

Protecting Workers' Jobs and Income During COVID-19

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SUMMARY. The COVID-19 pandemic has exposed and exacerbated the harmful impacts of disparities in access to workplace supports like paid leave and unemployment benefits, and has led to worsening economic conditions for people already living on the margins. Workers in the United States have long experienced a crisis around care – too often having to risk their jobs and income when they or their loved ones become ill. The United States is one of the only countries in the world without universal, guaranteed, job-protected paid leave. A complex patchwork of laws allows some workers to take time off work to care for themselves and their families, but low-wage workers are often excluded from coverage or otherwise face barriers to accessing these protections. The unemployment insurance system provides temporary, partial wage replacement to those who lose their jobs through no fault of their own. But some workers, including undocumented immigrants, are excluded, and cumbersome rules and administrative obstacles prevent many others from accessing benefits. In March 2020, Congress enacted temporary emergency paid sick and family leave for the first time, as well as expanded unemployment benefits, but both programs have serious gaps that disproportionately impact women, people of color, low-income workers, and immigrants. This Chapter examines the income and job protection policy responses to COVID-19 and recommends additional solutions that center the needs of low-wage workers and families, and prioritize racial and gender equity and access for immigrants.

Introduction

Income and Job-Protection Policies Before the Pandemic

Until the pandemic, the United States stood out as one of the only countries in the world without any guaranteed right to paid sick days (WPAC, 2020) or paid parental leave (Livingston & Thomas, 2019).

Since 1993 the Family and Medical Leave Act (FMLA) has provided 12 weeks of unpaid, job-protected leave, with continued health insurance, to address a worker's own or a family member's serious health condition or to bond with a new child. FMLA was amended in 2008 to also cover military caregiving leave. But at least 40% of workers do not qualify for FMLA given the law's strict requirements (50+ employees within 75 miles, one year of service, and 1,250 hours worked in the prior year). Low-wage workers are disproportionately excluded. Even among those who qualify, most cannot afford to take unpaid leave. Sixty-one percent of Black adults, 67% of American Indian and Alaska Native adults, and 71% of Latinx adults are either ineligible for or cannot afford to take unpaid FMLA leave, compared to 59% of white adults (Joshi et al., 2020). Moreover, FMLA is narrow, allowing leave only to address serious illnesses or new child bonding and covering only parents, spouses, and minor children. The law does not contemplate care needs because of school closures, or bereavement leave.

The Americans with Disabilities Act (ADA) requires employers with at least 15 employees to provide reasonable accommodations, which can include unpaid leaves of absence, to a worker with a disability, unless it would pose an undue hardship. However, employers are not required to continue health insurance under the ADA.

Some states have their own job protection and disability accommodation laws. Eight states and the District of Columbia have enacted paid family and medical leave laws, and 13 states have enacted paid sick days laws, with many localities providing more sick days than offered under state law. Some employers voluntarily provide paid leave. But millions of workers are either not covered by or face barriers accessing these benefits, and those earning low wages often have the least access. Among civilian employees in 2019, only 31% of the lowest wage workers had access to paid sick days, compared to over 90% of the highest earners (DeSilver, 2020). As of 2019, only 5% of the lowest wage workers had access to any paid family leave through their employers, compared to 30% of the highest earners (BLS, 2020). Forty-eight percent of Latinx workers and 36% of Black workers report having no paid time off of any kind (BLS, 2019).

Since the 1930s, the unemployment insurance (UI) system has provided temporary, partial wage replacement benefits to people

