March 29, 2020

RE: Families First Coronavirus Response Act
Family and Medical Leave to Employees by COVID-19 Online Dialogue

The City of New York submits the following comments concerning the paid family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA).

A. Regulations should narrowly construe any exemptions from coverage to effectuate the public health purposes of the emergency law

1. Healthcare providers under Section 5111(1)

One of the purposes of Families First Coronavirus Response Act (FFCRA) is to allow those who may be sick to take time off for quarantine or recovery without financial penalty. Section 5101(a)(1)-(3) itemizes three qualifying reasons for use of FFCRA leave that are all tied to the employee's own health and risk of exposing others. Section 5111(1) of FFRCA authorizes the Secretary of Labor to issue regulations excluding certain health care providers and emergency responders – who play a unique and critical public role during this crisis – from coverage. During this pandemic, it is crucial that private sector home care workers without existing paid leave be able to access FFCRA leave to avoid spreading COVID-19 and without incurring personal financial consequences. Particularly for frontline healthcare workers employed by private agencies to provide care in people's homes, FFCRA leave is an important tool to avoid encouraging sick home care workers to continue working when they risk spreading COVID-19 to others.

The Secretary should ensure that any Section 5111(1) regulations do not exclude private sector home care workers from using FFCRA or comparable leave for their own COVID-19 quarantine, treatment, or recovery. In DCA's enforcement experience, many privately-employed home health aides, nurses, occupational therapists, and others who provide health-related services in private homes often do not have access to paid sick leave – if at all – beyond the minimum 5-day requirement under New York City law. A comparable policy should mean an existing leave policy that provides an amount of time off equal to FFCRA for the health care worker's own COVID-19 quarantine, treatment, or recovery.

Therefore, any Section 5111(1) regulations should:

- Be tied to specific circumstances that directly promote the public health;
- Specify whether the exemption applies to all qualifying uses or if qualifying uses relating to the worker's own health and risk of spreading the virus to others will be covered;

- Specify the narrow categories of healthcare workers covered by the exemption to avoid uncertainty for borderline healthcare workers such as home health aides, nurses, occupational therapists, and others providing health-related services in private homes; and
- Take into account the worker's access to other comparable leave.

2. Small businesses under Section 5111(2)

The Secretary of Labor can issue regulations pursuant to Section 5111(2) that exclude small businesses from the requirements of Section 5102(a)(5) of FFCRA when "the imposition of such requirements would jeopardize the viability of the business as a going concern." To the extent the Secretary of Labor exercises this authority, such exemption should be very narrow and discrete and directly tied to demonstrated economic circumstances. Specifically, the regulations should establish that compliance may only "jeopardize the viability of a business" when payment of the benefits would necessarily prevent the business from continuing to function. Before excluding employees from the important benefits provided in FFCRA, the Department of Labor (DOL) should have a clear standard for assessing the businesses' ability to function on a case-by-case basis and do an employer-specific financial analysis, and should not categorically exclude industries or sectors. DCA and other enforcement agencies routinely have to balance the legitimate business interests of small employers with workplace protections, and it is possible to conduct specific and concrete assessment of financial viability without unduly excluding workers from emergency benefits meant to help compensate workers and prevent further spread of COVID-19.

B. Clarify definitions and terminology in FFCRA

1. "Quarantine or isolation order" in Section 5102(a)(1)

DOL should interpret "quarantine or isolation order" in Section 5102 of FFCRA broadly. As quarantine and isolation are not defined in FFCRA, the terms should be taken to mean any separation of a person from the general population due to concerns about the spread of illness. Thus the section should be interpreted to include *all* government and public health official orders at the state and local level, whether they use the terms "quarantine" and "isolation" or not, including all government orders directing a particular populations of workers to stay home because the population is particularly vulnerable to infection. Such an interpretation would ensure that the many elderly and immune-compromised workers who were required to stay home pursuant to New York's "Matilda's Law" not need balance their need for income with their need to protect their and the public's health.

2. "Self-quarantine" in Section 5102(a)(2)

DOL should interpret "advised by a health care provider to self-quarantine" in Section 5102(a)(2) of FFCRA to include any instructions to quarantine/isolate/stay home because of illness, including any COVID-19 symptoms. It should also include instructions to quarantine/isolate/stay home because an employee is particularly vulnerable to COVID-19 infection, due to age, immune deficiencies, heart or pulmonary condition, etc. Such interpretation is apparent from the plain meaning of "self-quarantine," which is not defined in FFCRA, but should be clarified for the public.

