



August 17, 2020

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

Dear Secretary Scalia:

We are writing on behalf of Argentum and the American Seniors Housing Association (ASHA) to urge the Department of Labor to appeal the decision in *State of New York v. United States Department of Labor* filed on August 3, 2020. We believe that this decision—redefining eligibility for paid leave under the Families First Coronavirus Response Act (FFCRA)—most certainly will significantly curtail the availability of the senior living workforce at a time when workers are critically needed to care for those most vulnerable to complications from COVID-19.

Argentum and ASHA are the leading national associations exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Our member communities offer assisted living, independent living, continuing care, and memory care services, representing approximately 75 percent of the professionally managed senior living industry.

Senior living is a home- and community- based setting for nearly two million older adults combining housing, supportive services and health care as needed. Communities are caring for some of the most vulnerable Americans as well as supporting the staff and team members who provide that care and service every day. Individuals who are at the greatest risk of complications from COVID-19 include people aged over 65 years and those suffering from comorbidities. Within senior living communities, more than half of all residents are over the age of 85, and another 30 percent are between the ages of 75-84. They often cope with multiple chronic conditions and often require assistance with activities of daily living (ADL), such as eating, dressing, bathing, and the management or administration of medication. Over 42 percent suffer from some type of cognitive impairment.

Congress included health care providers and emergency responders as specifically exempted from the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) expanded by the FFCRA and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. This was intended to ensure the continuity of care during the COVID-19 pandemic when these essential workers are most needed.

We supported the rule issued on April 1, 2020 (85 FR 19326) that established a necessarily broad definition of a “Health Care Provider” to exclude “anyone employed” in senior living from the EPSLA and EFMLEA. As we noted in comments submitted on March 23, absent an exemption

from the requirement of the EFMLA and EPSLA, senior living would lack the available workforce needed to deliver care to our nation's seniors. We believe that the Department acted appropriately to include these workers as exempt from the expanded leave provisions, in line with the obvious Congressional intent behind exempting these workers from the FFCRA and CARES Act.

We are concerned that District Judge J. Paul Oetken's ruling vacating the Department's regulations in this area will significantly impact senior living providers' ability to deliver necessary care for seniors, who are at greatest risk from COVID-19. Without further action by the Department to appeal this ruling or to issue new rulemaking, the definition of a "health care provider" would be narrowly limited to just medical doctors and not include other essential workers such as registered nurses, licensed practical and licensed vocational nurses, nursing assistants, personal care aides, medical assistants, dietetic technicians, and others essential to the operation of senior living communities.

All workers in senior living communities are critical to the ultimate delivery of care to residents, and therefore this exemption must extend not only to direct care staff but also to supporting staff. These positions, which include food preparation workers, food servers, recreational workers, and management such as medical and health services managers and operations managers, are essential to the operation of communities, and resident care is not possible without the coordination of all employees within a community.

If the Department issues interim guidance, we request that it preserve a broad definition to include all senior living employees, consistent with the intent of the FFCRA and CARES Act as passed by Congress. We have attached an enumeration of all roles that we believe are essential to the continued operation of senior living communities and should continue to be exempt from the EFMLA and EPSLA expanded paid leave provisions. As with the initial rulemaking, this should include employees who work in assisted living, independent living, memory care, and continuing care retirement communities.

Now more than ever, our residents desperately need the care and attention of our nearly one million workers. We are requesting that the Department act quickly to ensure that seniors will continue to have access to those providing direct care and support services during this time, by issuing an interim rule to clarify the eligibility for the EFMLA and EPSLA expanded paid leave provisions and appealing the recent court ruling.

If you have any questions or if we can be of assistance as you move forward, please do not hesitate to contact James Balda at (703) 894-1805 or jbalda@argentum.org or David Schless at (202) 885-5560 or dschless@seniorshousing.org.

Respectfully,



James Balda
President & CEO
Argentum



David Schless
President
American Seniors Housing Association