A Reporter at Large
October 26, 2020 Issue

Trump’s Labor Secretary Is a Wrecking Ball Aimed at Workers

As Election Day looms, Eugene Scalia, a cunning lawyer committed to dismantling regulation, is weakening one employee protection after another.

By Eyal Press
October 19, 2020

Even if Joe Biden wins, Scalia’s deregulation blitz will likely take years to reverse.

Illustration by Paul Sahre. Photographs: Yuri Gripas / Bloomberg / Getty (Scalia); Getty (Workers)

On February 24, 2010, during a show at SeaWorld Orlando, a trainer named Dawn Brancheau was reclining on a platform in the middle of a stadium pool when Tilikum—the park’s largest killer whale—pulled her into the water and thrashed her around until she drowned. Her death was initially reported as an accident, but a subsequent investigation by the Occupational Safety and Health Administration revealed an “extensive history” of incidents exposing SeaWorld trainers to serious hazards. (It turned out that Tilikum, along with two other whales, had previously drowned a trainer at another park.) *OSHA* fined SeaWorld seventy-five thousand dollars for three violations and ordered it to either install barriers or keep trainers

at safe distances during shows.

SeaWorld contested *OSHA*'s actions, and, in 2013, the D.C. Circuit Court of Appeals heard the case. The lawyer representing SeaWorld argued that *OSHA*, a division of the Labor Department, had improperly threatened the premise of the marine park's business, which, he claimed, required close contact between trainers and killer whales. "It's as if the federal government came in and told the N.F.L. that close contact on the football field would have to end," the lawyer declared, adding that SeaWorld had training protocols that neutralized risk. When Judith W. Rogers, a judge on the court, suggested that SeaWorld's protocols placed the burden of safety on workers, the lawyer responded that this was perfectly fair: "In workplaces that present some inevitable background hazard, it will be incumbent, in part, on employees to address that."

SeaWorld lost the case. But it wasn't the last opportunity that the lawyer, Eugene Scalia, would get to influence the fate of workers exposed to peril. Last September, Scalia became the Secretary of Labor. The son of the late Associate Justice of the Supreme Court Antonin Scalia, he secured the position after Alex Acosta stepped down amid revelations that, in 2008, while serving as U.S. Attorney in Miami, he'd arranged a lenient plea deal for the financier and alleged sex trafficker Jeffrey Epstein. Like many other Cabinet officials in the Trump Administration, Scalia had credentials that suggested an antagonism toward the agency he was appointed to run. The official role of the Labor Department is "to foster, promote and develop the welfare of the wage earners, job seekers and retirees of the United States." As an attorney, Scalia had spent decades helping corporations gut or evade government regulations, including worker protections.

A secretive poultry tycoon, who is also one of Trump's top donors, is ruthlessly leveraging the coronavirus crisis to strip workers of protections.

Since Donald Trump entered politics, he has surrounded himself with grifters and figures of gross incompetence. Scalia is part of a smaller cohort: distinguished conservatives who have joined the Administration to advance their own ideological goals. A graduate of the University of Chicago Law School, where he edited the law review, and a partner at the white-shoe firm Gibson, Dunn & Crutcher, where he has specialized in labor-and-employment law and

administrative law, Scalia has an intellectual pedigree that most members of Trump's inner circle lack. Temperamentally, he has little in common with the bombastic President. Yet, like virtually everyone in the Republican Party, Scalia has chosen to view this Administration chiefly in opportunistic terms. His longtime agenda has been curtailing government, and at the Labor Department he has overseen the rewriting of dozens of rules that were put in place to protect workers. As the coronavirus has overrun America, Scalia's impulse has been to grant companies leeway rather than to demand strict enforcement of safety protocols.

On April 28th, Richard Trumka, the president of the A.F.L.-C.I.O., sent Scalia a letter accusing the Department of Labor of forsaking its mission. Even as millions of workers were risking their health to perform jobs deemed essential, *OSHA* had done little more than issue a modest list of voluntary safety guidelines. Trumka demanded that Scalia impose emergency temporary standards that would require companies to follow specific rules to slow the spread of *COVID*-19, such as providing employees with personal protective equipment and adhering to social-distancing guidelines established by the Centers for Disease Control.

Scalia's response was polite but unyielding. "Correspondence such as yours can help us do our jobs better," he began, but then insisted that Trumka's complaints were riddled with "basic misunderstandings." Imposing emergency temporary standards was unnecessary, Scalia wrote, because *OSHA* already had the authority to penalize irresponsible companies under the General Duty Clause, which requires employers to create an environment "free from recognized hazards." This was the basis for *OSHA*'s actions against SeaWorld in 2010—notwithstanding the objections Scalia lodged at the time, which were so strenuous that Judge Rogers asked him at one point if he believed that "the agency, under the General Duty Clause, has *no role* to play." The clause has played little role lately, Trumka told me. Since the pandemic began, *OSHA* has received more than ten thousand complaints alleging unsafe conditions related to the virus. It has issued just two citations under the General Duty Clause.

