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## **A Dozen Tips for Advocating for Workers Affected by COVID-19 (including legal claims checklist)**

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For the Legal Network for Gender Equity Webinar – Advocating for Workers Affected by COVID-19  
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**\*\*Contact the Center for WorkLife Law at 415-565-4640 or [info@worklifelaw.org](mailto:info@worklifelaw.org) for free assistance with counseling workers and pursuing litigation concerning discrimination against family caregivers, pregnant and breastfeeding people, and workers with family responsibilities.**

Workers with questions about leave generally fall into three categories:

1. People with caregiving responsibilities
  - Childcare
  - Eldercare
  - Caring for a family member with a disability
2. People with health concerns
  - Worker at high risk (pregnancy, diabetes, asthma, obesity, etc.)
  - Worker wants to avoid exposing high risk family/household member
  - Worker has general concerns about coronavirus exposure and/or unsafe working conditions
3. People out of work or facing job loss/unpaid leave
  - Layoff/furlough
  - Termination (often when leave expires or sometimes in retaliation for taking leave)

### **Examine All Legal Angles**

#### **Tip #1: Consider all leave options**

- The new Families First Coronavirus Response Act provides paid or partially paid leave for covered and eligible workers who need time off for qualifying coronavirus-related reasons. For more information, visit the Department of Labor's Rule and other guidance (<https://www.dol.gov/agencies/whd/ffcra>) and the Center for WorkLife Law's resources, all available at [www.worlifelaw.org](http://www.worlifelaw.org) or here:

Leave for the Worker:

- [Leave to seek a coronavirus medical diagnosis](#)
- [Leave to stay at home or self-quarantine based on advice of a health care provider](#)

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- [Leave needed because of a shelter-in-place or isolation order](#)

### Leave to Care for Others:

- [Leave to care for children due to school or care closures](#)
- [Leave to care for someone else advised to stay home or self-quarantine](#)
- [Leave to care for someone under a shelter-in-place or isolation order](#)

### Millions of workers are excluded from FFCRA leave, and it gets used up quickly, so consider other options when a worker needs leave for caregiving or health reasons:

- **CHECK REGULARLY FOR NEW COVID-19 LAWS** in the state and local jurisdiction where the employee works. These laws fill in the coverage gaps left by FFCRA (e.g., apply to employers with more than 500 employees), and they're passing frequently at the state and local level.
  - Google works great to track these down!
- State and local **paid sick leave laws** – also passing regularly, so google frequently. These are not COVID-19-specific laws, but can be used for various COVID-19-related reasons. Some of these laws have “closure provisions” that allowed limited paid time off work when a child’s school is closed for public health reasons.
- Leave may be available as an **ADA** accommodation for individuals with underlying health conditions that constitute disabilities under the Americans with Disabilities Act (asthma, diabetes, heart conditions, cancer, etc.).
- Leave may be available as a pregnancy or breastfeeding accommodation under the federal **Pregnancy Discrimination Act** or state-level pregnant worker fairness acts. See [www.pregnantatwork.org](http://www.pregnantatwork.org) for more info.
- **FMLA** and state-level equivalents
  - COVID-19 can be a serious health condition entitling employee to take FMLA leave in serious cases that both incapacitate the employee (or their child, parent, or spouse) for more than three consecutive days and require ongoing medical treatment, as well as in cases requiring an overnight stay in a medical facility. See and apply the definition of “serious health condition” at 29 CFR 825.113.
  - Employees can take leave to provide “psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition” 29 CFR 825.124. Some states have equivalent provisions.
    - Argument can be made that an employee with a family member with a serious medical condition that puts them at high risk (e.g., cancer or heart disease) may take FMLA leave to avoid exposing the family member to coronavirus, thereby providing “psychological comfort and reassurance.”
    - This theory is surely an uphill battle, but worth consideration, particularly in letters informing employers of their legal obligations.