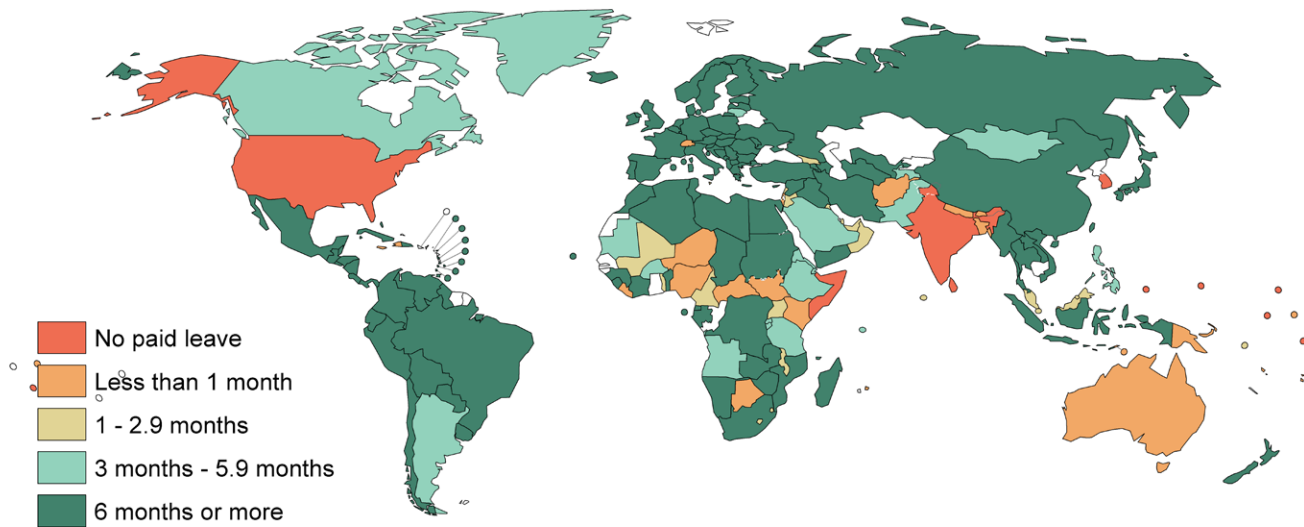


Figure 28.1. For how long are workers guaranteed paid sick leave? Source: WORLD Policy Analysis Center, 2019, www.worldpolicycenter.org

who are unemployed or underemployed through no fault of their own. To be eligible, claimants must be able to work, available for work, and have sufficient earnings in their base period (typically a one-year period prior to becoming unemployed). Claimants must have had valid work authorization during their base period and at the time they apply for benefits. As a result, undocumented immigrants are excluded. Until recently, new entrants to the workforce and self-employed workers had been left out as well.

Even before the pandemic, many people faced obstacles accessing UI benefits due to antiquated systems, confusing forms, language barriers, and a system that incentivizes employers to contest benefits to avoid higher tax rates. Benefit amounts vary by state, with the most generous jurisdictions covering only 50% of a worker's prior wages – not nearly enough to make ends meet, especially for people earning low wages.

Policy Responses to the Pandemic

The Families First Coronavirus Response Act (FFCRA), enacted March 18, 2020, represents the first ever federal paid leave policy in the United States. A temporary measure effective April 1 through December 31, 2020, the law provides two weeks of emergency paid sick days, and up to 12 weeks of paid leave to address coronavirus-related school closures or childcare unavailability. The law covers workers at employers with fewer than 500 workers.

Under the FFCRA, paid sick days can be used by an employee who: (1) is subject to a quarantine or isolation order; (2) has been advised by a health care provider to self-quarantine; (3) has symptoms of COVID-19 and is seeking diagnosis; (4) is caring for an individual subject to quarantine or isolation order or who has been advised to self-quarantine; or (5) is caring for a child whose school is closed or care provider is unavailable due to COVID-19. The law allows the secretary of Health and Human Services to designate other similar conditions in which paid sick days may be used.

Workers taking paid sick days for their own health (reasons 1-3) receive 100% of their wages up to \$511/day. Those caring for others (reasons 4 and 5) receive two-thirds pay, up to \$200/day. For extended school closure leave, the first two weeks may be unpaid (though an employee may use their two weeks of paid sick days to cover those weeks), and for the following 10 weeks, an employee receives two-thirds pay, up to \$200/day. To be eligible for extended leave, the employee must have worked for the employer for 30 days. Employers pay workers directly but are reimbursed via refundable tax credits.

The FFCRA allows exemptions for employers in the health care and emergency responder industries. For leave taken due to school closures, the law allows employers with fewer than 50 employees to claim an exemption if the leave would jeopardize the viability of the business. Under Department of Labor (DOL) regulations, businesses with fewer than 50 employees can exempt themselves without providing any explanation.