The pandemic likely would have overwhelmed *OSHA* no matter who was running the Department of Labor. Founded in 1970, *OSHA* has a budget less than a tenth the size of the Environmental Protection Agency's. Limited resources, meek

penalties, and fierce opposition from business interests have long inhibited *OSHA*'s ability to address the unsafe conditions that lead to the deaths of some five thousand workers on the job annually, with injuries sustained by nearly three million more.

Nevertheless, there are ways *OSHA* can let companies know that willfully violating the law has serious consequences. One of these methods is negative publicity. In 2014, after four workers at a DuPont facility in Texas were exposed to carbon monoxide and died from suffocation, David Michaels, who directed *OSHA* under Barack Obama, declared, "*Nothing* can bring these workers back to their loved ones. . . . We here at *OSHA* want DuPont and the chemical industry as a whole to hear this message loud and clear." The statement was part of an initiative, launched under Obama, to shine a light on companies that behaved recklessly. According to Matthew Johnson, a Duke economist and the author of "Regulation by Shaming," a study of the policy's deterrent effects, such messages targeted at local media and trade publications led to a thirty-per-cent reduction in violations at nearby facilities in the same industry.

The Trump Administration summarily ended the policy. Michaels, who is now a professor at the George Washington University School of Public Health, asked me, "When have you heard President Trump *mention OSHA*? Or Vice-President Pence? Or even Scalia? With thousands of workers sick and hundreds dying over an infectious disease that we know how to prevent, Scalia should be banging the table saying, 'You have to make sure workers are safe!' He should be next to Anthony Fauci on television every night." Despite reports of workers being exposed to unsafe conditions everywhere from Amazon warehouses to greenhouse farms, Michaels said, Scalia has been "invisible."

Scalia's muted role might be attributed to personality: unlike his father, who expressed his opinions with abandon, Eugene Scalia seems disinclined to draw attention to himself. An alternative explanation is that Scalia is disinclined to draw attention to how little his agency has done to protect workers. (He declined to be interviewed for this article.) A Labor Department spokesperson told me that Scalia has been "focussed since the beginning of the pandemic on insuring the safety of workplaces," in part by offering extensive guidance for both employers and workers. Yet *OSHA* has explicitly told employers that none of its *COVID*-19

recommendations impose new legal obligations.

This lax approach reflects the Administration's broader opposition to regulation. When Trump entered office, he announced that all federal agencies must revoke at least two regulations for every new one added. Under Alex Acosta, the Labor Department eliminated some Obama-era rules, but hard-liners such as Mick Mulvaney, then the director of the Office of Management and Budget, were dissatisfied with the pace of change. Several sources told me that, when the Miami *Herald* revealed Acosta's favorable plea deal for Epstein, the furor served as an excuse to fire him. Nick Geale, Acosta's chief of staff, was also ousted.

Last December, in one of Scalia's first interviews as Secretary of Labor, on Fox News, he proclaimed, "The President has been dialled in to regulatory reform from Day One. And it's no surprise that we're now seeing this vibrant economy." At the time, the unemployment rate was below four per cent. It has since doubled, a fact that, along with the pandemic's rising death toll, has made touting the virtues of eliminating regulations more awkward. One casualty of the Trump Administration's "regulatory reform" was an Obama-era initiative, launched after the 2009 H1N1 pandemic, to develop an infectious-disease standard for work sites. When *COVID*-19 struck, some former *OSHA* officials pushed the agency to reinstate a modified version of the standard, and current staffers prepared one. Michaels said, "The staff told me, 'We had it ready to go.' " It went nowhere.

Introduced instead was a Department of Labor policy memorandum relieving the vast majority of employers of any duty to keep records about whether employees' coronavirus infections were "work-related." The memo, issued on April 10th, just as cases were exploding nationally, so confounded Joseph Woodward, a former associate solicitor for occupational safety and health at the Labor Department, that he wrote a five-page letter to Scalia. The letter, which Woodward shared with me, warned that, without proper data, *OSHA* "will be left in the dark about conditions that have resulted in employee deaths." The decision, he noted, also "ignores the right of employees to know whether work-related illnesses are occurring," which "is a basic human right." The policy was so roundly criticized that Scalia scuttled it. This fall, however, *OSHA* informed employers that they no longer have to report *COVID*-19 hospitalizations unless an employee was admitted within twenty-four hours of a workplace exposure—a highly unlikely

scenario, given that symptoms are usually delayed.

Scalia has bristled at criticism of his handling of the pandemic, accusing Woodward and others of failing to show "due respect for the steps the dedicated men and women at *OSHA* are taking." But David Michaels told me that the front-line officials he'd heard from felt handcuffed by the Labor Department's current leadership. "They're there to protect workers—and they're not being sent to *do* anything," he said. A former *OSHA* official in Massachusetts informed me that colleagues there had been "pulled off a *COVID*-19 fatality inspection at a Walmart where two employees died." Their superiors ordered them to "do a roofing inspection" instead.

