

The Honorable Eugene Scalia  
Secretary of Labor  
US Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

Dear Secretary Scalia,

The undersigned 158 organizations write in response to the recently enacted Families First Coronavirus Response Act, Public Law No: 116-127, and urge the Department of Labor (DOL or the Department) to consider the following as you implement the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA) provisions of the law.

The EPSLA and EFMLEA provisions in the Families First Coronavirus Response Act provide critical paid leave to many employees affected by the COVID-19 pandemic. These are vital measures and will ensure access to paid leave for 22 million public sector workers and somewhere between an estimated 32 million to 67 million private sector workers, depending on how options for exemptions are used by businesses and approved by the Department of Labor.<sup>1</sup> The Department should make every effort to ensure that as many working people as possible are covered by the law. Unnecessarily excluding additional working people would endanger the health of these individuals, their families, and their communities. Low-wage workers, who are often in public-facing jobs, are least likely to have access to paid sick days or paid family and medical leave,<sup>2</sup> yet may be unable to afford time off without it, making it difficult to comply with government orders and public health recommendations.

**Regulations should narrowly construe exemptions:**

Small Business Exemption: We urge you to narrowly construe Section 5111 of the EPSLA and Section 3102 of the EFMLEA. The language of the law provides the Secretary authority to issue regulations to exempt small businesses with fewer than 50 employees from the ability to take leave to care for a child when “the imposition of such requirements would jeopardize the viability of the business as a going concern.” This is carefully crafted narrow language that indicates an exemption should only be contemplated if the requirement that sick leave -- or extended family leave -- would be the cause of the business no longer being able to function. The Department should, in the spirit of that language, make it clear that exemptions will not be granted unless payment of benefits would jeopardize the continuation of the business. We further believe that the language indicates the Department should implement a process for individualized assessment of the viability of a business. In particular, this is not an opportunity for the

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<sup>1</sup> Sarah Jane Glynn, Congress Must Extend Paid Leave Protections to All Workers in Next Coronavirus Response Bill, Center for American Progress, March 2020, <https://www.americanprogress.org/issues/women/news/2020/03/24/482196/congress-must-extend-paid-leave-protections-workers-next-coronavirus-response-bill/>

<sup>2</sup> Why Low-Wage Workers Need the Healthy Families Act, CLASP, March 2020, <https://www.clasp.org/publications/fact-sheet/why-low-wage-workers-need-healthy-families-act>

Secretary to wholesale exclude certain industries or sectors. There is no question that many businesses are already struggling, and we support providing relief to employers more quickly, such as through a preemptive grant that is verified later. The answer is not, however, to exclude millions of workers employed in small businesses from these critical leave rights.

Health Provider and Emergency Responder Exemption: We also urge you to institute a clear and narrow policy for excluding certain health care providers and emergency responders from the definition of eligible employee under the EFMLEA and EPSLA, such as requiring those employers to have an existing policy that meets or exceeds the requirements of the law. Health care workers are on the front lines of the COVID-19 crisis, risking their lives and exposing themselves to an increased risk of getting sick. Employers already have the option to opt out of the law's requirements. The Department should refrain from further limiting these workers' access to paid sick time in the event they do get sick. We understand the desire to limit new requirements on an already burdened health care system, but we must protect these critical workforces and the public that is relying on them now, more than ever.

**Clarify the availability of intermittent leave under EPSLA and EFMLEA:**

The Department should clarify that the law allows workers to take intermittent leave under both provisions, providing employers and employees flexibility to manage care for children and the employer's operations. The FFCRA does not include any limitations on employees' rights to take the new emergency FMLA leave on an intermittent basis. Therefore, guidance or regulations should clarify that employees have the right to use leave under the new 29 U.S.C. § 2612(a)(1)(F) intermittently as needed, consistent with the current intermittent use requirements (under 29 U.S.C. § 2612(b)(1)) for qualifying exigency leave (29 U.S.C. § 2612(a)(1)(E)). We believe that qualifying exigency leave is most similar to the leave provided under the new emergency purpose because it provides for exigency leave to provide emergency childcare -- here as a result of a family member's military service under 29 C.F.R. § 825.126(b)(3)(ii). The new law should be interpreted consistently with the regulations already in force under the FMLA for child care leave, allowing employees to take public health emergency leave intermittently on the same basis as qualifying exigency leave. We also urge you to adopt the same approach with regard to the law's new paid sick leave provisions -- interpreting provisions to the extent with reference to existing interpretations, creating a simple, consistent approach that is easy for both employers and employees to understand.