Some states and localities have attempted to fill the gaps left by the FFCRA. For example, on April 16, 2020, California Governor Gavin Newsom issued an executive order giving food sector workers (including grocery store employees, delivery drivers, etc.) at hiring entities with at least 500 employees the right to two weeks of paid sick days for certain purposes. Likewise, a number of jurisdictions, including New York State, Colorado, and the District of Columbia, have enacted emergency paid sick leave for reasons related to COVID-19, and other states and localities including Arizona, Oregon, Minneapolis, and New York City have issued administrative guidance clarifying that existing permanent paid sick leave laws may be used for certain reasons related to COVID-19 (ABB, 2020).

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted March 27, 2020, expanded UI benefits in significant, albeit temporary, ways. It created a new program, Pandemic

Unemployment Assistance (PUA), which covers people who are not eligible for state UI benefits, including self-employed individuals and people with insufficient prior earnings. In addition to covering people who lose work due to COVID-19, PUA also covers people who are sick or caring for others with COVID-19 and who cannot work due to school closures. PUA is set to expire at the end of 2020. The CARES Act also created the Pandemic Unemployment Compensation (PUC) program, which provides an additional \$600 per week, through July 2020, to anyone receiving unemployment benefits, including PUA. The Act also provides an extra 13 weeks of benefits tacked onto the end of state UI benefits, expiring December 31, 2020.

Beyond leave and unemployment insurance, some jurisdictions have implemented innovative policies to support workers affected by COVID-19. For example, California created a \$125 million disaster relief fund providing \$500 grants, up to \$1,000 per household, for undocumented workers who are unable to access traditional unemployment benefits. Other states and localities have created similar disaster relief programs providing one-time payments, while Oregon implemented a \$20 million program providing weekly hardship payments to undocumented workers for a maximum of four weeks. Additionally, some localities like Los Angeles, San Jose, and San Francisco have adopted “right of recall” ordinances, which provide workers who have been laid off in industries heavily impacted by COVID-19 a right to return to their jobs once their employer reopens.

Assessment

Guaranteed Paid Leave for All Workers

Even before the coronavirus crisis hit, workers earning low wages, immigrants, people of color, workers with limited English proficiency, and LGBTQ+ individuals faced barriers to paid leave (Chang, 2015; Joshi, 2020). With workers now having less job security and even more caregiving responsibilities, the country is experiencing a caregiving and public health crisis that is hitting people with low incomes and intersectional identities especially hard.

The lack of universal, job-protected paid leave in the United States has long forced millions of workers to choose between their livelihood and their health. In the midst of a pandemic, the lack of these supports has even graver repercussions for our entire society. Without access to paid sick days and job-protected paid family and medical leave, many workers who are sick or exposed to the virus feel they have no choice but to go to work for fear of losing their jobs and income. This can spread infectious disease, including to other workers who are facing job instability, making tracing and containment nearly impossible. The Centers for Disease Control and Prevention estimated that during the H1N1 pandemic, seven million people were infected and 1,500 died because sick employees did not stay home.

Many of the paid leave laws that were on the books prior to COVID-19 are inadequate to meet workers’ needs during this pandemic. Among those with access to paid sick days, for example, the vast majority have nine days or fewer. But the COVID-19 incubation period can be as long as 14 days, and the disease can last much longer once symptoms begin.

Existing laws also do not cover the circumstances that many workers are facing in this crisis. For example, someone who is exposed to or infected with COVID-19 but remains asymptomatic may not qualify as having a serious illness or disability under the FMLA, the ADA, or analogous state laws. Likewise, existing leave laws may not offer protection to an employee who is not sick, but is vulnerable to severe complications because of their age or underlying conditions, or if they live with someone who is over 65 or otherwise vulnerable to complications.

Unfortunately, the FFCRA has not adequately addressed these gaps, and has exacerbated preexisting racial and socioeconomic disparities. According to the Center for American Progress, the law leaves up to 106 million workers without guaranteed protections (Glynn, 2020). At best less than half the private sector workforce has any guaranteed leave under the FFCRA, and at worst only 17% are covered (Glynn, 2020). Especially troubling, the law excludes millions of essential workers, who are predominantly people of color, immigrants, and women. Under DOL regulations that interpret the law’s exemptions extraordinarily broadly, everyone employed in the healthcare and emergency responder sectors can be excluded regardless of their job title. These exemptions are in addition to the millions who are automatically excluded because they work for employers with at least 500 people, including many essential grocery, agricultural, and retail workers. The vast majority of health care workers, including those working in nursing homes and providing care to elderly and at-risk individuals, may have no choice but to go to work sick or risk losing their job.

