Companies Delay Return to the Office*, THE NEW YORK TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/technology/offices-reopening-delay-coronavirus.html [https://perma.cc/E92P-UVDF].

140. 29 U.S.C. § 2601; 42 U.S. Code § 12101; Pub. L. No. 116-127.

141. *See* Pub. L. No. 116-127; U.S. Dep't of Labor, *Families First Coronavirus Response Act: Employee Paid Leave Rights*, https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave [https://perma.cc/M9WU-7PKA] (accessed Nov. 28, 2020).

142. *See also* DISCIPLINE AND DISCHARGE FOR ATTENDANCE, *supra* note 128, at 3.1.A ("Where the employer has implemented an attendance policy and then failed to follow its terms . . . arbitrators frequently have overturned or reduced the discipline.").

143. *See* 2020 AAA LEXIS 216 at 25–6.

144. 2010 AAA LEXIS 312, 21 (2010) (Rogers, Arb.).

the common law of arbitration to new Covid-19 specific workplace grievances, applying and properly weighing the relevant factors can require significant experience.[145] Additionally, what weight to give to external factors is frequently debated and often influenced by changing community expectations of the role of the arbitrator.[146] This section traces historical shifts in labor relations that have contributed to a more public and quasi-judicial role for labor arbitrators, and proposes holding arbitrators to higher ethical standards with additional training requirements in response to preserve the integrity of the profession.

A. THE SHIFTING PUBLIC ROLE OF THE ARBITRATOR

American labor arbitration has changed dramatically over the decades, often in response to major national economic and social crises shifting the American workforce and labor-management relations.[147] In the 1940s, for example, the disruption caused by World War II prompted major developments in the labor arbitration field, including ushering in changing court attitudes toward labor arbitration, new critical examinations of the role of labor arbitration as a profession, and increased legal protections of workers such as under the Taft-Hartley Act of 1947.[148]

In the 1930s, motivated by the Great Depression, President Roosevelt pushed for new wage and hour legislation, which, after prolonged debate, led to the passage of the Fair Labor Standards Act ("FLSA").[149] Over time, a growing body of public laws governing employee rights have emerged,[150] sparking new debates over the scope of an arbitrator's authority to decide questions of external law, and further shifting the profession away from its traditional characterization as a purely private process.[151] While some arbitrators have insisted on recognizing the

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145. *See, e.g.*, Jeff J. Minckler, *So You Want to Be a Labor Arbitrator*, PERSP. ON WORK (2014).

146. *See, e.g.*, *The Labor Arbitrator's Several Roles*, *supra* note 34, at 882.

147. *See generally The Maturing Years*, *supra* note 20, at 558.

148. *See id.* at 629–31, 577–78.

149. *See* Howard D. Samuel, *Troubled Passage: The Labor Movements and the Fair Labor Standards Act*, MONTHLY LAB. REV. 32 (Dec. 2000), https://www.bls.gov/opub/mlr/2000/12/art3full.pdf [https://perma.cc/CG73-CGDH].

150. Beginning the 1960's Congress enacted the Equal Pay Act (29 U.S.C. §206), Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), the Occupational Safety and Health Act (OSH Act) (29 U.S.C. §651), and the Employment Retirement Income Security Act (ERISA) (29 U.S.C. §1001). FRANK ELKOURI, EDNA A. ELKOURI, KENNETH MAY, PATRICK M. SANDERS & MICHELLE T. SULLIVAN, *Use of Substantive Rules of Law*, *in* HOW ARBITRATION WORKS 10.1.A. (2016). The Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA), among other statutes affecting rights in the workplace, have more recently since been added. *See id.*

151. *See, e.g.*, Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, OHIO ST. J. ON DISP. RESOL. 199, 234–35 (2005) [hereinafter *The Evolving Role*]. As Malin and Vonhof importantly ask:

> When arbitrators adjudicate a grievant's FMLA rights, do they remain solely the parties' designated contract reader and therefore governed by the parties' expectations in the manner that arbitrators and scholars from Dean Shulman forward have ascribed? Or are they beginning to assume a more public role, a role somewhat independent of the parties?

