**UPDATED MARCH 30, 2020[[1]](#endnote-1): Families First Coronavirus Response Act Takes Effect April 1**

**All Cities Must Prepare to Provide Paid Sick Leave and Emergency FMLA**

Wednesday evening, March 18, 2020, President Trump signed into law the “Families First Coronavirus Response Act” (FFCRA). Below are the two employer provisions of the Act that cities need to enact no later than April 1, 2020.

**Emergency Family and Medical Leave Expansion Act (EFMLEA)**

* **Expanded Coverage** – The Act amends and expands the Family and Medical Leave Act (FMLA) on a temporary basis. The current employee threshold for EFMLEA is those employers with fewer than 500 employees and all public employers regardless of size. This means cities, with one or more employees, are required to provide EFMLEA as discussed below.
* **Expanded Eligibility** – For employees to be eligible under EFMLEA, the employee has to have worked for the employer for at least 30 days prior to the designated leave**.** However, the Act also includes language allowing the employer to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave.
* **Emergency Responders** – For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, the Department of Labor (DOL) provides the following guidance:

An emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency. It also includes individuals that work for such facilities employing these responders and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

However, to minimize the spread of the virus associated with COVID-19, DOL encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

* **Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow:
	+ An employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.
* **Definition of Child** – Under the FFCRA, a son or daughter is an employee’s own child - which includes their biological, adopted, or foster child, stepchild, a legal ward, or a child for whom they are standing in loco parentis (someone with day-to-day responsibilities to care for or financially support a child). In addition, the Wage and Hour Division has clarified that under the FFCRA, a “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older) who has a mental or physical disability and is incapable of self-care because of that disability.
* **Paid Leave** – The first 10 days of EFMLEA is unpaid, unless the employee is also eligible for leave under the emergency paid sick leave act (discussed below). During this 10-day period, an employee, not otherwise eligible for the emergency paid sick leave, may elect to substitute any accrued paid leave (such as vacation or sick leave) to cover some or all of the 10-day unpaid period. After the 10-day period, the employer must pay:
	+ Full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled. The EFMLEA limits this pay entitlement to $200 per day and $10,000 in the aggregate per employee.
	+ Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work, as agreed upon when hired, or based upon the appropriate number of hours of leave according to the average hours per day the employee was scheduled to work over the entire term of his or her employment.
	+ The employee may choose to use existing paid leave from on the city’s current paid leave policies to supplement the amount the employee receives from EFMLEA, up to the employee’s normal earnings.
* **Intermittent Leave –** Under EFMLEA, intermittent leave is allowed only when the employer and employee can agree on a schedule. However, DOL encourages employers and employees to collaborate to achieve flexibility, including handling such leave on a day-by-day basis.
* **Job Restoration**– Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the EFMLEA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of EFMLEA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee’s leave.
* **Effective Date and Expiration**– DOL issued new guidance on March 24 stating that the effective date is April 1 and is not retroactive. The law will remain in effect until December 31, 2020.

It is important to note that the other parts of the current FMLA, have not changed. KLC’s blog has information on the requirements of FMLA at <https://www.klc.org/News/7037/what-types-of-events-qualify-for-leave-under-the-fmla-part-1-of-2> and <https://www.klc.org/News/7038/what-types-of-events-qualify-for-leave-under-the-fmla-part-2-of-2>, as well as information on the Department of Labor’s website at <https://www.dol.gov/agencies/whd/fmla>. Also, important to note, any leave taken under the new EFMLEA provisions, counts toward an employee’s 12-week FMLA entitlement. The total amount of leave available under the FMLA remains at 12 weeks. So, for example, an employee who previously used four weeks of FMLA leave due to a serious health condition would have eight weeks of FMLA leave available for the reason listed above.

**Emergency Paid Sick Leave Act**

* **Eligibility** – This provision requires employers with fewer than 500 employees,and all public employers regardless of size, to provide full-time employees (regardless of the employee’s duration of employment prior to leave) with 80 hours of paid sick leave at the employee’s regular rate. As with EFMLEA, there is an exception for employers to exclude those who are healthcare providers or emergency responders (see the definition provided by DOL under the EFMLEA section of this article).

“Employees” under this Act includes anyone qualified as an employee under the Fair Labor Standards Act (which includes virtually all private sector employees, whether full- or part-time, or temporary), but does not include independent contractors. As far as pay, employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

* **Reasons for Paid Sick Leave**include because the employee is:
1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a healthcare provider to self-quarantine due to COVID-19 concerns (caring for another who is subject to an isolation order or advised to self-quarantine as described above is not limited to only family members).
5. Caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to COVID-19 precautions; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
* **Cap on Paid Sick Leave Wages**– Paid sick leave wages are limited to $511 per day up to $5,110 total per employee for their own use and to $200 per day up to $2,000 total to care for others and any other substantially similar condition.
* **Carryover and Interaction with Other Paid Leave**– This paid sick leave will not carry over to the following year and is in addition to any paid sick leave currently provided by employers. The law is clear that the paid leave provided by this law is in addition to any employer-provided paid leave. Therefore, an employer is prohibited from revising their policies after the law is enacted to avoid providing additional paid leave to employees. Also, after the first workday (or partial workday) that an employee receives paid sick time under this law, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time provided under this law.

In addition, the employee may choose to use existing paid leave based on the city’s current paid leave policies to supplement the amount the employee receives from the Emergency Paid Sick Leave Act provisions, up to the employee’s normal earnings.

* **Calculating Rate of Pay**– Employers are required to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.  However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period.

Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period, as agreed upon when hired, or based upon the appropriate number of hours of leave according to the average hours per day the employee was scheduled to work over the entire term of his or her employment. A public agency (or employer employing less than 500 employees) is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the EFMLEA (summarized above).

* **Effective Date and Expiration**– DOL issued new guidance on March 24stating that the effective date is April 1 and is not retroactive. The law will remain in effect until December 31, 2020.

**Reimbursement Provisions**

Currently under the federal law there are no reimbursement allowances for these payments for local governments. Many organizations, including the National League of Cities, are working on provisions that will include reimbursement. In the event that provisions are enacted, cities should retain appropriate documentation in support of leave provided under these provisions. For childcare-related leave this could include (1) a notice that has been posted on a government, school, or day care website, or published in a newspaper, (2) or an email from an employee or official of the school, place of care, or childcare provider. For COVID-19, Emergency Paid Sick Leave specifically related to the illness, documentation from a healthcare provider regarding the need for leave would be sufficient; however, healthcare providers may not be able to provide notice immediately upon request based upon the volume of care being required at this time.

**Notice Requirements**

Employers are required to post a notice in conspicuous places in the workplace where notices are typically placed. The [Notice](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf) is available for download on the Department of Labor website and a list of [frequently asked questions](https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions) related to the poster are available on the website as well.

We have also included on the KLC website, a sample Municipal/Executive Order adopting these provisions that cities can use and then distribute to their employees. If you have any questions or if you need anything else, please contact Personnel Services Manager Andrea Shindlebower Main, at ashindlebower@klc.org or Personnel Services Attorney Courtney Risk Straw at cstraw@klc.org or by calling 800-876-4552. For specific legal questions, we highly recommend discussing with your city attorney.

1. This document was updated March 25 and March 30 from preliminary guidance provided by the DOL, which can be found at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. The DOL also stated it will be issuing implementing regulations regarding the new law in the near future, so be aware of possible additional changes. [↑](#endnote-ref-1)