

The Honorable Eugene Scalia,
Secretary of Labor and
Cheryl Stanton, WHD Administrator
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

April 10, 2020

Dear Secretary Scalia and Administrator Stanton,

The undersigned 111 organizations write in response to the Department of Labor's (DOL or the Department) Temporary Rule: Paid Leave under the Families First Coronavirus Response Act (FFCRA) and sub-regulatory guidance. We appreciate the Department's recognition of the need for swift action in the face of the COVID-19 pandemic. These are critical protections that can save lives and lessen the extraordinary burdens on the millions of workers who need time to recover, self-quarantine, or provide care. As you have stated, paid leave is essential to help people maintain ties to employment. It is also essential to ensure that workers can comply with orders necessary to preserve the public health and stop the spread of this dangerous virus without sacrificing the health and economic security of themselves and their families.

We write with three purposes:

1. In light of the critical need to get income to as many families as possible during this unprecedented crisis (a need clearly recognized by the FFCRA), we urge you to reconsider a number of the decisions you have made regarding interpretations of FFCRA which have, in our view, impermissibly narrowed the number of workers covered and the scope of the protections afforded them, in contravention of the text of this important piece of legislation.
2. We are also concerned that there has been insufficient outreach and media attention to this new law and the rules implementing it. Without a large-scale, nationwide effort to get the word out, workers will not know that they have the right to income during this extremely difficult time. We need an outreach effort that recognizes the urgent and unprecedented need for information about the benefits guaranteed by FFCRA especially for workers earning low wages, who can least afford to stay home without paid leave.
3. Finally, we write to request that you ensure swift and robust compliance assistance and enforcement to protect workers. The Department was given \$15 million under the CARES Act and should use that funding for outreach and education as well as enforcement of the Emergency Paid Sick Leave Act

(EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA) provisions of the FFCRA.

1. Revisit and Improve the Regulations To Cover All Workers the FFCRA is Meant to Cover.

(A) Refine the expansive definition of health care providers and emergency responders to only apply to true health care providers and emergency responders rather than depriving millions of workers of benefits they should receive.

Rather than extend protections to workers as the law intended, the Department has excluded as much of the private sector workforce as possible, including health care professionals on the front lines. The law allowed employers of health care providers and emergency responders to opt out of providing their employees emergency paid leave, but DOL's regulation has an extraordinarily expansive definition of emergency responders and health care providers who can be excluded, including for health care providers:

anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility.

This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

These exclusions mean that someone working at a factory that happens to be manufacturing any kind of medical equipment would be excluded. It means that a person doing janitorial work at a hospital could be excluded. By DOL's own estimates, this could take protections away from an estimated 9 million health care workers and 4.4 million emergency responders. Many of those wrongfully deemed health care

workers or emergency responders will be low-wage workers who not only need paid sick time but really need to be able to stay home rather than spreading the virus where they work.

These overly broad exemptions are the inverse of the language of the FFCRA, which focuses on the role of the employee rather than of the employer, and create inconsistency within the statute and with existing FMLA regulations. The exemptions also impermissibly delegate to state officials the ability to define health care provider and emergency responder, which will only result in more workplace confusion.

The Department should reconsider the definition of health care providers and emergency responders to narrow the scope of workers excluded from the emergency paid leave protections. Many of these critical workers face an increased risk of exposure to the virus and must have access to paid sick leave and extended paid leave to protect the health of themselves, their families, and the public they serve.

(B) Develop a definition explaining when the viability of a small business will truly be threatened by giving paid sick time, and ensure a process for small business exemptions that will bar ineligible businesses while also providing for consistency and understanding of the rules.

The FFCRA provides that DOL has the authority to promulgate regulations for good cause when payment of leave for care of a child whose child care or school has been closed by small businesses with fewer than 50 employees would “jeopardize the viability of the business as a going concern.” DOL has developed a definition of when a business’s viability would be jeopardized so that the business would be eligible for an exemption that goes beyond financial viability.