terms of the agreement even if that means ignoring the law,[152] many arbitrators will now consider relevant external law,[153] particularly when doing so under the flexibility of a "just cause" analysis.[154] As some commentators note, this general trend to arbitrate complex federal laws has put new pressure on arbitrators to "get the law right,"[155] and has contributed to the increasing legalization of the profession.[156] Yet, from a legitimacy perspective, to the extent that many public laws governing the workplace can be inferred to have been part of the bargaining negotiations of a modern workplace, such that their application is "interwoven with the CBA," it has been argued that the parties' expectations have also evolved "to encompass this quasi-public role of the labor arbitrator."[157]

Meanwhile, community perceptions of workers and the labor process have also shifted since the latter half of the twentieth century, both in connection with increased legal protections as well as vastly changed labor demographics.[158] As more Americans are working and working longer in life, community values are shifting from "living wage" concerns to heightened importance on human rights and "quality of work life" issues, including job security and workplace dignity[159]—issues of particular importance during the current pandemic. In response, arbitrator James Gross has suggested that labor arbitrators should consistently apply fundamental human rights principles to workplace grievances, such as in cases where employees refuse to work out of safety concerns.[160] Though a more extreme articulation of the labor arbitrator's public policy role, resembling

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152. *See, e.g.*, Bernard D. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, *in* The Arbitrator, the NLRB and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators 1, 15 (Dallas L. Jones ed., 1967) (reprinted at 34 U. CHI. L. REV. 545, 557 (1967)).

153. *See, e.g.*, *The Evolving Role*, *supra* note 151, at 208–09. In what is often referred to as the "Melzer-Howlett debate," Professor Bernard Melzer's restrictive view of external law has been contrasted with Arbitrator Robert Howlett's view that arbitrators should render decisions based on both contract language and law. *See id.*

154. *See, e.g.*, *id.* at 238 ("[P]arties now accept that disciplinary action that violates the FMLA cannot be for just cause."); GTE N., 113 LA 665, 672 (1999) (Brodsky, Arb.) (finding compliance with the ADA a component of just cause).

155. *The Evolving Role*, *supra* note 151, at 236.

156. *See, e.g.*, James Oldham, *Arbitration and Relentless Legalization in the Workplace*, *in* ARBITRATION, 23–40 (1990); Perry A. Zirkel & Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction*, 16 OHIO ST. J. ON DISP. RESOL. 243 (2001).

157. *The Evolving Role*, *supra* note 151, at 238–39.

158. *See, e.g.*, Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule*, 51 U. PITT. L. REV. 641, 649–50 (1989). Squire offers statistics to show that while in 1880 the American labor force consisted of 47.3% of the population, by 1987 it made up 61.5% as life expectancy increased from under 47 years to over 70. *Id.*

159. *See id.*

160. *See* James A. Gross, *Incorporating Human Rights Principals into U.S. Labor Arbitration: A Proposal for Fundamental Change*, 8 EMP. RTS. & EMP. POL'Y J. 1 (2004) [hereinafter *Human Rights Principals*]; James A. Gross, *The Human Rights Movement at U.S. Workplaces: Challenges and Changes*, 65 ILR REV.: J. WORK & POL'Y 3 (2012); James A. Gross, *Value Judgments in Arbitration: Their Impact on the Parties' Arguments and on the Arbitrators' Decisions*, *in* ARBITRATION 212, 218–19 (1997) [hereinafter *Value Judgments in Arbitration*].

Professor Jones' broad community values theory, Professor Gross has some support.[161] After all, if the view of arbitration is to promote fair dispute resolution in the workplace to reduce national labor unrest, the labor arbitrator may be obligated not only to uphold the terms of a collective bargaining agreement, but to enforce an implicit "social contract"[162] that incorporates broader humanitarian values. As two prominent arbitrators have argued, an arbitrator's interpretation of "just cause" therefore increasingly may be seen to "determine not only the propriety of a given disciplinary action, but also the standards of conduct that employers may require and how far, and in what manner, they may regulate employees' lives."[163]

