FAQ: Immigrant Workers' Rights and COVID-19—A Resource for Workers and Their Advocates*

The COVID-19 public health crisis is creating many challenges for immigrant workers and their families.[1] An estimated six million immigrants are in essential jobs at the front lines of the response to this pandemic. They work in industries such as health care, grocery and pharmacy retail, manufacturing, cleaning and janitorial services, and agriculture. An additional six million foreign-born workers are employed in industries that have been hard-hit by business closures. These include food service, travel and hospitality, personal services and private household work, and building services.[2]

It is critical that all immigrants know their rights at work and have the information and protections they need to ensure their health, safety, and wellbeing during this unprecedented time. Many resources are available to address various aspects of this crisis. This document is designed to answer frequently asked questions from immigrant workers and their advocates related to COVID-19. Where possible, we include links to additional information on various topics.[3] This is an evolving area of policy, and this document will be updated to reflect the rapidly changing nature of this issue.

This document answers frequently asked questions from immigrant workers and their advocates about COVID-19-related topics.

This FAQ covers these topics:

* **The information in this document does not constitute legal advice and does not replace the advice of an experienced employment or immigration attorney.**

[1] For general information on the pandemic, visit the Centers for Disease Control and Prevention site.

[2] Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable, Migration Policy Institute.

[3] Many of the issues discussed are based on state and local law and policy, and so there is not a "one size fits all" approach. Additionally, for workers who are represented by a labor union, the collective bargaining agreement may give workers rights beyond those provided under local, state, and federal laws and orders represented here.

Safety and Health on the Job

How can employers meet their responsibility to protect workers during this crisis? How can workers protect themselves on the job during this crisis?[4]

The Occupational Health and Safety Administration (OSHA) and the Centers for Disease Control and Prevention (CDC) have released information for workers on how to prevent the spread of the virus and how to stay safe on the job. Specific employer guidance is available from OSHA, the CDC, and the World Health Organization (WHO). State agencies, including the New York State Department of Health, California Department of Industrial Relations (Cal/OSHA), and Washington State Department of Health, also provide additional information on essential worker safety during COVID-19. Be sure to check your state Department of Health website for the most updated information.

Specific guidance also is available for restaurant workers, farmworkers, retail and grocery workers, hospitality and tourism, long-term care facilities, childcare programs, and domestic workers. See also NELP's toolkit on worker safety and health during the COVID-19 pandemic.

Do health and safety laws protect immigrant workers during this public health crisis?

Yes. Health and safety laws protect all workers, regardless of immigration status.

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Are there specific protections under health and safety law for the COVID-19 pandemic?

The federal Occupational Safety and Health (OSH) Act gives all workers the right to safe and healthful working conditions and imposes on employers the duty to provide workplaces that are free of known hazards that could harm their employees. However, federal OSHA does not currently have standards (legal rules) that specifically address protection from COVID-19 in the workplace.[5] ***In addition, in a sharp departure from previous pandemics and crises, advocates are raising alarms about OSHA's refusal to protect workers, reporting that OSHA is not conducting any COVID-19 related inspections—not even for health care workers at risk***.[6]

In approximately half of the states, however, the state government has its own OSHA agency, as well as additional laws and regulations that go above and beyond the federal standards;

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[4] For more information, see Worker Safety & Health During COVID-19 Pandemic: Rights and Resources.

[5] OSHA does have a standard to deal with the risks posed by bloodborne pathogens that may be relevant for some workers as well as standards regarding personal protective equipment, and a sanitation standard that requires that all restrooms be sanitary and that they include running water and soap. OSHA has recently released relevant enforcement guidance on the shortage of N95 masks given COVID-19. See Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic. The OSH Act also contains a "General Duty Clause" which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." For more information on the General Duty Clause, see OSH Act Section 5(a)(1).

[6] For more information on OSHA's inaction, see On Labor: Worker Health is Public Health and The Center for Public Integrity's "The Labor Department Won't Take Steps To Protect Health Care Workers from the Coronavirus."

these states enforce their own safety and health laws.[7] These 22 states are called "state-plan states." ***If you live in a state-plan state, your state may enforce additional standards relevant to the COVID-19 crisis, though advocates are also raising alarms at the lack of state-level enforcement to protect workers.***[8]

How do workers enforce their rights under health and safety laws?

Typically, workers enforce their rights under the OSH Act by filing a complaint with federal OSHA or the state agency, which are charged with enforcing the Act, although that may have limited utility. In this pandemic, workers and their advocates can also file complaints with the county health departments. Workers and their advocates may also be able to use general whistleblower statutes or novel claims under common law to ensure workplaces are healthy and safe.

In addition to this traditional administrative enforcement of health and safety laws, workers can engage in ***protected, concerted activity.*** By joining together with co-workers, an individual worker gains the legal right to demand safe and healthy working conditions from her boss.[9] Workers engaged in such activity are protected from adverse actions by their employer. See the next section for information about how to engage in protected, concerted activity and file a complaint with the National Labor Relations Board (NLRB).