DOL admits in the Regulation that their definition of the exemption of small employers with fewer than 50 employees could impact as many as 96 percent of employers covered by the law. Nonetheless, the Department has decided to let these 96 percent of covered businesses self-determine if they are eligible for the exemption without requiring them to even certify on a form that they meet the standards or share any information with DOL, much less requiring any review or appeals process for employees who will not be able to access paid leave. Allowing employers with fewer than 50 employees to self-determine if they are exempt from the law invites confusion and abuse, particularly since the question of when there is an employee who is necessary to the business or when there may be too many staff members taking leave such that the business’s viability would be threatened is a very difficult standard to fairly self-assess. There is already a great deal of confusion among small businesses as to whether they must be exempted under these standards and as to what provisions of the law the exemption applies to. Small businesses are entitled to tax credits for providing paid leave under the FFCRA so the situations where viability will really be an issue should be limited. Additionally, this means DOL has no way of knowing which or how many employers are claiming the exemption.

DOL should create a simple, one-page, online, check-the-box form that small businesses claiming an exemption must complete and certify is correct, under penalty of perjury, and submit to the Department of Labor. This will ensure small businesses understand that the conditions under which they may claim an exemption are limited to situations where they would be forced to close if they gave their employees FFCRA paid leave.

(C) Alter the regulations regarding intermittent leave to permit intermittent leave without the employer's consent.

Nothing in the language of the FFCRA limits a worker's ability to take intermittent leave to scenarios where the employer allows it. Yet the Department's regulations do just that.

Requiring workers who need intermittent leave to obtain their employers' consent is illogical and unenforceable and leads to internal inconsistency with the FMLA. Worryingly, the regulations do not even require that the employer negotiate the intermittent leave issue in good faith. For example, a single mother who shares custody of a young child whose school is closed will likely require intermittent leave to care for that child. If her employer refuses her intermittent leave, even for illegitimate reasons, she may be unable to care for her child during the periods when she has custody. That worker's need to care for her child is no less urgent because it is intermittent.

(D) Additional concerns

We have additional concerns about the Regulation and guidance narrowing workers' rights under the law, including the following, which we would be happy to address with you in more detail in follow-up communications:

- The requirement that an employer have work for the employee as a precondition to taking leave will significantly limit workers' ability to benefit from the FFCRA.
- The limitations on EFMLEA to workers who have not exhausted their FMLA leave means many workers will not benefit from the new rights created under this law.
- The extensive documentation requirements for workers, including requiring an employee requesting paid sick leave under § 826.20(a)(1)(i) to provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject may pose unnecessary barriers to workers' ability to take leave.

2. Outreach and Education So That Workers Know Their Rights Under the FFCRA

DOL must swiftly implement a comprehensive media, outreach, and education plan to inform millions of workers and employers about their new paid leave rights and requirements. It is critically important that information about the paid leave benefits is shared widely, so workers know they can use paid leave to stay home if they are sick, protecting the health of their co-workers and the public they serve, and helping slow the

spread of the virus and flatten the curve. Every day there are news reports of workers, primarily low-wage, going to work sick, and even dying, while making sure we have groceries, health care, food, deliveries, and supplies. Many of these workers now have access to new paid leave benefits but are not aware of them or do not know how to use them. DOL must raise awareness about the new paid leave law to increase its usage, especially among low-wage workers and workers of color, including clarifying that oral statements of the need for leave are sufficient. Lessons learned from the implementation of paid family and medical leave programs and paid sick days laws in states and localities have proved the importance of communicating to employees and businesses so everyone who is eligible can take advantage of these critical protections.

DOL has the resources, the authority, and the responsibility to ensure workers and employers are well-informed about the FFCRA paid leave provisions. DOL should use the \$15 million Congress provided to implement the laws to invest in significant and speedy “Know Your Rights” campaigns that include multilingual outreach and education to ensure employers understand their new obligations and employees understand their new rights under the law. This should include translating the fact sheets already on DOL’s website into more languages, informing employers that translated posters are available online, and encouraging employers to post notices in the language(s) spoken by their employees. This should also include sending funding to state agencies and local community groups to push “Know Your Rights” information directly to workers. DOL must make every effort, including interviews and ad-buys, to ensure that major outlets and social media channels are sharing information about this new right.

3. Compliance assistance and robust and timely enforcement to protect workers’ rights to paid leave

Given the unprecedented scope of this pandemic and workers’ immediate need to access paid leave to stay home if they are sick and comply with government orders and public health instructions, DOL should devote significant resources to aggressive implementation of the law. Millions of workers have access to new paid leave benefits, and DOL must protect workers’ rights by quickly enforcing the law and requiring compliance from employers. To that end, DOL should act immediately to stop their temporary period of non-enforcement of the law.

