

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

2/23/2021

Austin Evers
American Oversight
1030 15th Street NW, Suite B255
Washington, DC 20005
202-919-6303
foia@americanoversight.org

Re: Freedom of Information Act Request No. # 895749

Dear Mr. Evers,

This letter responds to your Freedom of Information Act (FOIA) request of August 11, 2020, in which you requested all email communications (including emails, complete email chains, email attachments, calendar invitations, and calendar invitation attachments) sent by officials of the Department of Labor in the table that you provided from March 1, 2020 through the date of search. Your request was received in our office on **8/11/2020** and assigned FOIA tracking number **895749**.

A search for responsive records of the Office of the Secretary (OSEC) was conducted based on your request. Results from the search presented the below attached responsive records:

- 10 pages are being released without redactions, and
- 5 pages which have been redacted in part under to 5 U.S.C. § 522(b)(6) which permits the withholding of personnel, medical and similar files when disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

If you have questions about this response, you may contact the Office of the Secretary (OSEC) FOIA point of contact at OSEC-FOIA@dol.gov or the DOL FOIA Public Liaison, Thomas Hicks, at 202-693-5427 or by email at hicks.thomas@dol.gov. Alternatively, you may contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration, to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at 202-741-5770, by fax at 202-741-5769, or by calling toll-free at 1-877-684-6448.

Additionally, if you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal,

please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked “Freedom of Information Act Appeal.”

Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,

Thomas DeBusk

Thomas DeBusk
Administrative Officer

From: [Rickhoff, Hans](#)
To: [Mondl, Rachel E - OSEC](#)
Cc: [Bajnrauh, Heide](#)
Subject: RE: meeting request from former Congressman Lamar Smith
Date: Tuesday, March 24, 2020 10:24:15 AM

Hi Rachel,

I hope you are doing ok and understand that you are probably completely underwater. Briefly, we reached out a few months ago, we continue to believe that IMCS would add value to the worker's compensation program as the COVID-19 crisis impacts federal workers. With pandemic accommodations increasing, workers are facing anxiety, stress, depression, and isolation, which threatens to increase stress claims. IMCS is well-equipped solution to keep federal workers safe, at work, and productive.

The quick request is would it be possible to discuss with your colleagues from worker's compensation to discuss the program, impact of stress on federal workers during a pandemic, and provide background on the program and how IMCS can possibly be helpful in the short-term?

Thanks and hope you are staying safe and well. Hans

From: Mondl, Rachel E - OSEC <Mondl.Rachel.E@dol.gov>
Sent: Monday, January 13, 2020 9:49 AM
To: Rickhoff, Hans (b) (6)
Cc: Bajnrauh, Heide (b) (6)
Subject: RE: meeting request from former Congressman Lamar Smith

****EXTERNAL Email****

Mr. Rickhoff,

Thanks for reaching out. I understand my colleague Julia Hearthway was in touch with Ms. Bajnrauh late last week. DOL's Office of Procurement Services is available to discuss inquiries on this matter. I've copied below the contact information for the Director of Procurement Operations, Sandra Foster.

Sandra E. Foster
Director, Procurement Operations
Office of the Assistant Secretary for Administration and Management
Suite S-4307
(b) (6)

Thanks,
Rachel

Rachel E. Mondl
Chief of Staff

Office of the Secretary
U.S. Department of Labor

(b) (6)

From: Rickhoff, Hans (b) (6)
Sent: Tuesday, January 7, 2020 5:34 PM
To: Mondl, Rachel E - OSEC <Mondl.Rachel.E@dol.gov>
Cc: Bajnrauh, Heide (b) (6)
Subject: meeting request from former Congressman Lamar Smith

Hi Rachel,

I hope all is well and you survived this snowstorm. I am reaching out to request a meeting with you or the appropriate officials from DOL and my colleague former Congressman Smith (R-TX) on behalf of our client Integrated Medical Care Services (“IMCS”), a U.S. company serving the U.S. workers’ compensation insurance and disability markets. Any help in setting a meeting would be much appreciated. We have reached to the Office of Worker’s Compensation Program but have been unsuccessful in getting a response.

