



The Urgent Case for Permanent Paid Leave

Lessons Learned From the COVID-19 Response

By Diana Boesch | September 1, 2020

The coronavirus pandemic has made evident the cracks in the U.S. economic system and has exacerbated persistent, long-standing racial, ethnic, and gender inequalities, further eroding families' economic stability.¹ One issue that has been front and center during the current crisis is the lack of meaningful, comprehensive paid family and medical leave and paid sick leave policies to support workers and public health. Before the pandemic, the United States was an extreme outlier among developed countries because of its lack of national paid leave policies, which forced many workers to rely on the discretionary benevolence of their employers to gain access to paid leave. In 2019, more than 32 million people in the country did not have access to a single paid sick day,² and 4 out of 5 workers did not have access to paid family leave.³ Low-wage workers and workers of color are less likely than higher-wage and white workers to have access to paid leave. This gap is particularly dangerous and harmful for people of color and women, who are disproportionately represented in front-line industries where they face higher risks of exposure to the coronavirus.⁴ Communities of color are already feeling the economic fallout from the crisis, and inequality in access to critical workplace protections such as paid leave only deepens the harm.⁵

The absence of national paid leave policies left workers and the public unprepared for the pandemic. Without paid sick days, for example, workers are more likely to go to work when they have a contagious illness, risking public health.⁶ In response to the coronavirus pandemic, Congress passed the first national paid leave laws as part of the Families First Coronavirus Response Act (FFCRA) to provide workers with up to two weeks—or 80 hours—of emergency paid sick leave and up to 12 weeks of emergency leave for child care, only 10 weeks of which are paid. While these laws are critical to support workers with caregiving responsibilities and workers recovering from COVID-19, they are temporary—sunsetting on December 31, 2020—and loopholes and exemptions exclude an estimated 68 million to 106 million private sector workers.⁷

Now, more than ever, the United States needs—and the public wants⁸—permanent paid leave laws to support workers' health and economic security for the duration of the pandemic and into the future. The country can no longer rely on the private market or employers to voluntarily offer paid leave, nor can the public continue to

accept existing inequities in access to workplace protections—and the policy solutions that fail to remedy these inequities. As policymakers now contemplate how to create permanent paid leave laws that can address the diverse needs of workers, they must consider the lessons learned from the emergency paid leave laws in order to design effective policies capable of dismantling inequities and adequately preparing workplaces and the country for the future.

Lessons learned from emergency paid leave

Understanding the components of the emergency paid sick leave law and the emergency paid child care leave law, as well as how the laws have been implemented by the U.S. Department of Labor (DOL), will help policymakers design more effective national, permanent paid leave policies. Lessons learned from the emergency paid leave laws are discussed in the following sections.

1. Cover all workers

The emergency paid leave laws are uniquely expansive in covering many workers who are often excluded from accessing paid leave. Part-time workers and self-employed workers are automatically covered under the laws, and workers do not have to meet a tenure or minimum hours worked requirement to be eligible for emergency paid sick leave. They face only a 30-day tenure requirement to be eligible for emergency paid child care leave. Covering part-time workers in a paid leave program is especially important to ensure the inclusion of women: Almost one-quarter of employed women work part time, often due to caregiving responsibilities.⁹ The laws also cover private sector workers at businesses with fewer than 50 employees, a group excluded from unpaid leave under the Family and Medical Leave Act (FMLA).¹⁰ Public sector workers are covered under the laws, which is particularly important for racial equity as Black or African American workers are overrepresented in the public sector,¹¹ although many federal employees are excluded from emergency child care leave.¹²

