

United States Senate

WASHINGTON, DC 20510

September 22, 2020

Loren Sweatt
Principal Deputy Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Ave NW
Washington, DC 20210

Dear Assistant Secretary Sweatt:

We are writing to seek information about the Occupational Safety and Health Administration's (OSHA) delayed and feckless response to the dozens of outbreaks of coronavirus disease 2019 (COVID-19) affecting thousands of workers in hundreds of meatpacking facilities across the country.

This month OSHA issued citations against two meatpacking facilities for failing to “furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employee[s].”¹ Specifically, OSHA cited both facilities for failing to “develop or implement timely and effective measures to mitigate the exposures to the hazard of [COVID-19].”² These two facilities – Smithfield Packaged Meats Corporation in Sioux Falls, South Dakota and JBS Foods, Inc. in Greeley, Colorado – were the sites of serious, deadly worksite and community outbreaks that sickened over 1,500 workers, killed ten, and put thousands more in their communities at risk.³

OSHA inspected the facilities in spring 2020, but did not take any enforcement action until September, after much of the damage was already done.⁴ And now that your agency is finally taking enforcement action, you have elected to issue the smallest possible fine for these companies' egregious behavior, sending a message to Smithfield, JBS, and all employers that companies won't face any real accountability from OSHA for putting workers' lives at risk from COVID-19.

OSHA's inaction disproportionately harms workers and communities of color. A Centers for Disease Control and Prevention (CDC) study found that workers of color constituted 87% of

¹ OSHA, Citation and Notification of Penalty, Inspection Number 1472736, issued September 8, 2020, available at <https://big.assets.huffingtonpost.com/athena/files/2020/09/10/5f5a5589c5b62874bc19d98b.pdf>; OSHA, Citation and Notification of Penalty, Inspection Number 1475131, issued September 11, 2020, available at <https://www.warren.senate.gov/imo/media/doc/jbs-osa-citations.pdf>. The citations reference the Occupational Safety and Health (OSH) Act general duty clause at 29 USC 654(a)(1).

² *Id.*

³ *Id.*

⁴ *Id.*

COVID-19 cases among workers at meat processing facilities.⁵ Your failure to do your duty also compounds existing racial injustices – Black and Latino individuals are nearly five times more likely to be hospitalized due to COVID-19 than white individuals,⁶ and are disproportionately dying from COVID-19.⁷

Your agency’s shameful inaction during this crisis has been a clear dereliction of your mission “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁸ We are therefore writing to seek information about why OSHA took so long to take enforcement action, why OSHA’s enforcement action was so lenient, and whether OSHA will now, finally, issue an Emergency Temporary Standard to protect workers from COVID-19 risks.⁹

When OSHA conducted inspections in the Spring and identified violations of the *Occupational Safety and Health Act* (OSH Act) at the Smithfield and JBS facilities, swift and public action could have prevented transmission of the virus and saved the lives of workers at those plants and members of the communities where they worked and lived—primarily low income communities and communities of color. Between the time of OSHA’s inspection at Smithfield in Sioux Falls and your enforcement action, per your own citation, “approximately 1,294 employees had tested positive for [coronavirus]” and “of those employees, approximately 43 were hospitalized and four employees died of complications related to the virus.”¹⁰ Between the time of OSHA’s inspection at JBS in Greeley, Colorado and your enforcement action, 290 workers “contracted the virus and developed symptoms ranging from mild irritation to severe illnesses that resulted in at least 51 hospitalizations and six fatalities due to COVID-19 related illnesses.”¹¹

These workers did not have to get sick due to Smithfield’s and JBS’s disregard for workers’ health. Your agency could have acted swiftly to require that these workplaces made changes – like slowing down line speeds to ensure workers could remain at distance of six feet apart¹² – as rapidly as possible. But in the absence of OSHA actions, these companies appeared to have chosen to do little to protect their workers, and instead made false claims to Congress

⁵ Michelle A. Waltenburg, et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April-May 2020*, 69 Morbidity & Mortality Weekly Report 887 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927e2-H.pdf>.

