

PAID LEAVE FOR COVID-19 RELATED REASONS [Updated September 16, 2020]

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (H.R. 6201; P.L. 116-127). This Act amended and/or added various federal laws due to the COVID-19 pandemic, including provisions for employee paid leaves.

The Act added a new law and amended the Family and Medical Leave Act (FMLA). The new law is entitled "Emergency Paid Sick Leave Act" (EPSLA) and the amendment to the FMLA is entitled "Emergency Family and Medical Leave Expansion Act" (EFMLEA). These are two separate Acts addressing the current COVID-19 national public health emergency with respect to employees and/or their family members.

This document addresses the provisions and **regulations** relating to paid leave for employees for reasons related directly to the public health emergency caused by COVID-19. These Acts and regulations are effective April 1, 2020, through December 31, 2020. ***The United States Department of Labor (USDOL) amended some of the regulations relating to these leaves and they are effective on September 16, 2020. The relevant changes to the regulations are noted in the related sections.***

The Emergency Paid Sick Leave Act:

This Act applies to **all** employees. It requires an employer to pay up to two weeks (80 hours) of leave to a full-time employee who is **unable to work or unable to telework** for one of the six reasons listed below. The employee **must be unable to work or unable to work from home (telework)** due to one of the stated reasons. If the employee is able to work or to work from home, the employee is not entitled to the paid leave.

The **regulations** make clear an employee is not entitled to the paid sick leave for any of the stated reasons **IF** the employee is able to work or telework. The **regulations** also provide if the employer does not have work for the employee to do, the employee is not entitled to the paid sick leave as the employee is not "unable to work" because there is no work for the employee to do. ***The revised regulations clarify this requirement by stating after each reason for the leave an employee may not take paid sick leave where the employer does not have work for the employee.*** The first issue school corporations should address when a paid sick leave is requested under the EPSLA is whether the employee is unable to work, ***telework, or the school does not have work for the employee to do.***

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. [Since the **regulations** require the employee to be

unable to work from home and this includes the employer does not have work for the employee to do, the governor's stay-at-home order would not apply under this reason.]

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. [The **regulations** include persons who are in high-risk groups and have been told to self-quarantine due to the high risk.]

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. [The **regulations** provide this includes time for making, waiting for, and attending appointments.]

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2). [The **regulations** define "individual" under this reason to mean more than a family member. It means an individual for whom the employee has a personal relationship that would indicate an expectation the employee would care for the individual when ill. This may mean a parent, grandparent, aunt, uncle, partner, etc.]

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions. [**The USDOL clarified in its notice of the new regulations if a school is on a hybrid schedule, each day the school is closed and the employee takes a full day of leave, the day is a separate leave day and intermittent leave does not apply to those leave days.**]

(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 the Treasury and the Secretary of Labor. [*The USDOL stated in its notice for the new regulations the Secretary of the Health and Human Services has not specified any substantially similar conditions as of September 16, 2020.*]

The **regulations** define a full-time employee as one who works at least 40 hours per week on a regular schedule. Thus, a part-time employee is an employee who works less than 40 hours per week on a normal weekly schedule (the same number of hours each day or week) or on as needed or as assigned weekly schedule.

The **regulations** provide the calculation for the number of hours of paid sick leave a part-time employee is entitled to based upon hours scheduled to work. As a summary, the part-time employee who has a normal weekly schedule is entitled to the number of hours worked in a two-workweek period. As an example, if a secretary works 35 hours per workweek, the secretary is a part-time employee and is entitled to 70 hours of EPSLA leave. The part-time employee who does not have a normal weekly schedule is entitled to 14 times the average number of hours worked per day for the school corporation over a specified period of time. For these part-time employees, the regulations or your local counsel should be consulted to

determine the exact number of hours of paid sick leave the employee is entitled to under the EPSLA.

The Act requires the compensation for the paid leave be limited to the following amount:

- For reasons 1,2, or 3: Must be at least the greater of the employee's regular rate of pay or minimum wage. The compensation is capped at \$511 per day of the leave and no more than \$5110 for the two-week leave.
- For reasons 4,5, or 6: Must be two-thirds of the greater of the employee's regular rate of pay or minimum wage. The compensation is capped at \$200 per day of the leave and no more than \$2000 for the two-week leave.