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### Tip #2: Ask worker whether an accommodation is better than leave

- Not working eliminates all risk, but most people still need to work because:
  - Statutorily-provided leave is limited in duration and can end in termination when it runs out. Accommodation may last for months or years.
  - Leave is typically partially paid or unpaid, so unaffordable for many
  - Working preserves health insurance, if any
- **Accommodations that may help during a pandemic:**
  - remote work
  - higher-quality PPE (masks, face shield, goggles)
  - plexiglass
  - HEPA filters
  - temporary transfer to alternate position
  - modification of job duties
  - modified schedule or reduced hours
  - alternate work location
  - work uniform changes
  - administrative leave, when necessary (may be available as an accommodation, even in the absence of a statutory leave entitlement)
- Workers asking for leave may not know they are entitled to a reasonable accommodation, so your job is to probe that with them. You can ask: **“Do you have any health conditions?”**  
 Consider:
  - **ADA-qualifying conditions: diabetes, heart conditions, cancer, immunocompromised state, etc.**
  - **Pregnancy and breastfeeding.** Accommodations potentially available under:
    - Pregnancy Discrimination Act
    - Americans with Disabilities Act
    - FLSA’s Break Time for Nursing Mothers provision (safe space for expressing milk must be provided, even during the pandemic)
    - state and local pregnant worker fairness acts and breastfeeding laws. Visit [www.pregnantatwork.org](http://www.pregnantatwork.org)
  - **Obesity** may be a disability in some states (e.g., California)
- No accommodation entitlement for **seniors**, so very important to try to use another underlying medical condition as an accommodation hook
- Even workers not legally entitled to accommodation may be able to use their right to take leave as leverage to negotiate for an accommodation, if the employer wants to keep them on the job. This can be a win-win, since leave typically expires, but accommodations may continue indefinitely.

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**Tip #3: When worker feels unsafe: explore whether employer is complying with federal, state, and local health and safety guidelines**

- Can't eliminate all risk, and
- Coronavirus health and safety standards are typically not enforceable (except Virginia!), but
- Highlighting an employer's failure to follow agency guidelines can apply effective pressure to change.
  - CDC guidance for businesses: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
  - OSHA guidance on returning to work: <https://www.osha.gov/Publications/OSHA4045.pdf>
  - State and local health departments and other agencies often issue guidance, and may be willing to become involved
  - Consider filing a complaint with state-level OSHAs
  - Private enforcement difficult, but some successes have been seen with:
    - Unfair competition claims (CA)
    - Nuisance law!

**Tip #4: Probe whether discrimination played a role in who is chosen for furlough/layoff/termination, & who is given leave and accommodations.**

- **Mothers, fathers, and other family caregivers** are being pushed out and treated less favorably
  - **Family Responsibilities Discrimination (FRD)/ Caregiver Discrimination statutes**
    - 185 FRD laws around the country!
    - No administrative exhaustion
    - Typically uncapped damages and attorney fees
    - Very little case law - clean slate – sky's the limit!
    - For more on FRD statutes, visit [www.worklifelaw.org/FRDlawsCOVID](http://www.worklifelaw.org/FRDlawsCOVID).
  - **Title VII of the Civil Rights Act** and state-level sex discrimination laws
    - Disparate treatment theory
      - Stereotyping (adverse decisions relying on sex-based assumptions that mothers will be unavailable and uncommitted during the pandemic because of childcare duties, and the proscriptive stereotype that fathers should not be providing care for their children, because their wife should be doing that).
      - If you don't have stereotyping evidence, you may be able to rely on gender "plus" children.
      - Contact Center for WorkLife Law for help formulating these claims.
    - Disparate impact theory (an identifiable policy or practice of not allowing accommodations or flexibility for caregivers during the pandemic disproportionately impacts women).