Joining together with co-workers, an individual worker gains the legal right to demand safe and healthy working conditions.

How does a worker file a complaint with OSHA?

The federal administrative agency, OSHA, appears unwilling to conduct inspections relating to possible hazards posed by COVID-19, so it may be difficult to enforce these rights through OSHA complaints at this time. ***Sustained public pressure could help change this practice.*** Nonetheless, OSHA is still operating during this crisis, and is processing worker complaints about unsafe conditions. Although OSHA is not conducting inspections based on these complaints, it is processing them informally, which means investigators will contact the employer by phone or email if they believe the complaint alleges a serious hazard. ***Even if OSHA is not conducting inspections related to COVID-19, workers should still consider filing a complaint, particularly when there are egregious violations that pose an immediate danger to workers' health and safety.***[10]

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[7] For more information on which states are state-plan states, see OSHA Frequently Asked Questions.
[8] For example, the California state agency Cal/OSHA has a specific standard to protect workers exposed to airborne infectious diseases such as the coronavirus, and Oregon is announcing publicly that it is going to enforce its state health and safety laws, see "State to conduct workplace inspections after 1,200+ coronavirus-related complaints filed."
[9] This right, under Section 7 of the NLRA, covers non-supervisory and non-managerial employees.
[10] Imminent dangers are working "conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." If workers decide to file such a complaint, they should state clearly what employer practices create a COVID-19-related imminent danger. Based on federal OSHA's current conduct, it is likely that OSHA will not consider anything except the most extreme and egregious of situations relating to COVID-19 to rise to the level of "imminent danger."

Under the OSH Act, a current worker(s) or her representative(s) may file a complaint and request that OSHA conduct an inspection.[11] The complaint should include facts suggesting that an employer is violating the OSH Act, the relevant guidance that OSHA has published, or any specific OSHA standard or regulation.[12] The complaint can be filed by phone or through the OSHA website. Any worker can file a complaint, and she can ask OSHA not to reveal her name to the employer. Organizations may file complaints on behalf of a worker(s); when possible, this is preferable.[13]

State and local governments, including county health departments or state health and safety agencies in state-plan states, may continue to play a more active role in meeting their obligations to protect workers' health and safety during the COVID-19 crisis. Workers in these states could also consider filing a complaint with the relevant state or local agency.

Will an OSHA inspector ask about a worker's immigration status if she files a complaint?

The investigator should not ask.[14] Even if the investigator does ask about immigration status, workers are under ***no obligation*** to answer an OSHA inspector's questions about immigration status.

Can a worker file an OSHA complaint in a language other than English?

Absolutely. A worker's lack of English skills does not mean she cannot participate in the OSHA complaint and inspection process. When filing a complaint, a worker should make OSHA aware of the dominant language among workers. If possible, OSHA will send an inspector who can speak the language. If an attorney, advocate, or organizer can provide interpretation, note that in the complaint.

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[11] OSHA's refusal to conduct inspections based on COVID-19 hazards stands in contrast to the text of the OSH Act. The Act actually has strong language mandating inspections in certain circumstances. Under the Act, when OSHA receives a formal complaint, and OSHA has reason to believe the complaint describes conditions which may violate the Act, then OSHA *must* conduct an inspection. For hazards outside of the COVID-19 context, this means that a worker's complaint could trigger an inspection—literally— within days. If OSHA determines that reasonable grounds for an inspection exist, the agency must inspect the worksite "as soon as practicable." If the OSHA inspectors discover a violation of a standard or the general duty clause of the OSH Act, OSHA may issue citations (penalties) against the employer to punish it and to get it to correct ("abate") its behavior. OSHA may take up to six months to issue a citation.

[12] For more information on filing an OSHA complaint, see Chapter 5 of The OSH Law Project's "Eliminating Workplace Hazards" toolkit.

[13] When a worker center, labor union, or other organization files a complaint on behalf of worker(s), they can do so without naming any of the individual workers. The workers should write a short note, stating that they are designating the Organization as their representative, and sign their names. That note can then be redacted and included with the complaint to ensure that the agency does not question the Organization's legitimacy to file the complaint.

[14] A 2011 memorandum of understanding (MOU) between ICE and the U.S. Department of Labor (USDOL), which applies to OSHA, outlines the two agencies' commitment to ensure coordination to protect workers who are exercising their labor rights against retaliation by employers and other parties who use the threat of immigration enforcement.

Using Collective Action to Improve Workplace Safety and Health

How does a worker engage in "protected, concerted activity" to demand safe and healthy working conditions from her employer?