The **regulations** state the regular rate of pay is calculated per the Fair Labor Standard Act (FLSA) provisions for full-time employees.

The **regulations** set out a calculation for the regular rate of pay for part-time employees with a normal weekly schedule and part-time employees with a varied weekly schedule. For those part-time employees with a normal weekly schedule, the regular rate is calculated based upon the amount of time the employee would normally work. The **regulations** provide a calculation to determine the regular rate of pay for part-time employees who do not have a regularly scheduled workweek and it is based upon the hours worked over a specific time period. To determine the regular rate of pay for these employees consult the **regulations** and/or your local counsel.

Under this Act, the employer **cannot** require an employee to take any paid leave accumulated by the employee. The **regulations** clearly require the employee to take the EPSLA leave first and then any other paid leave the employee is entitled to as provided by the employer if needed. In addition, the **regulations** prohibit the employer from requiring the employee to take any other leave before taking the EPSLA leave and the leave provided under the EPSLA does not diminish in any way the accumulated paid sick leave the employee has earned.

The Emergency Family and Medical Leave Act:

This Act amends the FMLA to add a section that provides an additional reason for FMLA leave and all the requirements for this additional leave are contained in the added section and expires on December 31, 2020. The requirements of this Act are in addition to and separate from the requirements discussed above relating to the Emergency Paid Sick Leave Act.

The section added to the FMLA is section 110 and applies to all employees who have worked for the employer for at least 30 calendar days. The employer is required to provide leave to the employee when the employee is **unable to work or telework** due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child

care provider of such son or daughter is unavailable, due to a public health emergency. An employee would be entitled to the regular 12 weeks of FMLA leave for this reason.

The **regulations** clarify the 30 calendar days employment period to mean the employee was on the payroll of the employer for 30 calendar days prior to the taking of the EFMLEA leave. The **regulations** also adopt the FMLA definition of “son or daughter” which includes a child who is over the age of 18 years and is unable to care for themselves.

The **regulations** also provide this leave is not in addition to the 12 weeks of FMLA; if an employee has used FMLA leave days in the 12-month period prior to the use of EFMLEA leave days, the previously used FMLA days count and the number of FMLA days for EFMLEA purposes is reduced by the amount of the previously used FMLA days. [As an example, if an employee used 4 weeks of FMLA days in February 2020, the employee has only 8 weeks of FMLA to use for EFMLEA leave. Also, if an employee has used all of their FMLA days, the employee is not eligible to use EFMLEA leave.]

The **regulations** provide the 12 weeks of EFMLEA days are only for the time the Act is effective and does renew if the employer’s FMLA 12-month period starts during the effective dates of the EFMLEA. For example, if the employer’s 12-month period for FMLA begins July 1, an employee is not entitled to 12 weeks of EFMLEA leave until July 1 and to 12 weeks of EFMLEA leave after July 1, for a total of 24 weeks. EFMLEA leave is for **12 weeks** total during April 1 and December 31, 2020.

The Act requires the first 10 days of the leave to be unpaid, but an employee may elect to use accumulated paid leave for these days. The **regulations** provide if the employee uses accumulated paid leave for these 10 days, the employee is to be paid for the paid leave and such payment is not subject to the caps in the EFMLEA. The **regulations** also allow the employee to elect to use the EPSLA paid leave concurrently with the first two weeks of unpaid EFMLEA leave. This provides the employee with the option to receive pay during the time of both leaves if the employee is eligible for leaves under both Acts.

The remainder 10 weeks of the FMLA leave must be paid. The compensation for this portion of the leave is two-thirds of the employee’s regular rate of pay but is capped at \$200 per day and \$10,000 for the 10 weeks or \$1000 per week of the leave. The **regulations** provide calculations for the regular rate of pay for full-time and part-time employees for EFMLEA leave and are the same calculations used for the EPSLA leave.

