

Congress of the United States
Washington, DC 20515

October 6, 2020

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

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

Dear Secretary Azar and Secretary Scalia:

More than seven million cases of coronavirus disease of 2019 (COVID-19) have been confirmed in the United States, as essential workers continue to provide critical resources and services to communities during this pandemic.¹ We urge you to take action to protect American workers, particularly those at highest risk for COVID-19.

As states and employers alike struggle to meet testing needs, the Department of Health and Human Services (HHS) has yet to disburse more than \$8 billion of the \$25 billion provided under the *Paycheck Protection Program and Health Care Enhancement Act* (PPHCEA)² for necessary expenses related to COVID-19 testing.³ As of October 6, the Health Resources and Services Administration (HRSA) has awarded about \$482.1 million⁴—or 24.1 percent—of the \$2 billion provided by the *Family First Coronavirus Response Act* (FFCRA)⁵ and PPHCEA to pay for free COVID-19 testing for the uninsured.⁶ Although HRSA distributed \$225 million to Rural Health Clinics (RHCs) to support COVID-19 testing from PPHCEA, this funding was provided for the building or construction of temporary structures, leasing of properties, and retrofitting facilities as necessary to support COVID-19 testing, and five states did not receive funding at all.⁷

This is particularly troublesome given how many frontline workers at highest risk lack access to health insurance. One in every seven essential workers is uninsured, and those serving in the restaurant, construction, and home health industries are more likely to be uninsured and receive low wages.⁸ About 50 percent of essential workers cannot afford unexpected medical expenses.⁹ Additionally, many people with insurance are still encountering barriers to accessing needed testing. For example, there have been reports of self-insured

¹ Centers for Disease Control and Prevention, Coronavirus Disease (COVID-19), Cases in the U.S. (Oct. 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

² Pub. L. No. 116-139 (2020).

³ Paige Winfield Cunningham, Democratic senators say Trump administration has been slow to use coronavirus testing funds, *The Washington Post* (June 21, 2020), https://www.washingtonpost.com/politics/democratic-senators-say-trump-administration-has-been-slow-to-use-coronavirus-testing-funds/2020/06/21/d9868c66-b3f3-11ea-a510-55bf26485c93_story.html.

⁴ Centers for Disease Control and Prevention, COVID-19 Claims Reimbursement to Health Care Providers and Facilities for Testing and Treatment of the Uninsured Program (Oct. 6, 2020), <https://data.cdc.gov/Administrative/Claims-Reimbursement-to-Health-Care-Providers-and-rksx-33p3/data>.

⁵ Pub. L. No. 116-127 (2020).

⁶ Rachel Cohrs, Tiny Fraction Of \$2 Billion Federal Uninsured COVID-19 Testing Funds Have Gone Out, *Modern Healthcare* (June 8, 2020), <https://www.modernhealthcare.com/payment/tiny-fraction-2-billion-federal-uninsured-covid-19-testing-funds-have-gone-out>.

⁷ Health Resources & Services Administration, Coronavirus Disease (COVID-19) Information – Federal Office Rural Health Policy, Allocation to Rural Health Clinics for COVID-19 Testing (May 20, 2020), <https://www.hrsa.gov/rural-health/coronavirus/rural-health-clinics-covid-19-testing-fy20-awards>. Health Resources & Services Administration, Press Release: HHS Provides \$225 Million for COVID-19 Testing in Rural Communities (May 20, 2020), <https://www.hhs.gov/about/news/2020/05/20/hhs-provides-225-million-for-covid19-testing-in-rural-communities.html>.

⁸ Audrey Kearney and Cailey Muñana, Taking Stock of Essential Workers, Kaiser Family Foundation (May 1, 2020), <https://www.kff.org/policy-watch/taking-stock-of-essential-workers/>. Rachel Garfield, Matthew Rae, Gary Claxton, Kendal Orgera, Double Jeopardy: Low Wage Workers at Risk for Health and Financial Implications of COVID-19, Kaiser Family Foundation (Apr. 29, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/double-jeopardy-low-wage-workers-at-risk-for-health-and-financial-implications-of-covid-19/>.

⁹ *Supra* at note 5.

health plans refusing to pay for COVID-19 tests at all or requiring cost-sharing from consumers,¹⁰ both of which are prohibited under the law.¹¹

On June 23, 2020, HHS, the U.S. Department of Labor (DOL), and the U.S. Department of the Treasury (the Treasury) issued guidance regarding implementation of FFCRA and the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*¹², excluding certain COVID-19 testing from mandated coverage.¹³ This interpretation of FFCRA and the CARES Act is not supported by the statutes, which make clear that health plans are required to provide coverage for COVID-19 tests and related items and services without cost-sharing, prior authorization, or other medical management requirements.¹⁴ We have written to the Administration urging immediate action to revisit the guidance, yet have received no response to date.¹⁵ In addition, despite repeated calls on the Trump Administration to develop a national coronavirus testing strategy¹⁶ and vigorously ensure compliance with requirements that testing be made available to workers,¹⁷ the White House has been unwilling to provide states with a clear strategy or even disperse the resources Congress has already dedicated to ensuring communities have access to adequate COVID-19 testing.¹⁸

Notably, as part of their ongoing state reopening plans, several Governors are requiring employers to provide routine COVID-19 diagnostic testing for workers in industries that have been disproportionately impacted by COVID-19, including nursing homes, meat and produce processing facilities, and warehouses.¹⁹ Frontline workers continue to face a significantly higher risk of COVID-19 exposure as social distancing requirements change and in-person contact with customers and co-workers increases.²⁰ Some employers with on-site health clinics or partnerships with local health care providers have access to the necessary resources to provide adequate and reliable COVID-19 diagnostic testing for workers, but this is not true across the board.

