

## **Families First Coronavirus Response Act Became Effective April 1<sup>i</sup> All Cities Are Required 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 is information on the two employer provisions of the Act that went into effect 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 calendar 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, healthcare, 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, firefighters, 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 calendar 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 child care provider is unavailable due to COVID-19 related reasons.
  - If a child’s school is operating on an alternate day basis, the employee is eligible to take paid leave on days when their child is not permitted to attend school in person and must instead engage in remote learning, as long as the employee needs the leave to actually care for their child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA, and its implementing regulations, the school is

effectively “closed” to the employee’s child on days that he or she cannot attend in person.

- If a child’s school gives the employee a choice between in person or remote learning, the employee is not eligible to take paid leave because the child’s school is not “closed” due to COVID–19 related reasons; it is open for the child to attend. This leave is not available to take care of a child whose school is open for in-person attendance. If the employee’s child is home not because his or her school is closed, but because the employee has chosen for the child to remain home, the employee is not entitled to FFCRA paid leave. However, if, because of COVID-19, the employee’s child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the employee may be eligible to take paid leave to care for him or her.
- **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 two weeks of EFMLEA is unpaid, unless the employee is also eligible for leave under the Emergency Paid Sick Leave Act (discussed below). During this two-week period, an employee, not otherwise eligible for the emergency paid sick leave, may elect to substitute any accrued paid leave (such as vacation, personal or paid time off) to cover some or all of the two-week unpaid period. After the two-week 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 typically works in a two-week period. If the normal hours scheduled are unknown, or if the part-time employee’s schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after that. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.
  - Under 29 CFR 826.160 the employee and the employer may agree to use existing paid leave (such as vacation, personal or paid time off) from one of the city’s current paid leave policies to supplement the amount the employee receives from EFMLEA, up to the employee’s normal earnings.
- **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 guidance on March 24, 2020, stating that the effective date is April 1, 2020, 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>. 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;
    - Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. The 29 CFR 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. Employees may not take paid sick leave for this qualifying reason if the employer does not have work for the employee as a result of a shelter-in-place or a stay-at-home order (i.e. business closes or revenue losses prevent keeping a position and at that point unemployment would occur).
  2. Advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
    - The advice to self-quarantine must be based on the healthcare provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. And, self-quarantining must prevent the employee from working or teleworking.
    - The term “healthcare provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason

for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of FMLA.

3. Experiencing COVID-19 symptoms AND seeking medical diagnosis;
    - The 29 CFR 826.20(a)(4) explains that symptoms that could trigger this are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis.
    - Employees may not take paid sick leave under FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms.
  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).
    - The employee must have a personal relationship (e.g., family member or roommate) where there is an expectation that the employee would care for them.
    - The term “healthcare provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of FMLA.
  5. Caring for the employee’s child (same definition as in EFMLEA) 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
    - An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee’s child needs.
    - Under this provision of the EPSLA, 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.
  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.
    - The U.S. Department of Health and Human Services (HHS) has not yet identified any “substantially similar condition” that would allow an employee to take paid sick leave. If HHS does identify any such condition, DOL will issue guidance explaining when one may take paid sick leave on the basis of a “substantially similar condition.” Employers are recommended to watch DOL and the Centers for Disease Control and Prevention (CDC) websites for information.
- **Cap on Paid Sick Leave Wages** –If an employee is out for reasons 1-3 listed above, sick leave must be paid at the employee’s required compensation up to 80 hours but is capped at \$511 per day and \$5,110 in the aggregate per employee. If an employee is out for reasons 4-6 listed above, sick leave must be paid at 2/3 the employee’s required compensation and is capped at \$200 per day and \$2,000 in the aggregate per employee.
  - **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 typically works in a two-week period. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after that. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment. See also the [Families First Coronavirus Response Act: Questions and Answers](#), specifically question 75 on seasonal employee calculations.

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 two weeks of unpaid leave permitted by the EFMLEA (summarized above).

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

### **Work Availability**

The qualifying reason for any FFCRA must be the actual reason the employee is unable to work, as opposed to a situation in which the employee would have been unable to work regardless of whether he or she had a FFCRA qualifying reason. This means an employee cannot take FFCRA paid leave if the employer would not have had work for the employee to perform, even if the qualifying reason did not apply.

### **Employee Notification Requirements**

The 29 CFR 826.90 addresses an employee's notice to his or her employer regarding the need to take leave. Section 826.90(a) explains that for paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19 related reasons, an employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick

leave in order to continue to receive such leave. Sections 826.90(b) and (c) explain that it will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA. The employer may not require the notice to include documentation beyond what is allowed by § 826.100.

Section 826.90(d) states that it is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

### **Documentation Requirements**

The employee is to provide the employer, either orally or in writing, the following information for EFMLEA or emergency paid sick leave as soon as practicable:

- Employee's name;
- Date leave requested;
- Qualifying reason; and
- Oral or written statement that the employee is unable to work based on the qualifying reason.

For Emergency Paid Sick Leave:

- Name of governmental entity that issued quarantine or isolation order;
- Name of healthcare provider who advised to self-quarantine; or
- Notice from a healthcare provider (be flexible).

NOTE: The term "healthcare provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of FMLA.

Child care related:

- Name of child;
- Name of school or child care facility or provider;
- A representation that no other suitable person will be available to care for the child; and
- A copy of a notice posted on a government, school or day care website, notice published in a newspaper; or an email from an employee or official of the school, place of care or child care provider.

Documentation should also be kept for any denial of leave.

### **Recordkeeping**

Section 826.140 explains that an employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for emergency paid sick leave or Emergency FMLA, the employer is required to document and retain such information for four years.

### **Intermittent Leave**

For any FFCRA related leave, 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 when necessary.

### **Effect of Other Laws, Employer Practices and Collective Bargaining Agreements**

The 29 CFR 826.160 discusses the effect of taking Emergency Paid Sick Leave and Emergency FMLA on other rights, benefits, employer practices, and collective bargaining agreements.

### **Reimbursement Provisions**

Reimbursement through the CARES Act is being handled by the [Department for Local Government](#) for COVID-related expenses incurred from March 1, 2020, through December 30, 2020. In addition to many other COVID-related expenses, the cost of providing emergency paid sick leave and paid emergency family and medical leave to public employees to enable compliance with COVID-19 public health precautions are reimbursable with proper documentation. Additional information and an application can be found on the DLG website and cities can also email DLG at [DLG.CRF@ky.gov](mailto:DLG.CRF@ky.gov) with any questions.

### **Prohibited Acts**

An employer is prohibited from discharging, disciplining, or discriminating against any employee because the employee took emergency paid sick leave, has filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding, under or related to the Emergency Paid Sick Leave Act, or has testified or is about to testify in any such proceeding.

The prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries described in the FMLA, 29 USC 2615, apply to employers with respect to eligible employees taking, or attempting to take, leave under the EFMLEA.

### **Notice Requirements**

Employers are required to post a notice in conspicuous places in the workplace where notices are typically placed. In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by email, or post the required notice electronically on an employee information website to satisfy the FFCRA requirement. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through e-mail, or online. The [Notice](#) is available for download on the Department of Labor website and a list of [frequently asked 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](mailto:ashindlebower@klc.org) or by calling 800-876-4552. For specific legal questions, we highly recommend discussing with your city attorney.

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<sup>i</sup> This document was updated from guidance provided by the DOL, updated to reflect the DOL's revised regulations September 11, 2020, which can be found at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> in addition to the temporary regulations issued April 1, 2020, by the DOL which can be found at <https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>.