The National Labor Relations Board (NLRB) enforces the National Labor Relations Act (NLRA). Section 7 of the NLRA gives employees the right to engage in ***protected, concerted activity***—which is when two or more employees take action for mutual aid or protection regarding the terms and conditions of employment. Therefore, when two or more workers file an OSHA complaint together or jointly complain to their employer about unsafe working conditions, they are likely engaging in concerted activity that is protected under the NLRA. If an individual worker files an OSHA complaint to protect both herself and other workers from hazards they all face, that individual, even though acting alone, may be protected by the NLRA.[15] Many organizations are offering support to non-union workers who are interested in organizing in their workplace.[16]

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What kinds of changes can workers advocate for to reduce the risk that they and their co-workers will be exposed to COVID-19?

Workers can advocate that their employers implement effective workplace controls, such as the kinds of work practices and protective equipment or shields outlined in the employer guidance from the CDC and OSHA. The most important measure to keep workers safe is increased physical distance between workers, and between workers and customers, to six feet. Workers can join together through concerted activity to demand that their employer develop an infectious disease preparedness and response plan.[17] See NELP's Worker Safety and Health Toolkit for more information about protective measures to keep workers safe.

What can a worker do if her employer is not giving her the equipment needed to protect herself?

When workers face certain hazards, their employers have an obligation to provide and pay for personal protective equipment (PPE). This obligation exists regardless of a worker's immigration status. PPE can include masks and gloves; a worker's right to this equipment

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[15] In light of Alstate Maintenance, LLC, 367 NLRB 68 (2019), just complaining about an issue that affects multiple employees may not be enough to count as "concerted" activity. Nonetheless, such a worker would be protected from retaliation under the OSH Act, see section on Retaliation, *infra*.

[16] The CWA Union is offering support, and the Democratic Socialist of America (DSA) and the United Electrical Workers (UE) have joined forces to help non-union workers organize their workplaces.

[17] Any plan should incorporate four levels of workplace controls: **engineering controls** (such as improving ventilation, installing plastic shields and other physical barriers, and instituting drive-through services); **work practices designed to prevent exposure** (including frequent handwashing, practices to increase physical distancing, staggering shifts, and regularly cleaning and disinfecting commonly touched surfaces in the workplace); **administrative policies** (including providing sick leave that allows workers to stay home when they are sick without loss of pay, encouraging working from home whenever possible, and training employees on the disease response plan and workplace controls); and finally, **personal protective equipment** (which should be provided at no cost to the employee, and in conjunction with employee training and medical evaluation and fit testing).

depends on the particular facts of a worker's industry and worksite.[18] OSHA is not enforcing any requirement for any personal protective equipment in this pandemic. However, some state and local officials are now requiring that workers wear masks in certain jobs—and these requirements may expand as the disease continues to spread in workplaces. Further, the CDC has just updated guidance that encourages employers to pilot test the use of face masks.

Additionally, workers can join together to engage in concerted activity to ensure adequate protection on the job, as highlighted above. This can include demands for employer-provided PPE in order to perform their essential job functions safely.

What rights does a worker have if someone else at her worksite had a confirmed case of COVID-19 and she thinks she was exposed?

The CDC has just issued very controversial guidance that workers potentially exposed to COVID-19 may be permitted to continue work following the exposure, provided they wear a mask for 14 days (that can be provided by the employer), their temperature must be monitored every day by the employer, and other measures must be followed. Worker rights and public health experts are deeply opposed to this recommendation, because it will endanger all co-workers, their families, and their communities. The CDC does continue to *recommend* cleaning and disinfecting rooms or areas in offices or other worksites occupied by those with suspected or confirmed COVID-19.

Regardless of CDC guidance, workers can join together in concerted activity to demand that all workers who were in close contact with the infected person be allowed 14 days of paid leave to self-quarantine, and that the employer disinfect the areas where the infected person was present.

Before refusing to work or walking off the job to protest unsafe working conditions, workers should consult a qualified labor and employment attorney.

Can workers walk out or refuse to work to protest unsafe working conditions during the COVID-19 crisis?

The NLRA's protection of concerted activity could apply in this circumstance. For example, protected concerted activity could include raising shared concerns about workplace health and safety with an employer and, if those concerns are unresolved, joining together to walk off the job or to refuse to work in order to protest critically unsafe working conditions.[19]

The OSH Act section 11(c) offers workers a "right to refuse" work under certain circumstances.[20] Where employees have a good faith and reasonable belief that taking on an assignment will cause imminent death or serious injury, they can legally refuse to expose themselves to the dangerous condition. Typically, the employee must first ask the employer to correct the dangerous condition.

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[18] For example, workers exposed to bodily fluids that may contain bloodborne pathogens—like some cleaners and janitors—should have the right to PPE. Exposure to infectious diseases may also require employer-provided PPE.

[19] For further information regarding protected, concerted activity in the context of employee refusals to work in unsafe working conditions, see N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962) and subsequent case law.

[20] OSHA has a specific regulation on the right to refuse work, 29 CFR § 1977.12(b)(2).

However, this right is subject to ***extreme limitations*** and is highly dependent on the specific facts of the situation.[21]

The situation may be different for unionized workers who are subject to a "no-strike" clause in a union contract. There is an exception to a no-strike clause based on abnormally dangerous working conditions in certain circumstances.[22] Therefore, an individual union worker who refuses to work is unlikely to be subjected to valid discipline if she acted in good faith and refused to work because of an abnormally dangerous condition that objectively exists. As above, employees who join together to refuse to work will be on stronger legal ground.

