
COVID-19 and Labour Law: U.S.

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Abstract

This article summarizes new laws in the U.S. enacted during the covid-19 pandemic to protect workers and address the profound economic impact the pandemic has caused. The initial U.S. response to the pandemic was highly fragmented, taking place primarily at the state and local levels. In late March two federal statutes were enacted to provide extended unemployment benefits, help struggling businesses, and provide sick leave. Myriad legal questions remain unanswered.

Keywords: Covid-19; Labour Law; Unemployment benefits; Sick leave.

The explosion of covid-19 in the United States in late March 2020 has caused a near-complete shutdown of economic activity. As of April 1, 2020, nearly 80% of Americans were on lockdown, with exceptions for healthcare workers, grocery store workers, delivery drivers, and other “critical” sectors. The impact was immediate and enormous, with 3.28 million workers – nearly five times the previous record high – applying for unemployment benefits in the week ending March 21¹. The number of new unemployment claims doubled the following week².

The initial U.S. response to covid-19 was highly fragmented, mostly implemented at a state and local government level rather than a national level. Some states responded early and forcefully by, for example, shutting schools and imposing lockdowns; other states have responded late and piecemeal³.

A particular challenge in the U.S. is the lack of both universal health care and universal sick leave. Before the pandemic, sick leave was available to only 71% of private-sector workers, and to only 31% of workers in the lowest 10% pay bracket⁴. Workers – especially

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¹ Eric Morath et al., [Record Rise in Unemployment Claims Halts Historic Run of Job Growth](#), Wall St. J. (updated March 26, 2020).

² Sarah Chaney & Eric Morath, [Record 6.6 Million Americans Sought Unemployment Benefits Last Week](#), Wall St. J. (Apr. 2, 2020).

³ See, e.g., BBC News, [Coronavirus: The US Governor Who Saw It Coming Early](#), BBC News (1 April 2020).

⁴ U.S. Bureau of Labor Statistics, [Higher wage workers more likely than lower wage workers to have paid leave benefits in 2018](#) (August 3, 2018).

low-wage workers – are unlikely to self-quarantine if it means they don't get paid⁵. A new statute, described below, provides sick leave to many workers impacted by covid-19.

At the national level, the primary response has been passage of two new statutes. The first, the Coronavirus Aid, Relief and Economic Security Act (CARES Act)⁶, was signed on March 27, 2020. The CARES Act provides displaced workers US\$ 600 per week for four months on top of their state unemployment benefits, which vary in amount by state. The law also expands benefit eligibility to workers who typically cannot collect, including independent contractors, the self-employed, and those who have not worked the minimum number of hours. The law encourages employment retention by specifying that workers who are furloughed (temporarily laid off) can collect unemployment, meaning those employers won't have to go through hiring and onboarding once the employer (hopefully) re-opens.

The CARES Act also creates several funds for loans to businesses. A \$500 billion Exchange Stabilization Fund, to be administered by the U.S. Department of Treasury, consists of \$50 billion in direct lending to the airline industry and “businesses important to maintaining national security”, and about \$450 billion in emergency loans for general business. This direct lending requires recipients to maintain most staffing through September 2020.

Similarly, the emergency loan provisions set conditions for nonprofits and private businesses with between 500 and 10,000 employees, including that they maintain staffing, pledge not to offshore jobs, abide by collective bargaining agreements with unions, and promise neutrality if employees seek to form a union during the loan term. The CARES Act also provides hundreds of billions of dollars in partially forgivable loans to employers with fewer than 500 workers, with requirements that the money be used for payroll and other immediate needs, and without most of the conditions applied to the other loans.

Another major national response to covid-19 has been passage of the Families First Coronavirus Response Act⁷. This statute covers private employers with fewer than 500 employees and certain public employers (it assumes that large employers already provide their employees with sick leave). It makes employees of covered employers eligible for:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care

⁵ Xenia Schel-Adlung & Lydia Sandner, International Labour Organization, *Paid Sick Leave: Incidence, Patterns and Expenditure in Times of Crisis* (2010).

⁶ H.R.748, S. 3548, 116th Congress (2019-2020).

⁷ H.R.6201 - 116th Congress (2019-2020).

for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19...; and

- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19⁸.

Employers will receive tax credits to offset the costs of providing this paid leave.

Social partners such as labor unions have not played a significant role in designing any of these measures. However, U.S. labor unions may benefit from the current situation in two ways. First, as described above, the CARES Act requires most employers seeking to benefit from the statute to promise neutrality in forthcoming union elections. This is significant because under current labor law, employers can and often do vigorously oppose workers' efforts to organize. Second, many low-wage workers in industries that now are vital (e.g., health care, transportation, retail grocery) have, until now, been treated by their employers as expendable – and treated commensurately. Labor protests and wildcat strikes have escalated as these workers demand safety equipment and better pay – and this may lead to more union organizing activity.

Myriad unanswered legal questions remain. For example:

- Does covid-19 qualify under state workers' compensation law as an occupational disease, which entitles some workers to medical insurance? In states where employers are allowed to opt out of workers' compensation, are employers liable for illness and loss of wages on common law negligence grounds for employees who contract covid-19 at work?
- Covid-19 without lingering complications probably is not a "disability" under federal antidiscrimination law, but would employees disabled by other conditions be entitled to additional accommodation (such as temporary leave, work at home, the provision of masks and gloves, etc.) because of the pandemic?
- Whether and under what circumstances will the "general duty" clause of the federal statute governing occupational safety and health apply under current circumstances to require employers to prevent significant risk?
- Will that same statute permit employees to stop working in the face of imminent danger?
- Can a public employer require employees to prove they are vaccinated, if and when there is a vaccination?
- The Families First Act does not provide paid sick leave to gig-economy workers, which is a major limitation. Under the CARES Act, will companies such as Uber, for whom many gig-economy workers work, be required to pay into state

⁸ U.S. Department of Labor, Wage and Hour Division, [Families First Coronavirus Response Act: Employee Paid Leave Rights](#).

unemployment compensation funds to help pay for the benefits their workers will receive under that statute?⁹

The U.S. was slow to prepare for and respond to the health effects of the covid-19 pandemic. It has done a better job of responding to the pandemic's dire economic consequences. Had an ounce of such resources have been expended on prevention, much less would be required for the cure.

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⁹ Richard Carlson, listserv email, original on file with author.