ANCOR American Network of Community Options and Resources

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March 26, 2020

VIA ELECTRONIC MAIL

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

Re: Families First Coronavirus Response Act
Definition of "Health Care Provider"

Long Term Care/Intellectual and Developmental Disability Providers

Dear Mr. Secretary:

At the request of the U.S. Department of Labor ("DOL") via its nationwide Town Hall of March 20, 2020, we, the American Network of Community Options and Resources (ANCOR), are writing to provide input as DOL prepares to issue regulations and/or interpretive guidance regarding the "Families First Coronavirus Response Act" ("FFCRA").

ANCOR is a national, nonprofit trade association representing more than 1,600 private community providers of services to people with disabilities. Our members provide long-term care to more than 600,000 people with intellectual and developmental disabilities across the country through Medicaid Home and Community Based Services. The providers who ensure their health and safety, do this largely unrecognized. They are among the unsung heroes that we hear about daily.

ANCOR respectfully requests that, pursuant to the explicit authority granted to DOL in the Emergency Family and Medical Leave Expansion Act ("EFMLA"), Division C of the FFCRA, and the Emergency Paid Sick Leave Act ("EPSLA"), Division E of the FFCRA, that DOL issue regulations defining "health care provider" for purposes of exclusion from the definition of "eligible employee" for purposes of the EMFLA and EPSLA, to include:

> An employee of any long term care provider of support to people with intellectual and developmental disabilities through Home and Community Based Services and Intermediate Care Facilities who is providing care and support essential to activities of daily living and independence to a vulnerable population of adults with intellectual and developmental disabilities.

These employees, Direct Support Professionals who deliver care and support to intellectual and developmental disabilities (herein, "DSP"s), provide essential services to this population and

have worked for decades to build a structure of support that allows people to live as independently as possible. A large population of the people our members support live in residential settings that require a trained employee to be physically at the site to conduct their assigned job responsibilities 24 hours a day, seven days a week. Our reasons supporting our request that DSPs be defined as "health care providers" for purpose of the EMFLA and EPSLA are set forth below.

ANALYSIS

Statutory Requirements

The EPSLA generally provides eligible employees who are employed by a private-sector employer with fewer than 500 employees with up to eighty hours (for full time employees) of paid sick leave when: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual subject or advised to quarantine or self-isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Subject to statutory caps, this sick leave is generally paid by the employer at the employee's regular rate when taken for the reasons specified in sections (1), (2), or (3); or at a reduced rate for reasons (4), (5), or (6).

The EMFLA generally provides eligible employees who are employed by a private-sector employer with fewer than 500 employees with up to twelve weeks of emergency FMLA leave, where leave is taken for a "qualifying need related to a public health emergency." The statute defines "qualifying need related to a public health emergency" as an employee being unable to work or telework due to a need for leave to care for a son or daughter, if the child's school or place of care has been closed, or their child care provider is unavailable, due to a public health emergency.

The first segment (for full-time workers, ten days) of EMFLA leave may be unpaid (although as a practical matter, paid leave is likely to be provided by way of the EPSLA); the remaining ten weeks of EFMLA leave is paid at two-thirds of the employee's regular rate, again subject to certain statutory caps.

Exemption of Certain Health Care Providers

Section 3102 of the EMFLA expressly provides the Secretary of Labor with the authority, for good cause shown to exempt "certain health care providers" from the definition of "eligible employee" for purposes of the statute's expanded FMLA benefits. Section 5111 of the EPSLA grants the same authority to the Secretary for purposes of that statute's emergency paid sick leave benefits.

Both the EMFLA and EPLSA adopt as a baseline definition of "health care provider" the definition set forth in the Family and Medical Act. Section 101(6) of the FMLA, 29 U.S.C. § 2611(6), defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services."

Regulations implementing the FMLA define "any other person … capable of providing health care services as: (i) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; (ii) nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; (iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner; (iv) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and (v) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law. *See* 29 CFR 825.102.

