

## **American Association of School Personnel Administrators**

### **The FMLA and the Emergency Family and Medical Leave Expansion Act (EFMLEA)**

**By Scott D. Macdonald, Esq., SPHR, SHRM-SCP**

The Families First Coronavirus Response Act (“FFCRA”) creates two new emergency leave requirements in response to the COVID-19 global pandemic. The law took effect on April 1, 2020 and is slated to remain in effect until December 31, 2020. One part of the FFCRA, the Emergency Family and Medical Leave Expansion Act (“EFMLEA”), amends portions of the FMLA to permit eligible employees to take up to twelve weeks of expanded family and medical leave to care for a child whose school or childcare facility has closed on account of the COVID-19 pandemic (or whose daycare provider is no longer available). The Emergency Paid Sick Leave Act (“EPSLA”) provides for up to two weeks (80 hours) of paid sick leave for specified reasons related to COVID-19. Both the EFMLEA and the EPSLA apply to public school systems, so it is important for school systems to understand the school system’s obligations under the two new pieces of legislation, employees’ entitlements, and how the two laws interact. This article provides a detailed summary of the EFMLEA as implemented by regulations issued by the U.S. Department of Labor (“DOL”), and its interaction with the FMLA and the EPSLA.

#### **The EFMLEA Entitlements**

The EFMLEA expanded the FMLA to provide eligible employees with up to 12 workweeks of leave if the employee is unable to work or telework due to a need for leave to care for the employee’s child or children whose school or place of care (i.e., childcare facility) has been closed, or whose child care provider is unavailable for reasons related to the COVID-19 pandemic. An employee is eligible for leave under the EFMLEA after 30 calendar days of employment. In order for the leave to qualify as EFMLEA leave, there must be work for the employee to perform—either at the school district’s workplace or by teleworking, and the employee must be able to perform the work but for the need to care for a child. If the school district does not have any work for the employee to perform, then the employee’s need to care for his or her child does not entitle the employee to EFMLEA leave. In addition, the employee must verify that no other suitable person is available to care for the child or children during the period for which the employee is requesting EFMLEA leave.

An Employee is able to telework if (a) the school district has telework for the employee; (b) the school district permits the employee to work from a location other than the employee’s normal workplace (most likely from home); and (c) there are no extenuating circumstances that prevent the employee from performing that work (such as serious COVID-19 symptoms). Telework may be performed during normal work hours or at other times agreed upon by the school district and the employee. In that way, if the school district has work for an employee to do through teleworking, it may be feasible for the employee to care for his or her child and satisfactorily complete the required work over the course of a workday. For example, the school district may agree that an employee can perform telework for COVID-19 related reasons from 8:00-10:00 a.m., 11:00 a.m. to noon, 12:30-3:00 p.m., 4:00-6:00 p.m. on weekdays. This allows an employee, for

example, to help teach students whose school is closed while also caring for his or her child, reserving work times when there are fewer distractions. Of course, the school must compensate nonexempt employees for all hours actually worked—7.5 hours in the above example—but not all 10 hours between the employee’s first principal activity at 8:00 a.m. and last at 6:00 p.m.

Any leave taken under the EFMLEA through December 31, 2020 counts towards the 12 workweeks of FMLA leave to which the eligible employee is entitled for any qualifying reason other than military caregiver leave in the applicable twelve-month calculation period established in the school district. In other words, leave under the EFMLEA runs concurrently with FMLA leave. An eligible employee can take a maximum of 12 workweeks of EFMLEA leave between April 1 and December 31, 2020 even if that period spans two FMLA leave 12-month periods. For example, if the school district’s 12-month period begins on July 1, and an eligible employee took seven weeks of EFMLEA leave between April and the end of June 2020, the employee could only take up to five additional weeks of EFMLEA between July 1 and December 31, 2020.

The fact that an employee or a covered family member under the FMLA (parent, spouse, or child) is self-quarantining due to exposure to the coronavirus does not qualify the employee for EFMLEA leave or for FMLA leave. In addition, the fact that an employee or the employee’s covered family member has been diagnosed with the COVID-19 virus does not qualify the employee for FMLA leave *unless* the virus turns into a serious health condition. For example, if the employee or covered family member is admitted to a hospital for at least one overnight stay, then the virus would constitute a serious health condition. However, it may be difficult if not impossible in such a situation for the employee to provide needed care for a covered family member due to the fact that visitation to hospitals has been curtailed or restricted, and the employee may or may not be able to communicate with the covered family member otherwise. The irony of that untenable situation is readily apparent. At any rate, once the covered family member is released from the hospital, any period of recovery from his or her inpatient stay would be covered under the FMLA for the employee as leave to care for the family member with a serious health condition.