Before relying on these rights to refuse to work or walk off the job to protest unsafe working conditions, workers should consult a qualified labor and employment attorney.

Retaliating against workers for exercising their health and safety rights is illegal. Where possible, workers should engage in collective action to enforce those rights.

What rights do immigrant workers have if an employer retaliates[23] against them for enforcing their health and safety rights?

Regardless of their immigration status, retaliation against a worker for exercising these rights is prohibited. There are two potential avenues to pursue if a worker is retaliated against: the OSH Act and the NLRA. It is preferable for workers to obtain the anti-retaliation protections of both, and a worker can file complaints with both agencies simultaneously.[24] ***When possible, workers should draft complaints that invoke both of these statutory protections. Most advocates consider the NLRA's anti-retaliation protections much more effective.***

Section 11(c) of the OSH Act protects most workers from retaliation if they assert their rights under the law.[25] This includes workers who are retaliated against after complaining about a violation of their health and safety rights on the job. In practice, however, OSHA's anti-retaliation provisions are weak. The

[21] The regulation and case law make clear that it is an extraordinary remedy unavailable in most cases.
[22] Under Section 502 of the NLRA, workers can avoid employer discipline if they: believed in good-faith that their working conditions were abnormally dangerous; their belief was a contributing cause of the work stoppage; their belief is supported by ascertainable, objective evidence; and the perceived danger posed an immediate threat of harm to employee health or safety. See TNS, Inc., 329 NLRB 602, 606 (Sept. 30, 1999).
[23] Retaliation has been found to specifically include immigration-based retaliation, including calls or threats to call immigration or law enforcement. For example, see Pizzella v. Tara Construction, No. 19-CR-10369 LTS (D. Mass. Sep. 26, 2019) and related USDOL press statements. It can also include impermissible re-verification of workers' authorization to work.
[24] OSHA and the NLRB have entered into a Memorandum of Understanding concerning employer retaliation against concerted employee health and safety complaints that may violate both Section 11(c) and the NLRA.
[25] For more information on Section 11(c), see The OSH Law Project's "Stand Up Without Fear: Understanding the OSH Act's Retaliation Provisions" toolkit. Also see, USDOL Reminds Employers That They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic

investigative process can take a long time to resolve, and the law has a very short deadline for filing a claim—***only 30 days***.[26]

The National Labor Relations Act (NLRA) also protects workers from retaliation when they engage in "protected concerted activity" together with, or on behalf of, their co-workers. The adjudication process at the NLRB typically happens more quickly than an 11(c) complaint at OSHA, and workers have six months to file an unfair labor practice charge with the NLRB after the unlawful retaliation.

Advocates representing immigrant workers may choose to prioritize filing a charge with the NLRB (in place of or in addition to filing a section 11(c) complaint with OSHA), as that may provide their client with greater protection, given the NLRB's better established processes for dealing with immigration status–related issues during the investigative process and in Board proceedings.

How does a worker file a claim with the NLRB?

If a worker believes that her rights under section 7 of the NLRA—namely, her right to engage in protected concerted activity free from employer retaliation—have been violated, she can file a complaint with the NLRB. Such a complaint is called an unfair labor practice charge. This charge can be filed by the worker(s) or her representative(s), and must be filed within six months of the date of the violation.[27]

Will the NLRB agent ask about a worker's immigration status if she files a complaint?

NLRB agents should not inquire into a worker's immigration status during the investigatory phase of an unfair labor practice charge.[28]

What remedies are available to undocumented workers who are retaliated against?

Although the anti-retaliation provisions of both the OSH Act and the NLRA protect all workers regardless of immigration status, undocumented workers may have more limited remedies under the NLRA and likely the OSH Act than employment-authorized workers.[29]

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[26] Equitable tolling of the statute of limitations is allowed in limited instances, including debilitating illness or injury and major natural or man-made disasters. COVID-19 may provide the basis to toll the statute of limitations on an 11(c) claim.

[27] For more information about how to file a charge with the NLRB, please see this fact sheet, and consult a labor or employment attorney, or workers' rights advocacy group in your area.

[28] The NLRA protects all workers, regardless of immigration status, and the NLRB should make all merits determinations, which occur at the end of the investigatory phase, without inquiring into (or allowing an employer to inquire into) a worker's status. See GC Memo 15-03 "Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Proceedings." However, once a determination has been made in the merits stage of the investigation, and the NLRB proceeds onto the remedial or liability stage, a worker's immigration status may become relevant. See OM Memo 11-62 "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings." For more information, see also Flaum Appetizing Corp., 357 NLRB 2006 (2011) (limits on employer inquiries into immigration status in compliance proceedings) and subsequent case law.