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- These are challenging claims to make. Please contact Center for WorkLife Law for resources and free support!
- **Americans with Disabilities Act:**
  - Workers who care for people with disabilities that require additional care due to the pandemic may have an associational disability claim if they are terminated, selected for furlough, or otherwise treated worse because of their association with someone with a disability.
  - Likewise, employees who are not hired, fired, etc. because of their association with someone with a severe case of COVID-19 may have an associational disability claim or a “regarded as” ADA claim.
- **People at greater health risk** are being pushed out when employer wants to “avoid liability” associated with their presence at work:
  - People with disabilities
    - **Americans with Disabilities Act** and state equivalents
  - Seniors
    - **Age Discrimination in Employment Act (40+)**
  - Pregnant workers
    - **Pregnancy Discrimination Act** and state-level pregnant worker fairness acts
- **Retaliation.** Workers have been unlawfully terminated for:
  - asking for leave
  - requesting an accommodation
  - complaining about health and safety
- **Wrongful discharge in violation of public policy.** Available in some states. E.g., termination for a worker’s refusal to come into work in violation of a government-issued stay-at-home order.
- **Race, national origin, and other protected classifications,** as usual. Ensure layoff, accommodation, and leave decisions are not being made on the basis of membership in protected classes.

### Look for Helpers

#### **Tip #5: Check if the employee is in a labor union.**

Most CBAs require compliance with all federal, state, and local laws. Unions may be able to resolve workers’ complaints by filing a grievance. Offer to talk through the law with union officials.

#### **Tip #6: Coach Healthcare Provider Gatekeepers**

Healthcare providers are responsible for writing the work notes that certify employees’ needs for accommodation and leave. How they write the note often determines whether an accommodation/leave is granted, or whether the worker loses their income, health insurance, or job. After taking attorney-client

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privilege considerations into account, you can provide guidance to healthcare providers to maximize the effectiveness of their work notes.

- Communicate with providers about what is reasonable
  - E.g., Don't write: "My patient cannot be exposed to any risk of coronavirus" unless really true. Because that cannot be provided as an in-person reasonable accommodation, the employee will not be allowed to work.
  - Instead try: "My patient must have access to appropriate PPE, including goggles." Or "I recommend my patient work from home."
  - Medical recommendations can be amended later.
- For pregnancy and breastfeeding accommodations, use the Center for WorkLife Law's note-writing guidance for healthcare providers, available at [www.PregnantAtWork.org](http://www.PregnantAtWork.org).

### Counseling the Worker

#### **Tip #7: Clearly explain their legal rights in plain language, but be comfortable with the novelty and uncertainty presented by COVID-19**

It has always been true that the law is not black and white, but it is particularly true now as new coronavirus laws pass and are interpreted and challenged, and as old laws are applied in a novel context. Be comfortable expressing to the worker that things are unsettled, but you will take the strongest position possible in their interest.

*Also keep in mind that many people are going through the most difficult time of their lives. Try to be patient, understanding, and kind.*

#### **Tip #8: Discuss potential for retaliation and strategies to avoid it**

- Communicate that retaliation for protected activity (e.g., asking for leave or accommodations, complaining about dangerous conditions) is illegal but there are no guarantees that employers will not retaliate.
  - The employee must make the decision whether to take the risk of retaliation.
- Worker knows their supervisor and workplace best, but you can strategize with them about how to present the issue in a way that is least likely to ruffle feathers. Consider whom to talk to and in what order, and how to frame the request or complaint. When possible, workers should emphasize their commitment to doing a good job for the supervisor/employer.
- **National Labor Relations Act Section 7:** protects concerted worker activity for mutual aid or protection, even when workers are not in a union, so long as they act in concert with another employee. SO, encourage workers seeking improved conditions to speak up with others for additional protection from retaliation.
- Suggest keeping notes, especially on anything that sounds wrong or unfair, and sending follow up written communications memorializing when something is agreed to, like extended job protected leave.
  - Plan ahead for not having access to work email on leave or following termination.