**Clarify Definitions and Terminology in EPSLA:**

"Quarantine"/"Isolation Order": The Department should ensure that the "quarantine or isolation order" language in Section 5102 of the EPSLA is interpreted as broadly as possible. Many state and local executives are issuing instructions to protect public health that go beyond the Center for Disease Control's "quarantine" and "isolation" definitions because of the need to quickly move to control community spread of the virus, particularly in large cities. The Department should make it clear that Section 5102(a)'s reference to a "Federal, State, or local quarantine or isolation order related to COVID-19" includes all governmental and public health official orders at the state and local level, whether they use the words "quarantine," "isolation," or other

instructions, such as to shelter-in-place and self-isolate. We believe this is consistent with the language of the statute but would like to see this clearly stated in regulations.

“Self-quarantine”: For 5012(a)(2), the Department should clarify that “self-quarantine” includes instructions to isolate because of illness.

Scope of “business is closed because of ... order to close”: We ask DOL to specify that employees of schools and child care operations or other businesses are eligible for leave under Section 5102(a)(1) if their place of business is closed because of a Federal, State, or local order to close schools or other businesses related to COVID-19. Again, we believe this is consistent with the statute but would request that it be specified in regulations.

Employment Relationship: The EPSLA uses the definitions of employee, employer, and to employ from the Fair Labor Standards Act (FLSA). We recommend sub-regulatory guidance or FAQ documents that employment relationships are determined for purposes of the Act’s large employer exemption consistent with the FLSA, with links to existing guidance on determining the existence of an employment relationship.

Substantially similar conditions under EPSLA:

EPSLA 5102(6) allows the Secretary, in consultation with the Secretary of the Treasury and the Secretary of Labor, to extend the purposes of leave to “any other substantially similar condition” to those listed. We urge the Secretary to consider two circumstances that are substantially similar to the purposes of leave articulated in EPSLA 5102(1)-(5). First, as mentioned above, the definition of “quarantine” and “isolation” under EPSLA section 5201(a)(1) should include federal, state, and local orders to shelter-in-place. We believe that these orders would be covered by the statutory text in any event, but they could also be considered “substantially similar.” Second, we believe that there are several “substantially similar situations” with respect to family caregivers that should be included: As with children who may no longer be able to attend school, many people with disabilities and older adults will also no longer be able to utilize their usual source of care. This will leave family members with new care responsibilities—preparing meals for their sibling with a disability or ensuring their parent or grandparent takes the appropriate dose of medication at the right time. These workers are being, and will be, impacted by COVID-19 even if they or the one for whom they are caring are not directly infected with the virus or under a self-quarantine order. We urge DOL, along with the Departments of Health and Human Services and Treasury, to ensure that these substantially similar conditions are incorporated into regulations.

**Guidance needed for EFMLEA:**

Employment Relationship: We would like to see clarification that the employment relationship under EFMLEA is determined by the FMLA, as amended. Guidance on the FMLA’s revised definitions of eligible employees and employers under the EFMLEA and existing guidance on the integrated employer test would be helpful, as the Department has started doing with the Families First Coronavirus Response Act: Questions and Answers page.

Interactions with non-emergency FMLA: It would be helpful to clarify that workers are eligible for EFMLEA leave if they have already taken 12 weeks FMLA within the past year because EFMLEA creates a new legal right to up to 12 weeks of protected time. It would also be helpful to indicate that if an employee takes EFMLEA leave under the new provision of the FMLA at Section 102(a)(1)(F) the employee will still be able to take FMLA for other purposes after the coronavirus crisis is over. At a minimum it should be clarified that FMLA leave will be available for other purposes even if the employee is still within their 12 month FMLA period after EFMLEA sunsets on December 31, 2020.

### **Eligible Employees and Interactions with Unemployment Insurance/Pandemic**

#### **Unemployment Assistance:**

Many employers are unfortunately having to furlough, place on administrative leave, or reduce hours of their employees. Guidance clarifying that workers on reduced hours or administrative leave are still employees eligible for paid leave may help employers and employees understand workers' eligibility for paid sick and emergency FMLA leave, versus needing to apply for unemployment insurance or Pandemic Unemployment Assistance (when enacted). When the third coronavirus response law is passed, it would also be helpful to clarify that employers have an obligation to allow employees to use their emergency paid leave before seeking Pandemic Unemployment Assistance.