IMCS delivers specialized behavioral health services that are at the forefront of the integration of customary medical care and behavioral health care. Based on IMCS’ protocol development work and jointly conducted research in cognitive behavioral therapy (CBT) over the last nine years, IMCS has data showing savings of over \$37k per injured worker claim through the administration of the COPE with Pain® in a study of over 1,800 treatment resistant subjects.

As further background, over 100,000 new worker’s compensation cases were opened through the Federal Employees’ Compensation Act (FECA) for a total of \$3 billion in benefits distributed for work-related injuries or illnesses in FY 2018. IMCS would appreciate the opportunity to discuss its programs that deliver specialized behavioral health services to injured workers providing evidence-based, cost- effective treatment that reduces chronic pain, manages trauma and curbs opioid abuse. IMCS has developed a national network of more than 1,000 psychologists, psychiatrists and licensed clinical social workers that covers all 50 states.

Please let me know if we can provide anything additional and if you might have the ability to help meet with representatives from IMCS who will be in DC in the next few weeks . Thank you for your consideration it is much appreciated.

Best, Hans

Hans Christopher Rickhoff

AKIN GUMP STRAUSS HAUER & FELD LLP

2001 K Street N.W. | Washington, DC 20006 | USA | Direct: (b) (6) | Internal: (b) (6)
Fax: +1 202.887.4288 | [akingump.com](http://www.akingump.com) | [Bio](#)

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EXECUTIVE DIRECTOR

Mary Rasenberger

April 22, 2020

Dear Secretary Scalia:

The Authors Guild respectfully requests that the Department of Labor (DOL) clarify its Pandemic Unemployment Assistance (PUA) guidance so that it is unequivocal that home-based independent contractors and freelancers are eligible for unemployment compensation under the new programs.

We understand that Senate Finance Committee Ranking Member Ron Wyden, Senate Minority Leader Chuck Schumer and 32 other Senate Democrats sent a letter dated April 13th requesting the Labor Department clarify guidance to ensure workers who Congress intended to be covered under PUA are indeed covered.

Unfortunately, we do not believe the clarifications outlined in the DOL's April 17th response—including guidance documents UIPL 16-20—sufficiently address the situation of freelance creative workers who normally work from home or in the field, and whose PUA claims, in the absence of further guidance, may be denied by the states.

The DOL's reply letter refers to UIPL 16-20. Attachment I, Section (C)(k) of that letter extends PUA to unemployed and partially employed independent contractors whose “ability to continue performing customary work activities” has been severely limited by the COVID-19 public health emergency forcing the person to suspend the activities. As an example, UIPL 16-20 cites ride-share drivers; likewise, the DOL's FAQ discusses ride-share drivers, giving an example of an “emergency state or municipal order restricting movement makes continued operations unsustainable.”

These clarifications are somewhat helpful but do not clearly address the situation of writers and other freelancers who have the “ability” to work but where their employers and clients are no longer hiring them due to COVID-19 crisis. Like other workers, they have lost all or a substantial part of their income for the reasons described in the attached letter, which The Authors Guild and 18 other organizations representing writers, visual artists and songwriters sent to Speake Pelosi and House Minority Leader Kevin McCarthy.

Unlike ride-share drivers, many freelance creative workers are not hampered by shelter-in-place orders. While it is true that certain photographers and journalists who cover events, etc. are out in the field and as such maybe losing work due to shelter-in-place orders, the vast

majority of creative freelancers work from home and have lost work because the work has dried up due to broader economic effects of COVID-19. Their clients or employers in many cases have either shut down or are financially unable to hire them at this time.

