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SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS

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<https://coronavirus.house.gov>

July 21, 2020

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

Dear Secretary Scalia,

The Select Subcommittee on the Coronavirus Crisis is reviewing the Department of Labor's implementation and enforcement of the paid leave provisions of the Families First Coronavirus Response Act (FFCRA).¹ In passing this law, Congress intended to make paid leave more widely available to American workers during the coronavirus pandemic, in order to protect workers and their families and help stop the further spread of this deadly virus. However, under your leadership, the Department of Labor's rule appears to ignore the law's intent by allowing millions of businesses to deny FFCRA paid leave to their employees. Reports also indicate that the Department has failed to adequately inform workers of their right to take leave and failed to rigorously enforce businesses' obligation to provide leave.

The FFCRA requires employers with 500 or fewer employees to provide their employees with two weeks paid sick leave at full pay if the employee contracts the coronavirus or is quarantined, two weeks leave at two-thirds pay to care for a sick or quarantined family member, and up to ten weeks of additional leave at two-thirds pay to care for a child whose school or other care provider is closed as a result of the virus. The law provides for tax credits to reimburse employers for costs related to this paid leave. To ensure employees know about the law, the FFCRA requires employers to post a notice about their ability to take paid leave and prohibits retaliation against employees who request it or file any complaint or institute any proceedings related to such leave.

The Centers for Disease Control and Prevention recommends that employers actively encourage employees to stay at home when sick in order to protect other employees and reduce the spread of coronavirus in the workplace.² Given the record-high rates of new infections

¹ Families First Coronavirus Response Act, Pub. L. No. 116-127; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (amending certain FFCRA provisions relating to paid leave).

² Centers for Disease Control and Prevention, *Reducing the Spread of COVID-19 in Workplaces* (updated May 3, 2020) (online at www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html#Reducing-the-Spread-of-COVID-19-in-Workplaces).

across the country—and the recent warning from Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, that daily new cases could “go up to 100,000 a day if this does not turn around”—it is imperative that sick employees are able to stay home.³

The FFCRA provided the Secretary of Labor with authority to issue regulations for “good cause” to exclude certain health care providers and emergency responders from the definition of eligible employee and to exempt small businesses with fewer than 50 employees from certain paid leave requirements when the imposition of such requirements “would jeopardize the viability of the business as a going concern.”⁴

The Department’s regulations provide an extremely broad interpretation of the employer exceptions in the FFCRA,⁵ which may prevent millions of employees from accessing the leave provisions passed by Congress. For example, the Department’s rule on health care providers allows employers to exclude “anyone employed” at any health care facility—including janitors and cafeteria workers—as well as people working in medical schools, local health departments, nursing or retirement facilities, pharmacies, “or any similar institution.” The Department also broadly defines emergency responders to include military, law enforcement officers, corrections officers, fire fighters, child welfare providers, and “public works personnel,” among others. These frontline workers are susceptible to exposure to the coronavirus and may spread it to vulnerable patients and other frontline workers if they do not have adequate paid leave.⁶

The Department’s regulations also significantly broadened the FFCRA small business exemption from certain paid leave requirements. For example, the Department’s rule allows a small business to deny paid leave if an otherwise eligible employee’s absence would “pose a substantial risk to the financial health or operational capacity” of the business. A business can also deny leave to an employee if the business “cannot find enough other workers who are able, willing, and qualified” to serve as replacements.⁷

The Department’s rule also does not require an employer to provide the Department with substantiation to justify denying FFCRA leave to an employee, making verification and enforcement exceedingly difficult.

³ Dr. Anthony Fauci Says U.S. Coronavirus Outbreak Is ‘Going To Be Very Disturbing,’ Could Top 100,000 New Cases a Day, CNBC (June 30, 2020) (online at www.cnbc.com/2020/06/30/fauci-says-us-coronavirus-outbreak-is-going-to-be-very-disturbing-could-top-100000-cases-a-day.html).

⁴ Families First Coronavirus Response Act, Pub. L. No. 116-127; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136.

⁵ Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg. 19326 (Apr. 6, 2020); Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act; Correction*, 85 Fed. Reg. 20156 (Apr. 10, 2020).

⁶ *Health Care Workers on the Front Lines of Coronavirus Don’t Get Expanded Paid Sick Leave Protections*, Texas Tribune (Apr. 6, 2020) (online at www.texastribune.org/2020/04/06/texas-medical-workers-left-out-coronavirus-paid-sick-leave-protections/).

⁷ Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg. 19326 (Apr. 6, 2020); Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act; Correction*, 85 Fed. Reg. 20156 (Apr. 10, 2020).