[29] There are no reported cases or administrative guidance concerning whether undocumented workers are entitled to reinstatement or backpay under Section 11(c). However, the Supreme Court held in Hoffman Plastic Compounds, Inc. v. NLRB, a case concerning the NLRA, that undocumented workers

Paid and Unpaid Time Off from Work

Can immigrant workers take sick leave or family leave from work due to COVID-19?

It depends. Some employers offer paid sick leave or paid family and medical leave to their employees. Before March 2020 there was no federal *requirement* that a private sector employer provide employees with paid sick time or paid family and medical leave. In response to the COVID-19 public health crisis, Congress passed the Families First Coronavirus Response Act (FFCRA). The law requires certain employers to provide their employees with paid sick leave and paid family leave for reasons relating to COVID-19.[30] Through the end of the year, employees of certain employers are entitled to take up to 10 days of paid sick leave and up to 12 weeks of emergency paid family leave for reasons related to the COVID-19 public health crisis.[31]

Paid sick days and paid family leave are available to many employees, regardless of immigration status.

There are no immigration status–related restrictions on eligibility for paid sick leave or paid family and medical leave; employees are entitled to both types of leave, regardless of their immigration status. Because these benefits are paid directly to employees by their employers in the same way that wages are paid, there is generally no involvement with government agencies (unless an employee decides to file a claim alleging violations of a paid sick leave law). The FFCRA emergency paid sick and paid leave provisions will be enforced by the U.S. Department of Labor's Wage and Hour Division, which should not inquire into workers' immigration status in conducting its enforcement activities.[32] In practice, this leave will be easier for immigrant workers employed "on the books" to claim.[33]

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are not entitled to backpay or reinstatement following an unlawful discharge under that law. Since the remedies for discharges in violation of the NLRA and for discharges in violation of Section 11(c) are so similar, it is likely that a court would find that undocumented workers are not entitled to backpay or reinstatement under the OSH Act based on the Supreme Court's reasoning in the Hoffman Plastic decision.

[30] Importantly under FFCRA, employees of certain employers can qualify for paid sick time for many reasons, including if the employee is unable to work because she is caring for a child whose school or place of care is closed due to COVID-19. Note, however, that paid family and medical leave under the FFCRA is not available for care of oneself or a family member for illness - only for leave needed to care for an employee's minor child whose school or care provider is unavailable due to a COVID-19 public health emergency. See Understanding the Impact of Key Provisions of COVID-19 Relief Bills on Immigrant Communities.

[31] On April 1, 2020, USDOL released guidance allowing employers with fewer than 50 employees to claim an exemption from the FFCRA requirement that they provide paid leave for COVID-19-related childcare—effectively gutting the FFCRA's paid leave protections related to school closures and childcare unavailability for the roughly 34 million workers whose employers have fewer than 50 employees. For more information about new employee paid leave protections in the FFCRA, including eligibility criteria and wage rates, see resources from the USDOL as well as A Better Balance, Family Values @ Work, and the National Partnership for Women and Families.

[32] For further information regarding WHD's enforcement and undocumented workers, see "Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division."

[33] Under the FFCRA, an employer may seek tax credits for the wages paid to employees to fulfill the law's requirements. Therefore, although workers who are paid off the books are not prohibited from requesting the leave, it will likely be met with more resistance from employers (as they will not get a tax credit for providing the benefit).

Independent contractors can also take paid sick and paid leave for the purposes covered in the FFCRA, but their "pay" comes in the form of a reimbursement through payroll tax credits when they file their self-employment taxes with the federal government.[34]

If workers are receiving health insurance through their employer, the employer must continue that coverage during the leave period. In most cases, workers have the right to return to their jobs (or an equivalent position) after the leave period.[35]

In some states and localities, there are state-administered paid family and medical leave benefits, temporary disability insurance programs, and paid sick days laws that may offer workers additional options for paid time off (but note that not all programs cover leave for public health emergencies).[36] Some states with paid family leave and temporary disability insurance allow workers to access these benefits regardless of their immigration status.[37]

Can immigrant workers take unpaid FMLA leave from work due to COVID-19?

An employee who is sick, or whose family members are sick, may be entitled to leave under the Family Medical Leave Act (FMLA) regardless of their immigration status. The FMLA only covers larger employers (those with 50 or more employees within a 75-mile radius). To be eligible, an employee must have worked a certain amount of time for the employer (at least one year, and a minimum of 1,250 hours within the previous year).

Immigrant workers who are eligible for FMLA may take up to 12 weeks of unpaid, job-protected leave. Leave may be taken to address their own serious health condition or the serious health condition of a parent, spouse, minor child, or an adult child who is incapable of self-care. A serious health condition may include the flu where complications arise that result in an incapacity of more than three days and ongoing treatment by a health provider.[38] Upon the end of her leave, a worker should be reinstated to her previous (or similar) position.

When a worker returns from leave, can an employer ask her to show her immigration documents or re-verify the worker's documents?

