

## Securing Essential Work for Low Wage Workers

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Deepa Das Acevedo, [\*Essentializing Labor Before, During, and After the Coronavirus Epidemic\*](#), 52 *Ariz. St. L.J.* 1091 (2020).

The COVID crisis comes at a time of transition and peril for low wage workers, exposing and exacerbating their vulnerability under United States labor and employment law. The crisis also provides an opportunity for reimagining the state's responsibility towards low wage workers. Even before the pandemic, in today's gig economy an increasing number of workers lack any certainty about, and control over, their working lives. In *Essentializing Labor Before, During, and After the Coronavirus Epidemic*, Deepa Das Acevedo uses the COVID crisis to illustrate how the baseline at-will employment rules contribute to the precarity of the lives of low wage workers. Das Acevedo advocates rejecting the at-will doctrine to address that precarity.

In *Essentializing Labor*, Das Acevedo shows how the debate over who is an essential worker at the height of the COVID crisis revealed the failure of US labor law to protect the interests of low wage workers. Government measures to protect against COVID made it necessary to determine who is an "essential" worker. "Essential" workers such as medical workers, first responders, grocery store employees and food production workers were exempt from stay-at-home restrictions and could therefore keep their jobs even during the worst times of the COVID crisis.

However, being labeled an essential worker has been a double-edged sword – essential workers not only *could* go to work; they were often *required* to go to work, without sufficient measures to protect them from the disease, or risk losing their jobs. As a result, essential workers have been disproportionately likely to be infected with COVID and to die of the disease.

Arguably, essential workers (especially healthcare workers) have an obligation to society to continue to work in jobs that are essential to the health, safety, and welfare of the people. If so, however, our society has a reciprocal obligation to protect the health and safety of those workers. Yet the United States Supreme Court has repeatedly rejected claims that the government is constitutionally obliged to protect people from external harm. Thus, workers are dependent on positive law to protect them from danger in the workplace, including the danger imposed by a pandemic. Yet, as Das Acevedo explains, positive law actually increases their vulnerability.

Although the term "essential worker" has only recently become widely used, Das Acevedo explains that the term "essential labor" has long been important to US labor and employment law. During the pandemic, a worker is essential if her labor is essential to society. Before the pandemic, the determination of whether a worker was essential depended on the perspective of the employer. But neither determination is made from the perspective of the worker herself, even though the job is essential to the workers' well-being and survival.

Das Acevedo argues that, from the workers' perspective, all jobs are essential, not only because work is necessary for economic survival, but also because work is central to human flourishing and to one's identity. Moreover, in the United States a job is more essential than in other western democracies. Many benefits and legal protections in this country are linked to employee status, from health insurance to anti-discrimination laws. In the emerging gig economy, workers do not enjoy even the minimal benefits that adhere to the employee status. This distinguishes the United States from other western democracies, where the state provides health care and pensions, and where legal protections apply to all workers regardless of their technical status, providing a safety net for all workers, even if they are required to do essential jobs.

Notwithstanding the fact that being an employee is even more essential to workers in our country than in other countries, U.S workers have far less job security than workers in other western democracies. Under the employee-at-will system which underlies U.S. labor and employment law, workers can be fired at any time for just about any reason. Das Acevedo argues that doing away with the at-will doctrine is an essential step towards improving the lives of low wage workers. Replacing employee at will with just cause termination rules would give workers a baseline stability and certainty that they need for their essential jobs.

Recently, scholars have begun to explore the 13<sup>th</sup> Amendment's protection against involuntary servitude as a source of positive rights for low wage workers. Other scholars have argued that the Court should refine its 14<sup>th</sup> Amendment state action doctrine. In this article, and in all of her work on low wage gig economy workers, Das Acevedo lays the groundwork for theorizing their rights, all for all of those interested in creating a responsive state to protect vulnerable workers.

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