Advocating for Workers Affected by COVID-19: Rights and Remedies under the Family First Coronavirus Response Act (FFCRA) and Related Laws
Advocating for Workers Affected by COVID-19

How Workers Are Affected

By COVID-19

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ANXIETY & FEAR ABOUT COVID-19

COVID-19 can be overwhelming & cause strong emotions.

Stress can include:
- Fear & worry about your own health
- Fear & worry about the health of a loved one(s)
- Changes in sleep or eating patterns
- Difficulty sleeping or concentrating
- Worsening of chronic health problems
- Worsening of mental health conditions
- Increased use of alcohol or other substances

Up to 106 Million Workers were Excluded from Coronavirus Relief Policies
- Center for American Progress
Because of the Coronavirus public health emergency, Congress passed a law providing paid sick days and paid family leave for some workers. Here is information on who is covered and for what, and what your rights are.
Response Categories: Questions, Statements, Concerns

1. Exhausted All Options
2. Navigating the Best Possible Option
3. Still Working Despite Need for Time Off
4. Employer Issues: Retaliation, Confusion About FFCRA
“I Am Out of Options”

- PA health provider with an autistic child learned that the Dept of Corrections claimed the health care provider exemption.
- I’m afraid to submit my application - my green card expired. I have a permanent resident card. I didn’t realized it's expired. I don't have the money to renew it.
- ATT call center worker asked if the 500+ exemption was national employer or local work site. They are excluded but we learned that ATT extended their PTO days for COVID, giving this worker 2 more weeks of time to figure out how to home-school and work outside.
- Excluded CA Worker learned that they could use the CA State Paid Leave Fund to extend the time they needed for caregiving.
Navigating: PSDs, PFL, UI

I am an employee of a company with 500+ employees and not eligible for additional paid sick leave or leave to take care of my 2 kids who are out of school. I have also been notified that I've been laid off effective the first week of May, after which point I may claim unemployment. However since I also have a side business as a self-employed consultant I think I am eligible to get paid leave under the new law and that may be worth more than the unemployment. I need to know what kind of documentation I need to get the paid leave and how to calculate what I am eligible for.
Still Working....

I work at a nursing home where 75% have tested positive. I care for my dad and am afraid I might get him sick because of where I work.
Experiencing Employer Issues

I am a single mom, only support for both of my kids, my 93 yr old grandmother and 70 yr old aunt. My employer took a PPP loan and is forcing me off of unemployment and saying I have to go back to work at a unsafe restaurant and is bullying me and threatening me, my well being and the security of my family and our well being.

I am in quarantine. I need to know how to protect myself from an employer that is abusing the SBA Emergency Fund. He is collecting the funds, while attacking his employees hoping they will quit.
Counseling Workers During the COVID-19 Era

Liz Morris, Deputy Director
Center for WorkLife Law,
University of California, Hastings Law
Questions about leave typically come from:

- People with caregiving responsibilities
  - Childcare
  - Eldercare
  - Family member with disability/health issue, incl. COVID-19

- People with health concerns
  - Worker at high risk (pregnancy, diabetes, asthma, obesity, etc.)
  - High risk family/household member
  - General concerns about risk and unsafe working conditions

- People out of work or facing job loss
  - Layoff/furlough
  - Facing termination
Examine All Legal Angles

Tip #1: Consider leave options, beyond FFCRA

- Check regularly for new COVID-19 Emergency Leave Laws
- State and local paid sick leave
- Leave as an ADA accommodation
- Leave as an accommodation for pregnancy (Pregnancy Discrimination Act or state law)
- FMLA and state-level equivalents
  - COVID-19 can be a “serious medical condition”
  - “Psychological comfort and reassurance” for family member. 29 CFR 825.124.
Examine All Legal Angles

Tip #2: Ask whether an accommodation is better for the worker

- Accommodations that may help during a pandemic:
  - remote work
  - higher-quality PPE (masks, face shield, goggles)
  - plexiglass
  - HEPA filters
  - temporary transfer to alternate position
  - modification of job duties
  - modified schedule or reduced hours
  - alternate work location
  - work uniform changes
  - administrative leave
Ask whether an accommodation is better for the worker, cont’d

