

Congress of the United States

Washington, DC 20510

April 1, 2020

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

Dear Secretary Scalia:

We write you to raise deep concerns with materials issued by the Department of Labor (DOL) interpreting the paid sick and family leave provisions of the Families First Coronavirus Response Act (FFCRA) and request you revise them immediately. Several of the statements put forth in the document, labeled “Questions and Answers,” contradict the plain language of the FFCRA and violate congressional intent.¹

In the guidance, DOL makes assertions regarding the following topics that are not in accordance with law:

- Q&A 15 and 16 regarding certification of the need for leave;
- Q&A 18 and 23-27 regarding what qualifies as being “unable to work” as well as employers’ ability to evade the requirements of the Act by closing a worksite, furloughing employees, or reducing work hours;
- Q&A 20, 21, and 22 regarding the ability to take leave intermittently;
- Q&A 55 and 56 regarding the definition of a “health care provider”; and
- the absence of a Q&A clarifying that “shelter in place” orders qualify employees for paid sick leave.

These items are addressed in turn below. We request these specific Q&A be removed immediately, revised in accordance with the FFCRA’s text and congressional intent, and re-posted on DOL’s website.

Q&A 15 and 16 – Certification of the need for paid sick or family leave

Regarding what records employers must keep and what documents employees must provide in order for an employee to qualify to receive paid sick or family leave, DOL states that certification should be required by employers, even though the FFCRA does not allow for any such requirement from employers nor from DOL.

Regarding recordkeeping, DOL states that to receive the refundable tax credit under the FFCRA, employers should keep records, including “any needed substantiation to be retained to support the credit,” and states that an employer “is not required to provide leave if materials sufficient to

¹ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

support the applicable tax credit have not been provided.”² DOL also states employees must provide whatever documentation is required in applicable IRS forms and that “Your employer may also require you to provide additional [documentation][sic] in support of your expanded family and medical leave taken to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons.”³

This conclusion has no basis in the text. Employers must provide paid leave if an employee meets one of the qualifying needs for such leave—and the employer has no authority to require certification of the need for leave. The text was written this way to ensure employees are able to use their newly-guaranteed paid sick and family leave during the COVID-19 pandemic in order to slow the spread of the disease, while also avoiding overburdening the healthcare system with the need for doctor certifications. Additionally, DOL’s suggestion that the ability of an employee to qualify for paid leave will be based on what the Treasury Secretary decides to require in terms of employer documentation for the refundable tax credit provided to employers is particularly alarming. That conclusion would provide the Treasury Secretary with the authority to delineate when employers can refuse to provide leave—specifically, when particular documentation is not presented by employees—which is an authority that is not granted to the Treasury Secretary in the FFCRA.

Furthermore, the paid family leave provisions of the FFCRA do not amend the FMLA to allow an employer to require certification beyond what the FMLA already allows. Employers’ ability to require documentation is currently restricted under the FMLA to documentation supporting the need for unpaid leave to care for a covered family member with a serious health condition or for the employee’s own serious health condition (and does not even extend to unpaid leave needed to bond with a newborn child or child placed for adoption or foster care).⁴ There is no indication anywhere in the text of the FFCRA that Congress intended to extend this ability to require certification to paid leave taken to care for a child whose school or place of care is closed, and DOL has no authority to extend it to such circumstances without a congressional directive.

Q&A 18 and 23-27 – Being “unable to work” and Reduced Hours, Furloughs, & Closures

Regarding what it means to be “unable to work” under the FFCRA—and to therefore qualify for paid sick or family leave—DOL states an employee qualifies as being unable to work solely if an employee is unable to work due to one of the qualifying reasons under the Act *and* “your employer has work for you.”⁵ Subsequently, in answers to questions 23 through 27, which pertain to whether an employer can cut off employees’ rights to paid sick or family leave by reducing hours, furloughing employees, or closing a worksite, DOL answers in the affirmative that employers have this ability under the FFCRA.

² “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

³ *Id.*

⁴ “Fact Sheet #28G: Certification of a Serious Health Condition under the Family and Medical Leave Act,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28g.pdf>.