A recent [survey](#) of our member authors indicates that these freelance workers are losing income at an alarming rate, and deserve relief. We hear from members that they have been turned down for PUA relief from their states. Accordingly, we request that the DOL create additional criteria under § 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act to allow freelancers and independent contractors who normally work from home but have lost work due to COVID-19 to be clearly eligible for PUA unemployment assistance, specifically where the individual has a history of verifiable income as a freelancer or independent contractor prior to COVID-19 and has lost verifiable income from such work as a result of COVID-19.

We are concerned that absent explicit guidance, states—many of which already have a policy against extending unemployment compensation to independent contractors, and who are already inundated with unemployment claims from typically eligible workers—may interpret the statute and the DOL's guidance narrowly to deny the claims of home-based freelance workers. Your clarification would of tremendous help to writers and other creative freelancers who are struggling desperately right now due to loss of work.

We are grateful for your attention to this important issue.

Very truly yours,



Mary Rasenberger
Executive Director
The Authors Guild

cc:

The Honorable Mitch McConnell
The Honorable Chuck Schumer
The Honorable Nancy Pelosi
The Honorable Kevin McCarthy

From: [Marla Grossman](#)
To: [Marla Grossman](#)
Subject: Authors Guild Seeking Clarification on PUA Eligibility for Home-based Freelance creators
Date: Wednesday, April 22, 2020 2:25:10 PM
Attachments: [Outlook-qo4ysabw.png](#)
[CARES Act amendment to clarify application of PUA to freelance workers \(4.14.20\).pdf](#)
[Authors Guild Letter to Secretary Scalia \(4.22.20\).pdf](#)

Please see the attached letter from the Authors Guild respectfully requesting Secretary Scalia that the Department of Labor (DOL) clarify its Pandemic Unemployment Assistance (PUA) guidance so that it is unequivocal that home-based independent contractors and freelancers are eligible for unemployment compensation under the new programs. We have also attached a letter that we sent to congressional leaders last week on this subject.

Please let me know if you have any questions or are able to have a follow-up phone conversation about this. Home-based creative freelancers are being denied access to the PUA programs and would be most grateful for your assistance.

With appreciation,
Marla Grossman



Marla P. Grossman
Partner
The American Continental Group, Inc.
1800 M Street NW
Suite 500 South Tower
Washington, D.C. 20036
Direct: (202)-327-8100
Fax: (b) (6)
E-mail: (b) (6)



April 14, 2020

Request for an Amendment to the CARES Act to Clarify Application of PUA to Freelance Workers and Independent Contractors

The Authors Guild and the organizations below applaud Congress for recognizing the urgent need for financial assistance of independent contractors and freelancers under the CARES ACT provisions for **Pandemic Unemployment Assistance (PUA)**. As you know general unemployment insurance is not available to self-employed workers, but they have been hit as hard as other workers by the pandemic, and the PUA insurance is potentially a great relief for those workers. However, the PUA eligibility criteria in the CARES Act appear to exclude many freelancers, including writers, visual artists, songwriters, and other creative workers, who normally work from home or in the field, even though their incomes have been decimated due to lack of work resulting from COVID-19's impact on their employers and clients.

Defining the Problem

To be eligible for PUA under Section 2102 of the CARES Act, an individual must self-certify either that (i) the individual is prohibited from working because of one or more of the “COVID-19-related” reasons listed in Section 2102(a)(3)(A)(ii)(I);¹ **or** (ii) the individual is self-employed,

¹ Section 2102(a)(3)(A)(ii)(I) lists the following COVID-19 factors that an individual can rely on to be eligible for PUA:

“(aa) [T]he individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID–19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;

(ii) the individual has to quit his or her job as a direct result of COVID–19;

(jj) the individual's place of employment is closed as a direct result of the COVID–19 public health emergency; or

an independent contractor, or otherwise ineligible to receive regulation unemployment compensation **and** the individual lacks the ability to telework with pay. Neither provision clearly applies to freelance writers, songwriters, composers, lyricists, graphic artists, illustrators, and photographers and other freelance creators who can theoretically telework and who may not be able to show that they have been affected by one of the eleven statutory COVID-19 reasons, including inability to reach their place of employment, but who are nonetheless experiencing hardship and reduced income due to the economic impact on their clients and fewer opportunities being available. In other words, the problem isn't that these freelance writers, graphic artists, photographers and songwriters cannot telework or get to their "place" of employment or that their places of employment are closed: the problem is that the previously available work isn't there. Writers, songwriters and graphic artists generally work from home or in the field and photographers and visual journalists work in the field.