B. ARBITRATOR ETHICS AND ACCOUNTABILITY

As public perception of the role of the labor arbitrator continues to shift away from a purely private model,[164] the ethical standards and trainings of labor arbitrators should also evolve to protect the integrity of the arbitration process. Generally, labor arbitrators either choose to operate on an *ad hoc* basis by independently administering cases, or operate with a private provider institution, most of which promulgate and self-regulate ethics codes for the arbitrators associated with their organizations.[165] The most prevalent code, adopted by the National Academy of Arbitrators ("NAA"), American Arbitration Association ("AAA"), and Federal Mediation and Conciliation Services ("FMCS"), is the *Code of Professional Responsibility of Labor-Management Disputes*, formerly known as the *Code of Ethics and Procedural Standards for Labor Management Arbitration*.[166] This Code primarily addresses procedural concerns, including arbitrator conduct during and after a hearing and due process requirements, in an effort to promote arbitration as an honest and impartial method of voluntary dispute resolution in the workplace.[167]

The impartiality of labor arbitrators has, however, been a subject of frequent examination.[168] As some critics point out, many arbitrators are hired as "repeat players" (although this is of greater concern in the employment arbitration

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161. *See, e.g.*, James B. Atleson, *Arbitration: The Presence of Values in a Rational Decisionmaking System*, *in* ARBITRATION 225–31 (1997) (accompanied by a comment by Richard Mittenthal).

162. *See, e.g.*, Thomas A. Kochan, *Shaping the Future of Work: Challenges and Opportunities for U.S. Labor Management Relations and Workplace Dispute Resolution*, 74 DISP. RESOL. J. 11, 12 (2019).

163. *Just Cause: An Evolving Concept*, *supra* note 21, at 32–33.

164. *See, e.g.*, *The Evolving Role*, *supra* note 151, at 238–39.

165. *See, e.g.*, Shari Maynard, *The Current State of Arbitrator Ethics and Party Recourse Against Grievances*, 8 Y.B. ON ARB. & MEDIATION 204, 207 (2016), *https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article* [https://perma.cc/55TE-TUB3].

166. American Arbitration Association, *The Code of Professional Responsibility of Arbitrators of Labor-Management Disputes* (2007) [hereinafter *Code of Professional Responsibility*].

167. *See id.* at 6.

168. *See, e.g.*, Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 958 (2002) [hereinafter *Ethics Issues in Arbitration*].

context) and may be influenced by a need to "please" their clients into issuing "compromise" awards.[169] The drafters of the *Code of Professional Responsibility* expressly sought to discourage such a view by including Part 1 A 2, which makes intentionally issuing a compromise to "achieve personal acceptability" an ethical violation.[170] Although an associated agency may investigate complaints against its members and remove an arbitrator from its lists of recommended arbitrators as a sanction for a violation,[171] an arbitrator may continue to operate independently or under another provider. For this and other reasons, there have been many calls to hold arbitrators to a uniform ethics standard with clearer enforcement mechanisms.[172]

Critics also highlight the lack of training for labor arbitrators and their incompetence in deciding significant legal rights of would-be-litigants.[173] After all, not all arbitrators are lawyers, and the profession does not require an arbitrator to be trained or highly knowledgeable in statutory employment law.[174] Neither is there a formal certification process to become a labor arbitrator.[175] The greatest training resource for a new arbitrator is to find an experienced arbitrator, and Part 1 C 4 of the code emphasizes that arbitrators should "cooperate in the training of new arbitrators."[176] Perhaps unsurprisingly, labor arbitrators have thereby largely remained a specialized group of likeminded decisionmakers, who have been predominantly white and male.[177]

The lack of diversity in the profession has become an increasing point of concern given that, "[b]ecause of substantially different values, experiences, backgrounds, and perspectives, arbitrators as deciders might be blinded to the ways in which they privilege some voices (often the voices of people like them) and stifle others (often people not like them) when listening to testimony, processing the facts, and making judgments."[178] One study presenting members of the National Academy of Arbitrators with hypothetical discipline or discharge grievances involving conflicts between an employee's work and family responsibilities revealed how even subtle demographic biases can affect decision-making, and called for additional research on the effects of unconscious prejudice in labor

169. *See id.* at 956.

170. *See* Robert L. Douglas & Jeffrey T. Zaino, *Ethical Standards for Labor Arbitrators: What Every Advocate Should Know*, PERSP. ON WORK 58, 59 (2013) [hereinafter *What Advocates Should Know*].

171. *See generally Code of Professional Responsibility*, *supra* note 166, at 5.