The Need to Exclude DSPs from the Definition of "Eligible Employee" Under the EMFLA and EPSLA

We note at the outset that the definition of "health care provider" and other persons "capable of providing health care services" are included in the FMLA for a very specific statutory purpose: namely, to identify those individuals who are authorized under the statute to certify the need for an employee to take FMLA leave related to a serious health condition (or that of a family member). *See* 29 U.S.C. §§ 2613, 2614. They have never been construed to determine whether a given worker is a "health care provider" for the purposes of determining whether an individual is providing necessary health care to patient populations.

Put another way, the definition of "health care provider" and those "capable of providing health care services" set forth in existing law and regulations was not intended to address the situation presented under the EMFLA and EPSLA, that is, whether an employee is delivering health care services in the context of a public health emergency, and/or whether such an employee should be excluded from eligibility for certain benefits during such a crisis.

Like nurse-practitioners, nurse-midwives, physician assistants, and others recognized under current regulations, DSPs are part of a continuum of care, and a vital part of our integrated health care delivery system. Given the critical public health services they are providing, there is a compelling need to exclude DSPs from the definition of "eligible employee" for purposes of the EMFLA and EPLSA.

DSPs deliver health care services in Medicaid Home and Community Based Services setting often identical to those provided in post-acute care facilities, in a non-acute setting. This means the delivery of these services in an isolated environment, consistent with guidance for "social distancing" and non-exposure to COVID-19 promulgated by health officials.

DSPs work to ensure that individuals with intellectual and developmental disabilities are provided critically-needed care 24 hours a day, seven days a week in home or community-based settings. Indeed, it is because of this fact that the DOL has previously recognized that the services DSPs provide "are captured under other occupational codes including 31-1011 Home Health Aides and 39-9021 Personal Care Aides, depending on actual work performed." *See* Letter of Rebecca Rust, DOL Bureau of Labor Statistics Assistant Commissioner for Occupational Statistics and Employment Projections to U.S. Representatives Joe Courtney (November 28, 2018).

We are gravely concerned, based on prior experience, that absent an exemption from the requirements of the EFMLA and EPSLA, we will lack an available workforce able to deliver much needed care to individuals with intellectual or developmental disabilities. We faced such a shortage during the economic downturn of 2008, when broad-based extensions of benefits to displaced workers resulted in a lack of available workers to deliver critical care.

For these reasons, we request that DOL use the regulatory authority it is provided by way of statute to exempt from the definition of "eligible employee" for purposes of the EFMLA and EPSLA the following:

> An employee of any long term care provider of support to people with intellectual and developmental disabilities through Home and Community Based Services and Intermediate Care Facilities who is providing care and support essential to activities of daily living and independence to a vulnerable population of adults with intellectual and developmental disabilities.

By doing so, DOL will ensure that these workers will continue to provide much-needed health and medical care during this unprecedented national health emergency. For purposes of determining whether DSPs are "health care providers" under these statutes, these health care workers are no differently situated than nurse practitioners, clinical social workers, nurse-midwives, and the range of other health care professionals delivering care in an integrated health care system.

The Exclusion of DSPs Is Consistent with Public Health and Safety Precautions Taken by State and Local Governments

Finally, we note that the exclusion of DSPs from the definition of "eligible employee" under the EPSLA and EMFLA is entirely consistent with actions taken by state and local governments responding to the COVID-19 pandemic by way of mandated business closures. As numerous states have ordered business closures or "shelter in home" orders for businesses and their employees, with exemption for "essential" workers, the work of DSPs has consistently been recognized in these states as essential. Delivery of care to individuals with intellectual or developmental disabilities has been recognized as essential in a number of states, including Connecticut, Florida, Kentucky and North Dakota.

The recognition by states and localities of the essential nature of all aspects of public health delivery demonstrates that DSPs are "health care providers" within an integrated health care delivery system. These facts further support DOL's designation of DSPs as exempt from the definition of "eligible employee" under the EPSLA and EMFLA.

For all of the foregoing reasons, we respectfully submit that DOL should designate DSPs, as defined above, as exempt from the definition of "eligible employee" for purposes of the emergency leave allowances of the EFMLA and EPSLA.

Thank you for your consideration of our request. Should you require any further information, please do not hesitate to be contact me via email at smccracken@ancor.org.

Sincerely yours,

Shannon McCracken

Shannon McCracken
Vice President, Government Relations