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September 22, 2020

## LEGAL UPDATE

**To:** Superintendents, Member School Districts (K-12)

**From:** Nancy L. Klein, Senior Associate General Counsel 

**Subject:** Emergency Family and Medical Expansion Act and Emergency Paid Sick Leave Act – Updated to include New Federal Regulations effective September 16, 2020  
Memo No. 23-2020 – REVISED

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

#### A. Definitions

1. “**Eligible Employee**” means “an employee who has been employed for at least 30 calendar days by the employer....”
2. “**Employer**” includes “any public agency.”
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 “**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.

Note: “Closed” means the usual physical location where the son/daughter receives instruction or care is not open to the child for onsite instruction / care.

4. “**School**” means elementary or secondary school.
5. “**Place of Care**” means a physical location in which care is provided for the son/daughter while the employee works, and includes day care facilities, preschools, before and after



school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

6. “**Child Care Provider**” means:

- a. A provider who **either** 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, that is:
  - i. Licensed, regulated or registered under state law, and
  - ii. Satisfies state and local requirements (42 USC 9858n(6)), **or**
- b. A family member or friend who *regularly* cares for the son/daughter with or without compensation.

**B. EFMLA 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 Corona Virus Response Act (“FFCRA”).
3. EFMLA leave rights expire on December 31, 2020.

**C. Intermittent Leave**

Intermittent EFMLA is permitted when the employee and employer agree on an intermittent schedule.

Employer permission is not required when the school, place of care, or child care provider is closed or unavailable to the son/daughter only on some days of the employee’s work week. The revised regulations clarify that “each day of closure or unavailability is a separate reason for leave, and thus [the employee] would not need to take leave for a single reason intermittently.”

**D. EFMLA Leave – Compensation**

1. First 10 days  
The first 10 days of EFMLA 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, MOU, 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.

**E. Notice of Need with Required Documentation for EFMLA Leave**

Employee is required to give notice of the need for EFMLA leave "as soon as practicable." If the need for leave is foreseeable, "practicable...will generally mean providing notice before taking leave." (See Section III. B. and C.4., below, for Required Documentation.) If the employee fails to give the required notice, the employer should inform the employee and give the employee an opportunity to provide the required documentation. (29 CFR 825.90)

**F. Restoration to Position**

1. Employees who take EFMLA 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 EFMLA leave concludes, or the date that is 12-weeks after the date on which the employee's EFMLA leave 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 an “individual” 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 also Section II, 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 also, Section II, 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 not related to the employee's own health concern (Section II., paragraphs B.4. to B.6., above), the rate of pay is two-thirds the employee's regular rate.
5. Possible Dual Rights to PSL and EFMLA Leave - Employees who take PSL for child care reasons (Section II, paragraph B.5, above) have rights to EFMLA leave, if they meet eligibility requirements (i.e., employed at least 30 calendar days).
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.
  - c. Combined aggregate of PSL and EFMLA cannot exceed \$12,000.

**D. Intermittent PSL**

If the reason for taking PSL is Qualifying Reason 1, 2, 3, 4, or 6, employees are not permitted to take PSL intermittently, unless they are teleworking.

If the reason for taking PSL is Qualifying Reason 5 (child care), intermittent leave is permitted with employer agreement. Employer permission is not required when the school, place of care, or child care provider is closed or unavailable to the son/daughter only on some days of the employee's work week. The revised regulations clarify that "each day of closure or unavailability is a separate reason for leave, and thus [the employee] would not need to take leave for a single reason intermittently."

**E. 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 FFCRA and has filed a complaint/instituted a proceeding under the FFCRA or is about to testify in such a proceeding.

**F. Expiration of PSL Rights**

PSL rights expire on December 31, 2020.

**G. Employer Notice Requirements**

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\\_N](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_N))



[on-Federal.pdf](#)) in a conspicuous place where notices to employees are customarily posted.

**III. Employee Notice with Required Documentation of Qualifying Reasons (29 CFR 826.90 and 826.100)**

**A. Time for Furnishing Notice with Required Documentation**

Employees are *not* required to give advance notice. Employers may require employees to give notice after the first workday (or portion thereof) for which the employee takes PSL. If employee fails to give the required notice, the employer should inform the employee and give the employee an opportunity to provide the required documentation. (29 CFR 825.90)

**B. Required Documentation Common to all Qualifying Reasons**

1. Employee's Name,
2. Date(s) for which leave is requested,
3. Qualifying reason(s) for the leave, and
4. Oral or written statement that the employee is unable to work.

**C. Required Documentation for Specific Qualifying Reasons**

1. Qualifying Reason 1: The name of the government entity that issued the Quarantine or Isolation order.
2. Qualifying Reason 2: The name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19.
3. Qualifying Reason 4: The name of the government entity that issued the Quarantine or Isolation order to which the "individual" being cared for is subject or the name of the health care provider who advised the "individual" to self-quarantine due to concerns related to COVID-19.
4. Qualifying Reason 5: The name of son/daughter, the name of the school/place of care/childcare provider that has closed or become unavailable, and a representation that no other suitable person will be caring for the son/daughter during the period the employee takes PSL or EFMLA leave.

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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