#### **Interaction of EPSLA with State/Local Paid Sick Days laws:**

Section 5107 of the EPSLA ensures that the rights provided do not diminish employee's rights or benefits they are entitled to under any other Federal, State or local law, collective bargaining agreement, or existing employer policy. Guidance should state, therefore, that these leave rights are in addition to those provided by the employer as well as in addition to those required under state and local law.

#### **Health insurance coverage and paid sick leave:**

Guidance or regulations should clarify that, for employees taking covered paid sick leave under the law, it is an illegal form of discrimination prohibited under Section 5104 to terminate or in any way modify the terms of an employee's health insurance coverage while on leave, including by not providing any employer contribution to the cost of premiums the employer would have provided had the employee continued to work.

**Notice/Model Notice:** The Department should provide guidance with respect to Section 5103 of the EPSLA by indicating that a place where "notices to employees are customarily posted" should include websites, online handbooks, etc. and should encourage employers to ensure that all employees, including those working remotely or on leave, are provided this critical information. The Department's Model Notice should be written in plain language and provide clear information on workers' protections from retaliation and other discrimination under both Acts.

**Outreach and education:** The extraordinary current crisis, as well as the number of workers benefited by this law, requires a significant and speedy outreach and education campaign to ensure employers understand their obligations and working people understand their rights and

are not afraid to exercise them. Given the unprecedented scope of this pandemic and the immediate needs for leave to comply with government orders and public health instructions, DOL should devote significant resources to aggressive implementation.

Since the early 2000s, states and municipalities across the country have passed paid family and medical leave and paid sick days laws. These laws are intended to ensure workers do not have to make difficult decisions between caring for their loved ones, themselves, and paying their bills. The paid sick days laws include paid leave for reasons including sick time, safe time, and in some states paid sick time specifically can be used for a public health emergency. We urge that any education about the new laws providing COVID-19 leave also include information about these state and local laws or at least reference the fact that they may provide additional help. We also want to point out that because many of these laws have been in place for over five years, we have learned important lessons about the importance of communicating to businesses and employees about their benefits, robust public outreach and education campaigns, and educating healthcare systems and safety net providers who can share these resources with patients and clients.

We suggest a COVID-19 task force charged with implementation, creation of a hotline, monitoring of all calls to determine additional guidance needs, and partnering with community-based groups to ensure outreach to all populations. We further encourage creativity in using media and social media to spread awareness. This is an unprecedented public emergency but also an unprecedented response creating huge responsibility to get the word out to American workers about their rights.

**Enforcement:** Robust and timely enforcement is essential to ensure that workers who need leave immediately have access to it. This is particularly critical where some of these workers will lack a private right of action under the EFMLEA and many will be increasingly fearful of losing their job.

We suggest creating a mechanism for workers to submit questions and problems directly to the Department of Labor for review and to create further guidance for implementing these laws. We further ask that the COVID-19 task force and state governments be able to review data about the number and types of complaints made as well as the industry involved and any further specificity possible.

Paid leave is essential to help people maintain ties to employment. At this moment of public health crisis, it is essential to enable all Americans to stay healthy as Congress has recognized. It is in the best interests of workers to construe this legislation to help as many workers as possible, insuring they can support themselves and their families while protecting their health and the health of their neighbors and also seeing to it that workers will have a job to return to and businesses will have experienced workers when the crisis is over.