However, the laws also have exemptions that exclude between 68 million and 106 million people, or 53 percent to 83 percent of all private sector workers.¹³ This limited coverage hinders the laws' effectiveness in protecting public health and supporting workers' economic security. The laws automatically exempt workers at businesses with 500 or more employees; allow employers of health care providers and emergency responders to exempt their workers entirely; and allow businesses with fewer than 50 employees to self-determine their exemption from providing paid child care leave.¹⁴ A recent ruling by a New York federal judge, in striking down several of the DOL's regulations, may lead to fewer workers excluded from coverage.¹⁵ Still, the significant exemptions mean that millions of workers will not be covered, such as low-wage workers who are already less likely to have access to employer-provided paid leave, which perpetuates disparities in access to paid leave.¹⁶ Exclusion of any group of workers, based on employer size, occupation, or other eligibility requirements, limits who benefits from a

paid leave program, harms vulnerable workers, and creates challenges during outreach and education to explain the program.

The most significant way for policymakers to improve racial, gender, and economic equity in access to paid leave is by designing national, permanent paid leave policies that cover all workers, no matter their income, full- or part-time status, employer size, or occupation.

2. Include short- and long-term medical and caregiving leave

The coronavirus pandemic has shown that workers need time away from work for many reasons: recovering from their own illness; quarantining if they have been exposed to COVID-19; caring for an individual who is sick or quarantining; or caring for their child whose school or place of care is closed or unavailable. The FFCRA was critical in recognizing and covering all these needs for purposes for which workers can take two weeks of emergency paid sick leave.

While short-term paid sick leave and long-term paid family and medical leave are separate policies¹⁷ that are necessary parts of a continuum of care for workers to manage their own health and care for their loved ones, Congress hindered the comprehensiveness of long-term paid leave under the FFCRA. The 12 weeks of emergency leave is limited to only one purpose for which a worker can use leave: to care for their child whose school or place of care is closed. Although this extended child care leave is critical for caregivers, the narrow scope of the emergency paid leave law fails to help workers who need long-term medical leave or family caregiving leave for other reasons. For example, some people experience debilitating coronavirus side effects for months after their initial illness and may develop lifelong disabilities, which can interfere with their ability to work.¹⁸ And workers who need to care for seriously ill family members or elderly relatives who have lost access to senior care during the pandemic will not be able to take long-term emergency paid leave.

Even outside the context of the coronavirus, evidence demonstrates the necessity of including both medical leave and caregiving as covered purposes for taking long-term paid family and medical leave. Recently released data from 2018 FMLA surveys show that the most common reason for workers taking leave is to recover from a serious medical illness, accounting for 51 percent of all leaves taken in the last 12 months.¹⁹ Meanwhile, covering caregiving leave is particularly important to support women, who take on the majority of caregiving responsibilities in the United States.²⁰ Narrow paid leave proposals—a continued focus for some members of Congress²¹—that fail to cover leave beyond that for parents after the birth or adoption of a new child are wholly inadequate and out of touch with the needs of workers and their families.²²

In order to address the full spectrum of workers' medical and caregiving needs, especially for workers with disabilities and those with long-term coronavirus effects,

policymakers must design two compatible permanent paid leave policies—short-term paid sick leave and long-term paid family and medical leave—that are comprehensive of all the reasons workers need leave.

3. Provide sufficient duration of leave and automatic triggers

The two weeks—up to 80 work hours—of emergency paid sick leave passed as part of the FFCRA may have been based on early public health recommendations that individuals with COVID-19 should quarantine for two weeks.²³ This duration, and the fact that the emergency paid sick leave is available immediately without an accrual period, is appropriately more generous than many preexisting state and local earned paid sick leave laws.²⁴ The 12 weeks of emergency child care leave, with only 10 weeks paid, was created as an amendment to the FMLA and therefore uses the same duration.

However, these durations have already proved to be inadequate to meet the full needs of many workers for the extent of the coronavirus pandemic. Two weeks of emergency paid sick leave may not be enough time to allow a worker to recover from COVID-19. And for parents who need to provide care for their children home from school or child care during the crisis, the 12 weeks of emergency child care leave is proving to be insufficient to meet their long-term caregiving needs, especially with some schools shifting to online learning in the fall.²⁵ Additionally, workers who have multiple reasons for needing paid leave could be left without any options after they exhaust all their available time. For example, if an eligible employee used all two weeks of their emergency paid sick leave in May when they were sick with the coronavirus, they would be left with no paid leave to care for a spouse who became sick in July.