OSHA has also reduced its personnel. According to a report published in April by the National Employment Law Project, which drew on data obtained through the Freedom of Information Act, *OSHA* hasn't had so few inspectors in forty-five years. And forty-two per cent of the agency's leadership positions, including that of Assistant Secretary of Labor for Occupational Safety and Health—the job that Michaels held—are vacant. Although the Labor Department has lately made some new hires at *OSHA* and in other divisions, years of attrition have taken a toll, according to Irv Miljoner, who until his recent retirement directed a district office in the department's Wage and Hour Division. "Many field offices have only about half of the investigative staff they had five years ago," he said. "The field is being strangled."

When Scalia was appointed, Ann Rosenthal, a career Labor Department lawyer, sent him a congratulatory note. Compared with many Trump Administration appointees, she thought, he had a rigorous professionalism that would lead him to fulfill the agency's mandate no matter his personal views. At the same time, Rosenthal knew that Scalia's conservative beliefs were deep-seated: when their paths first crossed, two decades earlier, she and Scalia were ideological adversaries.

Rosenthal was then an *OSHA* supervisor, helping to lay the groundwork for a new ergonomics standard to address musculoskeletal disorders, such as carpal-tunnel syndrome and tendinitis, that afflicted hundreds of thousands of workers every year. Labor unions had long been pushing for such a standard, but corporate

lobbyists opposed it. In the spring of 2000, the Labor Department held public hearings on a draft version of the standard. Scalia, then thirty-six and already a partner at Gibson Dunn, emerged as one of the standard's fiercest critics, introducing himself at the hearings as "somebody who has been following ergonomic regulation here in Washington and around the country."

Despite the prominence of Scalia's father, law was not Eugene's initial calling. At the University of Virginia, he majored in English, and considered getting a Ph.D., according to William Kilberg, a close friend of the Scalia family who became his mentor. Kilberg, who was a partner at Gibson Dunn, prevailed on him to apply to law school, then recruited him to the firm.

Trim and bald, Scalia is a less imposing physical presence than his father, but he shared the elder Scalia's right-wing views and his penchant for asking tough questions. As witnesses testified in support of *OSHA*'s draft regulation, Scalia and another Gibson Dunn lawyer, Baruch A. Fellner, took turns grilling them. Patricia Smith, the solicitor for the Labor Department under Obama, attended the hearings, and recalled that Scalia, despite his mild demeanor, was a "bulldog" during cross-examinations. He was equally contentious in his writings: in a report for the Cato Institute, he called ergonomics a "folly," and argued that "supposed musculoskeletal disorders" correlated more with "psychosocial factors," such as whether workers liked their jobs, than with lifting heavy objects and other occupational risks.

Eric Frumin, who also attended the hearings, was then the health-and-safety director of the Union of Needletrades, Industrial, and Textile Employees. Even as Scalia dismissed ergonomics as "junk science," Frumin noted, he was serving as counsel to companies, such as UPS, that had adopted strong ergonomic programs to protect their workers from injuries. Frumin likened the situation to oil companies publicly denying the scientific evidence of climate change while privately accepting its validity. "The level of deceit is every bit as vicious as what we've seen on climate change, or what Purdue said about OxyContin," he said. "It doesn't get the same level of attention, because it's about workers who break a sweat every day. But it's every bit as dangerous in blocking the use of science to protect people from severe, preventable risks to their health."

Scalia didn't succeed in stopping *OSHA* from adopting an ergonomics standard, which it announced in November, 2000. The regulation, the agency predicted, would protect as many as four and a half million workers from repetitive-stress injuries over the subsequent decade. But, two months after George W. Bush became President, Republicans in Congress overturned the standard—a move applauded by the National Coalition on Ergonomics, an industry group that portrayed the regulation as a threat to American competitiveness. One of the lawyers representing the lobby was Eugene Scalia. Shortly thereafter, Bush nominated Scalia to serve as solicitor—the chief legal counsel—in the Labor Department. Democrats in the Senate tried to forestall the appointment by delaying a confirmation vote.

Bush ended up giving Scalia a one-year recess appointment, and eventually named him acting solicitor. Peg Seminario, then the health-and-safety director of the A.F.L.-C.I.O., warned, "The Bush Administration could not possibly have found *anyone* who is more vehemently against regulation and enforcement of ergonomic hazards than Eugene Scalia." But Ann Rosenthal, who had moved to a job in the solicitor's office, told me that Scalia turned out to be surprisingly "*good* on enforcement." She said, "*OSHA* continued to do ergonomic inspections and issue citations, and he supported *OSHA* in that."

