

Congress of the United States
Washington, DC 20515

October 2, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Scalia:

We write regarding the implementation of paid leave provisions of the Families First Coronavirus Response Act (FFCRA) by the Wage and Hour Division (WHD) of the Department of Labor (DOL).¹ We are concerned that the Administration is actively defying Congressional intent and may be attempting to limit the number of workers who use paid sick and paid family leave benefits to which they are entitled.

All workers in the United States should be able to take time away to care for themselves or their loved ones without fear of losing their jobs or livelihood. Access to paid leave is particularly crucial during the COVID-19 pandemic. It undermines both our economic recovery and our efforts to combat coronavirus when workers must choose between working and staying home when they or their family members are sick or quarantining in order to protect others.

On a bipartisan basis, Congress recognized this by authorizing historic paid leave provisions through FFCRA—which expanded access to paid leave by requiring some employers to provide paid sick days and paid leave for certain purposes during the COVID-19 crisis.

While FFCRA’s paid leave provisions were an important step forward, DOL’s implementation of the provisions has limited their effectiveness by narrowing eligibility, neglecting to adequately inform workers of their eligibility, and failing to vigorously investigate complaints of employer violations—or to set out a plan to do so in the future.

On August 3, 2020, a federal judge for the Southern District of New York ruled that DOL defied Congress’s intent in implementing FFCRA paid leave provisions, noting that the Department “jumped the rail” by exempting certain employees who are health care providers from paid leave benefits.²

¹ Families First Coronavirus Response Act, Pub. L. No. 116-127 (2020) (online at www.congress.gov/116/plaws/publ127/PLAW-116publ127.pdf).

² *State of New York v. United States Department of Labor, et al.*, No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020) (online at www.nysd.uscourts.gov/sites/default/files/2020-08/State%20of%20New%20York%20v.%20United%20States%20Department%20of%20Labor%20et%20al%2C%2020-cv-3020%20%28JPO%29.pdf).

Similarly, just four days later, on August 7, 2020, the Department of Labor Office of Inspector General (OIG) released a report noting deficiencies in DOL's implementation of FFCRA's paid leave provisions. The OIG found that DOL used a definition of "health care provider" that is broader than that established by the Family and Medical Leave Act (FMLA) of 1993 to exclude certain employees from paid leave benefits.³ According to the OIG, DOL's estimate that approximately nine million health care providers could be excluded from paid leave eligibility is an underestimate that fails to account for all professions that Congress intended to be covered by FFCRA's broader definition.⁴

The OIG also noted that during the COVID-19 pandemic, DOL has reduced on-site investigations of complaints of employer violations, which is impacting DOL enforcement activities and oversight of FFCRA worker protections—including paid leave benefits. The OIG found that DOL lacks sufficient plans for how it will use \$2.5 million in funding allocated through the Coronavirus Aid, Relief, and Economic Security (CARES) Act to ensure that it fulfills FFCRA obligations, such as outreach and enforcement.⁵

Although DOL recently revised FFCRA's paid leave regulations in light of the federal court's ruling, its implementation of the law's paid leave provisions remains flawed, and serious questions remain regarding the reasoning behind its actions.⁶ Under the updated rule, a greater number of workers are still excluded from paid leave benefits than those defined as "health care providers" by FMLA. DOL also failed to update its rule to wholly account for the federal court ruling, leaving unchanged the requirements that employees may take paid leave only if work would otherwise be available and that employees have employer approval to take leave intermittently—both of which were struck down by the District Court.⁷

As a result of DOL's flawed implementation of FFCRA, America's workers have been prevented from accessing critically important paid leave protections. For this reason, and in an effort to better understand DOL's implementation of FFCRA, we ask that you provide written responses to the following questions and information requests by October 16, 2020:

³ Family and Medical Leave Act of 1993, Pub. L. No. 103-3 (online at www.congress.gov/103/bills/hr1/BILLS-103hr1enr.pdf).

⁴ Department of Labor, Office of Inspector General, *COVID-19: WHD Needs to Closely Monitor the Pandemic Impact on Its Operations* (Aug. 7, 2020) (online at www.oig.dol.gov/public/reports/oa/2020/19-20-009-15-001.pdf).

⁵ *Id.*

⁶ Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg. 57677 (Sept. 16, 2020) (online at www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act).

⁷ *State of New York v. United States Department of Labor, et al.*, No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020) (online at www.nysd.uscourts.gov/sites/default/files/2020-08/State%20of%20New%20York%20v.%20United%20States%20Department%20of%20Labor%20et%20al%2C%2020-cv-3020%20%28JPO%29.pdf).

1. What efforts has WHD taken to promote the use of paid sick leave and paid family leave by eligible workers and employers and to inform workers that they may be eligible for paid leave? Please provide:
 - a. A timeline of any such efforts;
 - b. An assessment of whether outreach efforts to workers occurred early enough in the COVID-19 pandemic to maximize workers' awareness of their benefits;
 - c. A description of the metrics DOL is using to evaluate these efforts' effectiveness; and
 - d. An assessment of the extent to which WHD has utilized the available \$2.5 million in the Coronavirus Aid, Relief, and Economic Security (CARES) Act funds for such efforts.
2. Why has WHD repeatedly used a broader definition of "health care provider" than that of the Family and Medical Leave Act of 1993 to exempt a greater number of workers from paid leave eligibility?
3. How did WHD arrive at its initial estimate that nine million health care providers would be impacted by the definition it used to exempt certain workers from paid leave benefits?
4. What additional actions will DOL take in response to the federal court ruling in *New York v. Department of Labor* regarding the scope of these exemptions?
5. Please provide a list of the enforcement actions WHD has taken with respect to FFCRA paid leave provisions.
6. What actions is DOL taking to address concerns raised in the OIG report, including those pertaining to implementation of FFCRA paid leave provisions and the effectiveness of DOL's oversight of FFCRA paid leave provisions?
7. Since FFCRA was signed into law, how many complaints has WHD been receiving per week from workers regarding FFCRA paid leave benefits? Please provide the following breakdown of the nature of these complaints:
 - a. For each week or month, how many and what percentage of complaints WHD has received are from workers with care or health needs that fall within the scope FFCRA paid leave provisions versus outside the scope of FFCRA paid leave provisions;
 - b. How many and what percentage of these complaints are from workers in companies that are too large to be covered;
 - c. How many and what percentage of these complaints are from workers who have been denied leave due to one of the three employer-based exemptions;

- d. How many and what percentage of these complaints are from workers who have likely been wrongly denied leave; and
 - e. How many and what percentage of these complaints pertain to violations of FFCRA paid leave provisions?
8. How long has it taken for WHD to respond to and to investigate complaints regarding violations of FFCRA paid leave provisions?

In addition, we request that DOL provide a briefing to our staff by the same date on these matters. Thank you for your immediate attention to this request.

Sincerely,



JIMMY GOMEZ
Vice Chair
House Committee on
Oversight and Reform



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



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