Generally no, and the action could be illegal under the FMLA or other employment laws providing the right to take leave. Under immigration law, employers have no requirement to re-verify a worker's immigration status upon a return from such a leave. This return from leave is not considered a "hiring" (which would trigger an employer's responsibility to verify employment eligibility) because the employee is continuing her employment.

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[34] See Sections 7002 and 7004 of the FFCRA; additional information available on the IRS Coronavirus Tax Relief website.

[35] See U.S. The Department of Labor Families First Coronavirus Response Act Frequently Asked Questions, Question 43

[36] As of April 2020, the District of Columbia, Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, Michigan, Nevada, Maine, New York have all passed some form of statewide paid sick leave legislation. For additional information, visit Family Values @ Work (see their state and local legislation tracker here) and the National Partnership for Women and Families.

[37] See additional information on immigrant eligibility for paid family leave in California, New York, and Washington, and temporary disability insurance in California.

[38] See WHD FMLA Advisor article on "serious health condition."

Under employment law, employees taking protected leave under the FMLA and the FFCRA are protected against retaliation, including job loss, discipline, and/or discrimination for using sick time, or family or medical leave. If employees are using protected family or medical leave, their employers must restore them to their job positions or to equivalent positions with equivalent employment benefits, pay, and other terms and conditions of employment.[39]

Workers who return to work after taking leave are continuing employees and should not have their employment authorization verified or re-verified.

Employers who choose to re-verify immigration status upon return to work run the risk of violating state and federal anti-discrimination and anti-retaliation laws and subjecting themselves to possible enforcement by the U.S. Department of Labor or an employee's claim in court. This includes employers who re-verify workers employment authorization using E-Verify.

Additionally, an employer that requires employees of certain national origin, racial, or ethnic groups to re-verify their immigration status or employment eligibility may be liable for committing national origin discrimination in violation of the anti-discrimination provisions of federal immigration law.

An employer tells a worker not to report to work but does not clarify whether the worker is being terminated. If the worker is undocumented, should she advocate to be placed on unpaid leave or be temporarily laid off?

Being placed on unpaid leave is significantly better than being temporarily laid off for undocumented workers. While on leave, employers are required to maintain an employee's group health benefits as if the employee continued to work. In addition, many immigrant workers are ineligible for programs, such as unemployment insurance, that serve as a safety net for other workers after layoffs. Finally, while an employee is on leave, she retains her employment—and when the leave ends, she will be continuing her employment rather than being re-hired by her employer. As a continuing employee, her employer does not need to re-verify her employment authorization.

[39] See U.S. The Department of Labor Families First Coronavirus Response Act Frequently Asked Questions, Question 43 for additional information regarding small employer exemptions from the reinstatement requirement.

Employer Actions Regarding Workers' Health

Can an employer send a worker home if she displays symptoms associated with COVID-19?

Yes. The CDC recommends that workers who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. It does not violate the Americans with Disabilities Act (ADA) for an employer to send such an employee home during a pandemic.[40]

Can an employer take a worker's temperature?

For the duration of the pandemic, yes. Normally, employers are prohibited from engaging in medical examinations of employees (such as taking an employee's temperature) unless the employer can establish that the examination was job-related and consistent with business necessity. But new guidance says that employers can take certain preventive steps after a pandemic is declared. This guidance clarifies that because the World Health Organization declared a pandemic on March 11, 2020, and the CDC and state and local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may currently measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

Prohibited Discrimination and Harassment

What rights do immigrant workers have against discrimination in the workplace?

All workers have the right to be free from unequal treatment in employment based on a personal characteristic or status, such as race or national origin, that is protected under anti-discrimination laws. Since the law prohibits discrimination based only on certain protected categories, not every form of discriminatory or unfair treatment is illegal.

Discrimination can be expressed through "harassment," such as when a boss, supervisor, or co-worker says or does something that creates an intimidating, hostile, or threatening work environment. Harassment is illegal if it is based on a personal characteristic or status protected under anti-discrimination laws. To be illegal, the harassment must be so "severe or pervasive" that it interferes with the employee's ability to perform the job.

Discrimination can also take the form of employer actions that single out certain workers, such as treating workers of Asian heritage worse due to the association of COVID-19 with China. It is against the law to treat certain workers worse than other workers because of their race, national origin, or ethnic background.

[40] For further information, see What You Should Know About the ADA, the Rehabilitation Act, and COVID-19 and Pandemic Preparedness In The Workplace And The Americans With Disabilities Act from the Equal Employment Opportunities Commission (EEOC), the agency that enforces violations of anti-harassment and anti-discrimination law.

Can an employer prohibit speaking languages other than English at work?

Maybe. Employers may not have an "English only" rule unless it is necessary for conducting business.

Do undocumented workers still have these rights?

Yes. The right to be free from discrimination and harassment at work does not change based on a worker's immigration status. However, immigration status may affect what remedies are available.

Unemployment Insurance

Can immigrant workers receive unemployment insurance?