Many publications, for instance, are no longer hiring many freelance writers, illustrators, editorial cartoonists and photographers either because they are closed, have furloughed or laid off their own staff, or they are limiting their coverage mainly to COVID-19 related matters. Because so many aspects of normal life are shut down now, the subjects that many freelancers write, photograph, illustrate and record are not being currently covered. For instance, there are no sporting, performing or visual arts events being held to cover, and restaurants have closed in many areas of the country. Sports writers and photographers, along with theater, art, and restaurant critics are highly under-employed right now.

This comes on the heels of a dramatic decline in news media revenue over the last decade that caused many publications to lay off staff writers, graphic artists and photographers and use freelancers instead. As a result, many journalists, including high-profile figures, no longer work at the publications' offices, but work from home or in the field, and do not have the protections of employment. As a result of the COVID-19 crisis, many are not receiving enough work to sustain their livelihoods. According to a recent New York Times article, since the start of the COVID-19 crisis, journalism has been hit hard by a drastic decrease in ad revenue, and as a result as many as "28,000 workers at news companies in the United States have been laid off, been furloughed, or had their pay reduced" with many publications that rely on advertising revenues going out of business.

PUA insurance does not clearly cover workers in this situation – unless they meet the statute's other criteria. Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act permits the Secretary for unemployment assistance in each state to establish additional criteria, but it is not clear that the states can, nor are they required to, provide assistance to freelancers who normally work from home or in the field but have lost work due to COVID-19.

Proposed Solution – Clarifying language in Phase 4 COVID-19 bill

The Authors Guild, together with other organizations listed below representing hundreds of thousands of workers, recommend that Congress include in the Phase 4 bill language that

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section."

expressly applies to freelance workers who cannot find work as a result of COVID-19 because their clients are no longer providing them work. This would apply to freelance writers, songwriters, composers, lyricists, graphic artists, illustrators, photographers and other 1099 workers who work from home, out in the field or other various locations, outside of the employers' place of business. The worker would, of course, have to certify that the loss of work is due to COVID-19.

This clarification could be achieved by amending Section 2102(a)(3)(A)(ii)(I) of the CARES Act, listing the "COVID-19-related" reasons, by changing Section 2102(a)(3)(A)(ii)(I)(kk) to (ll) and replacing it with reason (kk) as follows:

"The individual has a history of verifiable income as a freelancer or independent contractor prior to COVID-19 and has lost verifiable income from such work as a result of COVID-19."

In the alternative, we ask that you request the Secretary of Labor to create guidelines that clearly make these workers eligible for PUA if they have lost income due to the crisis.

Yours truly,

The Authors Guild

American Photographic Artists

American Society of Journalists and Authors

American Society of Media Photographers

Association of Health Care Journalists

Garden Communicators International

Graphic Artists Guild

Horror Writers Association

National Association of Science Writers

National Press Photographers Association

National Writers Union

North American Nature Photography Association

Novelists, Inc.

Professional Photographers of America

Science Fiction and Fantasy Writers of America

Society of American Travel Writers

Society of Composers & Lyricists

Songwriters Guild of America
The Dramatists Guild of America



AMERICA'S ESSENTIAL HOSPITALS

April 8, 2020

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

Ref: Families First Coronavirus Response Act and Fair Labor Standards Act

Dear Secretary Scalia:

America's Essential Hospitals appreciates the actions of the Trump administration to mitigate the novel coronavirus (COVID 19) outbreak and to provide critical support to front line responders as they confront this crisis. These actions will help hospitals meet the immediate needs of their communities as they prepare for and respond to COVID 19 cases. We write to express our concerns about the impact paid leave provisions of the Families First Coronavirus Response Act (FFCRA) and exemption provisions of the Fair Labor Standards Act (FLSA) will have on providers that are indispensable to the response effort.