• “Do you have any health conditions?”
  • ADA disabilities (diabetes, heart conditions, cancer, immunocompromised state, etc.)
  • Pregnancy and breastfeeding
  • Obesity, in some states
  • No accommodation entitlement for seniors, so important to ask for medical conditions!
  • Leverage right to take leave for an accommodation
Tip #3 When worker feels unsafe: explore whether the employer is complying with health and safety guidelines

- Typically not enforceable, but can apply pressure:
  - CDC
  - OSHAs
  - State and local health departments
- Complaints to government agencies
- Limited private claims: see handout
Examine All Legal Angles

Tip #4 Probe whether discrimination played a role

• Mothers, fathers, and other caregivers are being pushed out
  • Family Responsibilities Discrimination (FRD) (Caregiver) statutes
    • 185 FRD laws around the country
    • No administrative exhaustion
    • Typically uncapped damages and fees
    • Clean slate – sky’s the limit!

• Title VII and state-level sex discrimination laws
  • Stereotyping (mothers and fathers)

• ADA: Associational claims (need not be family)
Probe Whether Discrimination Played a Role, cont’d

- People at greater health risk may be pushed out to avoid liability:
  - People with disabilities
    - Americans with Disabilities Act
  - Seniors
    - Age Discrimination in Employment Act (40+)
  - Pregnant and breastfeeding workers
    - Pregnancy Discrimination Act and Break Time for Nursing Mothers law
Probe Whether Discrimination Played a Role, cont’d

• Retaliation
  • asking for leave
  • asking for an accommodation
  • complaining about health and safety

• Wrongful discharge in violation of public policy (e.g., stay-at-home orders)

• Race, national origin, and other protected classifications
Tip #5 Rely on Labor Unions

Most collective bargaining agreements require compliance with federal, state, and local law
Look for Helpers

Tip #6 Coach Health Care Provider Gatekeepers

• Can communicate with provider about what is reasonable
  • E.g., Don’t write: “My patient cannot be exposed to any risk of coronavirus” unless really true.
  • Instead try: “My patient must have access to appropriate PPE, including goggles.”
  • Medical recommendations can be amended later.
Coach Health Care Provider Gatekeepers, cont’d

• Use WorkLife Law’s note-writing guidance for pregnancy and breastfeeding (www.PregnantAtWork.org)
Counsel the Worker

Tip #7 Clearly explain their legal rights in plain language, but be comfortable with the novelty and uncertainty presented by COVID-19.

Remember, some people are going through the most difficult time in their lives.
Tip #8 Discuss potential for retaliation and strategies to avoid it

• Illegal, but no guarantees (worker decides to take risk)
• Strategize how to frame requests/complaints
• National Labor Relations Act Section 7: protects concerted worker activity for mutual aid or protection, even when workers are not in a union, so long as they act in concert with another employee
• Keep notes and memorialize agreements with employer
Counsel the Worker

Tip #9 Inform about Unemployment Insurance and Pandemic Unemployment Assistance, & FLAG APPEAL DEADLINES!

- Common for employees to assume, often incorrectly, they are not eligible for unemployment benefits
  - Share the basics and encourage them to apply when they are out of work.
  - Resources available in handout “the basics”
Inform employee about income replacement programs, cont’d

• **UI**: rules differ state to state, but many states modified suitable work requirements and relaxed requirements around availability and job searching.
  
  • **Bottom line**: folks are eligible now for UI where they would not have been in the past. Apply!
Inform employee about income replacement programs, Cont’d.

• **PUA**: income replacement for those out of work or working less who are not eligible for regular UI, but who are out of work for reasons enumerated in the CARES Act, including:
  • independent contractors,
  • people with caregiving responsibilities,
  • people with COVID-19 or caring for patient
  • people at risk due to underlying health conditions
  • Many other enumerated reasons.
  • **Bottom line: Apply!**
• Unfortunately, delays, confusing procedures, undocumented folks ineligible, and improper denials are common nationwide.