Moreover, FFCRA leave is only fully paid if taken for an employee’s own health and not for caregiving, which disproportionately harms women who do the bulk of family care. The Act also only provides two weeks to people who are sick with or caring for someone with COVID-19, even though the illness can last much longer.

Working parents, many of whom are sandwiched between caring for young children and older adults, are disproportionately harmed by inadequate leave protections. With the pandemic already lasting several months with no end in sight, 12 weeks of leave to care for children whose schools are closed is inadequate. Reports indicate that schools likely will open only part time, if at all, this fall, but the FFCRA does not allow intermittent leave unless the employer agrees, which means many parents will need to find alternative care or stay home and risk losing their job. Women are more likely to have been laid off, to have left, or to have considered leaving work to care for their families in the pandemic (Cassella & Mueller, 2020). Women of color are especially disadvantaged by school closures and inadequate leave policies, with potentially long-lasting detrimental effects on their families’ economic security, health, and wellbeing (Frye, 2020). Further, the FFCRA only provides extended leave to address care unavailability for children, not adults, which negatively impacts workers caring for older loved ones or those with disabilities.

Some states and localities have enacted paid leave laws that go beyond the FFCRA, but gaps remain. And the patchwork of federal, state, and local leave laws is confusing and difficult to navigate. Because employers pay benefits under the FFCRA, effective implementation requires extensive funding for outreach and

compliance assistance, as well as vigorous enforcement efforts to prevent retaliation against workers. With courts and labor agencies operating with limited capacity due to the pandemic, workers may face challenges enforcing their rights when employers violate the law.

Improved Access to Unemployment Insurance for All Workers

In a May 2020 survey, over 43% of adults said they or someone in their family had lost a job or income as a result of the economic fallout of COVID-19, with disproportionate losses among low-wage and Latinx workers (Acs & Karpman, 2020). The CARES Act has expanded access to UI for many nontraditional and low-income workers. The additional \$600 in weekly benefits under the PUC program has been shown to significantly lower poverty rates for people of color (DeParle, 2020). But unless Congress extends these supplemental benefits, they will expire at the end of July 2020, leaving millions without the ability to feed and house their families. A Congressional Budget Office report found that the cutoff of these benefits will disproportionately harm women and Black and Latinx workers.

The new benefits under the CARES Act also have added new layers of complexity, causing confusion about eligibility rules and how to navigate the system. For example, gig workers in some states could potentially be eligible for either regular UI or Pandemic Unemployment Assistance. In California, misclassified workers are entitled to regular UI but have to undergo a wage audit, leading to significant delays. Application and certification forms are confusing, and claimants may face overpayments and improper assessment of penalties for making “false statements” even if errors are made in good faith.

Although self-employed workers are newly eligible for pandemic unemployment benefits, those who have both wages and self-employment earnings are forced onto regular UI, and their benefit amounts do not account for their self-employment earnings, resulting in low benefit awards.

Further, as the economy reopens and people are called back to work, many will be working reduced schedules. But under offset rules in many states, earning even a fraction of one’s prior wages may make a worker completely ineligible for benefits. Others who are called back will feel unsafe returning but risk losing their benefits if they refuse to return to their jobs.

Administrative barriers, including inadequate staffing and outdated and under-resourced government systems have dramatically impeded access to benefits at a time when record numbers of people are needing assistance. State unemployment agencies have faced significant challenges in responding to this historic crisis. In a May survey, only 36.3% of adults whose families experienced job loss had received UI benefits in the previous 30 days (Acs & Karpman, 2020). Reports abound of people calling agencies dozens of times a day for days and weeks on end, without being able to reach anyone to address their questions. Claimants with limited English proficiency and without computers are especially harmed by insufficient access.