Scalia also apparently surprised his boss, Elaine Chao, who was the Secretary of Labor at the time (and is now the Secretary of Transportation). In 2000, a dissident faction of the United Brotherhood of Carpenters and Joiners filed a lawsuit with the Labor Department, aiming to force the union to open its regional councils to elections. Last year, Bloomberg Law disclosed that Chao directed Scalia to side with the union's autocratic president, Douglas McCarron, who had ties to President Bush. Scalia refused, and resigned after Chao backed McCarron on her own.

William Kilberg, Scalia's mentor, portrayed the resignation as a characteristic act of integrity, and claimed it showed that Scalia is "sympathetic to organized labor." But Scalia has also written articles disparaging unions. In a 2000 op-ed for the *Wall Street Journal*, he depicted *OSHA*'s proposed ergonomics standard as "a major concession to union leaders, who know that ergonomic regulation will force companies to give more rest periods, slow the pace of work and then hire

more workers (read: dues-paying members).” And, as a corporate lawyer, Scalia has repeatedly hindered the efforts of workers to secure benefits or defend their rights. In 2005, he represented Walmart in a case in which the judge struck down a Maryland law requiring large corporations to spend at least eight per cent of their payroll on health care. Four years later, he helped convince a court that disabled UPS workers should be prevented from joining together and waging a class-action lawsuit against the company for alleged violations of the Americans with Disabilities Act. (The workers had to settle complaints individually.) Gibson Dunn has played a leading role in shielding companies from civil-rights lawsuits of this kind. A decade ago, it defended Walmart against a group of female employees claiming systematic gender discrimination in pay. In 2011, the case was dismissed by the Supreme Court, in a landmark 5–4 decision that has made it far more difficult for workers to file such suits; the majority opinion was written by Antonin Scalia.

Eugene Scalia’s admirers and critics alike acknowledge that he has a gift for persuading courts to overturn government regulations. “He likes to unravel puzzles,” Kilberg said. After the 2008 financial crash, Scalia successfully challenged the authority of the Federal Stability Oversight Council—which had been created to identify certain institutions as “too big to fail”—to designate MetLife as a “systemic risk” to the economy. Scalia argued, among other things, that the council hadn’t amassed enough data to assess MetLife’s vulnerability to financial stress. He also repeatedly challenged key provisions of the Dodd-Frank Act—legislation that Congress passed in 2010 to rein in Wall Street.

Scalia’s victories have often resulted from his meticulous scrutiny of government rules and from his ability to convince judges that agencies have acted “arbitrarily and capriciously” by failing to perform rigorous cost-benefit analyses of regulations. Conservatives have long maintained that requiring agencies to perform such analyses helps insure that rules will be rational and efficient. Critics contend that the real goal is to slow down the rulemaking process, by forcing agencies to waste time conducting elaborate assessments of regulations whose benefits may be impossible to monetize. Gary Rivlin, a reporter who covers the financial industry, told me that Scalia’s skill in applying “a magnifying glass” to federal regulations sometimes led officials at the Securities and Exchange Commission to forgo even trying to enact a new rule, for fear of “getting sued by

Eugene Scalia" and having it invalidated.

Some critics attribute Scalia's courtroom success primarily to the deep pockets of the business associations that have employed him. When the Chamber of Commerce sues the S.E.C., one side has virtually unlimited funds, the other a few overworked public attorneys. Scalia has also had the luxury of "forum-shopping" cases, bringing suits in friendly venues such as the federal district courts in Texas, which are stacked with conservative judges who share his hostility to regulation. (Scalia denies doing this.)

Scalia undoubtedly believes that eliminating regulations benefits society. In a speech last November before the Federalist Society, the conservative legal association, he boasted that the Trump Administration had "cut at least *eight* regulations for every one added." Scalia reminded the audience of James Madison's disdain for the "commercial shackles" that prevented "industry and labour" from arriving at productive outcomes on their own, without interference from "enlightened" legislatures. But removing these shackles has also been immensely lucrative for Scalia and his corporate clients. Dennis Kelleher, the president of Better Markets, a nonprofit organization, said of Scalia, "He clearly saw an opportunity once Dodd-Frank passed, and Wall Street's biggest firms opened their wallets to help the forces of darkness kill financial reform." Last year, Better Markets published a report highlighting Scalia's role in helping gut many regulations passed after the 2008 financial meltdown.

Some legal observers have wondered why Scalia left a highly remunerative job to serve an erratic, mendacious President who has shown little loyalty to his advisers. Theodore Olson, a partner at Gibson Dunn who was close to Antonin Scalia, turned down an offer to represent Trump during the Mueller investigation, saying of the Administration, "It's chaos, it's confusion, it's not good for anything." Olson told me he was glad that someone of Eugene's calibre had taken the Labor Secretary job. Drawing an implicit contrast to Trump, Olson said that Scalia "*reads* a lot—he *thinks* a lot." Kilberg said of Scalia, "It was not an easy decision on his part. He thought about it long and hard. And I think at the end of the day he thought, I can do some good things."