⁶ CDC, COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity, “Key Updates for Week 36, ending September 5, 2020,” <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-09-11-2020.pdf>.

⁷ CDC, National Center for Health Statistics, “Provisional Death Counts for Coronavirus Disease 2019 (COVID-19),” https://www.cdc.gov/nchs/nvss/vsrr/covid19/health_disparities.htm.

⁸ 29 USC 651.

⁹ OSHA has the authority to promulgate an Emergency Temporary Standard to protect workers when workers “are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” 29 USC 655(c)(1).

¹⁰ OSHA, Citation and Notification of Penalty, Inspection Number 1472736, issued September 8, 2020, available at <https://big.assets.huffingtonpost.com/athena/files/2020/09/10/5f5a5589c5b62874bc19d98b.pdf>.

¹¹ OSHA, Citation and Notification of Penalty, Inspection Number 1475131, issued September 11, 2020, available at <https://www.warren.senate.gov/imo/media/doc/jbs-osh-citations.pdf>.

¹² OSHA, Citation and Notification of Penalty, Inspection Number 1472736, issued September 8, 2020, available at <https://big.assets.huffingtonpost.com/athena/files/2020/09/10/5f5a5589c5b62874bc19d98b.pdf>.

and the public – in the case of Smithfield, claiming that “the accusation that we have been unwilling to implement worker protections is patently and demonstrably false.”¹³

Well-publicized action by OSHA could have had a beneficial impact on the rest of the food industry by clearly establishing that plants could implement improved workplace safety operations to protect their employees from COVID-19.¹⁴ But OSHA’s lack of enforcement – and now its paltry fines – send the message that this administration is not taking enforcement seriously, and as of this week, “at least 804 meatpacking and food processing plants (496 meatpacking and 308 food processing) ... have had confirmed cases of Covid-19.”¹⁵

On top of the delays, your weak enforcement action against Smithfield and JBS is outrageously inadequate. OSHA issued Smithfield and JBS one fine each for failing to “develop or implement timely and effective measures to mitigate the exposures to the hazard of [coronavirus]” before March 23, 2020 and March 25, 2020, respectively.¹⁶ Both citations come with a penalty of \$13,494 – pocket change for these multi-billion dollar conglomerates.¹⁷ Your agency’s press release for the Smithfield citation proclaims that this penalty is “the maximum allowed by law,” a disingenuous claim.¹⁸

In reality, your decision to issue one single citation for violations of the OSH Act’s general duty clause¹⁹ was the absolute minimal enforcement action OSHA could have taken.²⁰ OSHA has the authority to issue a serious violation for every area of the inspected facilities

¹³ Letter from Smithfield Foods, Inc. CEO Kenneth M. Sullivan to Senators Elizabeth Warren and Cory Booker, June 30, 2020, <https://www.warren.senate.gov/imo/media/doc/Smithfield.pdf>.

¹⁴ OSHA’s most recent field operations manual, updated in April 2020, affirms that, “Civil penalties advance the purposes of the Act by encouraging compliance and deterring violations,” and that the penalty structure is “designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers.” OSHA, Field Operations Manual, Effective date April 14, 2020, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164.pdf; A recent study found that “OSHA would need to conduct 210 additional inspections to achieve the same improvement in compliance as achieved with a single press release.” Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 American Economic Review 1866 (2020), available at <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20180501>.

¹⁵ Food & Environment Reporting Network, “Mapping Covid-19 outbreaks in the food system,” <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>.