Perhaps the most significant gap in the current UI system is the categorical exclusion of undocumented workers. The U.S. workforce includes approximately 7.6 million undocumented workers, and research shows that they are facing disproportionately high rates of unemployment due to the pandemic. In California alone it is estimated that 357,867 undocumented workers have lost their jobs since the start of the pandemic (Flores & Padilla, 2020). While some states and localities have implemented disaster relief programs that provide undocumented individuals with one-time grants, these are woefully insufficient to meet the needs of workers and families who have gone months without any source of income. 🌞

Recommendations for Action

Federal government:

- Pass the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act to eliminate the employer exemptions to paid leave in the Families First Coronavirus Response Act (FFCRA) and to provide comprehensive emergency paid sick leave and paid family and medical leave, fully funded by the federal government.
- Enhance FFCRA enforcement by
 - o Allocating more funding to the Department of Labor (DOL) for FFCRA enforcement and outreach;
 - o Funding legal aid and community organizations to engage in outreach and enforcement;
 - o Requiring DOL to advise workers and employers to consult state and local laws that go above and beyond federal law to increase awareness of and compliance with all applicable leave protections;
 - o Requiring employers claiming exemptions under FFCRA to report and justify the exemptions to DOL.
- Pass the FAMILY Act to create a permanent paid family and medical leave social insurance program.
- Pass the Healthy Families Act to permanently guarantee employer-provided paid sick days to all workers.
- Extend unemployment benefits, including Pandemic Unemployment Compensation, for the duration of the pandemic.
- Extend unemployment benefits to undocumented workers.
- Revise unemployment insurance rules that penalize workers with both wages and self-employment earnings.
- Clarify that workers have the right to refuse unsafe work and remain eligible for unemployment benefits.

- Reform the Pandemic Unemployment Assistance program to allow waivers of overpayments.
- Expand access to the workshare program.

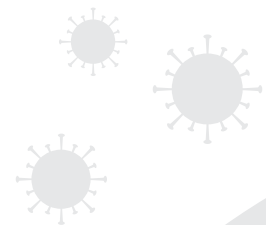
State governments:

- Appropriate and allocate state funds to create wage replacement programs for undocumented workers who have lost work or hours as a result of the COVID-19 pandemic.
- Pass supplemental paid leave laws that include
 - o Robust job protection, health insurance continuation, inclusive family definitions, and anti-retaliation provisions;
 - o Funding for enforcement and outreach, especially in languages beyond English;
 - o Ease certification requirements;
 - o Ensure that paid leave may be used for all coronavirus-related reasons, including the employee's own illness, school closures and unavailability of family care, and the vulnerability of the employee or someone in the home to complications of COVID-19.
- Require employers to provide reasonable caregiving accommodations, such as remote work and part-time schedules, to parents and caregivers.
- Increase benefit amounts and duration under permanent paid leave laws.
- Pass right of recall laws, giving workers who are laid off due to the pandemic a right to return to their jobs once their employers reopen.
- Reform earnings offset rules so that part-time workers can remain eligible for unemployment and paid family and medical leave benefits.
- To improve administration of unemployment and paid leave laws, state agencies should

- o Increase customer service staff and language access in unemployment and paid leave agencies; simplify and translate forms;
- o Ease standard for waiving overpayment of unemployment benefits, and require states to meet a heightened burden of proof before assessing a false statement penalty;
- o Issue administrative guidance clarifying that existing leave laws can be used for reasons related to COVID-19.

Local governments:

- Pass supplemental paid leave ordinances, with local enforcement power and funding for outreach and education.
- Pass right of recall ordinances.
- Fund medical-legal partnerships with public health departments to disseminate information about workplace rights at COVID-19 testing sites and via health clinics and hospitals.



About the Author

Sharon Terman is Director of the Work and Family Program and Senior Staff Attorney at Legal Aid at Work, a nonprofit legal advocacy organization that advances the workplace rights of families with low incomes. Sharon counsels and represents employees facing family medical crises, advocates for policy change to promote family-supportive workplaces, and educates the community. She has helped craft several landmark laws improving California's work-family policies, has provided expert testimony before Congress on paid family and medical leave, and serves on Governor Newsom's Paid Family Leave Task Force. Sharon is a graduate of U.C. Berkeley and Stanford Law School.

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