• Reach out to newly-created clinics that are operating at legal aid orgs and law schools

• Get applications in ASAP to get ball rolling

• Help callers denied benefits to identify quick-turnaround appeal deadlines
Counsel the Worker

Tip #10 Inform about other lifelines

• 211: mental health, shelter and housing, utilities, crisis hotlines, supplemental nutrition programs, health care, and more

• Local legal aid orgs
Tip #11 Offer something in writing

- Center for WorkLife Law’s fillable forms for requesting FFCRA leave
  - Includes info ER needs to claim tax exemption
  - English and Spanish
  - www.worklifelaw.org

- Write or ghost-write letter to employer

- Basic education handouts
  - E.g., IRS/DOL printouts
Take Care of Yourself

Tip # 12 Access Attorney Support

• Call the Center for WorkLife Law on caregiver discrimination (FRD)
  • Formulating claims and litigation support
  • FRD attorney network
  • Liz Morris – 415-565-4640
• Remember, even if there is no legal remedy, your listening ear helps
• This is hard – take time for self-care
FFCRA: CURRENT CASES, CHALLENGES AND EMERGING ISSUES

PRESENTED BY M. FRANCES RYAN AND EDWARD C. SWEENEY
WEBINAR MATERIALS

• DEPARTMENT OF LABOR FINAL RULE ON FFCRA

• NEW YORK V. DEPARTMENT OF LABOR OPINION

• JONES V. EASTERN AIRLINES SELECT PARTS OF LEGAL BRIEF
NY V. DEPARTMENT OF LABOR CHALLENGE

- WORK AVAILABILITY REQUIREMENT
- DEFINITION OF “HEALTH CARE PROVIDER” AS “ANYONE EMPLOYED AT …”
- INTERMITTENT LEAVE EMPLOYER CONSENT REQUIREMENT
- DOCUMENTATION REQUIREMENTS “PRIOR TO TAKING LEAVE”
NY V. DEPARTMENT OF LABOR RESULTS

- KNOCKS DOWN WORK AVAILABILITY REQUIREMENT
- KNOCKS DOWN DEFINITION OF HEALTH CARE WORKER: STATUTORY DEFINITION “ANY OTHER PERSON DETERMINED BY THE SECRETARY TO BE CAPABLE OF PROVIDING HEALTH CARE SERVICES”
- KNOCKS DOWN REGULATORY REQUIREMENT THAT EMPLOYER CONSENT TO INTERMITTENT LEAVE
- KNOCKS DOWN “PRIOR TO TAKING LEAVE” REQUIREMENT
CASE EXAMPLES

STEPHANIE JONES V. EASTERN AIRLINES

- HIGHLY COMPENSATED WOMAN WHO HAD JOINED THE COMPANY OCTOBER 2019
- SINGLE MOTHER WITH SON WHOSE SCHOOL CLOSED DUE TO COVID-19
- VISITING MOTHER FROM TEXAS WITH COVID-19 SYMPTOMS
- ONLY BLACK HIGH LEVEL EMPLOYEE AT EASTERN AIRLINES
STEPHANIE JONES’ EXPERIENCE IN MARCH 2020

- TELECOMMUTES LIKE OTHER EASTERN EMPLOYEES AFTER STAY HOME ORDER
- AFTER FFCRA BEGINS ASKING FOR FLEXIBILITY TO CARE FOR SON WHILE TELECOMMUTING
- HR LEADER TELLS JONES SHE IS ELIGIBLE FOR LEAVE
- MARCH 24 EMAIL -- FMLA/FFCRA LEAVE
- TERMINATED MARCH 27
CHALLENGES

- PA SCHOOLS CLOSE STARTING MARCH 13 -- THERE IS NO LEGAL PROTECTION FOR PARENTS

- FFCRA ON MARCH 18 BUT WHEN DOES IT TAKE EFFECT?

- ARE DIFFERENT PARTS OF FFCRA EFFECTIVE ON DIFFERENT DATES?

- CAN WORKERS TAKE INTERMITTENT LEAVE UNDER FFCRA WHILE TELECOMMUTING?
EFFECTIVE DATE OF FFCRA

- STATUTE SAYS “NOT LATER THAN FIFTEEN DAYS AFTER THE ENACTMENT”

- JOHNSON V. UNITED STATES: ALL LAWS EFFECTIVE UPON ENACTMENT UNLESS CONGRESS SETS PROSPECTIVE DATE

- DOL 4/1 Q&A SAYS PAID LEAVE PROVISIONS ARE EFFECTIVE ON APRIL 1

- DOL 4/6 RULE SAYS ELIGIBLE EMPLOYEES MAY TAKE EXPANDED FAMILY AND MEDICAL LEAVE DURING THE PERIOD APRIL 1 THROUGH DECEMBER 31
DID EMPLOYERS HAVE A LICENSE TO RETALIATE BEFORE APRIL 1?

