

COVID-19 and Labour Law: U.S.

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Update: 14 July 2020

Abstract

Since the initial response to the Covid-19 labor crisis, the United States has faced a series of issues that raise questions as to the success of the initial measures taken, as well as the potential need for future legislation. Just as the United States took a piecemeal approach to shutting down, it has taken the same approach to reopening. With political pressure mounting to reopen the economy in full, parts of the U.S. are in medical crisis and many legal issues remain to be addressed.

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

1. Background

The first case of Covid-19 was confirmed in the United States on January 21, 2020, and on January 31, 2020, a public health emergency was declared¹. On February 6, 2020, the first death attributed to Covid-19 in the United States occurred². On March 11, 2020, the World Health Organization declared Covid-19 a pandemic³. By March 26, 2020, the United States had overtaken China for the most Covid-19 cases in the world at 83,836⁴. As of July 8, 2020, the United States had 2,982,900 cases of Covid-19, and there were 131,066 deaths attributed to the pandemic⁵.

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¹ See Grace Hauk et al., *Five months in: A timeline of how COVID-19 has unfolded in the US*, USA Today News (June 23, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/> (noting that the first case was a Washington state man who had returned from Wuhan, China on Jan. 15, 2020).

² *Ibid.* (noting that the first death in the United States was originally thought to be on February 29, 2020, but a subsequent autopsy showed an earlier Covid-19 related death).

³ *Ibid.*

⁴ *Ibid.*

⁵ CDC, *Cases in the U.S.*, (July 8, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

2. Wage Replacement

The United States did not order a national lockdown or quarantine; the decision was left to the discretion of each state's governor. Despite the fragmented approach in reacting to the health crisis, the economic response was federal and came early in the pandemic. The United States enacted The Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020, worth approximately \$2 trillion⁶. The CARES Act provided up to \$1,200 in Economic Impact Payments to individuals whose income was less than \$99,000, and an additional \$500 per child under 17 years of age⁷.

The CARES Act extended the maximum amount of time that an individual was able to collect unemployment from 26 weeks to 39 weeks⁸. In addition to the funds received under state unemployment insurance, those who filed were also eligible to receive \$600 per week in federal funds⁹. Currently almost 21 million Americans are receiving unemployment benefits¹⁰. The benefits extended under the CARES Act are set to expire on July 31, 2020¹¹. In May 2020, the United States House of Representatives passed the HEROES Act, which would extend the unemployment benefits granted under the CARES Act for the remainder of 2020¹². The HEROES Act would also grant all qualifying individuals a second Economic Impact Payment¹³. This bill is currently on hold at least until the United States Senate returns from recess on July 20, 2020¹⁴. It seems inevitable that additional economic measures will be taken in the near future, but the timing is contingent on the ability of Congress to reach an agreement.

3. Job Retention

The CARES Act also included the Paycheck Protection Program (PPP), instituted to provide funds to small businesses¹⁵. Under the PPP, \$659 billion¹⁶ was allocated as a direct incentive for small businesses to retain their workers¹⁷. A small business, defined as having less than 500 employees per location, was eligible to receive a forgivable loan contingent

⁶ U.S. Dep't of the Treasury, *The CARES Act Works for All Americans*, (Last checked July 11, 2020), <https://home.treasury.gov/policy-issues/cares> [hereinafter Treasury memo].

⁷ *Ibid.*

⁸ Oscar Gonzalez, *The CARES Act unemployment benefit ends July 31. Here (sic) what you should know*, CNET (July 8, 2020), <https://www.cnet.com/personal-finance/extra-600-cares-act-unemployment-benefit-ends-july-31-here-what-you-should-know/>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Jim Wang, *Second Stimulus Check Update: Here's Everything We Know Right Now*, FORBES (July 9, 2020), <https://www.forbes.com/sites/jimwang/2020/07/09/second-stimulus-check-update-what-we-know-so-far/#6e1910bc2c0d>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Treasury Memo, *supra* (n.) 6.