Ann Rosenthal, the career Labor Department lawyer, recently retired. Although

she expressed personal fondness for Scalia, she told me that she was "profoundly disappointed" by his tenure. She was astonished that *OSHA* had issued so few citations during the pandemic, and mystified by the weak language in the guidance sent to employers. "There's a lot of 'Consider doing this,' 'If it's possible, do that,' " she said. "Under the law, it's an employer's *obligation* to keep workers safe." Rosenthal added bitterly, "I'm really appalled."

On April 12th, a fast-food worker from Chicago named Carlos De Leon filed a complaint with *OSHA* detailing hazards at the McDonald's where he worked, in the West Loop. An employee had tested positive for the coronavirus, De Leon's complaint alleged, but many workers had not been informed of the illness or instructed to self-quarantine, contravening the advice of the Chicago Department of Public Health. Social-distancing rules weren't being followed in the kitchen, and nothing had changed when De Leon shared his concerns with his manager. De Leon's letter to *OSHA* requested "an immediate on-site inspection."

Two weeks later, *OSHA* told McDonald's to address the matter on its own. "We have not determined whether the hazards, as alleged, exist at your workplace, and we do not intend to conduct an inspection," *OSHA* wrote in a letter, a copy of which was sent to De Leon, along with a note that described his complaint as "non-formal."

Until recently, complaints to *OSHA* were classified as "non-formal" if they were relayed over the phone; "formal" complaints were filed on paper and normally merited inspections. De Leon's complaint was filed on paper. After he heard that two more workers at the McDonald's had contracted the coronavirus, he sent *OSHA* a second complaint, also in writing, repeating the request for an inspection. Nothing happened. De Leon said of *OSHA* officials, "They're not doing the job they're supposed to be doing."

At the end of April, several employees, including De Leon, went on strike to protest the situation at the McDonald's. When De Leon returned to work, in May, he found the conditions largely the same. After three more employees contracted the virus, he and several other employees filed two separate complaints with the Chicago Department of Public Health, noting that their appeals to *OSHA* had been fruitless. In stark contrast to *OSHA*, Judge Eve Reilly, of the Cook County Circuit

Court, issued a preliminary injunction against four local McDonald's outlets. "The potential risk of harm to these Plaintiffs and the community at large is severe," Reilly wrote in her ruling. "It may very well be a matter of life or death."

On October 5th, the Harvard Center for Population and Development Studies released a working paper that examined why the per-capita mortality rate from *COVID*-19 is five times higher in America than it is in Germany. The paper found a correlation between complaints to *OSHA* in various regions of the country and local spikes in mortality roughly seventeen days later. The findings indicated that national safety standards and stronger enforcement by the federal government could have mitigated the virus's spread "in the workplace and, in turn, the community at large." (The Labor Department spokesperson said that the study didn't "establish that an increase in fatalities was somehow attributable to how *OSHA* responded to complaints.")

Among the communities most imperilled are rural counties with meatpacking plants, where more than forty thousand workers have contracted *COVID*-19 and at least two hundred have died, many of them Latino immigrants. In April, Trump signed an executive order categorizing meat and poultry as "critical" to "national defense," thus insuring that meat-processing facilities would stay open. *OSHA* issued "interim guidance" but no mandatory safety measures to protect workers. Inspections of meatpacking plants have increased in the months since, but Alfonso Figueroa, an official with the United Food and Commercial Workers, has not been impressed by their rigor. On May 13th, Figueroa learned that an *OSHA* inspector was coming to a beef plant in Dodge City, Kansas, where three workers had died. "I got word of them coming maybe thirty minutes beforehand," Figueroa said. "So, we do our introductions, and we walk through the areas where the deceased workers used to work—the kill floor, the ground-beef area, the fabrication floor." The walk-through was "really fast," Figueroa said. He explained to the inspector that a lot of workers were scared and that, even though partitions had been placed in some areas, employees still interacted closely in hallways and locker rooms. "I said, 'There's much more that needs to be done.' " But the *OSHA* inspector seemed to be in a rush to leave. "I've been involved in other *OSHA* inspections that have been very thorough," Figueroa said. "This wasn't—at all."

In July, Justice at Work, a pro-worker nonprofit organization, sued *OSHA* on behalf of a group of meatpackers at a Maid-Rite plant in Pennsylvania, alleging that conditions there posed an "imminent danger." At a hearing, Matthew Morgan, a lawyer for Justice at Work, pressed Susan Giguere, an *OSHA* assistant area director, to explain why a formal written complaint alleging social-distancing lapses hadn't led to an on-site inspection. Giguere responded that, based on "guidance" from top Labor Department officials, all *COVID*-19 complaints were "being handled as non-formal." *OSHA* eventually agreed to conduct an inspection, but, the day before, the agency contacted the plant's director of human resources. Later, Morgan asked the *OSHA* inspector who visited the plant if giving a company a heads-up was conventional practice. It wasn't. "Then why did you do it here?" Morgan asked. "To make sure that I was safe from *COVID*-19," the inspector said, explaining that a "job-hazard analysis" had been done on *her* behalf, and that her superiors had determined that taking added precautions was justified. "*OSHA* has a right to protect employees," the inspector told Morgan—a right that, evidently, Maid-Rite workers could do without.