Some can. To receive regular unemployment insurance benefits, immigrants must be authorized to work at the time they file for benefits and during the entire period they are receiving benefits (the "benefits period"). This is necessary in order to meet the requirement that UI recipients be "able and available" to work.

Immigrants must *also* have been "permanently residing under color of law" ("PRUCOL") during the "base period" used to calculate the benefit amount. In this context, PRUCOL generally means work-authorized, though there may be some variation between states with regard to the interpretation of PRUCOL. Thus, anyone with a valid work permit, or whose status allows them to work, and who was work-authorized during the base period should be eligible to receive regular unemployment insurance.[41]

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law. The bill includes significant enhancements to unemployment insurance[42] and provides assistance for some independent contractors and "gig" workers. The U.S. Department of Labor (USDOL) has not clarified the immigrant eligibility criteria that will apply to the new programs created by the CARES Act.[43]

Are unemployment benefits counted in the "public charge" test?

No. Unemployment insurance is an earned benefit, not a public benefit. So, under this administration's "public charge" rule, it should not be a negative factor in the assessment of whether an immigrant applicant for a visa or an adjustment-of-status (i.e., obtaining a "green card" or applying for legal permanent residence) is likely to become a public charge.

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[41] For more information, see the National Employment Law Project's Immigrant Workers' Eligibility for Unemployment Insurance.

[42] For more information, see the National Employment Law Project's Unemployment Insurance Provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

[43] See Unemployment Insurance Program Letter No. 16-20, released April 5, 2020, for further information. For information regarding other forms of disaster assistance, see the National Immigration Law Center's Disaster Assistance: Food, Shelter, Cash Payments and other help for Survivors of Major Disasters.

What are states and localities doing to address immigrants left out of unemployment insurance programs?

Advocates are working at the state and local levels to ensure that any programs providing relief to workers affected by the pandemic do not exclude immigrant workers. These efforts may include creating state-level unemployment insurance programs,[44] establishing relief funds,[45] enacting or expanding their state Earned Income Tax Credit programs,[46] or giving grants to local community-based organizations that support immigrants with direct assistance.

There are also many private efforts to assist those workers and families who are not receiving government benefits.[47]

Workers' Compensation

Can an undocumented worker receive workers' compensation benefits if she gets COVID-19 at work?

Possibly, but not likely.[48] Undocumented immigrant workers are generally eligible for workers' compensation benefits, as they are either explicitly or implicitly included in workers' compensation statutes in almost every state.[49] However, many states may not cover this type of disease, or only cover the disease for first responders.[50] Further, a worker would need to demonstrate that her COVID-19 infection occurred during the course and scope of employment. During a pandemic, this would likely be very challenging.

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[44] For example, the New Jersey legislature passed AB 3846 which creates the "Temporary Lost Wage Unemployment Program." It would allow people to make claims for lost wages due to COVID-19 who are not otherwise eligible for unemployment insurance benefits.

[45] Advocates in Oregon are pushing for a Worker Relief Fund that would provide temporary financial support for workers who are "falling through the cracks" and cannot access safety net programs. Minneapolis created a $5 million COVID-19 relief fund available to undocumented residents.

[46] See fact sheet from the Center on Budget and Policy Priorities, "States Should Support Struggling Families through EITCs."

[47] The Solidare Network has listed many of those funds, but this is by no means a comprehensive list.

[48] Note that workers' compensation is governed by state law, so the answer may vary by jurisdiction. To learn more about the criteria and application for workers' compensation benefits, contact the agency that oversees workers' compensation in the state, as state agencies make additional information available. For example, California publishes a guidebook; New York makes information available on their website, and Washington State has released a COVID-19 specific fact sheet.

[49] In 36 states, plus the District of Columbia, agency or court decisions have found that undocumented workers are included in the definition of "employee" in their state workers' compensation laws. Other states' laws do not specifically address immigration status, but the laws are understood as not prohibiting undocumented workers from receiving workers' compensation benefits. Undocumented workers are explicitly excluded from workers' compensation by statute only in Wyoming, and then only if they are both unauthorized to work and their employer failed to follow the I-9 employment authorization verification process. However, knowingly presenting false evidence of a person's identity in support of a claim for workers' compensation benefits is a criminal offense in Florida and has led to very serious consequences for the immigrant workers who applied for workers' compensation benefits and then were criminally charged. For more information, see Protecting Injured Immigrant Workers from Retaliation.

[50] Some states, including Ohio, New York, Minnesota, Alaska, and California, have specifically passed legislation covering COVID-19 under workers' compensation for some employees.

A worker should consult a qualified advocate or lawyer to learn more and be able to make an informed decision about whether to apply for workers' compensation benefits.

What kind of evidence do workers need to prove they contracted COVID-19 at work?