¹⁶ *Ibid.*

¹⁷ See U.S. Small Bus. Ass'n, *Paycheck Protection Program*, (Last checked July 11, 2020) <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

upon the requirement that the business quickly rehire employees and maintain salary levels¹⁸. In June 2020, the bill was amended to allow for more flexibility for business owners¹⁹. The amendment decreased the percentage of the loan required to be used for payment of salaries, and extended the timeframe to use the loan from eight weeks to 24 weeks²⁰. On July 4, 2020, President Trump signed an extension to the PPP, allowing it to continue until August 8, 2020²¹. It is estimated that within the first three months of the program, 4.9 million loans were received by small businesses²².

One major criticism of the response by the United States is the lack of oversight to the PPP. The government did not disclose who was receiving money under the PPP, but rather left the option of disclosure to the companies receiving the funds²³. It quickly became apparent that money was ending up in the hands of unintended entities²⁴. Companies that were not facing economic hardships caused by the pandemic, but rather had preexisting economic troubles, had been applying for and receiving loans²⁵. In addition, there was an exception in the PPP due to political lobbying that allowed for large chain restaurants and hotels to circumvent the 500 employee restriction to receive the loans²⁶. Upon facing public outrage some companies ultimately returned the money received under the PPP, while others did not²⁷. The PPP also did not include the usual restriction that religious organizations were ineligible to receive loans from the Small Business Administration²⁸. It is estimated that the Roman Catholic Church received as much as \$3.5 billion in loans under the PPP²⁹.

¹⁸ *Ibid.* (noting that 60% of the loan must be used to maintain payroll, the remaining 40% could be used for mortgages, rent and utilities).

¹⁹ Jonathan Nicholson, *Trump signs bill changing Paycheck Protection Program into law*, MarketWatch (June 6, 2020), <https://www.marketwatch.com/story/senate-oks-tweaks-to-small-business-lending-program-bill-goes-to-trump-for-signature-2020-06-03>.

²⁰ *Ibid.*

²¹ Neil Hare, *PPP Loan Program Extended; Loan Data Released: What Small Businesses Need To Know*, Forbes (July 8, 2020), <https://www.forbes.com/sites/allbusiness/2020/07/08/ppp-loan-program-extended-loan-data-released-what-small-businesses-need-to-know/#43a8166e7f11>.

²² *Ibid.*

²³ Jessica Silver-Greenberg et al., *Large, Troubled Companies Got Bailout Money in Small-Business Loan Program*, NY Times (May 13, 2020), <https://www.nytimes.com/2020/04/26/business/coronavirus-small-business-loans-large-companies.html>.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See Daniel Roberts, *Why chains like Shake Shack, Ruth's Chris, Potbelly qualified for PPP small business loans*, Yahoo! Finance (Apr. 20, 2020), <https://finance.yahoo.com/news/why-chains-like-shake-shack-ruths-chris-potbelly-qualified-for-ppp-small-business-coronavirus-relief-loans-170921820.html>.

²⁷ *Ibid.*

²⁸ Bill Bostock, *The US Catholic church may be the largest recipient of federal coronavirus aid, with as much as \$3.5 billion*, AP analysis says, Business Insider (July 10, 2020), <https://www.businessinsider.com/us-catholic-church-3-billion-coronavirus-loans-not-business-ap-2020-7>.

²⁹ *Ibid.*

4. Childcare for Workers

The Families First Coronavirus Response Act, enacted on March 18, 2020, allowed for two additional weeks of sick leave and 10 weeks of extended paid family and medical leave to those who were unable to work due to having a bona fide need to care for a child under the age of 18³⁰. Both forms of leave allowed a worker to collect two-thirds of their usual salary with the requirement that a child's school or childcare provider had been shut down for reasons related to Covid-19³¹.

If a parent immediately began utilizing the additional 12 weeks of leave, the paid leave is exhausted or nearing its end. The HEROES Act would provide additional service in the area of childcare services; providing \$7 billion in funding for childcare through the Child Care and Development Block Grant, as well as \$850 million to provide childcare for essential workers³². Despite pushback from medical and educational professionals, recently there has been political pressure to ensure a full reopening of schools in the Fall of 2020³³. If schools and childcare facilities are not able to reopen safely, additional measures will need to be taken to address the 56.6 million school age children that will be restricted to their homes³⁴.