⁵ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

Nothing in the text of the FFCRA indicates the employer must have work for an employee to perform on any particular day for that employee to be able to qualify for paid leave on that day—nor does it give employers the authority to refuse their employees their statutory right to paid leave by not assigning them work, furloughing them, or closing a particular worksite. This inaccurate conclusion would allow all employers to evade the requirements of the Act at any point during this pandemic by informing employees that it does not have work for them to perform at the moment—thereby fully depriving them of a day, a week, or 12 weeks of paid leave. This is a particularly outrageous outcome when viewed in the context in which Congress passed the FFCRA: a nation-wide social distancing directive and several state-wide orders to shelter in place. Under these circumstances, several businesses will obviously not have work to assign to employees, and Congress intended for such workers to still qualify for paid leave in such instances—otherwise, the purpose of the Act would be entirely defeated as workers in the hardest-hit of states would be deprived of paid leave at exactly the moments they need it most.

The paid leave requirements attach to any employee “unable to work” due to one of the qualifying reasons under the Act; it does not hinge on an employer being able to provide work to the employee on each of the days that the employee possesses one of those qualifying needs for paid leave. While Congress did not prohibit an employer from shutting down entirely and permanently laying off its employees, Congress did prohibit an employer from “discharg[ing], disciplin[ing], or in any other manner discriminat[ing] against” an employee due to the need for paid leave—reducing work hours, furloughing, or closing worksites, and using those actions to justify refusing to provide paid leave qualifies as such a prohibited act. DOL does not have the authority to say otherwise.

Q&A 20, 21, and 22 – Taking Leave Intermittently

Regarding the ability to take paid sick or paid family leave intermittently, DOL states an employee may only take their leave intermittently “if your employer allows it” and that unless the employee is teleworking then “paid sick leave...must be taken in full-day increments.”⁶ This conclusion is found nowhere in the text and gives the employer, rather than the employee who has the need for leave, the ability to decide how to use the employee’s leave.

The FFCRA gives employees the right to take paid sick leave that is specifically referred to as “paid sick time” throughout the act—not “paid sick days composed of a full workday”—and the Act includes a very clear definition of “paid sick time” as being “an increment of compensated leave that is provided by an employer for use during an absence from employment...”⁷ The Act specifies that “An employee shall be entitled to paid sick time for an *amount of hours*...” before delineating how those hours are to be calculated⁸ and goes on to prohibit an employer from requiring the employee needing paid sick leave to “find a replacement employee to cover *the hours during which* the employee is using paid sick time.”⁹ There is no indication in the text that an employee must take their paid sick time in such a way to compose a full and continuous workday of leave; the text, in fact, indicates the exact opposite. The only relevant limitation on

⁶ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

⁷ Families First Coronavirus Response Act, Pub. L. No. 116-127, Sec5110(5)(A).

⁸ *Id.* at Sec5102(b) (italics added).

⁹ *Id.* at Sec5102(d) (italics added).

the paid sick time in the Act is that the paid sick time stops beginning with the next scheduled workshift following the end of the employee’s need for leave—which DOL accurately articulates in Q&A 21 as describing that a particular period of paid sick time ends once there is no longer a qualifying need for such leave, with the employee retaining any unused paid sick time for future use.¹⁰ However, while the employee has a qualifying need for leave, the employee has the right to take that leave intermittently in the number of hours that the employee needs it for—and does not need their employer’s consent to do so.

DOL’s answer is particularly worrisome in the context of paid family leave, where DOL states paid family leave may only be taken intermittently “with your employer’s permission.”¹¹ The Family and Medical Leave Act (FMLA)—which the FFCRA amended to add paid family leave to during this crisis—provides explicitly for circumstances where unpaid FMLA leave may be taken intermittently and where it may not without employer agreement.¹² Without a similar congressional statement in the FFCRA, DOL lacks the authority to state that the leave may not be taken intermittently without employer agreement. Given that congressional intent was to respond to the unprecedented nature of this pandemic, DOL has the responsibility to provide the maximum flexibility for workers during this crisis—not restricting their leave to when employers’ grant their consent.

Q&A 55 and 56 – Definition of a “health care provider”

Regarding who qualifies as a “health care provider” for two separate purposes—determining who can advise self-quarantine under the Act and who may be exempted from paid sick or family leave by their employer under the Act—DOL provides two conflicting answers, defining the term extremely differently for the two situations even though there is neither a textual nor a logical basis for doing so.

In answer 55, DOL correctly states for the purposes of who may advise an employee to self-quarantine, which then qualifies the employee for paid sick leave, “health care provider” means “a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.”¹³ This is the only logical conclusion since Congress used the exact term from the FMLA itself—“health care provider”—and defined that term for the purposes of the FFCRA by directly adopting through cross-reference the definition in the FMLA.¹⁴ This definition should be used for these purposes and for all other similar purposes under the Act.