### **The Interaction Between the EFMLEA and the EPSLA**

In addition to expanding the FMLA, the portion of the FFCRA entitled the “Expanded Paid Sick Leave Act” (“EPSLA”) provides for up to two weeks (up to 80 hours) of paid sick leave *in addition* to an employee’s entitlement to paid leave under an employer’s existing leave policies if the employee is unable to work or telework because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider;
4. is caring for an individual who is subject to an order as described in number 1 or self-quarantine as described in number 2 above;
5. is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons; or

6. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services. The substantially similar condition may be defined at any point during the Effective Period, April 1, 2020, to December 31, 2020.

The DOL has determined that reason number 5 is *identical* to the reason for which an employee is entitled to expanded FMLA leave under the EFMLEA. Accordingly, an eligible employee may take leave under both the EPSLA and the EFMLEA. If so, the benefits provided by the EPSLA run concurrently with those provided under the EFMLEA. The principal practical effect of the overlapping provisions relates to (a) the pay an employee receives during those two weeks of overlapping leave and (b) the use of available paid leave as a substitution for any unpaid EFMLEA leave, as explained below in this article. None of the other five reasons for which an employee is entitled to leave under EPSLA qualifies as EFMLEA leave.

The amount of pay an eligible employee is entitled to receive is higher if the leave is for reasons 1 through 3 (full pay up to \$511 per day or a total of up to \$5,110 for the 10 days covered by the EPLSA). The individual referenced in reason number 4 must be an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. It does not include persons with whom the employee has no personal relationship. None of those four reasons under the EPLSA are covered by the EFMLEA, however.

## **Frequently Asked Questions**

### ***Is Leave Taken Under the EFMLEA Paid or Unpaid?***

The first two weeks (10 days) of leave under the EFMLEA is unpaid. The ensuing 10 weeks is paid at two-thirds of the employee's regular rate of pay up to a daily maximum of \$200, or a total of \$10,000. However, a full-time eligible employee (i.e., an employee scheduled to work 40 hours per week) is likely to be entitled to pay under the EPLSA during the first two weeks of leave (up to 80 hours) at two-thirds of the employee's regular rate of pay up to a daily maximum of \$200, or a total of \$2,000. In other words, for leave that qualifies leave under both the EPSLA and the EFMLEA, an employee may be entitled to a grand total of up to \$12,000 over the 12-week period between April 1 and December 31, 2020. The amount of pay is based on the regular salary for all exempt-level employees and based on the hourly rate of pay for nonexempt employees for the number of hours the employee would otherwise be scheduled to work. In short, the first two weeks of leave (up to 80 hours) may be paid under the EPSLA; the subsequent weeks are paid under the EFMLEA. Special rules apply to part-time employees (i.e., employees scheduled to work fewer than 40 hours per week), and employee who do not have a regular work schedule.

***Can the School District Require Employees to Use Available Paid Leave?***

Only during any EFMLEA leave that is unpaid. The rules regarding the substitution of paid leave under the EFMLEA are similar to, but not identical with, the rules regarding the use of paid leave under the FMLA. Specifically, under the FMLA the employee may elect, or the school system may require the employee, to use available paid sick, personal, vacation or other paid leave concurrently with unpaid FMLA leave, consistent with the school district's paid leave policies. The same rule applies under the EFMLEA for any *unpaid* portion of EFMLEA leave. As noted above, under the EFMLEA, only the first two weeks of leave is unpaid. However, an eligible employee may use paid sick leave available under the EPSLA and/or accrued paid leave provided by the school system during that period. The school district may not require an employee to use his or her own available paid leave in lieu of paid sick leave that is available under the EPSLA; such leave is *in addition* to any paid leave provided by the school district. Accordingly, because this period of EFMLEA is not unpaid if an employee is receiving paid sick leave pursuant to the EPSLA, the FMLA and EFMLEA provisions regarding the substitution of accrued paid leave do not apply, and neither the employee nor the school district may require the substitution of paid leave. However, the parties may agree to have leave supplement pay under the EFMLEA so that the employee receives the full amount of his or her normal pay. For example, the school district may agree to permit an employee to supplement the EFMLEA leave by substituting one-third hour of accrued paid personal leave or vacation each hour (or day) of EFMLEA leave. Note that paid sick leave is not referenced in the EFMLEA regulations because the reason for leave under the EFMLEA is to care for a *healthy* child due to the unavailability of school or childcare, and not because the child is sick or has a serious health condition. The use of paid sick to stay home with a healthy child for whatever reason is typically not permissible in school districts. Accordingly, it would not be permissible for the school district to require an employee to substitute available paid sick leave for any unpaid portion of EFMLEA leave under those circumstances. However, the school district may agree to waive its policy provisions and permit an employee to supplement paid leave under the EFMLEA with available paid sick leave.

