



## **NEW FEDERAL COVID-19 EMERGENCY LEAVES APPLY TO ALL SCHOOL DISTRICTS!**

Two new federal emergency leaves were just enacted by Congress to help employees and their families during the COVID-19 pandemic. One is an expansion of the current leave under the Family and Medical Leave Act (FMLA), but unlike the previous FMLA law it provides for some paid as well as unpaid leave. The other leave, referred to as Emergency Paid Sick Leave (EPSL), requires employers to provide paid sick leave to be used for specific COVID-19 related reasons. These laws are unique in that the federal government has not previously required employers to provide employees paid leave.

While there has been a lot of media attention about these new laws, please be advised that the rules and qualifying factors are somewhat different for public school districts (and other governmental entities) than private employers. Here's what you need to know:

1. **These leave laws only apply if an employee is not able to work or telework.** Many school employees are working from home. Others have no work to do because the school is shut down. These leaves will only apply if the district has work for the employee to do and the employee cannot work (or work remotely) for their own personal reasons. So do not worry about these leaves until you have employees telling you that they cannot work.
2. **These leave laws apply to all school districts.** The Family and Medical Leave Act normally applies to districts with at least 50 employees, but the new FMLA COVID-19 leave applies to all school districts, no matter how small. And while the new emergency FMLA leave (EFMLA) only impacts private employers with fewer than 500 employees, it again applies to all school district and governmental entities, even the larger ones. Likewise, EPSL applies to all public school districts too.
3. **These leaves apply to full and part-time employees.** Even if your district does not regularly provide leave for part-time employees, these leaves apply to part-time employees.
4. **The federal emergency leave provision become effective on April 1, 2020.** The paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. Therefore, any





leave taken by employees prior to April 1, 2020 will not be covered by the new federal leave provisions.

### **New FMLA Provision: The Emergency Family and Medical Leave Expansion Act (EFMLA)**

This provision applies to all school districts, regardless of how many employees they have. Eligible employees are those:

- Who have been employed for at least 30 days; and
- Are “unable to work (or telework) due to a need for leave to care for” their son or daughter who is under 18 years old “because the school or place of care has been closed or if the care provider for the son or daughter is unavailable due to a public health emergency” as declared by a federal, state or local authority.

EFMLA leave is implemented as follows:

- Employees must give notice of the need to use foreseeable leave “as soon as practicable.”
- The first ten days of leave are unpaid, except that employees may use any accumulated employer-provided vacation, personal, medical or sick leave during those ten days. Schools and districts are prohibited from requiring employees to use accumulated paid leave before taking EFMLA leave.
- After ten days, employees will be compensated at two-thirds of their regular rate of pay based on the number of hours employees would be expected to work. The Act does not address whether an employee may use accumulated employer-provided paid leave concurrently with EFMLA. Districts considering this option should discuss tax and retirement issues with their private school attorney.
- The EFMLA requires employers to include overtime hours in the calculation of pay due to employees for paid EFMLA leave. However, pay does not need to include a premium for overtime (i.e. time and a half) hours.
- Paid EFMLA leave is capped at \$200 per day and \$10,000 in the aggregate.
- The combination of unpaid and paid leave is for a maximum of 12 work weeks.





Hours for employees with varying schedules, such as substitutes, will be determined by taking an average of the hours worked in the six-month period ending on the date employees take leave. If an employee does not work during that period, hours will be based on the reasonable expectation of the hours the employee would work at the time of hiring.

At the conclusion of the leave, the employee must be restored to the same or an equivalent position. There is an exception to this requirement for employers with fewer than 25 employees who meet certain criteria.

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

This provision also applies to all school districts, regardless of how many employees they have. An employee who is unable to work (or telework) due to a need to take leave because the employee:

1. Is subject to a federal, state or local quarantine or isolation related to COVID-19
2. Has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Is caring for an individual who is subject to a federal, state or local quarantine or isolation or has been advised by a healthcare provider to self-quarantine related to COVID-19
5. Is caring for a son or daughter as defined in the FMLA because the school or place of care for the son or daughter has been closed or the care provider is unavailable due to COVID-19 precautions.
6. 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.

Compensation is based on the reason for the leave.

- If the leave is for reasons 1, 2 or 3, leave will be paid at the greater of the employee's regular rate of pay or the applicable minimum wage. Compensation will not exceed \$511 per day.
- If the leave is for reasons 4, 5 or 6, leave will be paid at two-thirds of the greater of the employee's regular rate of pay or the applicable minimum





wage. Compensation will not exceed \$200 per day. The Act does not address whether an employee may use accumulated paid leave concurrently with EPSL. Districts considering this option should discuss tax and retirement issues with their private attorney.

Schools and districts:

- Will post notice from the secretary of labor explaining available leave.
- Cannot require an employee to find a replacement employee in order to take the leave.
- Will make EPSL available for immediate use regardless of how long an individual has worked for the school or district.
- Cannot require employees to use other district-provided leave prior to using emergency leave.
- Cannot discharge, discipline or in any manner discriminate against any employee who uses emergency sick leave and has filed any complaint or instituted or caused to be instituted any proceeding under or related to the EPSL, including a proceeding that seeks enforcement of the EPSL, or has testified or is about to testify in an such proceedings.
- Are not required to pay employees for unused EPSL upon separation from employment.
- Full-time employees are entitled to 80 hours of leave.
- Part-time employees are entitled to leave based on the average number of hours the employee works over a two-week period.

Hours for employees with varying schedules, such as substitutes, will be determined by taking an average of the hours worked in the six-month period ending on the date employees take leave. If an employee does not work during that period, hours will be based on the reasonable expectation of the hours the employee would work at the time of hire.

### **How do the EMFLA and EPSL Act Interact?**

According to the guidance issued by the federal DOL, employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. An employee may take both EPSL and EFMLA leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The EPSL Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of





EFMLA leave which are otherwise unpaid under the EFMLA unless the employee elects to use existing employer-provided vacation, personal, or medical or sick leave under the employer's policy. After the first ten workdays have elapsed, the employee will receive 2/3 of their regular rate of pay for the hours the employee would have been scheduled to work in the subsequent ten weeks under the EFMLA.

Please note that an employee can only receive the additional ten weeks of expanded family and medical leave under the EFMLA for leave to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