¹⁶ OSHA also issued JBS an other-than-serious violation for failing to provide a copy of the OSHA 300 Log, documenting worksite injuries and illnesses, to an authorized individual in the time required by law. OSHA, Citation and Notification of Penalty, Inspection Number 1472736, issued September 8, 2020, available at <https://big.assets.huffingtonpost.com/athena/files/2020/09/10/5f5a5589c5b62874bc19d98b.pdf>; OSHA, Citation and Notification of Penalty, Inspection Number 1475131, issued September 11, 2020, available at <https://www.warren.senate.gov/imo/media/doc/jbs-osha-citations.pdf>.

¹⁷ *Id.*

¹⁸ OSHA, “U.S. Department of Labor Cites Smithfield Packaged Meats Corp. For Failing to Protect Employees from Coronavirus,” press release, September 10, 2020, <https://www.osha.gov/news/newsreleases/region8/09102020>.

¹⁹ The general duty clause of the OSH Act requires that covered employers, “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 USC 654.

²⁰ Government Executive, “OSHA’s ‘Minuscule’ Coronavirus Citations at Food Processing Plants Alarm Worker Safety Advocates,” Courtney Buble, September 14, 2020, <https://www.govexec.com/management/2020/09/oshas-miniscule-coronavirus-citations-food-processing-plants-alarm-worker-safety-advocates/168457/>.

where social distancing was not being implemented.²¹ OSHA also has the authority to classify the violations as “willful” for either “intentional disregard of violations” or “plain indifference,”²² increasing the maximum penalty tenfold, to \$134,937 per violation.²³ Indeed, in a letter sent to us in June 2020, Smithfield explicitly indicated that the company had considered – and rejected – fully implementing social distancing and slower line speeds, providing strong evidence that their violations were both willful and in intentional disregard of their duties to protect their workers.²⁴

In addition, Smithfield was likely aware that their “Cut, Conversion, and Harvest department-groups, in which numerous employees tended to work <6 feet (2 meters) from one another on the production line, experienced the highest attack rates” – because those were the findings of a case study conducted at the Smithfield facility by the South Dakota Department of Health.²⁵ But you let these companies get away with barely a slap on the wrist – letting Smithfield, JBS, and every other meatpacking facility know that OSHA will protect corporate profits, not workers and the American public.

There is ample precedent for larger fines. In 2019, OSHA cited a meatpacking plant with a penalty of \$615,640 for exposing workers to hazardous chemicals.²⁶ In 2010, OSHA cited a meatpacking company “with \$369,500 in proposed penalties for 38 alleged serious, willful, and other-than-serious safety and health violations.”²⁷ In 1988, under President Ronald Reagan, OSHA fined a meatpacking company for \$3.1 million for failing to combat cumulative trauma injuries in the plant that had disabled more than 600 workers, using the general duty clause.²⁸ This was following a 1987 citation for \$2.59 million to the same plant for failing to record job related injuries and illnesses.²⁹

Your record of inaction during this crisis has degraded the public’s faith in your willingness and ability to protect workers, especially workers of color. For meatpacking workers and all other essential workers, the failure started with your refusal to promulgate an Emergency

²¹ See, for example, the OSHA citations for violations of the general duty clause in multiple areas of a facility, citing conditions specific to that area: OSHA, Citation and Notification of Penalty, Inspection Number 975114, issued October 27, 2014, https://www.osha.gov/ooc/citations/WayneFarms_975114_1028_14.pdf.

²² OSHA, Field Operations Manual, Effective date April 14, 2020, pp. 4-22-23, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164.pdf.

²³ OSHA, “OSHA Penalties,” <https://www.osha.gov/penalties>.

²⁴ Letter from Smithfield Foods, Inc. CEO Kenneth M. Sullivan to Senators Elizabeth Warren and Cory Booker, June 30, 2020, <https://www.warren.senate.gov/imo/media/doc/Smithfield.pdf>.

²⁵ Argus Leader, “Study: Smithfield Foods cluster larger than first reported,” Jonathan Ellis, August 6, 2020, <https://www.argusleader.com/story/news/2020/08/06/cdc-study-smithfield-foods-cluster-larger-than-first-reported/3310043001/>.