The Department must dedicate significant resources to aid workers who need assistance accessing their paid leave benefits. This should include assigning dedicated staff to FFCRA implementation to respond to workers’ queries and concerns. DOL should create a specific FFCRA paid leave hotline and website, available in multiple languages, to share information with workers and provide them immediate assistance with their questions and complaints. As with any new workplace protection, DOL should expect and prepare for violations by some employers denying paid leave to their eligible employees. It is especially critical for DOL to respond quickly to remedy these denials for workers who are sick and need paid leave immediately to prevent the spread of the virus. DOL should also track and report on the usage of paid leave benefits in order to ensure proper implementation and enforcement of the law.

The Department has the responsibility to ensure this law is broadly understood, used, and well-enforced. Paid leave is not only essential to protect the health of workers, their families, and our communities, but it also helps people maintain ties to employment so workers will have a job to return to and businesses will have experienced workers when the crisis is over. Now more than ever, our country needs permanent and comprehensive paid leave to survive this pandemic and guard against the next crisis we might face.

Sincerely,

Paid Leave for All
1,000 Days
A Better Balance
Addiction Connections Resource
Alabama Arise
Alianza Nacional de Campesinas
American Association of University Women (AAUW)
Americans for Democratic Action (ADA)
Asian Pacific American Labor Alliance, AFL-CIO
Asian Real Estate Association of America (AREAA)
Black Women's Roundtable, NCBCP
Bronx Baptist Day Care & Learning Center
California Employment Lawyers Association
Caring Across Generations
Center for American Progress
Center for Law and Social Policy (CLASP)
Center for Parental Leave Leadership
Center for Popular Democracy
Center for Public Policy Priorities
Center for Public Representation
Center for Science in the Public Interest
Central Florida Jobs with Justice
Citizen Action of New York
Closing the Women's Wealth Gap
Coalition on Human Needs
Colorado Fiscal Institute
Colorado Plaintiff's Employment Lawyers Association
CTUL (Centro de Trabajadores Unidos en la Lucha)
DC Jobs With Justice
Disability Rights Education & Defense Fund
Economic Opportunity Institute
Economic Policy Institute
Equal Justice Center
Equal Rights Advocates
Equality North Carolina

Family Equality
Family Values @ Work
Family Voices NJ
Farmworker Justice
Futures Without Violence
Hawai'i Children's Action Network
Human Rights Campaign
ICA
Institute for Women's Policy Research
Interfaith Worker Justice
International Brotherhood of Teamsters
Justice at Work
Justice for Migrant Women
Justice in Aging
LatinoJustice PRLDEF
Legal Aid at Work
Legal Voice
Maine Women's Lobby Education Fund
Make The Road States
March of Dimes
Maryland Center on Economic Policy
Massachusetts Attorney General Maura Healey
Mayor's Office of Labor City of Philadelphia
Minneapolis Department of Civil Rights
Mothering Justice
Muslim Public Affairs Council (MPAC)
NAACP
National Center For Law and Economic Justice
National Center for Transgender Equality
National Consumers League
National Domestic Workers Alliance
National Employment Law Project
National Employment Lawyers Association
National Immigration Law Center
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
National Workrights Institute
New York Legal Assistance Group
North Carolina Council of churches
North Carolina Justice Center
OCA-Asian Pacific American Advocates
Oxfam America
Pacific Community Ventures
Paid Leave for the United States (PL+US)
PARENT ENGAGEMENT ACADEMY

Partnership for Working Families
PathWays PA
Public Advocacy for Kids (PAK)
Public Justice Center
Restaurant Opportunities Center of DC
Restaurant Opportunities Center of Pennsylvania
Santa Clara County Wage Theft Coalition
Service Employees International Union (SEIU)
Shifting Hearts & Minds
Shriver Center on Poverty Law
South Florida COSH
South Florida Interfaith Worker Justice
SPAN Parent Advocacy Network
Tash
Texas RioGrande Legal Aid, Inc.
The Arc of the United States
The Leadership Conference on Civil and Human Rights
Together Colorado
Tremain Artaza, PLLC
UsAgainstAlzheimer's
Vision y Compromiso
William E. Morris Institute for Justice (Arizona)
Women Employed
Women's Fund of Rhode Island
Women's Law Project
Women's Rights and Empowerment Network
WOMEN'S WAY
Working Families Party
Working Partnerships USA
Workplace Fairness