¹⁰ Blake Farmer, Congress said COVID-19 tests should be free – but who’s paying?, Nashville Public Radio, Kaiser Health News (May 22, 2020), <https://khn.org/news/congress-said-covid-19-tests-should-be-free-but-whos-paying/>.

¹¹ Pub. L. No. 116-136, div. A tit. III, 134 Stat. 282 (2020).

¹² Pub. L. No. 116-136 (2020).

¹³ FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43 (June 23, 2020), <https://www.cms.gov/files/document/FFCRA-Part-43-FAQs.pdf>.

¹⁴ *Supra* at note 11.

¹⁵ Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, Rep. Robert C. Scott, Chairman, House Committee on Education and Labor, Rep. Richard E. Neal, Chairman, House Committee on Ways and Means, Sen. Patty Murray, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions, and Sen. Ron Wyden, Ranking Member, Senate Committee on Finance, to Secretary Alex Azar, U.S. Department of Health and Human Services, Secretary Eugene Scalia, U.S. Department of Labor, and Secretary Steven T. Mnuchin, U.S. Department of the Treasury (July 7, 2020), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/HHS.DOL_DOT_2020.7.7.pdf.

¹⁶ Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce to Dr. Deborah Brix (Apr. 20, 2020), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/COVIDTaskforce.2020.4.20.%20Letter%20re%20Testing.OI_HE.pdf; Statement from Rep. Nancy Pelosi, Speaker, United States House of Representatives, Rep. Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, Sen. Chuck Schumer, Senate Minority Leader, Sen. Patty Murray, Ranking Member, Committee on Health, Labor, Education, and Pensions on the Trump Administration’s Disappointing National Testing Strategy Report (May 25, 2020), <https://energycommerce.house.gov/newsroom/press-releases/pelosi-schumer-pallone-and-murray-joint-statement-on-the-trump>.

¹⁷ Letter from Rep. Robert C. Scott, Chairman, House Committee on Education and Labor, and Rep. Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions, House Committee on Education and Labor, to Secretary Eugene Scalia, U.S. Department of Labor, on Compliance of ERISA Self-Insured Group Health Plans with COVID-19 Testing Coverage Requirements (July 2, 2020).

¹⁸ Scott Patterson and Sarah Krouse, Billions in Federal Covid-19 Testing Funds Still Unspent, The Wall Street Journal (Aug. 21, 2020), <https://www.wsj.com/articles/billions-in-federal-covid-19-testing-funds-still-unspent-11598014623>.

¹⁹ See Katie Thomas, Testing Nursing Home Workers Can Help Stop Coronavirus. But Who Should Pay?, The New York Times (June 9, 2020), <https://www.nytimes.com/2020/06/09/health/testing-coronavirus-nursing-homes-workers.html>; Steve Eder, Ellen Gabler, Sarah Kliff and Heather Murphy, What Role Should Employers Play in Testing Workers?, The New York Times (May 22, 2020), <https://www.nytimes.com/2020/05/22/business/employers-coronavirus-testing.html>; Statement from New York State Health Commissioner Dr. Howard Zucker on Successful Nursing Home Testing Program, New York State Department of Health (June 10, 2020), https://www.health.ny.gov/press/releases/2020/2020-06-10_nursing_home_testing_program.htm.

²⁰ Michael Grabell, Bernice Yeung and Maryam Jameel, Millions of Essential Workers Are Being Left Out of COVID-19 Workplace Safety Protections, Thanks to OSHA, ProPublica (Apr. 16, 2020), <https://www.propublica.org/article/millions-of-essential-workers-are-being-left-out-of-covid-19-workplace-safety-protections-thanks-to-osha>.

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Although the Centers for Disease Control and Prevention (CDC) released interim guidance on *Testing in Non-Healthcare Workplaces*²¹ and *Testing Strategy for Coronavirus (COVID-19) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case Is Identified*²², there are currently no CDC recommendations outlining how employers should provide continued diagnostic testing for workers to ensure safer workplaces as states reopen. For example, questions around the appropriate frequency of COVID-19 diagnostic testing for workers with the highest risk of COVID-19 exposure in the workplace or when surveillance testing for COVID-19 should be conducted in lieu of diagnostic testing in the workplace are currently unanswered.

Lack of clear and consistent guidance leaves employers, state and local health officials, and frontline health care workers responsible for developing and implementing often disparate protocols and procedures.²³ Clear and consistent recommendations and guidance on routine COVID-19 diagnostic testing for employers would prevent lengthy disruptions for essential businesses in the event of a localized COVID-19 outbreak, and they are particularly critical for protecting low-income essential workers and their families, many of whom have been devastated by this pandemic.

Given these continued challenges, we urge HHS and DOL to take immediate action to further protect workers across the country by providing clear guidance to employers for COVID-19 diagnostic testing and screening. Thank you for your attention to this matter.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman
Committee on Education and Labor



FRANK PALLONE, JR.
Chairman
Committee on Energy and Commerce

Cc: The Honorable Robert Redfield, Director of the Centers for Disease Control and Prevention

²¹ Centers for Disease Control and Prevention (CDC), *Testing in Non-Healthcare Workplaces* (July 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html>.

²² Centers for Disease Control and Prevention (CDC), *Testing Strategy for Coronavirus (COVID-19) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case Is Identified* (June 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/hd-testing.html>.

²³ Letter from National Association of County and City Health Officials, Big Cities Health Coalition to Director Robert Redfield, Admiral Brett Giroir (Aug. 28, 2020), https://www.naccho.org/uploads/downloadable-resources/NACCHO-BCHC-COVID-testing-guidelines-change-082720_1.pdf.