In September, *OSHA* imposed minor penalties on two slaughterhouses. A Smithfield plant in South Dakota, where four workers had died and some twelve hundred had been infected, received a $13,494 fine. A J.B.S. plant in Colorado, where eight workers had died and several hundred had tested positive, was fined $15,615. Deborah Berkowitz, who was *OSHA*'s chief of staff under Obama, called the penalties "barely a slap on the wrist, when these billion-dollar companies should have been slammed by *OSHA* for failing to protect workers—and would have been under any other Labor Secretary." Berkowitz, who now directs the National Employment Law Project's worker-health-and-safety program, said, "These are Black and brown workers. I just don't think this Administration cares about them at all."

William Kilberg told me that Scalia had actively engaged in efforts at Gibson Dunn to recruit people of color. But, even if Scalia is not, like Trump, openly racist, his agency's policies have disproportionately harmed Blacks and Latinos. One reason such people have made up an outsized share of the pandemic's victims is that many have so-called essential jobs: delivery drivers, home health aides, janitors. In failing to safeguard these workers, the Labor Department has signalled that their lives don't matter as much as those of desk workers in whiter, more rarefied

professions.

Since the pandemic began, the Department of Labor has also issued a series of little-noticed rules that have weakened the few protections that workers in low-wage industries have. A July 24th memorandum rolled back a policy, expanded under the Obama Administration, to deter wage theft, which robs low-income workers of billions of dollars every year. To address the problem, Obama's Labor Department began seeking to collect both back pay and a matching amount of damages. Aimed at bad actors who had little incentive to obey the law if the "damages" included only the wages that they had illegally withheld, the strategy was working, according to Michael Felsen, a former Labor Department regional solicitor general, who helped devise it. In 2015, for example, the Labor Department ordered a Rhode Island restaurant chain to pay cooks and dishwashers who had been denied overtime compensation three hundred thousand dollars in back wages and damages. Scalia's new rule sharply curtails the collection of such damages.

David Weil, who ran the Wage and Hour Division of the Department of Labor during Obama's Presidency, told me that other recent rule changes similarly harm low-wage workers. Scalia's Labor Department has lowered the salary threshold for exempting employees from overtime pay (meaning that fewer workers receive it). Another altered rule gives restaurant owners more discretion over tips, making it easier to shortchange waitstaff.

In July, word leaked that the Labor Department was rushing to enact a new rule that would more broadly define the term "independent contractor." Such workers can be denied a minimum wage, overtime pay, and other benefits. Shannon Liss-Riordan, a lawyer who has filed numerous lawsuits on behalf of Uber drivers and other "gig workers" classified as independent contractors, described Scalia's proposed change as a "gift to corporations." The effort also raises ethical questions, since several companies that particularly stand to benefit—including Uber, Grubhub, and DoorDash—are Gibson Dunn clients. In the cases that Liss-Riordan has litigated, Gibson Dunn has "been the primary firm I've been up against," she said. "It should raise some serious eyebrows that the head of the Department of Labor is pushing a fast-track attempt to limit protections for gig workers, given that his law firm has been actively working through the court

system to try to reduce the protections for these employees."

The Labor Department is granting the public only thirty days to comment on the rule—typically, the comment period is sixty days. This is especially striking in light of a 2012 op-ed about the Dodd-Frank Act that Scalia published in the *Wall Street Journal*, in which he lambasted federal agencies for failing to "listen carefully to what the public says" before imposing a regulation. In May, when the Labor Department issued a rule exempting certain retail workers who are paid by commission from receiving overtime pay, it acknowledged that the change was being implemented "without notice or comment."

A senior official in the Labor Department told me that its own experts and field officers have been sidelined by political appointees. In the past, the official said, field officers played an integral role in drafting new rules. Today, many of them learn about rule changes only after the fact, from agency press releases. Career officials have taken to calling the shadowy operatives now in charge the Ghost Squad.

Although some of Scalia's rules may be overturned under future Administrations, the reversal process can take years, particularly if industry mounts court challenges. As Liss-Riordan noted, "Once something is done, it's always harder to *undo* it."

In August, Janet Herold, the Labor Department's solicitor for the Western region, filed a complaint with the U.S. Office of Special Counsel, alleging that Scalia had abused his authority by intervening to settle a 2017 Labor Department lawsuit. The suit accused the tech company Oracle of underpaying women and people of color; lawyers with the department's Office of Federal Contract Compliance Programs had determined that Oracle owed these workers between three hundred million and eight hundred million dollars in back pay. Oracle denied any wrongdoing. In recent years, the company has developed close ties to the White House. Safra Catz, the company's C.E.O., served on the President's transition team; in February, Larry Ellison, Oracle's founder and chairman, hosted a fund-raiser for Trump. In the fall of 2019, shortly before the discrimination case went to trial, Herold learned that Scalia intended to settle it for between seventeen and thirty-eight million dollars—a sum that she considered far too low. She wrote a

memo objecting to this intervention.

