



March 26, 2020

## THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT PAID LEAVE PROVISIONS

In response to the ongoing novel coronavirus (COVID-19) pandemic and its significant economic impacts, the federal government enacted the Families First Coronavirus Response Act (FFCRA) on March 18, 2020. The Department of Labor will be issuing implementing regulations. This update will focus on the emergency paid sick leave provisions in the FFCRA relevant to school employers. As described further below, the FFCRA creates two new leave entitlements for use by public school employees for reasons related to COVID-19: Public Health Emergency Leave (EFMLA) and Emergency Paid Sick Leave (EPSL).

Pursuant to just released clarification from the Department of Labor, these new provisions are effective April 1, 2020, and will expire December 31, 2020. This means any leave approved and taken for the reasons provided below, unless they meet the requirements of another paid leave provided by collective bargaining agreement, policy, or state law, will be unpaid leave.

### Emergency Family and Medical Leave Expansion Act

The FFCRA's first category of new leave is provided in the Emergency Family and Medical Leave Expansion Act. This is an emergency expansion of the federal Family and Medical Leave Act of 1993 (FMLA). Please note the provisions cited below change the eligibility and pay status for FMLA leave but only for the specific purpose of "public health emergency leave," as defined. This new law does not change the eligibility requirements or compensation during other FMLA qualifying events (e.g., an employee's own serious health condition, child bonding, or caring for a family member with a serious health condition).

#### *What leave is an eligible employee entitled to?*

An eligible employee is entitled to up to 12 workweeks of job protected FMLA leave if the employee has a qualifying need related to a public health emergency. This means the employee is unable to work (or telework) due to a need for leave to care for the employee's son or daughter under 18 years of age. The need to care for the employee's minor son or daughter must be due to closure of the child's elementary or secondary school or place of care, or the unavailability of the son or daughter's childcare provider due to a government declared emergency with respect to

COVID-19. “Childcare provider” is defined as a provider who receives compensation for childcare services on a regular basis.

### ***Who is an eligible employee?***

Eligible employees are those who have been employed for at least 30 calendar days by a private employer with 500 or fewer employees, or by any sized public employer, and have a qualifying need related to a public health emergency. Additionally, an employee who has already utilized all of their 12-workweek entitlement to FMLA leave for another purpose will likely not be entitled to an additional 12 workweeks of leave for this qualifying event. If the employee has only used a portion of their FMLA leave for other purposes, he or she would likely only be eligible for any remaining portion of the 12-workweeks of FMLA leave previously unused.

### ***Is the leave paid?***

The first 10 days of public health emergency leave may be unpaid. However, an employee may elect to substitute any accrued vacation, personal, or medical or sick leave for the unpaid leave. This includes Emergency Paid Sick Leave discussed below.

After the first 10 days, an employer must provide paid leave for each day of leave up to the remainder of the 12 workweeks of available leave. Paid leave is at a rate of at least two-thirds of an employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work. Employees can likely utilize other paid leave to supplement their two-thirds rate of pay to stay in full-pay status. However, paid leave provided under these provisions is capped at \$200 per day and \$10,000 in the aggregate for the 12 workweeks that include both EPSL, described below, and Public Health Emergency Leave.

## **Emergency Paid Sick Leave (EPSL)**

The second category of leave created as part of the FFCRA is Emergency Paid Sick Leave. This paid leave is available to all school employees for specified reasons related to the COVID-19 health crisis, as set forth below. The total amount of leave for any one or more of the reasons described is 80 hours for full-time employees or the number of hours a part-time employee would normally work in a two-week period.

### **What is an employee entitled to?**

#### *Full Pay for Employee’s Personal Need*

An employee is entitled to utilize EPSL at their full rate of pay if the employee is unable to work or telework for any of the following reasons related to COVID-19:

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 healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

#### *Two-thirds Pay for Need to Provide Care to Another*

An employee is entitled to utilize EPSL at two-thirds of their regular rate of pay if they are unable to work or telework due to the need to care for another for any of the following reasons related to COVID-19:

1. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order or has been advised to self-quarantine by a healthcare provider related to COVID-19 concerns.<sup>1</sup>
2. The employee is caring for a son or daughter whose school or childcare provider has been closed or is unavailable related to COVID-19 safety measures.
3. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in collaboration with the Secretaries of Treasury and Labor.

An “individual” as referenced in Item 1 has been left open ended and does not appear to be restricted to a family member or domestic partner. It is likely a best practice for employers to inquire who the “individual” is for complete and accurate documentation of leave status.

A son or daughter under Item 2 has the same definition as under the FMLA generally, and includes a biological, adopted, foster, stepchild, legal ward, or a child of a person standing in loco parentis, someone who is 18 years or younger, or over age 18 and incapable of self-care because of mental or physical disability.

#### ***What are some other general provisions?***

An employee must be allowed to use this category of paid leave before the employer can require them to use other forms of accrued leave. The maximum benefit an employee can receive for the employee’s own personal need for this leave category is \$511 per day, with a total aggregate

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<sup>1</sup> This provision has raised some questions for employers. It is unclear whether California Governor Gavin Newsom’s March 16, 2020 (later expanded) self-isolation public health guidance and recommendations for individuals 65 years and older, and those with elevated risk due to serious chronic health conditions and compromised immune systems, is sufficient to meet the definition of an isolation order. Further, it is unclear if Governor Newsom’s March 19, 2020, stay at home order for all Californians is an isolation order for purposes of this federal law. Based on the intent of the federal law and the Governor’s guidance, it is our recommendation that the leave be granted upon request if an employee needs to take leave to care for an elderly family member or someone else with elevated risk.

benefit of \$5,110. The maximum benefit an employee can receive for providing care to another pursuant to this leave category is \$200 per day, or an aggregate amount of \$2,000. For the latter category, an employee may elect to use accrued leaves to supplement this two-thirds benefit to receive 100 percent of their regular rate of pay.

Emergency Paid Sick Leave will not carry over year-to-year and employers will not be required to pay out unused EPSL. This leave does not run concurrently with Public Health Emergency Leave unless the employee is eligible to receive both categories of leave.

For specific questions on which category of leave an employee is entitled to access or what specific leave eligibility an employee may qualify for, please contact Schools Legal Service so we can assist you in making the proper determination.

### ***Posting and Notification Requirements***

The law requires that the attached poster prepared by the federal Secretary of Labor be displayed in conspicuous places on the employer's premises where employee notices are customarily posted. In light of the current circumstances, it is our recommendation as best practices that employers proactively:

1. Post the attached FFCRA Poster in the typical physical, conspicuous locations of other FMLA leave entitlement notices;
2. Publish the FFCRA Poster to the employer's human resources page/website; and
3. Send electronic notification of employees' rights to the new entitlements (using the employer's standard method of communication).<sup>2</sup>

Employers should take these steps as soon as reasonably possible, but not later than April 1, 2020.

Do not hesitate to contact our office regarding this or other COVID-19-related matters.

- Melissa H. Brown and Tumara M. Thelen

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*School Business Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.*

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<sup>2</sup> You can use the following links to view and adapt employee and employer fact sheets related to FFCRA:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>