²⁶ OSHA, “U.S. Department of Labor Cites Texas Meat-Packing Plant For Exposing Workers to Highly Hazardous Chemicals,” press release, May 6, 2019, <https://www.osha.gov/news/newsreleases/region6/05062019>.

²⁷ OSHA, “US Labor Department's OSHA fines Wisconsin-based meat packing company VPP Group \$369,500 in penalties for 38 safety and health violations,” press release, August 31, 2010, <https://www.osha.gov/news/newsreleases/region5/08312010>.

²⁸ Los Angeles Times, “Meatpacker IBP Fined \$3.1 Million in Safety Action : Health Problem Disabled More Than 600, OSHA Says,” Donald Woutat, May 12, 1988, <https://www.latimes.com/archives/la-xpm-1988-05-12-fi-4248-story.html>.

²⁹ New York Times, “OSHA Seeks \$2.59 Million Fine for Meatpacker’s Injury Reports,” Philip Shabecoff, July 22, 1987, <https://www.nytimes.com/1987/07/22/us/osha-seeks-2.59-million-fine-for-meatpacker-s-injury-reports.html>.

Temporary Standard providing enforceable health and safety protections for workers specific to the threat of coronavirus. Without enforceable protections, and absent OSHA enforcement of general duty clause violations, meatpacking workers have been left at the whims of their employers, facing an unacceptable choice between their health and their paychecks. In response to a letter from a group of Senators requesting OSHA issue an emergency standard, DOL wrote in April 2020:

OSHA is able to issue an Emergency Temporary Standard (ETS) when there is a minimum level of workplace safety practice that is necessary to protect workers, but is not being followed by employers. ...at this time, we see no additional benefit from an ETS in the current circumstances relating to COVID-19.³⁰

There was ample evidence that employers were not protecting workers in the spring, and there is more evidence now.³¹

In order to gain clarity about why OSHA failed to take quick and adequate actions to enforce workplace safety laws and protect workers in meatpacking plants, we request your responses to the following questions no later than October 6, 2020.

1. What did OSHA find at the inspections of the cited JBS and Smithfield plants?
 - a. Did OSHA conduct on-site inspections of these facilities?
 - i. If so, when were these visits, how long were OSHA representatives at each facility, and were workers present when OSHA officials were conducting the inspections?
 - ii. If not, why not?
 - b. Did OSHA conduct any additional inspections of those facilities, and if so, what did they find?
 - c. Did OSHA interview any workers at these facilities? If so, how many workers were interviewed, and from what areas of the plant?
 - d. If OSHA did conduct on-site inspections for these facilities, why do the citations not reference specific areas in the plant where violations were present?³²
2. What accounted for the months between OSHA's inspections and OSHA issuing citations to Smithfield and JBS?

³⁰ Letter from Department of Labor Deputy Assistant Secretary Joe Wheeler to Senator Elizabeth Warren, April 10, 2020, on file with the office of Senator Elizabeth Warren.

³¹ Letter from Senator Elizabeth Warren to DOL Inspector General Scott S. Dahl, May 27, 2020, <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DOL%20IG%20requesting%20OSHA%20audit.pdf>

³² See, for example, the OSHA citations for violations of the general duty clause in multiple areas of a facility, citing conditions specific to that area: OSHA, Citation and Notification of Penalty, Inspection Number 975114, issued October 27, 2014, https://www.osha.gov/ooc/citations/WayneFarms_975114_1028_14.pdf.