- EASTERN AIRLINES SAYS YES, BECAUSE
  - NO PART OF THE LAW WAS EFFECTIVE BEFORE APRIL 1
  - JONES DID NOT HAVE 12 MONTHS OF SERVICE FOR FMLA LEAVE
DID EMPLOYERS HAVE A LICENSE TO RETALiate BEFORE APRIL 1?

- STEPHANIE JONES SAYS NO BECAUSE
  - SHE WAS PROTECTED FROM RETALIATION AND INTERFERENCE BY FMLA 1993 PROVISIONS
  - SHE WAS PROTECTED FROM RETALIATION BY FLSA
  - FFCRA ANTI-RETLALATION PROVISIONS WERE EFFECTIVE MARCH 18 AND PROTECTED HER FROM TERMINATION
  - FFCRA PROVISION SHORTENING TIME IN SERVICE TO 30 DAYS WAS EFFECTIVE MARCH 18
PAUL SIMONE WAS MAINTENANCE SUPERVISOR AT LTC HOME

COVID-19 INFECTION WIDESPREAD THROUGHOUT FACILITY

SIMONE ASKS FOR N95 MASK AND WAS DENIED

SIMONE TELLS SUPERVISOR HE HAS COVID-19 AND IS TERMINATED

SIMONE GETS SICK AND INFORMS SUPERVISOR HE HAS COVID-19 SYMPTOMS AND IS STAYING OUT OF WORK TO GET DIAGNOSIS BUT WILL COME IN FOR EMERGENCIES

SUPERVISOR LIES AND SAYS SIMONE RESIGNED
MAJOR CHALLENGE FOR SIMONE—IS HE COVERED BY FFCRA?

- STATUTORY EXCEPTION FOR HEALTH CARE WORKERS
- DOL RULE EXPANDS DEFINITION OF HEALTH CARE WORKER BEYOND STATUTE
- SECRETARY’S AUTHORITY AND CHEVRON DEFERENCE
- WHAT DOES IT MEAN FOR AN EMPLOYER TO ELECT TO EXCLUDE?
Families First Coronavirus Response Act & Other Leave Laws

TIME’S UP Legal Defense Fund
August 18, 2020
FEDERAL PAID SICK TIME AND COVID: Background

• Families First Coronavirus Response Act (FFCRA): paid leave in two parts; effective April 1, 2020

• FFCRA leave provisions sunset December 31, 2020
Two Kinds of Leave in FFCRA

• Emergency Paid Sick Leave
• Emergency Family and Medical Leave (EFMLA)
Emergency Sick Leave: Coverage

• Applies to public agencies regardless of size and private entities that employ fewer than 500 employees

• Key potential exceptions:
  – Healthcare providers (note definition)
  – Emergency responders
  – Employers with fewer than 50 employees (child care purposes only)
Emergency Sick Leave: Duration

• Employees are entitled to up to 80 hours of emergency paid sick leave.
  – Full-time: 80 hours of paid sick time
  – Part-time: average number of hours worked in 2 weeks
Emergency Sick Leave: Purposes

- Subject to a federal, state, or local quarantine or isolation order related to coronavirus (including shelter-in-place);
- Advised by health care provider to self-quarantine due to concerns related to coronavirus;
- Experiencing coronavirus symptoms and seeking medical diagnosis;
- Caring for an individual subject to federal, state, or local quarantine or isolation order related to coronavirus; or advised by health care provider to self-quarantine due to concerns related to coronavirus;
- Caring for a son or daughter if a school or place of care closed or child care provider unavailable due to coronavirus
Emergency Sick Leave: Wage Replacement

• For self care: 100% of regular pay,* up to $511 per day ($5,110 total)

• For care of others or school closures: 2/3 of regular pay,* up to $200 per day ($2,000 total)