Workers' compensation is a no-fault system, meaning that a worker can file a successful claim even if an employer took all the right steps to protect employees from exposure. A successful claim would need to show that the worker contracted COVID-19 after an exposure at work, the exposure was "peculiar" to the work, and no alternative means of exposure can be shown. Therefore, certain types of employment or circumstances specific to a person's work (e.g., a health care provider or a first responder) may present a stronger claim, as there is a higher risk of COVID-19 exposure.[51]

Workers should consult a qualified advocate or lawyer who can help them make an informed decision about whether to apply for workers' compensation.

Additionally, an employee seeking workers' compensation benefits for a COVID-19 infection will probably have to provide medical evidence, likely of the COVID-19 diagnosis itself, to support the claim, which can be very difficult to obtain in the current environment.[52] Employers who seek to contest this type of claim may be able to challenge it if there is another alternative exposure or if the employee's medical evidence is speculative.

What would be covered by workers' compensation benefits?

Workers' compensation coverage can include medical testing, cover treatment expenses if a worker becomes ill or injured and provide time-loss payments for those who cannot work if they are sick or quarantined.

Worksite Immigration Enforcement and Employment Eligibility Verification

Is ICE still enforcing immigration law?

Yes, but with some changes. In response to the pandemic, Immigration and Customs Enforcement (ICE) stated that it will "temporarily adjust its enforcement posture" to focus enforcement on public safety risks and individuals subject to mandatory detention based on criminal grounds.

Under longstanding policies of the U.S. Department of Homeland Security (DHS), the federal government recognizes that certain locations are "sensitive" in nature such that, except in limited circumstances, immigration agents should avoid or limit enforcement actions at such locations. These sensitive locations include, but are not limited to, schools, medical

[51] Similarly, it might be possible for an essential worker (e.g. grocery, cleaning service, construction, food service, or delivery workers) to prove that she was subject to a higher risk of exposure. Each of these categories of workers interact with greater numbers of people and places that run a higher risk of infection than the general public during the COVID-19 crisis, although the question of whether essential workers will be able to file successful claims will likely depend on variations in state law.
[52] Health care providers and COVID-19 testing supply-chain systems are often under-resourced and testing results are backlogged, leading to a scarcity of available testing kits and difficulty obtaining a test, even when one presents with potential COVID-19 symptoms.

treatment and health care facilities, places of worship, religious or civil ceremonies, and public demonstrations. In March 2020, ICE reiterated its commitment to this sensitive locations policy, stating that it will not carry out enforcement operations at or near health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities, except in the most extraordinary of circumstances, and declaring that people should not avoid "seeking medical care because they fear civil immigration enforcement."

Despite this public statement and the White House's declaration of a national emergency due to the COVID-19 public health crisis, ICE has continued to engage in immigration enforcement actions, ignoring state and local stay-at-home orders and strict social distancing guidelines. At a time when nonessential establishments are closing and people are being urged to stay home, DHS continues to conduct business as usual, exacerbating the fear that immigrant communities already are feeling. Of additional note, there are no provisions in any of the COVID-19 relief bills that limit ICE from conducting immigration enforcement at sensitive locations or elsewhere.

Will ICE continue to worksite immigration enforcement activities during the pandemic?

Probably. Homeland Security Investigations (HSI) is the branch within ICE that typically conducts worksite immigration enforcement against employers, including Form I-9 employment eligibility verification audits. ICE has stated that HSI "will continue to carry out mission critical criminal investigations and enforcement operations as determined necessary to maintain public-safety and national security." There is currently no indication they will discontinue conducting audits of employers.

For workers being hired during the COVID-19 crisis, are there any changes to the employment verification process?

Possibly. DHS is temporarily allowing employers to remotely review Form I-9s completed by workers at the time of hire. Additionally, DHS is extending the timeframe for employees to challenge Tentative Non-Confirmations (TNCs) they experience as part of the verification process.

Economic Stimulus Payments

Are immigrants eligible for the economic stimulus payments included in federal COVID-19 relief legislation?

To be eligible for a cash rebate, individual tax filers and those filing jointly must have valid Social Security numbers (SSNs).[53] However, there is an exception for spouses filing jointly where at least one spouse was in the armed forces during the prior tax year and at least one spouse has a valid SSN. Children claimed as dependents for the $500 rebate must have valid SSNs.

Are stimulus payments counted in the "public charge" test?

No. The stimulus payment is a tax credit, and the public charge regulation is clear that tax credits are NOT taken into account for the purposes of a public charge determination.

Access to Health Care

Where can immigrants who are uninsured receive health services, if they suspect they may have COVID-19?

Immigrants, regardless of status, can seek services at community health centers at a reduced cost or free of charge, depending on their income. However, people should call first to speak with a health care provider about their symptoms or concerns. Health centers may do patient assessments over the phone or using telehealth. The Families First Coronavirus Response Act provides funding to reimburse health care providers (including community clinics, health centers, outpatient clinics, and doctors' offices) for coronavirus testing of people who are uninsured. Note that testing is not yet widely available. For more information, see NILC's Update on Access to Health Care for Immigrants and Their Families.

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[53] See Policy Brief on Key Provisions of COVID-19 Relief Bills from NILC.