We are encouraged by the Department of Labor (DOL) guidance and subsequent temporary rule defining the term health care provider for the purposes of the FFCRA. This will help mitigate the disparate impact of the paid leave provisions on essential hospitals responding to COVID 19. However, the regulation fell short in that it still provides for an inequitable application of the FFCRA to public agencies compared with private employers that is inconsistent with the language of the Family and Medical Leave Act of 1993 (FMLA). Existing regulations implementing the FLSA also are unclear about the exempt status of employees who must adapt their duties in the face of a declared public health or national emergency. By allowing employers responding to the COVID 19 crisis to exempt their employees broadly from the FFCRA; by clarifying that public agencies with 500 or more employees are excepted from the FFCRA's paid leave requirements; and by clarifying the regulatory definition of emergency under the FLSA, DOL can ensure first line responders can maximize limited staff resources in times of great need.

America's Essential Hospitals is the leading champion for hospitals and health systems dedicated to high quality care for all, including the vulnerable. Our more than 300 members—all nonprofit or public hospitals—fill a vital role in their communities. They provide a disproportionate share of the nation's uncompensated care, and three quarters of their patients are uninsured or covered by Medicare or Medicaid. Our members provide state of the art, patient centered care

essentialhospitals.org

AMERICA'S ESSENTIAL HOSPITALS
401 Ninth St NW Ste 900
Washington DC 20004

t: 202 585 0100
f: 202 585 0101
e: contact@essentialhospitals.org
DOL-20-2078-A-000011

while operating on margins one fifth that of other hospitals—1.6 percent on average compared with 7.8 percent for all hospitals nationwide.¹

Our members serve as cornerstones of care, providing specialized inpatient, outpatient, and emergency services—such as trauma, burn, and inpatient psychiatric care—that often are unavailable elsewhere in their communities. Our members operate 31 percent of all level I trauma centers, 39 percent of all burn care beds, and 6,200 psychiatric care beds.² These are the types of specialized services that equip hospitals to respond to the COVID 19 crisis. In addition, members of America’s Essential Hospitals play a vital role in providing ambulatory care to their communities—operating a median of nine ambulatory care locations per hospital.³ Through these vast networks, they can reach patients in their communities and reduce unnecessary inpatient admissions and emergency department visits.

Essential hospitals are taking extraordinary steps to respond to COVID 19. Many of these necessary steps come with disruptions to daily operations and a significant price tag. They include constructing temporary spaces for diagnosing and treating COVID 19 patients, ensuring adequate stock of necessary equipment for patient care and personal protective equipment for front line staff, and canceling planned surgical cases to increase capacity for COVID 19 cases. They also are accommodating staff needs, including providing resources to work remotely when appropriate and accommodating staff child care needs resulting from school closures by establishing onsite child care facilities and subsidizing child care services.

This is an unprecedented and challenging time for our nation, as we are faced with a public health emergency of unknown scope and duration. Essential hospitals, at the center of the nation’s safety net, face this challenge with short supplies of available resources. Costs associated with COVID 19 continue to rise while revenues decrease. To succeed in mitigating the spread of the outbreak, essential hospitals need to divert their limited resources and staff from customary daily operations to diagnosing and treating those affected by the virus. By making the following changes, DOL can ensure essential hospitals have needed resources to respond to this pandemic.

- 1. DOL should clarify that the emergency exception under the FLSA includes declared public health and national emergencies.**

The department should clarify existing FLSA regulations on emergencies to include declared public health and national emergencies, such as the current COVID-19 pandemic. This will allow exempt staff to retain their FLSA exemption even if they perform non-exempt duties to assist in a COVID-19 response.