Policymakers must design national, permanent paid leave policies with durations that are sufficient to meet workers' needs and that follow advice from public health experts. Policies should also be flexible and targeted to respond to the unique needs of a crisis by including automatic triggers in case of a future public health emergency. These triggers would allow for expanded benefits if another public health emergency is declared, such as extended duration or broadened purposes for taking leave.

4. Ensure adequate wages across all types of leave

Under the emergency paid leave laws, workers receive their regular rate of pay, up to \$511 per day, for paid sick leave used for their own recovery or quarantine, and a lower rate of pay—two-thirds of their regular rate, up to \$200 per day—for caregiving purposes under both paid sick leave and paid child care leave. This lower level of wage replacement for caregiving leave disadvantages workers with caregiving responsibilities, primarily women. When women take the majority of caregiving leave, at a lower wage replacement, they have less income to support their families. This exacerbates gender inequality, especially for the 64.2 percent of mothers who are the primary or co-breadwinners in their families.²⁶ Additionally, during the first few months of the coronavirus crisis, the low wage replacement amounts may have deterred some workers from taking emergency paid leave, despite it guaranteeing continuation of their health insurance and

the ability to return to their job, and instead applied for unemployment insurance (UI), which included an extra \$600 a week on top of regular UI payments.²⁷

Generally, lower wage replacement levels in paid leave programs can lead to fewer workers taking leave because workers cannot afford even a partial loss of income. A study of California’s paid leave program in 2011 found that insufficient wage replacement may cause low-wage workers to be unable to afford to take some or all of the leave they need.²⁸ Men, in particular, are less likely to take leave if the wage replacement is too low.²⁹ In contrast, when wage replacement levels are higher, such as under San Francisco’s Paid Parental Leave Ordinance, men are more likely to take leave, improving gender equality.³⁰

In order for paid leave programs to help low-wage workers and address gender inequality, policymakers must ensure adequate wage replacement amounts—at the same level—for all types of leave.

5. Allow workers to care for their family and loved ones

The coronavirus pandemic has revealed the importance of caregiving relationships outside immediate families. When an individual lives far away from their family and becomes seriously sick with COVID-19, friends and chosen family can play a key role in their caregiving. Under the emergency paid sick leave law, employees can take paid sick leave to care for “individuals,” which the DOL regulation defined as an immediate family member, someone living with the employee, or someone with whom the employee has a relationship with an expectation of care.³¹ This broadly defined caregiving relationship is an expansive precedent set by the federal government and demonstrates that paid leave laws can easily incorporate inclusive family definitions without encouraging fraud or abuse. State paid leave programs have also led the way in expanding family definitions; New Jersey, for example, expanded its paid leave program’s definition of family in 2019 to include chosen family, or people who “have a close association with the employee which is the equivalent of a family relationship.”³² This is particularly impactful for LGBTQ workers and workers with a disability, who often have varied family forms and need paid leave that allows them to care for their loved ones.³³

National, permanent paid leave programs, then, must inclusively define family in order to acknowledge various caregiving relationships, including chosen family.

