



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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LEGAL UPDATE

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To: Superintendents, Member School Districts (K-12)
From: Nancy L. Klein, Senior Associate General Counsel *Nancy Klein*
Subject: Emergency Family and Medical Expansion Act and Emergency Paid Sick Leave Act
Memo No. 23-2020

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We plan to present our annual comprehensive workshop on Employee Health Leave Rights and Employer Responsibilities electronically in April and May. This year, we will include coverage of the Emergency Family and Medical Expansion Act and Emergency Paid Sick Leave Act. As these new laws go into effect on April 1, 2020, and expire on December 31, 2020, below is an outline for your reference. Please contact our office with any questions.

If you are interested in participating in the workshop, please visit our website at <https://sclscal.org/workshops/> to register.

I. Emergency Family and Medical Leave Expansion Act (“Emergency FMLA”)

A. Definitions

1. **“Eligible Employee”** means “an employee who has been employed for at least 30 calendar days by the employer....
 - a. An employer may exclude an employee who is an emergency responder. (Families First Act sec. 3105)¹
 - b. Although an employee does not have to meet the usual FMLA 1,250 service hour requirement or one year of employment requirement to be eligible for Emergency FMLA, the employee cannot have exhausted all FMLA rights in the applicable 12-month period.
2. **“Employer”** includes “any public agency.”

¹ U.S. Department of Labor may issue further guidance in this regard.



3. **“Qualifying Need Related to a Public Health Emergency”** (“Qualifying Need”) means an eligible employee is unable to work (or telework) due to a need to care for a son or daughter, under 18 years of age, whose:
 - a. School or place of care has been closed, or
 - b. Child care provider of son or daughter under 18 years of age is unavailable, because of an emergency declared by federal, state, or local authority with respect to COVID-19.
4. **“Child Care Provider”** means a provider who receives compensation for providing child care on a regular basis, including a center-based child care provider, group home child care provider, family child care provider, or other provider of child care services for compensation that is:
 - a. Licensed, regulated or registered under state law, and
 - b. Satisfies state and local requirements. (42 USC 9858n(6))
5. **“School”** means elementary or secondary school.

B. Emergency FMLA Leave –Duration/Commencement and Termination Date

1. Up to 12 workweeks of job-protected leave for a Qualifying Need.
2. Leave may commence on or after April 1, 2020, the effective date of the Families First Act.
3. Leave shall terminate on or before December 31, 2020

C. Emergency FMLA Leave – Compensation

1. First 10 days
The first 10 days of Emergency FMLA leave are unpaid, but the employee may use other *available* sources of paid leave, including:
 - a. Emergency Paid Sick Leave (See Part II, below)
 - b. Sick Leave – Education Code secs. 44978 and 87781 (certificated/academic EEs) and 45192 and 88192 (classified EEs), ***if permitted by applicable CBA or policy/regulation***
 - c. Personal Necessity Leave
 - d. Vacation Leave
 - e. Compensatory time
2. After 10 Days
 - a. Paid Leave for Employees with Regular Work Schedules



Two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise have been scheduled to work, but no more than \$200/day and \$10,000 in the aggregate.

b. **Paid Leave for Employees with Varying Work Schedules**

Two-thirds of the employee's regular rate of pay for the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes leave, including hours for which the employee took leave of any type, but no more than \$200/day and \$10,000 in the aggregate.

If the employee did not work during the preceding six-month period, two-thirds of the employee's regular pay for the "reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work, but no more than \$200/day and \$10,000 in the aggregate.

D. Notice

Employee is required to give notice of need for Emergency FMLA as soon as practicable.

E. Restoration to Position

1. Employees who take Emergency FMLA leave are entitled to be reinstated to the same or equivalent position upon termination of the leave.
2. Exception
For employers with fewer than 25 employees, reinstatement is not required if the employee's position no longer exists due to economic conditions or changes in operating conditions of the employer that:
 - a. Affect employment, and
 - b. Are caused by an emergency declared by federal, state, or local authority with respect to COVID-19.

Employer must make reasonable efforts to restore the employee to an equivalent position, and if such efforts fail, contact the employee if an equivalent position becomes available within one year of the earlier of the date on which the need for Emergency FMLA concludes, or the date that is 12-weeks after the date on which the employee's Emergency FMLA began.

II. Emergency Paid Sick Leave Act ("PSL")

A. Definitions

1. **"Employee"** includes a public employee regardless of how long the employee has been employed.



2. **“Covered Employer”** includes a public agency.

B. Qualifying Reasons for PSL

1. Employee is subject to federal, state, or local quarantine order due to concerns related to COVID-19.
2. Employee has been advised by a health care provider (“HCP”) to self-quarantine due to concerns related to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
4. Employee is caring for someone subject to a quarantine order (paragraph 1) or has been advised by an HCP to self-quarantine (paragraph 2).
5. Employee is caring for employee’s son or daughter because the school or place of care or child care provider is unavailable due to COVID-19 precautions. (See Emergency FMLA, above, and C.5., below.)
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

C. Duration of PSL and Rate of Pay

1. Full-time Employees – Leave for 80 hours at regular rate of pay. (See paragraphs C.4. and C.6.)
2. Part-time Employees – Leave for the number of hours the employee works on average over a two-week period at the regular rate of pay. (See paragraphs C.4. and C.6.)
3. Employees with Varying Schedules –Leave for the number of hours the employee was scheduled to work over the six-month period ending on the date the employee takes PSL, including hours the employee took leave of any type, at the regular rate of pay. (See paragraphs C.4. and C.6.)
4. Exception to Rate of Pay
When the Qualifying Reason for leave is to care for a family member (paragraphs B.4. to B.6., above), the rate of pay is two-thirds the employee’s regular rate.
5. Employees who take EPSL for the reasons specified in paragraph B.5., if eligible (i.e., employed at least calendar days), also have rights under Emergency FMLA).



6. Maximum Compensation

- a. \$511/day; \$5,110 in the aggregate for Qualifying Reasons in paragraphs B.1. to B.3., above.
- b. \$200/day; \$2,000 in the aggregate for Qualifying Reasons in paragraphs B.4. to B.6., above.

D. Use of PSL First and Related Rights

1. Employer may not require employee to use other paid leave before PSL.
2. Employer may not require employee to find a substitute as a condition of taking PSL.
3. Employer may not discharge, discipline, or in any manner discriminate against an employee who takes PSL in accordance with the Families First Act and has filed a complaint/instituted a proceeding under the Families First Act or is about to testify in such a proceeding.

E. Expiration of PSL Rights

PSL rights expire on December 31, 2020.

F. Notice Requirements

1. Employers are required to post a notice of the Emergency Paid Sick Leave Act (https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf) in a conspicuous place where notices to employees are customarily posted.
2. After the first PSL leave day, the employer may require an employee to “follow reasonable notice procedures....”

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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