In Herold's complaint to the Office of Special Counsel, she alleges that Scalia removed her from the case in retaliation. On August 28th, she learned that he intended to reassign her to fill a vacant position at *OSHA*. Herold had almost no experience with the agency.

In response to Herold's allegations, which were first reported by Bloomberg Law, a Labor Department spokeswoman told the *Times* that Scalia "never had any communications with Oracle or its attorneys concerning the department's litigation against the company." This is misleading. A senior Labor Department official and two individuals with knowledge of the case informed me that Scalia appears to have communicated with Oracle through a former legal partner, who served as a go-between. Another official with intimate knowledge of the case said that the former partner had called Scalia at home to discuss Oracle's interest in a settlement—thus insuring that the exchange wouldn't appear in government logs.

Herold's complaint suggests that Scalia removed her from the case not only to benefit Oracle but also for ideological reasons. Patricia Smith, the Labor Department solicitor under Obama, told me that Herold had been notably "aggressive and successful in obtaining liquidated damages" from companies that violated labor laws. Herold also had vocally objected to some of Scalia's new rules.

The news of Herold's transfer prompted Representative Rosa DeLauro and Senator Patty Murray to send a letter to the Labor Department's acting inspector general, Larry Turner, requesting an investigation. They wrote, "The Secretary's efforts to involuntarily transfer Ms. Herold appear to be retaliation against an employee simply doing her job to enforce the law." (The Labor Department spokesperson claimed that neither "Scalia nor anyone in department leadership was aware" of Herold's 2019 memo "prior to her reassignment, so there could not have been retaliation.")

In mid-September, the Office of Special Counsel requested that Herold's reassignment be delayed for ninety days, having determined that there were "reasonable grounds" to believe that the Department of Labor had committed a "prohibited personnel practice." On September 22nd, an administrative-law judge

in San Francisco ruled that, despite evidence of significant disparities in pay at Oracle, the company had not engaged in intentional discrimination against women and people of color. The Labor Department must now consider whether to appeal the ruling.

In July, Scalia visited Columbus, Ohio, to take part in a panel discussion highlighting the benefits of the new U.S.-Mexico-Canada trade agreement. A photograph of the event was subsequently posted on the Department of Labor Web site, showing him at a long table surrounded by members of JobsOhio, an economic-development agency. Everyone at the table was in business attire. All but one of the attendees—Scalia—had a mask on. Scalia also went maskless at a recent White House event supporting the Supreme Court nomination of Amy Coney Barrett. So far, he has tested negative for *COVID*-19; his wife, who was present as well, tested positive.

Unlike Trump, who also recently contracted *COVID*-19, after months of mocking the value of masks, Scalia probably does not doubt that politicians should defer to scientific experts about the nature of the virus and how to prevent its spread. Yet he has allowed himself to be used as a prop in Trump's anti-scientific crusade. Several former colleagues of Scalia's told me that he must be mortified by Trump's stewardship of the pandemic—and by the President's lack of sympathy for the more than two hundred thousand victims.

Then again, it's not evident how much sympathy Scalia has for Americans imperilled by the pandemic. One of the reasons the U.S. labor force has been particularly vulnerable to *COVID*-19 is that the U.S. is the only advanced Western country without universal paid sick leave. In March, Congress partially remedied this by passing the Families First Coronavirus Response Act, which guaranteed paid sick and medical leave to private-sector employees in companies with fewer than five hundred workers. Several weeks later, the Department of Labor issued a rule narrowing eligibility for these benefits. Under Scalia's rule, employees can be denied paid sick leave if their employers determine that they do not *need* them to work; no documentation is required to justify an employer's decision. Seizing on the fact that Congress's law excluded "health-care providers and emergency responders," Scalia's rule also expanded the definition of "health-care providers" to include everything from companies that contract with hospitals to institutions

where health-care instruction is offered.

As a lawyer, Scalia often accused federal agencies of overstepping their authority. On April 14th, New York's attorney general, Letitia James, sued the Department of Labor on similar ground, alleging that it had acted to deny workers crucial benefits that Congress had clearly intended to grant. This contention was affirmed by a recent audit of the Department of Labor, conducted by the Office of Inspector General, which found that the department had "significantly broadened the definition of health-care providers" in ways that were inconsistent with existing federal statutes.

On August 3rd, a U.S. District Court judge, J. Paul Oetken, struck down Scalia's restrictions. "This extraordinary crisis . . . calls for renewed attention to the guardrails of our government," Oetken wrote. "DOL jumped the rail."