Under the FLSA, a covered business must offer overtime pay and minimum wage protections to employees unless they fall under one of the exemptions, such as the executive, administrative, professional, outside sales, and computer employee exemptions. To qualify for one of these exemptions, the employee must be paid on a salaried basis, be paid a minimum salary, and perform certain duties that fall into one of the exempt categories. Certain registered nurses, for example, are considered exempt under the learned professional exemption. Hospitals employ

¹ Clark D, Roberson B, Ramiah K. *Essential Data: Our Hospitals, Our Patients—Results of America’s Essential Hospitals 2017 Annual Member Characteristics Survey*. America’s Essential Hospitals. April 2019. <https://essentialdata.info>. Accessed March 26, 2020.

² Ibid.

³ Ibid.

registered nurses in a wide variety of roles, some that are considered exempt and others that are considered non exempt. In certain administrative and nonclinical roles, registered nurses are exempt from FLSA requirements if their primary duties are considered exempt. Other nurses, including some performing clinical duties, are considered non exempt from the FLSA if their primary duties are classified as non exempt. However, in some instances, an employee can perform a combination of exempt and non exempt duties, which requires a determination by an employer as to whether the employee's primary duty is of an exempt or non exempt nature.

As health care facilities, including essential hospitals, respond to COVID 19, they are facing workforce shortages and turning to licensed health care professionals who might normally be in administrative, exempt roles to provide bedside care to COVID 19 patients. The shift from their typical duties to potentially non exempt duties will require employers to meticulously track their employees' hours, and if an employee spends more than 50 percent of their time performing non exempt duties, the employer might have to treat the employee as non exempt and pay overtime. Tracking these hours and adjusting payroll systems to pay these employees on an hourly basis is extremely burdensome on already resource and time constrained hospitals.

The FLSA regulations contain a potential solution to this problem, contained in a provision for emergencies that allows employees to perform non exempt duties without forgoing their FLSA exemption.⁴ **Because the provision does not specifically include declared national emergencies or public health emergencies, we urge DOL to clarify that emergencies such as the current national and public health emergency are qualifying emergencies that will not cause exempt employees to lose their exemption by virtue of performing non-exempt duties for the duration of the declared emergency.** The COVID 19 pandemic is an unprecedented emergency to which health care providers are responding in innovative ways to manage the surge of patients while balancing constrained resources. By making this clarification, the DOL can allow hospitals to adapt their workforce to focus on providing critical patient care.

2. DOL should interpret the 500-employee threshold of the FFCRA to apply to all employers bound by the new leave requirements, including public agencies, and work with Congress to extend payroll tax credits to public agencies.

The FFCRA requires certain employers to provide two weeks of paid sick leave and 10 additional weeks of paid family and medical leave to employees who meet certain conditions. Employers must provide these 10 weeks of leave to employees affected by COVID 19 school closures or interruptions in child care. The FFCRA also provides a special rule for an employer to exempt employees who are health care providers or emergency responders and vests the Secretary of Labor with authority to issue regulations to exclude such employees from the definition under the FFCRA. We are pleased that DOL issued regulations defining these terms broadly, thus allowing hospitals to best determine their staffing needs and response strategies to the COVID 19 emergency.

Although, the broad definition of health care provider is a positive change, the DOL's interpretation of "employer" will have a disparate impact on public agencies, including public hospitals that are on the front lines of the COVID 19 response across the nation. In setting out the types of employers to whom the leave requirements apply, the FFCRA creates an employer threshold of fewer than 500 employees. **The department should apply the threshold equitably**

⁴ 29 C.F.R. 541.706.

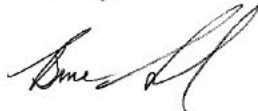
across all employers who are bound by the requirements of the new leave provisions and work with Congress to allow governmental entities to benefit from payroll tax credits.