The **regulations** allow the employee with the agreement of the employer to supplement the employee’s paid leave for these 10 weeks. The paid leave would be taken in portion to the required EFMLEA paid leave (i.e., one-third) to provide the employee with full pay for the leave; this is similar to applying paid leave to worker’s compensation so the employee would receive full pay for the period of the worker’s compensation time off. The **regulations** state if an employee supplements

paid leave for an EFMLEA leave, the pay caps for the EFMLEA portion of the leave remain the same.

The **regulations** allow the EFMLEA leave to be taken by the employee intermittently with the agreement of the employer as to the time increments of the leave and the times of the leave. This may occur when the employee is teleworking but needs time off to care for the child periodically. Such as there may be periods of time during the day where the employee needs to care for the child as there is not another person available to do so. [***The USDOL clarified in its notice of the new regulations if a school is on a hybrid schedule, each day the school is closed and the employee takes a full day of leave, the day is a separate leave day and intermittent leave does not apply to those leave days.***]

The **regulations** provide the other provisions of the FMLA relating to continued health care coverage, return to work, and employer prohibited actions against employees apply to the EFMLEA and will be subject to investigation and enforcement under the FMLA.

Regulations Applicable for Both Acts

The employee is required to give notice of the leave to the employer as soon as the employee can do so. The **regulations** provide the employee notice requirement applies to both the EPSLA and the EFMLEA and must be given as soon as the employee is aware of the need for the leave or within a day of the first leave day taken. ***The new regulations require the employee to provide the notice in writing and the notice contains the following information: employee's name; dates for the leave requested; the qualified reasons for the leave, and the employee is unable to work for the qualified reasons.***

The employer is required to post a notice of the employee's rights under the Acts. The **regulations** provide the notice may be posted in the employer's place of business, emailed to the employees, mailed to the employees, and/or posted on the employer's website. The United States Department of Labor, Wage and Hour Division, has provided a sample notice for employers to use and it may be found on the Department's website.

The **regulations** require employers to keep all records pertaining to an employee's leave under both Acts for four years. The **regulations** require an employer to make written documentation of an employee's oral request or notice of the leave as well as documenting the reasons for the employer's denial of a leave under the Acts.

The United States Department of Labor, Wage and Hour Division is responsible for the enforcement of both Acts. The **regulations** provide for the filing of complaints, the enforcement of the Acts, and the penalties for employer violations of the Acts.

Summary

Reading the two Acts together, all employees who cannot work or work from home are entitled to two weeks of leave for a COVID-19 related reason whether for the employee or for a child or an individual who needs the care of the employee.

The employee may be entitled to an additional leave under the FMLA for one of its qualifying leaves including the need to care for a child whose school or child care provider is closed due to a COVID-19 related emergency. The later leave applies to an employee who has worked for the employer for at least 30 calendar days.

The **regulations** provide for other detailed matters that may apply to school corporations. School officials should consult the regulations, local school counsel, or ISBA Legal Services for information on issues not addressed in this document.

Following is a table summarizing the requirements of each Act:

	Emergency Paid Sick Leave Act	Emergency Family and Medical Expansion Leave
Eligible Employee	All Full-time and Part-time Employees	An employee who has been employed for 30 calendar days
Reasons for Leave (Employee is unable to work or telework)	(1) The employee is subject to a quarantine or isolation order related to COVID-19. (2) The employee has been self-quarantined by a health care provider related to COVID-19. (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. (4) The employee is caring for an individual who is subject to an order described in (1) or has been advised as in (2). (5) The employee is caring for a child if the school or place of care of the child is closed, or the child care provider of such child is unavailable, due to COVID-19 precautions.	To care for a child under 18 years of age if the child's school, place of care is closed, or the child's child care provider is unavailable, due to a public health emergency.

	(6) The employee is experiencing any other similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.	
Duration of Leave	80 Hours/Two weeks (FT) Regularly Scheduled Hours (PT)	12 Weeks
Compensation	Reasons 1, 2, and 3: Regular rate of pay not to exceed \$511/day or \$5110 for the leave period Reasons 4, 5, and 6: 2/3 Regular rate of pay not to exceed \$200/day or \$2000 for the leave period	First 10 days of leave is unpaid (Employee can use accumulated paid days) Next 10 weeks – 2/3 of regular rate of pay not to exceed \$200/day and \$10,000 for the leave period