172. *See, e.g.*, *Ethics Issues in Arbitration*, *supra* note 168, at 958.

173. *See id.* at 951.

174. *See, e.g.*, Norman Brand, *Ethics in Employment Mediation and Arbitration*, http://www.normbrand.com/Files/articles/Ethics%20in%20Employment%20Mediation%20and%20Arbitration.pdf [https://perma.cc/7HDK-N442] (accessed Nov. 28, 2020).

175. *See The Maturing Years*, *supra* note 20, at 623, 626.

176. *What Advocates Should Know*, *supra* note 170, at 59.

177. *See, e.g.*, Sarah R. Cole, *Arbitrator Diversity: Can it Be Achieved?*, 98 WASH. U. L. REV. 5, 14 (Dec. 2020) (noting that one arbitration service reported 22% of its panelists were female and 9% were people of color; another reporting in 2013-14 showed 78% of arbitrators were white males with an average age of 66).

178. *Value Judgments in Arbitration*, *supra* note 160, at 224.

arbitration.[179] The National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Services should lead the way in recruitment efforts to improve the diversity of labor arbitrators and should require additional training, including implicit bias trainings, for their members, which could also help to promote a more consistent understanding among arbitrators of the value-based principles inherent in a determination of "just cause."

Although the potential for bias may be equal in the context of litigation as it is in arbitration, the emphasis within arbitration on streamlining dispute resolution between parties rather than on a "fair" resolution also arguably increases the tendency for unfairness.[180] The *Code of Professional Responsibility of Labor-Management Disputes*, or a uniform ethics code, if adopted, should combat this tendency by re-orienting the profession to emphasize the "fairness" of the process and thereby support the increasingly quasi-public and judicial role of labor arbitrators.[181] For example, labor arbitrators are not currently held to the same high standards as federal judges, whose ethics code emphasizes the importance of professional integrity to promote "justice in our society."[182] When arbitration is viewed solely as a private process, there is no "general charter to administer justice for a community which transcends the parties."[183] Yet, increasingly, arbitrators asked to determine whether discipline or discharge was for "just cause," are in a position of a "labor judge"[184] to promote "justice" as fairness in the workplace, and may even be asked to consider external laws and broad human rights as part of that bargaining equation.[185]

Codifying the role of "justice" within the ethics codes is not a merely theoretical correction. Attention to worker rights as well as to the effects of implicit bias are particularly important during the current Covid-19 pandemic, which has disproportionately impacted the working class and people of color, revealing deep-seated inequalities in the United States by race, ethnicity, gender, and income.[186] Loss of childcare options have caused many working women to disproportionately bear the brunt of household duties at the expense of continued employment.[187] And,

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179. Martin H. Malin & Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. PA. J. BUS. L. 175, 175, 178 & 211 (2008).

180. *See* Robert A. Giacalone, Martha L. Reiner & James C. Goodwin, *Ethical Concerns in Grievance Arbitration*, 11 J. BUS. ETHICS 267, 269 (1992).

181. *See generally id*. at 271.

182. *See* Code of Conduct for United States Judges, 2A Guide to Judiciary Policy (last revised March 12, 2019).

183. Shulman, *supra* note 33, at 1016.

184. Minckler, *supra* note 145, at 83.

185. *See Human Rights Principals*, *supra* note 160, at 50–51.

186. *See, e.g.*, Yaphet Getachew, Laurie Zephyrin, Melinda K. Abrams, Arnav Shah, Corinne Lewis & Michelle M. Doty, *Beyond the Case Count: The Wide-Ranging Disparities of COVID-19 in the United States*, THE COMMONWEALTH FUND, https://www.commonwealthfund.org/publications/2020/sep/beyond-case-count-disparities-covid-19-united-states [https://perma.cc/67P9-2XDG] (Sept. 10, 2020).

187. *See, e.g.*, Jewel Gausman & Ana Langer, *Sex and Gender Disparities in the COVID-19 Pandemic*, 29 J. WOMEN'S HEATH 465 (2020), https://www.liebertpub.com/doi/pdfplus/10.1089/jwh.2020.8472 [https://perma.cc/9BVH-SE4L].

while many frontline workers have reported increased psychological distress and other negative mental health effects,[188] the long-term consequences of the virus on the American workforce both economically and psychologically, and how the pandemic will continue to shape community values regarding fair labor relations, remains to be seen.