5. Gig workers, Independent Contractors, and the Self-employed

For gig workers, independent contractors, and the self-employed, the CARES Act extended unemployment benefits to a sector of the United States economy that was not previously eligible³⁵. The Act expanded state unemployment insurance plans to cover these workers, as well as allowed them to receive the additional federal \$600 per week³⁶. The HEROES Act would continue these benefits through March 2021³⁷. Despite these measures taking a step towards protecting the gig-economy by traditional measures, a new issue is starting to present itself. The high number of unemployed individuals has forced

³⁰ U.S. Dep't of Labor, *Families First Coronavirus Response Act: Employee Paid Leave Rights*, (Last checked July 10, 2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

³¹ *Ibid.*

³² Aubrey Edwards-Luce et al., *Fact Sheet: Aid to Children and Families in the HEROES Act (H.R. 6800)*, FIRST Focus on Children (May 22, 2020), <https://firstfocus.org/resources/fact-sheet/fact-sheet-aid-to-children-and-families-in-the-heroes-act-h-r-6800>.

³³ See Elizabeth Chuck, *Florida schools must reopen with in-person instruction, education commissioner says*, NBC News (July 7, 2020), <https://www.nbcnews.com/news/us-news/florida-schools-must-reopen-person-instruction-education-commissioner-says-n1233061>.

³⁴ Joel Achenbach et al., *With Coronavirus science still iffy, U.S. schools hope to reopen for 56.6 million K-12 students*, The Washington Post (July 9, 2020), https://www.washingtonpost.com/health/with-coronavirus-science-still-iffy-us-schools-hope-to-reopen-for-566-million-k-12-students/2020/07/09/10cba7d4-c203-11ea-b4f6-cb39cd8940fb_story.html.

³⁵ See Roy Maurer, *Gig Workers, Self-Employed Covered Under CARES Act*, SHRM (Apr. 3, 2020), <https://www.shrm.org/hr-today/news/hr-news/pages/gig-workers-self-employed-covered-under-cares-act.aspx>.

³⁶ *Ibid.*

³⁷ Alicia Adamczyk, *HEROES Act would provide another stimulus check, broader student loan relief*, CNBC (May 16, 2020), <https://www.cnbc.com/2020/05/16/what-you-need-to-know-about-the-heroes-act.html>.

many to attempt to supplement their income by other measures. Gig employers are being flooded with new applications, lowering both the amount of work available per worker, as well as allowing the employers to lower the salaries they are offering³⁸.

6. The Role of Social Partners

Social partners have played a role in the crisis, but have been largely silent in the negotiation for legislation. Workers who were already protected by a union contract fared better than those workers who were not³⁹. Many union workers were protected from outright termination, and those who were furloughed were often entitled to benefits under their respective collective bargaining agreements⁴⁰. Unions also helped in the fight to provide front line workers with personal protection equipment⁴¹.

The unions are vocally supporting the passage of the HEROES Act as a protection for the labor force. The American Federation of Teachers, America's second largest teachers' union, has expended \$1 million in advertising urging the passage of the Act⁴². What effect this support will ultimately have in the passage of the HEROES Act is not yet determined.

7. Conclusion

The United States appears to be moving rapidly towards a full economic reopening despite lingering health concerns. Many of the benefits conferred by the initial legislation are set to expire soon. Should the current resurgence of the virus in parts of the U.S. get out of hand, or a second wave emerge, the current measures will not be sufficient. Whether the government has learned from its initial errors and will be able to respond accordingly is yet to be seen.

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³⁸ See Alana Semuels, *'It's a Race to the Bottom.'* *The Coronavirus is Cutting Into Gig Worker Incomes as the Newly Jobless Flood Apps*, Time (May 15, 2020), <https://time.com/5836868/gig-economy-coronavirus/>.

³⁹ See Benjamin Pu, *Labor unions are on the front lines in battle over worker protections*, NBC NEWS (May 1, 2020), <https://www.nbcnews.com/news/us-news/labor-unions-are-front-lines-battle-over-worker-protections-n1197781>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Lauren Vella, *Teachers union to spend \$1 million in ads supporting HEROES Act*, The Hill (June 12, 2020), <https://thehill.com/business-a-lobbying/502446-aft-goes-in-on-1-million-ad-buy-in-support-of-the-heroes-act-amid-covid>.