6. Ensure employment protections for workers who use paid leave

One clear lesson from the current public health emergency is the importance of having strong protections against retribution, retaliation, or harmful actions taken against individuals who need to use paid leave. Job and anti-retaliation protections are critical components of paid leave programs, allowing workers to feel secure in taking leave because they know they can return to their job and are protected from adverse employment actions such as being disciplined, demoted, or fired. Workers, especially

those taking leave to recover from COVID-19 or another serious medical condition, also need a guarantee that their employer will continue their health insurance coverage while they are out on leave. This is critical during a recession; 5.4 million workers became uninsured because they lost their job in the first four months of the coronavirus crisis.³⁴ Anti-retaliation protections are especially important to ensure that certain workers—such as Black workers and women—are not unfairly targeted because they need leave or discouraged from taking leave. Black workers, for example, have reported experiencing more retaliation from their employer than white workers during the coronavirus pandemic.³⁵

The emergency paid sick leave law passed as part of the FFCRA sets an important precedent by guaranteeing that employees have job protection, continuation of health insurance, and anti-retaliation protections during their two weeks of paid sick time.³⁶ The employment protections in the 12 weeks of emergency child care leave are slightly more limited. As an amendment to the existing FMLA, the law includes the FMLA's job protection and continuation of health insurance for employees but does not add explicit anti-retaliation protections. It also creates less strict job restoration requirements for employers with fewer than 25 employees. This may result in millions of workers at the smallest businesses being fearful of taking emergency paid child care leave at all.

When making decisions about how best to address their family's or their own caregiving needs, workers should not have to worry about losing their jobs or derailing their careers simply because they choose to take leave. Having robust protections against these types of harmful outcomes should be articulated in any future paid leave law to make clear their scope and application, rather than relying on other laws such as the FMLA that may utilize different eligibility or other requirements.

Therefore, to promote racial, gender, and economic equity and encourage workers who most need access to paid leave the security to take it, policymakers must establish new guarantees for job protection, health insurance continuation, and anti-retaliation protections in national, permanent paid leave laws.

7. Provide effective outreach, education, oversight, and enforcement

The quick passage and implementation of the emergency paid leave laws meant that millions of workers gained access to new protections but that few were aware of them due to limited outreach and education. The emergency paid leave laws did not include explicit direction to the DOL to engage in outreach and education. While the Coronavirus Aid, Relief, and Economic Security (CARES) Act provided the DOL with \$15 million to enforce worker protection laws and oversee and coordinate activities related to the FFCRA, the department has actually done little public education around emergency paid leave.³⁷ Instead, the DOL has relied on employers to notify employees of their new benefits, which often results in no or inaccurate information provided to employees. Similarly, the emergency paid leave laws have limited over-

sight and enforcement provisions to ensure employers are complying with the laws and employees are receiving the benefits to which they are entitled. For example, the DOL has no clear oversight of businesses with fewer than 50 employees self-certifying that they are exempt from providing paid child care leave if they determine it jeopardizes their business viability.³⁸ The DOL conducted minimal enforcement of the protections,³⁹ including creating a 20-day period of nonenforcement at the beginning of the law's effective period⁴⁰ and failing to establish a clear and easy process for workers to submit complaints. All of this has contributed to workers' limited awareness and use of the emergency paid leave protections, which ultimately jeopardizes their health and economic security.

Policymakers must take the lessons learned from the ineffective implementation of the emergency paid leave laws and include specific funding and instruction around outreach and public education, as well as oversight and enforcement, in national, permanent paid leave laws.

Conclusion

Emergency paid leave can be an economic lifeline, and lifesaver, for workers and their families, especially in the midst of the coronavirus crisis. These policies build on the years of advocacy work in states and localities and on work at the federal level around the Healthy Families Act and the Family and Medical Insurance Leave (FAMILY) Act.⁴¹ But as stories of workers from across the country demonstrate,⁴² too many people are left out of coverage by the emergency paid leave provisions or will lose coverage when the laws expire on December 31, 2020. The United States must adopt national, permanent paid leave policies to help workers get through the crisis and support them in the future. Proposals such as the Providing Americans Insured Days of Leave (PAID Leave) Act of 2020 would fix many of the loopholes in the emergency paid leave laws and would establish permanent paid sick leave and permanent paid family and medical leave policies.⁴³ Policymakers can address the needs of workers and promote racial, gender, and economic equity by building on the lessons learned from the emergency paid leave laws when designing national, permanent paid leave policies.

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