A month later, another judge struck down a Scalia regulation, issued in March, that narrowed the circumstances in which businesses such as Amazon and McDonald's could be held liable when their subcontractors violated workers' rights. A coalition of seventeen states and the District of Columbia had sued the Labor Department, claiming that restricting the liability of "joint employers" would leave workers "more vulnerable to underpayment and wage theft." Judge Gregory H. Woods, of the Southern District of New York, concluded—with a rhetorical swipe at Scalia—that the rule was "arbitrary and capricious." The dispute showed that Scalia does not oppose *all* government regulations—just the ones that conflict with his pro-business ideology. He's fine with new rules that impose costs on workers.

As states have begun reopening their economies, employees have feared returning to workplaces that don't appear to be safe. In May, Bailey Yeager, a director at a human-resources company called *SHRM*, was asked for feedback about a proposal that she return to her office. Like most white-collar employees, she'd spent much of the spring working from her home, in Alexandria, Virginia, where *SHRM* is based. Yeager, concerned about infecting her two daughters, requested that she be allowed to continue working remotely "until returning to work is both more widespread regionally and there is a decline in the metrics regarding cases/hospitalizations." She also asked to see *SHRM*'s plans for

reopening safely, while adding that she was “flexible” about returning to the office. Two weeks later, Yeager, who in recent years had received glowing performance reviews and several promotions, was fired. Three other employees who’d expressed similar worries, including two with preëxisting medical conditions, were also terminated.

Insuring that employees are not subjected to retaliation for engaging in certain protected activities is a key responsibility of the Department of Labor—in particular, of *OSHA*, which enforces the whistle-blower provisions of more than twenty laws. During the Obama Administration, David Michaels established a federal advisory committee to strengthen *OSHA*’s whistle-blower program. After Trump was elected, the committee was disbanded, and since then the whistle-blower-protection office has had no leader, despite many reports of workers facing reprisals for complaining about unsafe conditions during the pandemic. A survey conducted in May by the National Employment Law Project revealed that one in eight workers “has perceived possible retaliatory actions by employers against workers in their company who have raised health and safety concerns.” The survey found that Black workers were more than twice as likely as white workers to have witnessed such retaliation.

After Yeager was fired, she contacted Bernabei & Kabat, a law firm that represents whistle-blowers, which filed a complaint on her behalf with *OSHA*, alleging that *SHRM* had terminated her unfairly. (The company denies any impropriety.) The complaint describes a conference call in which Johnny Taylor, the company’s C.E.O., outlined plans to “outsource” functions in departments where workers were resisting coming back to the office. Taylor also mentioned that he’d spoken recently with a friend of his, “the Secretary of Labor”—who had been slated to be the keynote speaker at a *SHRM* event in March, before the pandemic struck. In July, Yeager told me, an *OSHA* representative called her and pressured her to withdraw her complaint. When she declined, the representative said threateningly, “Are you sure you don’t want to withdraw it?”

In May, Loren Sweatt, *OSHA*’s principal deputy assistant secretary, appeared before the House Committee on Workforce Protections and declared, “You could not get a better spokesperson for whistle-blower protection than the Secretary of Labor.” Three months later, an audit by the inspector general revealed that this

was false: even as whistle-blower complaints have surged during the pandemic, the agency has left five whistle-blower-investigator positions vacant, inhibiting *OSHA*'s ability to handle the caseload.

It appears that Scalia at least cares about how his tenure as Labor Secretary is perceived in Washington. Several people I interviewed speculated that he nurtures larger ambitions, hoping to be appointed a federal judge and, eventually, a Justice of the Supreme Court. At the same time, Scalia has gone to great lengths to please the clients he used to serve as a corporate lawyer. Left out of Scalia's cost-benefit calculations is the public good.

Nothing illustrates this more than his involvement in a tussle over a Department of Labor rule that required financial advisers to give clients advice about their retirement assets that was in their best interests. Adopted in 2016, after an exhaustive six-year process, the rule was designed to eliminate conflicts of interest that gave brokers incentives to push high-risk investments on elderly retirees, potentially costing them billions of dollars a year. Scalia, then at Gibson Dunn, assailed the rule as a "regulatory Godzilla," and he and others repeatedly challenged it in court, on behalf of the U.S. Chamber of Commerce. Courts rejected those challenges four times, but Scalia finally won before the conservative Fifth Circuit Court of Appeals.

Given Scalia's role in overturning the rule, some assumed that he would recuse himself from the matter while serving as Labor Secretary. He did not. In June, the Department of Labor proposed a new rule, which is riddled with loopholes that, among other things, would enable financial advisers to resume recommending products that yield high commissions for them while exposing retirees to risk. This outcome doesn't surprise Barbara Roper, the director of investor protection at the Consumer Federation of America. The Secretary of Labor, she suggested, has, in effect, become the Secretary of Employers. She observed, "Secretary Scalia's former clients should be *very* happy with him."

Published in the print edition of the October 26, 2020, issue, with the headline "Safety Last."
Eyal Press, a Puffin Foundation Writing Fellow at the Type Media Center, is the author of "Beautiful Souls." His new book, "Dirty Work," will be published in 2021.