

To: State Affiliate General Counsels

From: Alice O'Brien, NEA General Counsel  
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Subject: Families First Coronavirus Response Act – Paid Leave Benefits

Date: March 24, 2020

Last Wednesday, the Families First Coronavirus Response Act (“FFCRA”) was signed into law. FFCRA takes effect on April 2 and expires on December 31, 2020. Among other provisions, the law provides emergency paid sick and some parental leave protections to eligible employees.

Eligible employees include virtually all public employees (except as described below) – including all public school employees. While there are employer size exemptions that apply to private-sector employers, these size exemptions do not apply to public employers.

### **Emergency Paid Sick Leave**

The law provides for up to 10 days of paid sick leave for full-time workers and paid sick leave commensurate with hours worked for part-time employees. The key requirements and provisions of the paid sick leave provisions are as follows.

- Applies to public employers regardless of size.
- Applies to private employers that employ fewer than 500 employees.
- Applies to all employees (as defined under the Fair Labor Standards Act), regardless of the length of employment, including seasonal and temporary employees.
- Employers of health care providers and emergency responders may elect to exclude such workers from these emergency paid sick leave requirements.
- Grants the Secretary of Labor the authority to issue regulations for good cause to: (1) exclude certain health care providers and emergency responders from eligibility for emergency paid sick leave, including by allowing such employers to opt those individuals out; and (2) exempt businesses with fewer than 50 employees from the emergency paid sick leave requirements when the imposition of such requirements would jeopardize the business’ viability.
- Leave is available for immediate use, regardless of how long the individual employee has been working for the employer.

- Full-time employees are entitled to 80 hours of paid sick time (the equivalent of 10 eight-hour days).
- Part-time employees are entitled to the number of hours they ordinarily work on average over a 2-week period; for part-time employees with a variable schedule, leave is calculated based on the number of hours the employee was scheduled per day over the previous 6-month period.
- Leave may be used only if the employee is unable to work (or telework) because of any of the following:
  1. Employee is subject to a federal, state, or local quarantine or isolation order related to coronavirus;
  2. Employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
  3. Employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
  4. Employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to coronavirus; or who has been advised by a health care provider to self-quarantine due to concerns related to coronavirus
    - Note: There does not appear to be any particular relationship requirement to this “caring for” provision
  5. Employee is caring for a son or daughter if a school or place of care has been closed due to coronavirus, or the childcare provider of the son or daughter is unavailable due to coronavirus;
    - “Son or daughter,” as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing *in loco parentis*, under 18 years of age.
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor and Secretary of the Treasury.
- Compensation amounts:
  1. For leave related to the employee’s own quarantine or illness (#1-3 above), compensation is their full rate of pay, up to a maximum of \$511 per day and \$5,110 total.
  2. For leave related to caring for another individual (#4-6 above), compensation is at 2/3 of the employee’s regular pay, with a cap of \$200 per day and \$2,000 total.
- Emergency paid sick time may be used prior to any existing paid leave. Employers are prohibited from requiring employees to use other paid leave first, and may not modify their existing paid leave policies to avoid being subject to this requirement.
- Nothing in this law diminishes other rights or benefits under an existing employer policy, collective bargaining agreement, or other federal, state or local law.

- After the first workday in which an employee receives emergency paid sick leave, the employer may require the employee to follow reasonable notice procedures.
- Employers cannot require, as a condition of providing emergency paid sick leave, that an employee be involved in searching for or finding a replacement worker.
- Employees are protected from retaliation (including job loss, discipline and discrimination) for using emergency paid sick leave or filing a complaint.
- Emergency paid sick leave does not carry over from one year to the next, and is not paid out at the termination of employment.

## **Emergency Family and Medical Leave Expansion Act**

The bill also amends the federal Family and Medical Leave Act (FMLA) to provide paid leave for childcare needs related to the coronavirus public health emergency for up to 12 weeks of leave. The key requirements and provisions of this expansion are as follows.

- Purposes for Leave: This public health emergency leave is **only** available to employees who are unable to work (or telework) due to a need for leave to care for a son or daughter under the age of 18 if the school or place of care has been closed, or the child’s childcare provider is unavailable, due to a public health emergency related to coronavirus (as declared by a federal, state or local authority).
  - “Son or daughter,” as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing *in loco parentis* (meaning one who is acting and intending to act as a parent, with no requirement of a legal or biological relationship), under 18 years of age.
- Eligibility:
  - Applies to public employers regardless of size, and private employers that employ fewer than 500 employees.
    - *Except* most employees of the federal government (those covered by Title II of the FMLA) are **not** covered.
  - Employee must only have been employed for at least 30 days to access this leave (as opposed to the 12-month employment period for FMLA).
  - Employers of health care providers and emergency responders may elect to exclude such workers from public health emergency leave.
  - The Secretary of Labor has authority to issue regulations for good cause to: (1) exclude certain health care providers and emergency responders from eligibility for the emergency family and medical leave expansion; and (2) exempt businesses with fewer than 50 employees from the emergency family and medical leave expansion’s requirements when the imposition of such requirements would jeopardize the business’ viability.

- The first 10 days may be *unpaid*.
  - During these 10 days, the employee *may* elect to substitute any accrued vacation, personal, or sick leave (including emergency paid sick leave). The employer may allow, but not require, such substitution of paid leave.
- Leave may be taken for up to 12 weeks, 10 weeks of which are paid.
- After the first 10 days, leave is paid at an amount not less than 2/3 of the employee's regular rate of pay, based on the number of hours the employee would otherwise normally be scheduled to work, capped at \$200 per day and \$10,000 in the aggregate.
  - For part-time workers, pay is equal to the average number of hours per day the employee was scheduled to work over the previous 6-month period.
- If the need for leave is foreseeable, the employee must provide the employer with notice of leave, as is practicable.
- Job protection/restoration: As with the FMLA, job restoration is required. Employees who take public health emergency leave are entitled upon return from leave to be restored to their job position or to an equivalent position with equivalent employment benefits, pay, and other terms/conditions of employment.
  - Exception: An employer with fewer than 25 employees does not have to restore an employee who took public health emergency leave if the position held by the employee no longer exists due to economic conditions or other changes in operating conditions caused by the public health emergency. The employer must, however, make a reasonable effort to restore the employee to an equivalent position with equivalent benefits, pay, and employment terms and conditions; if these efforts fail, the employer must make reasonable efforts for a 1-year period to contact the individual if an equivalent position becomes available.

For more information from the DOL, see here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

For more information from NEA regarding this new law, please contact Alice O'Brien, General Counsel, at aobrien@nea.org, or Keira McNett, Staff Counsel, at kmcnett@nea.org.