The impact of the Department’s overbroad rule for the small business exception may be dramatic. According to the Department’s own estimates, Congress’ paid leave provisions would potentially apply to nearly 6 million businesses with 500 employees or fewer—but nearly 5.8 million of these, or 96 percent, have 50 or fewer employees and are covered by the Department’s overbroad small business exemption. Contrary to the intent of Congress, the Department has effectively given businesses the unchecked ability to carve out a large swath of American workers from receiving emergency paid leave.

The Department also has failed to ensure that workers are aware of their right to paid leave and to effectively inform employers of their obligation to provide it. Surveys and media reports suggest that more than half of employees are not aware of these rights, and that many employers are unaware of their duty to provide FFCRA leave. Many employers have not provided employees with notice of their paid leave rights as required by law and have failed to take necessary steps to allow employees to use this leave.⁸

For all these reasons, the Select Subcommittee requests that you produce the following documents and information by August 4, 2020. These requests are consistent with House Resolution 935, which established the Select Subcommittee on the Coronavirus Crisis “to conduct a full and complete investigation” of the “efficiency, effectiveness, equity, and transparency of the use of taxpayer funds and relief programs to address the coronavirus crisis,” the nation’s “preparedness for and response to the coronavirus crisis,” and “any other issues related to the coronavirus crisis.”

1. Please provide all internal and external communications, comments, and stakeholders’ feedback regarding the development and adoption of the definitions of “health care worker” and “emergency responder” for purposes of the FFCRA leave exemption;
2. Please provide all internal and external communications, comments, and stakeholders’ feedback regarding the development and adoption of the small business exemption for purposes of the FFCRA leave exemption;
3. Congress appropriated \$15 million in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for the Department to prevent, prepare for, and respond to coronavirus, including enhancing public awareness of FFCRA paid leave. Please provide a detailed description of the steps the Department has taken to ensure employers and workers are aware of these paid leave provisions, and the amount of CARES Act funds the Department has spent in connection with these activities;

⁸ See, e.g., *Paid Leave Law Tries to Help Millions in Crisis. Many Haven’t Heard of It*, New York Times (May 8, 2020) (online at www.nytimes.com/2020/05/08/upshot/virus-paid-leave-pandemic.html); *Pandemic Paid Leave Is Available: Why Some Parents Aren’t Taking It*, New York Times (June 10, 2020) (online at www.nytimes.com/2020/06/10/parenting/pandemic-paid-leave.html).

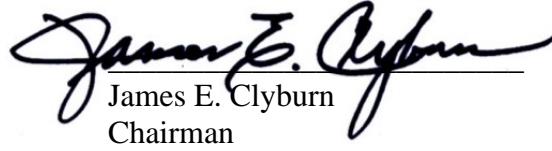
4. Is the Department tracking businesses that relied on the small business exemption to deny FFCRA leave to workers?
 - a. If so, provide a detailed description of the Department's process;
 - b. How many businesses have denied leave to employees on the basis of the FFCRA small business exemption, and how many employees at these businesses have been impacted? and
 - c. Has the Department asked any business for documentation of its reasoning for claiming the FFCRA small business exemption, and if so, identify the number of businesses for which it has it made such a request; and
5. How many businesses have granted FFCRA paid sick leave? How many businesses have granted FFCRA paid family and medical leave?
6. How many employees have used FFCRA paid sick leave? How many employees have used FFCRA paid family and medical leave?
7. How many complaints, including but not limited to complaints involving lack of notice, refusal to provide leave, or employee retaliation, has the Department received regarding FFCRA paid leave? Please provide a complete list of complaints, including the company, the location, the reason for the complaint, and disposition of the complaint (e.g., logged in a database, under investigation, Department enforcement action, etc.);
8. Is the Department tracking complaints about FFCRA paid leave? If so, identify the database you are using and describe how the Department is using the information;
9. How many FFCRA paid leave enforcement actions has the Department taken? Please provide a complete list, including the company, the location, the basis for the enforcement action, and disposition of the action:
 - a. How many resulted in a penalty?
 - b. What were the total penalties imposed?
 - c. How much back pay has the Department recovered?
10. How many claims for coverage of FFCRA paid leave has the Department approved, and how many has the Department denied?

An attachment to this letter provides additional instructions for responding to the Select Subcommittee's request. If you have any questions regarding this request, please contact Committee staff at (202) 225-4400.

The Honorable Eugene Scalia
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Thank you, in advance, for your prompt attention to this matter.

Sincerely,


James E. Clyburn
Chairman

Enclosure

cc: The Honorable Steve Scalise, Ranking Member

Responding to Oversight Committee Document Requests

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.
4. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and TIF file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.

7. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2105 of the Rayburn House Office Building.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic

message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term “including” shall be construed broadly to mean “including, but not limited to.”
5. The term “Company” means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; (b) the individual’s business or personal address and phone number; and (c) any and all known aliases.
7. The term “related to” or “referring or relating to,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term “employee” means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
9. The term “individual” means all natural persons and all persons or entities acting on their behalf.