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**Tip #9: Inform about unemployment insurance (UI), pandemic unemployment assistance (PUA), & other income replacement programs - & FLAG APPEAL DEADLINES!**

- Common for employees to assume, often incorrectly, they are not eligible for unemployment benefits.
  - **Share the basics and encourage them to apply when they are out of work (or in some states, earning less than normal).**
  - Helpful resources for the “basics”:
    - First check your state’s unemployment insurance agency website for updated info
    - National Employment Law Project resources:
      - <https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/>
      - <https://www.nelp.org/publication/unemployment-insurance-protections-response-covid-19-state-developments/>
    - National Law Review (20 Questions re: PUA):  
<https://www.natlawreview.com/article/pandemic-unemployment-assistance-20-questions-and-answers-employers>
    - National Conference of State Legislatures:  
<https://www.ncsl.org/research/labor-and-employment/covid-19-unemployment-benefits.aspx>
- **UI:** rules differ state to state, but many states modified suitable work requirements and relaxed requirements around availability and job searching.
  - **Bottom line: folks are eligible now for UI where they would not have been in the past. Apply!**
- **PUA:** income replacement for those out of work or working less who are not eligible for regular UI, or have exhausted UI benefits, but who are out of work for reasons enumerated in the CARES Act, including:
  - independent contractors,
  - people with caregiving responsibilities,
  - people with COVID-19 or caring for patient
  - people at risk due to underlying health conditions
  - Other enumerated reasons, available here:  
<https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/>
  - **Bottom line: Apply!**
- Unfortunately, people are facing a range of problems getting benefits nationwide, including
  - Major processing delays
  - Confusing application procedures, including lack of notice of PUA eligibility following a UI denial (SO, ensure folks denied UI put in an application for PUA in states where it is not automatic)
  - Undocumented workers are ineligible for UI and PUA. Some private funds exist.
    - List of California funds: <https://legalaidthatwork.org/blog/relief-funds/>

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- Improper benefits denials in violation of the CARES Act, including applicants being denied or losing benefits when employers report employee has “refused” to return to work, even when employee has valid reason for refusal (childcare, health condition, etc.)
- Reach out to newly-created pandemic unemployment assistance clinics operating at legal aid orgs and law schools to get more information on what is happening on the ground in your state, or for assistance with an appeal.
- Consider whether employees may be eligible for temporary disability insurance, state disability insurance, or paid family leave programs run by your state or private disability insurance programs offered by employers.
- **Get applications in ASAP to get ball rolling (and expect delays).**
- **Help callers denied benefits to identify quick-turnaround appeal deadlines.** Windows to appeal are often *very* brief. First thing to consider when someone is denied a state benefit should be the deadline to appeal.

### Tip #10: Inform about other lifelines

- Suggest worker calls 211 for assistance accessing other necessary resources. **211** is a comprehensive source of locally-curated social services information available throughout the U.S., including mental health, shelter and housing, utilities, crisis hotlines, supplemental nutrition programs, health care, and more.
- Refer to local legal aid orgs for non-employment poverty law issues.

### Tip #11: Offer something in writing

- Center for WorkLife Law’s **fillable forms for requesting FFCRA leave** can be filled out by the worker and include all of the info the employer needs to grant FFCRA leave request and claim the related tax exemption
  - Available in English and Spanish at <https://worklifelaw.org/covid19/helpline-resources/>
- Write or ghost-write letter to employer.
- For workers who do not want employer to know they have consulted a lawyer, you may offer basic educational handouts that the employee can send to the employer with information about the employer’s legal obligations.
  - E.g., Info from the IRS website on tax reimbursements or DOL’s FAQs about FFCRA leave



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### Take Care of Yourself

#### **Tip # 12: Access Attorney Support**

- Call the Center for WorkLife Law on caregiver discrimination/ family responsibilities discrimination (FRD) matters
  - We offer support in formulating claims and litigation strategy
  - Join our network to receive FRD trainings and other FRD resources
  - **Liz Morris – 415-565-4640 or [morrisliz@uchastings.edu](mailto:morrisliz@uchastings.edu)**

**Even when there isn't much to offer in terms of legal rights, your listening ear and accurate information go a long way for workers in crisis. Counseling people in crisis, while also dealing with our own COVID-19 challenges, can be taxing. Please take care of yourself!**