CONCLUSION

As one reporter in response to the AIDS epidemic stated:

> [N]early every . . . virulent outbreak of illness seems to carry with it not one but two epidemics: the physical manifestations of the disease itself and society's often predictable reactions to it—denial at first, followed by hysteria, a search for scapegoats, an onrush of commercial exploiters and, finally, though not always, improved health standards and scientific insights that significantly prolong life expectancies.[189]

The same could be said of the current pandemic. While there is understandable fear surrounding the spread of Covid-19, scientific knowledge of the virus is improving and vaccines are becoming available,[190] although these too will pose new challenges.[191] Until general fear subsides, employers should implement measures to keep their workplaces relatively safe, whether that means continuing to adjust to employees working from home, or enforcing social distancing, face mask, or other safety precautions.

Although there are likely to be many new workplace discharge and discipline disputes concerning Covid-19 in the months ahead, labor arbitrators have dealt with crisis-related grievances before and, by applying traditional common law principles such as articulated in the Dougherty and Nolan and Abrams frameworks, will be prepared to do so again under the current circumstances. In fact, labor arbitration, by providing participants with a relatively fast, cheap, informal, and final alternative to the court systems,[192] may be particularly suited to resolving disputes under the current conditions.

At the same time, the Covid-19 crisis has brought new visibility to a huge share of America's class of essential workers, and is increasing attention on inequalities in access to justice in the workplace.[193] The right to collective bargaining and the

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188. *See, e.g.*, *The Ripple Effects of the Pandemic*, 120 AM. J. NURSING 14–15 (July 2020).

189. Anne C. Roark, *Familiar Pattern; AIDS Adds to History of Epidemics*, LOS ANGELES TIMES, Feb. 23, 1986, at 1, as reproduced in *AIDS in the Workplace, supra* note 94, at 316.

190. *See, e.g.*, Katie Thomas & Jesse Drucker, *When Will You Be Able to Get a Coronavirus Vaccine?*, THE NEW YORK TIMES, https://www.nytimes.com/2020/09/17/health/covid-vaccine-when-available.html [https://perma.cc/MX8F-5FBQ] (updated Nov. 14, 2020).

191. *See, e.g.*, *The Covid Vaccine Challenges that Lie Ahead*, NATURE, https://www.nature.com/articles/d41586-020-03334-w [https://perma.cc/6BWX-YWUQ] (Nov. 24, 2020).

192. *See, e.g.*, James Oldham, *The Historically Shifting Sands of Reasons to Arbitrate*, J. DISP. RESOL. 41 (2016) (describing the four attributes of arbitration as "speed, economy, informality, and finality").

193. *See, e.g.*, Harold Meyerson, *The Return of the Labor Question*, 67(3) U. PA. PRESS 35 (2020).

"just cause" provision, as powerful employee protections, have once again come into the spotlight.[194] Additionally, after decades of decline, union participation and activism are predicted to surge as a result of the pandemic as changing public attitudes and public laws focused on workplace protections have the potential to fundamentally shift the future of labor relations.[195]

In turn, the expectations of the parties to labor arbitration, and accordingly, the role of the labor arbitrator to decide what is "just," are likely to continue to shift as well. As what were traditionally viewed as private workplace disputes are increasingly open to greater public accountability, so too should arbitration associations adjust their ethical standards and training requirements to preserve the integrity of the profession as it enters this new era.

194. *See, e.g.*, Celine McNicholas, Lynn Rhinehart, Margaret Poydock, Heidi Shierholz & Daniel Perez, *Why Unions are Good for Workers—Especially in a Crisis like Covid-19*, ECONOMIC POLICY INSTITUTE, https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/ [https://perma.cc/895V-7LQ8] (Aug. 25, 2020).

195. *See, e.g.*, Eliza Berkon, *Will the Pandemic-Inspired Wave of Unionization Efforts Lead to Greater Protections?*, NPR, https://www.npr.org/local/305/2020/05/14/856129908/will-the-pandemic-inspired-wave-of-unionization-efforts-lead-to-greater-protections [https://perma.cc/P8YC-4GW8] (May 14, 2020).