3. What communications did OSHA have with Smithfield or JBS between March and September 2020?
 - a. When did Smithfield become aware of potential OSHA action, and how did they respond?
 - b. Did OSHA provide any COVID-19-related workplace safety recommendations or other feedback to Smithfield and JBS between March and September 2020? If so, what were these recommendations, and were they followed by JBS and Smithfield?
 - c. Specifically, did OSHA at any time provide feedback to Smithfield that was “overwhelmingly positive and reaffirmed the fact that [Smithfield was] operating at or above the standards set forth in the joint CDC and OSHA guidance”?³³
4. What communications did OSHA have with the American Meat Institute between March and September 2020 concerning these two cited facilities?
5. Why didn’t OSHA issue multiple violations to Smithfield and JBS for every failure to “implement ... effective measures to mitigate exposures to the hazards of [coronavirus]” in different parts of the worksite? Please explain what guidance OSHA followed in making this decision.
 - a. OSHA regularly issues multiple violations to the same facility.³⁴ Why was a different decision made in the cases of Smithfield and JBS?
 - b. Was any Senate-confirmed official at the Department of Labor involved in this decision in any way?
6. General duty clause violations can be classified as willful if “an employer has demonstrated either an intentional disregard for the requirements of the [OSH] Act or a plain indifference to employee safety and health.”³⁵ How did OSHA determine the violations by Smithfield and JBS were not willful?
 - a. Please explain specifically how OSHA considered each of the conditions for “intentional disregard of violations” and each of the conditions for “plain

³³ Letter from Smithfield Foods, Inc. CEO Kenneth M. Sullivan to Senators Elizabeth Warren and Cory Booker, June 30, 2020, pp. 6, <https://www.warren.senate.gov/imo/media/doc/Smithfield.pdf>.


³⁴ See, for example, OSHA Inspection 1171020.015 at https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1171020.015; OSHA Inspection 1096581.015 at https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1096581.015; and OSHA Inspection 313135832 at https://www.osha.gov/pls/imis/establishment.inspection_detail?id=313135832.

³⁵ OSHA, Field Operations Manual, Effective date April 14, 2020, pp. 4-22, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164.pdf.

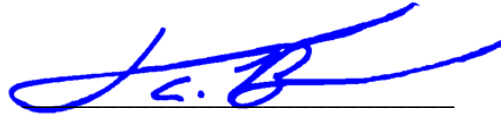
indifference violations” and determined they did not apply to either violation.³⁶

- b. For example, OSHA’s field operations manual states that “an employer commits an intentional and knowing violation if: an employer was aware of the requirements of the Act or of an applicable standard or regulation and was also aware of a workplace condition or practice in violation of those requirements, but did not abate the hazard.”³⁷ Smithfield has publicly stated that, “our plants are what they are,” in response to questions about implementing social distancing in their facilities, and said that the company will not slow down line speeds to allow for social distancing.³⁸ How was it determined that Smithfield’s actions do not constitute an “intentional and knowing violation”?
 - c. As another example, OSHA’s field operations manual also states that a willful citation can be issued “where an employer knows that specific steps must be taken to address a hazard, but substitutes his or her judgment for the requirements of the standard.”³⁹ How did OSHA determine that Smithfield’s actions did not constitute an “intentional and knowing violation”?
7. Given OSHA has now identified there is a “minimum level of workplace safety practice that is necessary to protect workers, but is not being followed by employers,”⁴⁰ does the agency plan to expeditiously promulgate an Emergency Temporary Standard for coronavirus?

Sincerely,



Elizabeth Warren
United States Senator



Cory A. Booker
United States Senator

³⁶ OSHA, Field Operations Manual, Effective date April 14, 2020, pp. 4-22-23, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164.pdf.

³⁷ Id., pp. 4-22.

³⁸ Letter from Smithfield Foods, Inc. CEO Kenneth M. Sullivan to Senators Elizabeth Warren and Cory Booker, June 30, 2020, <https://www.warren.senate.gov/imo/media/doc/Smithfield.pdf>.

³⁹ OSHA, Field Operations Manual, Effective date April 14, 2020, pp. 4-22, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164.pdf.

⁴⁰ As referenced in Letter from Department of Labor Deputy Assistant Secretary Joe Wheeler to Senator Elizabeth Warren, April 10, 2020, on file with the office of Senator Elizabeth Warren.