Sincerely,

9to5  
1,000 Days  
A Better Balance  
Alliance for a Healthy Kansas  
Amalgamated Transit Union, AFL-CIO  
American Association of University Women (AAUW)  
American Federation of Teachers  
American Muslim Health Professionals  
American Public Health Association  
Americans for Democratic Action (ADA)  
Arise Chicago  
Asian Pacific American Labor Alliance  
Asian Real Estate Association of America (AREAA)  
Beins, Axelrod, P.C.  
Bet Tzedek Legal Services  
Bronx Baptist Day Care & Learning Center  
California Employment Lawyers Association  
Caring Across Generations  
CATA - The Farmworkers' Support Committee  
Catholic Migration Services  
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  
Centro de los Derechos del Migrante, Inc. (CDM)  
Church World Service  
Citizen Action of New York  
City of Minneapolis Labor Standards Enforcement Division  
City of Seattle, Office of Labor Standards  
Closing the Women's Wealth Gap  
Coalition on Human Needs  
Colorado Fiscal Institute  
Colorado Organization for Latina Opportunity and Reproductive Rights  
Community Justice Project  
Community Organizing and Family Issues (COFI) / POWER-PAC IL  
CRLA Foundation  
DC Jobs With Justice  
Disciples Center for Public Witness  
Economic Opportunity Institute  
Economic Policy Institute  
Equal Justice Center (Texas)  
Equal Rights Advocates  
Equality North Carolina  
Family Equality  
Family Forward Oregon  
Family Values @ Work  
Farmworker Justice  
Futures Without Violence  
Georgia Budget and Policy Institute  
Greater New York Labor -Religion Coalition

Hawai'i Children's Action Network  
Heartland Alliance for Human Needs & Human Rights  
Hommel Law Firm  
Hope's Door  
ICA  
Indivisible Nation BK  
Insight Center for Community Economic Development  
Institute for Women's Policy Research  
Interfaith Worker Justice  
Jacobsen White Law, P.C.  
Japanese American Citizens League  
Jews United For Justice  
Jobs With Justice  
Justice at Work  
Justice at Work - Pennsylvania  
Justice in Aging  
Justice in Motion  
Kentucky Equal Justice Center  
Labor Project for Working Families  
LatinoJustice PRLDEF  
League of Women Voters of St. Lawrence County  
Legal Aid at Work  
Lutheran Episcopal Advocacy Ministry NJ  
Main Street Alliance  
Maine Women's Lobby Education Fund  
Make the Road Pennsylvania  
Massachusetts Law Reform Institute  
Maui Economic Opportunity, Inc.  
McKnight, Canzano, Smith, Radtke & Brault, P.C.  
Michigan Immigrant Rights Center  
Michigan League for Public Policy  
MomsRising  
NAACP  
NARAL Pro-Choice America  
NARAL Pro-Choice North Carolina  
National Association of Councils on Developmental Disabilities  
National Center for Law and Economic Justice  
National Center for Transgender Equality  
National Consumers League  
National Council of Jewish Women  
National Council of Jewish Women Los Angeles  
National Diaper Bank Network  
National Employment Law Project  
National Legal Advocacy Network  
National Partnership for Women & Families  
National Union of Healthcare Workers  
National Women's Law Center  
National Workrights Institute  
NC Justice Center  
NC State AFL-CIO  
NETWORK Lobby for Catholic Social Justice

New Jersey Citizen Action  
New Mexico Center on Law and Poverty  
New Working Majority  
New York Legal Assistance Group  
NJ Citizen Action  
NJ Time to Care Coalition  
North Carolina Council of Churches  
Ohio Domestic Violence Network  
Oxfam America  
Paid Leave for the United States (PL+US)  
Parent Engagement Academy  
Partnership for America's Children  
PathWays PA  
People's Parity Project  
Philly CLUW  
Polygon Education Fund  
Public Advocacy for Kids (PAK)  
Public Justice Center  
Restaurant Opportunities Center of DC  
Restaurant Opportunities Centers (ROC) United  
RESULTS  
Shriver Center on Poverty Law  
South Florida Council on Occupational Safety & Health  
South Florida Interfaith Worker Justice  
Southwest Women's Law Center  
Swipe Out Hunger  
TakeRoot Justice  
TASH  
Teamsters Local Union No. 705  
Texas RioGrande Legal Aid, Inc.  
The AIDS Institute  
The Arc of the United States  
The Restaurant Opportunities Center of Pennsylvania (ROC PA)  
The Women's Fund of Central Ohio  
The Workers Lab  
The YMCA of Greater Rochester  
TIME'S UP  
Union for Reform Judaism  
United for a New Economy  
United State of Women  
UsAgainstAlzheimer's  
WildFig Partners  
William E. Morris Institute for Justice (Arizona)  
Women & Girls Foundation  
Women AdvaNce  
Women Employed  
Women's Fund of Rhode Island  
Women's Funding Network  
Women's Law Project  
Women's Rights and Empowerment Network  
Worker Justice Center of New York

Workers Defense Project  
Working Partnerships USA  
Workplace Fairness  
YWCA Brooklyn