4. "Substantially similar condition" in Section 5102(a)(6)

Section 5102(a)(6) of FFCRA grants the discretion to Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor, to specify any other substantially similar conditions for which workers should also be entitled to the paid sick leave benefits provided in Section 5102 of the Act. First, if the DOL does not clarify that COVID-19-related federal, state, or local orders are included in Section 5102(a)(1) of the Act, regardless of the use of the word "quarantine" or "isolate," then the Secretaries should establish that such orders are substantially similar to quarantine or isolation. Specifically, the Secretaries should establish that orders directing particular populations that are exceptionally susceptible to COVID-19 infection or morbidity, such as New York's Matilda's Law, should entitle workers to paid leave.

Second, the Secretaries should establish that employees who are fulfilling new family care giving duties due to COVID-19, are experiencing substantially similar conditions to the provisions established in Section 5102(a) of the Act. For instance, an employee may need to use leave to care for a disabled sibling because the sibling's usual care-worker has been instructed by a doctor to quarantine. Such a situation is very similar to Section 5102(a)(5), but would take into account other essential family relationships.

C. Enforcement

In order to ensure that the public health goals and economic assistance provided by FFCRA are realized, enforcement must be immediate and robust. A 30-day "no enforcement period" is contrary to the plain language of FFCRA, is outside of the Department's authority, and undermines the fundamental purpose of FFCRA to provide timely paid leave benefits amidst parallel public health and economic crises. FFCRA is a pandemic response law that entitles employees who are sick or caring for someone who is sick or other affected by COVID-19 to monetary assistance so they can provide for themselves and their families and do not have to risk going to work and spreading COVID-19. Instituting a period of non-enforcement defeats the primary purpose of the FFCRA: to slow the spread of COVID-19 by taking away the financial pressure placed on employees who have or may have the virus. The COVID-19 public health cannot afford a "no enforcement" period. Employers must be required to comply immediately in order to slow the spread of COVID-19.

Further, a built-out, clear, and resourced enforcement mechanism is required so that FFCRA can actually address the harm to the public health caused by COVID-19. Such enforcement operation must include a means by which employees can easily submit inquiries and complaints directly to DOL. If an employee, and consequently the public, is harmed by an employer's failure to comply with FFCRA, DOL must have a credible process for handling complaints and addressing the violation. A built-out administrative enforcement process is crucial to ensure that employees are actually able to stay home when they are sick. Compliance with minimum labor standards requires the government agency charged with enforcement to have a comprehensive system in place in order to address complaints concerning both individuals and entire workplaces. DCA recommends accepting complaints via telephone, email, online forms, and, where feasible, in-person. Having an accessible, multilingual intake process is an essential service for workers who have been denied their rights under FFCRA.

Finally, DOL should maintain data about the number of complaints, the industries that complaining employees work in, and the nature of complaints, in addition to other details, and must should make such data available to state and local governments. This will allow as many

government entities as possible to have information needed to identify gaps in coverage and other issues to help stem the public health and economic fallout of COVID-19.

D. Outreach and Education

It is critical that DOL invest significant resources in ensuring that Americans are aware of and understand their rights under FFCRA. The Department's outreach and education efforts must be deployed thoughtfully in order to reach people who are confined to their homes or healthcare facilities and have limited access to their regular sources of information, like friends, family, schools, or community spaces. Outreach will need to rely heavily on traditional and new media channels, particularly on social media, which creates opportunities for meaningful interaction in the time of social distancing. Additionally, the Department must invest in non-English materials and other resources to ensure that speakers of languages other than English are able to access FFCRA rights.

In order to reach a broad audience that includes workers most vulnerable to exploitation, DOL should convene a task force to lead implementation of outreach and education efforts, as well as to create a hotline where workers can place questions and complaints. The members of this task force should be representative of and have strong relationships with diverse communities from around the country, as well as the prominent organizations in these communities. As a government agency, DCA recognizes that outreach and education efforts are most effective when the government is partnering with community organizations and community organizations are leading the way on strategy and helping to connect to communities on the ground.

The task force should ensure that localized outreach efforts educate Americans not only on their paid sick leave rights under FFCRA, but where applicable on their analogous rights under state and local laws. For example, in New York City, there are three different paid sick leave laws that may or may not apply in various situations: FFCRA, the New York State Emergency Paid Sick Leave Law, and the New York City Earned Safe and Sick Time Act. In many jurisdictions, there may be workers who are not covered by the federal law, but who are eligible for paid sick leave under a state or local law. Thus, the task force must connect the community organizations leading worker-facing outreach to the agencies that enforce state and local paid sick leave laws in those organizations' areas, to the extent that such relationships do not already exist.