Specifically, section 101(4)(A)(i) of the FMLA states an employer “means any person engaged in commerce or in any industry or activity affecting commerce [who employs 50 or more employees. ...].”⁵ The FFCRA replaces the “50 or more” language with “fewer than 500 employees.” The FMLA language goes on to clarify that this definition of employer “includes any ‘public agency,’ as defined in section 3(x) of the Fair Labor Standards Act of 1938.”⁶ It further states that a public agency is “considered to be a person engaged in commerce or an industry or activity affecting commerce.”⁷ Because the plain language of the FMLA clearly indicates that the requirements of section 101(4)(A)(i)—that the employer be engaged in or affect commerce—applies to public agencies, it is clear that Congress intended the employee threshold, which also is contained in section 101(4)(A)(i), to apply to public agencies. Therefore, the employee threshold of fewer than 500 employees established by the FFCRA applies to public agencies, as well as private employers. This reading is compelled by the statutory language and would provide an equitable application of the leave provisions across all types of providers, private or public.

Many essential hospitals are owned and operated by state or local governments or by quasi independent governmental entities, such as hospital authorities or independent taxing districts. There is no conceivable policy rationale for applying the FFCRA exemption for employers of 500 or more employees to private, nonprofit hospitals, for example, but not to public hospitals. Moreover, the FFCRA provides for payroll tax credits to employers to offset the costs of the paid leave but specifically carves out governmental employers from receiving this tax credit. Expecting governmental employers, including public hospitals, to provide paid leave but not receive reimbursement for this paid leave, while other entities can benefit either from an exemption due to their size or from a tax credit, is an inconsistent and inequitable policy. If DOL provides a plain language reading to the statute, which clearly indicates that the employee limitation applies to public agencies as well, it can avoid this outcome. **Simultaneously, the department should work with Congress to ensure that all employers, whether governmental or private, can benefit from the tax credits to help cover the costs of providing paid leave.**

We appreciate the opportunity to share feedback during this extraordinary time, as DOL implements FFCRA provisions. We look forward to continued engagement and partnership to successfully mitigate the COVID 19 outbreak. If you have questions, please contact Senior Director of Policy Erin O'Malley at (b) (6) or (b) (6)

Sincerely,



Bruce Siegel, MD, MPH
President and CEO

Cc: Cheryl Stanton, Administrator, Wage and Hour Division, U.S. Department of Labor

⁵ Family and Medical Leave Act of 1993, Section 101(4)(A)(i).

⁶ Family and Medical Leave Act of 1993, Section 101(4)(A)(iii).

⁷ Family and Medical Leave Act of 1993, Section 101(4)(B).

From: [Erin O'Malley](#)
To: [Scalia, Eugene - OSEC](#)
Cc: [Stanton, Cheryl M - WHD](#); [Bruce Siegel](#); [Beth Feldpush](#)
Subject: Letter on COVID-19 workforce flexibilities
Date: Wednesday, April 8, 2020 4:52:56 PM
Attachments: [FINAL AEH Letter to DOL on EFMLEA and FLSA 4-8-20.pdf](#)

Dear Secretary Scalia,

On behalf of our more than 300 member hospitals, America's Essential Hospitals submits the attached letter respectfully requesting that the Department of Labor issue guidance or rulemaking that will provide our hospitals with vital flexibility as they respond to the COVID-19 crisis.

Specifically, the association appreciates clarification from the Department on the definition of employer under the Emergency Family and Medical Leave Expansion Act and classifications of employees during emergencies under the Fair Labor Standards Act.

We appreciate your consideration of this letter. Please feel free to contact me with any questions.

Sincerely,
Erin O'Malley

Erin O'Malley | Senior Director of Policy
America's Essential Hospitals
401 Ninth St. NW, Suite 900
Washington, DC 20004
(b) (6) telephone | 202.585.0101 fax
(b) (6) | www.essentialhospitals.org