*For workers making less than minimum wage, substitute the applicable minimum wage.
Emergency Sick Leave: Other provisions

• Can be used immediately, regardless of length of employment
• Can be used *prior* to any other available leave (and does not diminish existing rights)
• Job protected for all covered employees
Emergency Sick Leave: Enforcement

• Enforced as FLSA minimum wage violations
• Private right of action or USDOL complaint
EFMLA: Coverage

• Applies to state & local government agencies regardless of size and private entities that employ fewer than 500 employees
• Must have been employed with employer at least 30 days

• Key potential exceptions:
  – Healthcare providers (note definition)
  – Emergency responders
  – Employers with fewer than 50 employees
  – Most federal employees
EFMLA: Purposes

• **Extended leave:** Amends the FMLA to include new purpose (“public health emergency leave”)

• **Purposes:** Unable to work due to need to care for a child whose school or place of care has been closed, or the child care provider is unavailable, due to coronavirus
EFMLA: Duration & amount of pay

• Workers can take up to 12 weeks of EFMLA leave:
  – First 2 weeks may be *unpaid*
  – Remaining 10 weeks must be *paid* at 2/3 of regular pay,* up to $200/day ($10,000 total)
EFMLA: Employment Protections

• **Reinstatement:** Employees who take EFMLA are entitled to get their job (or an equivalent job) back following leave
  – **Exception:** Employers with fewer than 25 employees are not required to reinstate employees under specific conditions

• **Retaliation:** All EFMLA-covered employees are protected against retaliation

• **Health insurance:** All EFMLA-covered employees are entitled to continuation of employer-provided health insurance while on leave
EFMLA: Enforcement

- Employers with < 50 employees: USDOL complaint only
- Employers with 50+ employees: USDOL complaint or private right of action
FFCRA: Tax Credits

- Subject to certain requirements, employers can be reimbursed for the full amount paid for emergency sick leave and EFMLA through refundable, advanceable tax credits (up to the caps)
On August 3, SDNY struck down certain provisions of the DOL regulations:

- Work availability requirement
- Health care provider definition
- Employer consent for intermittent leave
- Time requirement for documentation
FMLA

• Covered employees may also be able to use regular FMLA for COVID-related purposes:
  – Recovering from own COVID or COVID-related serious health condition
  – Caring for a family member with COVID or COVID-related serious health condition

• Note impact on duration
State & Local Emergency Laws

• Over 30 states and cities have passed their own emergency leave policies.
• Many of these policies fill in the gaps of the FFCRA (such as coverage of employers with more than 500 employees).
State & Local Permanent Sick Time Laws

- 13 states and over 20 cities and counties have passed paid permanent sick time laws providing protections beyond the emergency.
- These laws can offer important additional protections, including many that specifically cover school closures due to public health emergencies.
State & Local PFML Laws

• For those with extended health or caregiving needs, such as those dealing with ongoing health needs from contracting COVID-19, state paid family and medical leave laws may offer additional protections.

• 8 states and DC have passed these laws (though some are still being implemented).
Additional Information

- abetterbalance.org
- mwilliamson@abetterbalance.org
- 1-833-NEED-ABB
THE NEXT CORONAVIRUS PACKAGE MUST:

- Close the loopholes and include all workers, no exclusions!!
- Expand Emergency PSSDs through 2021
- Expand Emergency Paid Leave through 2021 and include family and medical caregiving reasons
- Make all paid leave and PSSDs permanent policies that are job protected
- Maintain the UI policies - Thru 2021
- Fund our city, state governments
- Ensure Increased Access to Healthcare
- Include a robust child care assistance package $50B or more
- PASS THE HEROES ACT - FIGHT FOR ITS PROVISIONS
Turn Up the Advocacy: MAKE SOME NOISE!

- TWEET AT YOUR SENATORS - PASS THE HEROES ACT
- PLAN VIRTUAL TOWN HALLS - INVITE ELECTED OFFICIALS
- DO HOUSE VISITS - THEY ARE HOME!
- PLACE OP-EDS ON PAID LEAVE, COVERING ALL WORKERS, CLOSING THE LOOPHOLES
- PUBLISH BLOGS
- GET CREATIVE: VIDEO, ART, MUSIC