However, in answer 56, DOL states for purposes of determining which employees may be exempted from paid sick and family leave by their employers, a “health care provider” is any employee who happens to work for an employer who also employs a health care provider, works at any type of quasi-medical facility, works as an employee contracted for non-health care

¹⁰ Families First Coronavirus Response Act, Pub. L. No. 116-127, Sec5102(c).

¹¹ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

¹² See 29 USC 2612(b).

¹³ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

¹⁴ Families First Coronavirus Response Act, Pub. L. No. 116-127, Sec5110(4).

services in a facility that houses a health care provider, or merely works in the medical supply chain, stating:

...a health care provider is 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 definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions [sic] to provide services or to maintain 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-19.¹⁵

First, DOL lacks authority to deviate from the definition provided by Congress. Second, DOL has no basis for defining a term that Congress has defined narrowly elsewhere in labor law to be so unreasonably broad solely for the purposes of allowing exclusions from protections. Third, DOL may not grant broad authority to define this term to state officials. Fourth, DOL is completely out of accordance with law in this interpretation not only for the reasons stated above, but also because it is in contravention of the language of the text.

The FFCRA states explicitly the employee must themselves qualify as a health care provider in order to potentially be exempted (“an employer of *an employee who is a health care provider...* may elect to exclude *such employee...*”)—not that the employee works for an employer who is a health care provider, not that the employee works for an employer who also employs health care providers or works at a location that also houses health care providers, and not that the employee works in the supply chain of health care providers; but that they themselves are a health care provider, as defined in the FMLA.¹⁶ This is true even of the regulatory authority given to DOL in the paid family leave space, which states that DOL has the authority to exclude certain health care providers from the definition of an *eligible employee*—not that DOL can exempt from paid leave all employees who happen to work for an employer who also employs a health care provider.¹⁷ DOL’s attempt to state otherwise is wholly without merit and is in clear contravention of the Act.

¹⁵ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

¹⁶ Families First Coronavirus Response Act, Pub. L. No. 116-127, Sec3105 (“An employer of an employee who is a health care provider or emergency responder may elect to exclude such employee from the application of the provisions...”); Sec5102(a) (...an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee...) (italics added).

¹⁷ Families First Coronavirus Response Act, Pub. L. No. 116-127, Sec3102(b) (“The Secretary of Labor shall have the authority...to exclude certain health care providers and emergency responders from the definition of eligible employee under section 110(a)(1)(A);”); FFCRA sec5111 (“The Secretary of Labor shall have the authority...to

Absent Q&A – Clarification of “quarantine or isolation order”

DOL does not clarify in its Q&A document that a government order directing citizens to stay home and not attend work qualifies as a “Federal, State, or local quarantine or isolation order related to COVID-19,” which qualifies an employee for paid sick leave. The only reasonable conclusion of both the FFCRA’s text and congressional intent is that the Act encompasses such orders, including the 31 orders issued by Governors across the country as of March 31, which are referred to by various names, such as “shelter in place” or “safer at home” orders, but which generally order people to stay home and not go to work unless performing essential functions.¹⁸

However, DOL provides an indication of the exact opposite in Q&A 27 (covered above), which states an employee loses their right to paid leave if their employer closes the employee’s worksite, stating “[t]his is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State, or Local directive.”¹⁹ This is generally unreasonable as it relates to worksite closures as detailed above, but it is also alarming in that it implies to employers and employees that shelter in place orders may not qualify for paid leave—a conclusion that is not authorized by the Act.

It is critical for DOL to clarify this point so all employees and employers are perfectly clear that employees who are subject to such orders qualify for paid sick leave simply by virtue of being subject to such orders.

Conclusion

We request DOL immediately revise its materials in accord with the text and congressional intent of the FFCRA, as detailed above, and to reflect such revisions in any regulations DOL promulgates. For any questions regarding this letter, please contact Joe Shantz with the Senate Health, Education, Labor, and Pensions Committee Minority Staff at Joseph_Shantz@help.senate.gov or Liz Albertine, Legislative Director for Representative DeLauro, at Elizabeth.Albertine@mail.house.gov.

Sincerely,



PATTY MURRAY
Ranking Member, Senate Committee on
Health, Education, Labor, and Pensions



ROSA L. DELAURO
Chair, House Appropriations Subcommittee
on Labor, Health and Human Services,
Education, and Related Agencies

exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out;”).

¹⁸ “See Which States and Cities Have Told Residents to Stay at Home,” *The New York Times*;

<https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

¹⁹ “Families First Coronavirus Response Act: Questions and Answers,” Wage and Hour Division, Department of Labor; <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.