***Does an employee qualify for EFMLEA because he or she is worried or anxious to go to work due to the COVID-19 risk?***

No. Reluctance to work due to a fear of contracting the COVID-19 virus does not entitle the employee to leave under the EFMLEA.

***Is an employee entitled to leave under the EFMLEA or the EPSLA if the employee is not working or teleworking?***

No. An employee is not entitled paid or unpaid leave where the employer does not have work for the employee.

***Are employees permitted to supplement paid sick leave under the EPSLA in order to earn 100% of their normal pay during the two-week paid sick leave entitlement period?***

Maybe. As noted above, paid sick leave under the EPSLA is in addition to any other paid leave that an employee has available under the school district's existing policies, pursuant to a current collective bargaining agreement or from some other source of paid leave. However, if the school

district and the employee agree, and employee may supplement paid sick leave under the EPSLA with other paid leave that is available for the purpose of caring for a healthy child whose school or daycare facility has closed, so that the employee receives full pay. In that case, the concurrent leave under the EFMLEA is no longer unpaid and the FMLA's substitution rules are inapplicable during that period.

***Are employees permitted to supplement paid sick leave under the EFMLEA in order to earn 100% of their normal pay during the 12-week entitlement period?***

Maybe. During any unpaid portion of leave under the EFMLEA, the regular FMLA rules apply. In other words, an eligible employee may elect to use, or the school district may require that an employee use, accrued leave available the purpose set forth in the school district's policies or in a collective bargaining agreement, such as paid personal leave or vacation concurrently with unpaid EFMLEA leave. However, during any paid portion of EFMLEA leave—whether through the EPSLA during the first two weeks of EFMLEA leave or during the ensuing 10 weeks of paid EFMLEA leave—the school district and the employee may agree to have accrued paid leave supplement the two-thirds pay under the EFMLEA so that the employee receives the full amount of their normal pay. Unlike paid sick leave under the EPSLA, the EFMLEA regulations do not expressly state that the two-thirds pay an eligible employee receives under the EFMLEA during the 10-weeks of paid EFMLEA leave is *in addition* to an employee's other paid leave, but the same conclusion is implicit in the regulations.

***Can an employee take leave under the EFMLEA intermittently?***

Yes, but only if the school district and the employee agree. If so, the intermittent leave may be taken in any increment of time agreed to (i.e., the "minimum increment" rule under the FMLA does not apply). The school district and the employee may agree to permit intermittent use of EFMLEA leave for any portion of for the entire period of EFMLEA leave. If the school district directs or allows an employee to telework, the school district and the employee may agree to the use of EFMLEA leave intermittently and in any agreed increment of time (but only when the Employee is unavailable to telework because of a COVID-19 related reason). Such an agreement should be confirmed in writing.

*Note:* The use of paid sick leave under the EPSLA also may be used intermittently if the school district and the employee agree but only for reason number 5 related the need to care for a child whose school or place of care of care is closed if the employee is required to report to work. If the employee is permitted to telework, then the parties may agree to the use of intermittent leave under the EPSLA for any reason.

*School districts who utilize the AASPA business partner eFMLA, Inc.'s electronic FMLA management software system may contact Attorney Macdonald at [scott@macdonaldhr.com](mailto:scott@macdonaldhr.com) at no cost with any questions related to the EFMLEA and the EPSLA for HR consulting advice. School districts interested in learning more about the software system may visit [www.efmla.com](http://www.efmla.com) for more information. This article is not intended to constitute legal advice. FMLA administrators should contact legal counsel for that purpose.*

## Summary of the EFMLEA Provisions in Relation to the FMLA

The following chart summarizes the relationship between the EFMLEA and the FMLA in certain topic areas of coverage. More specific information related to some of those topics is explained elsewhere in this article.

Provision	FMLA	EFMLEA
Eligible Employees	12 months of employment and 1,250 hours of service in the 12 months preceding the start of leave.	30 calendar days of employment preceding the start of leave (e.g., employee is eligible on April 1 if the employee was employed as of March 2).
Covered Reasons for Leave (Non-Military Related)	<ul style="list-style-type: none"> <li>• For the birth and newborn care of the employee's child;</li> <li>• For the placement with the employee of a child for adoption or foster care;</li> <li>• To care for the employee's spouse, son or daughter, or parent with a serious health condition;</li> <li>• For the employee's own serious health condition that makes the employee unable to perform one or more essential functions of his or her current position.</li> </ul>	<ul style="list-style-type: none"> <li>• Because the employee is unable to work (or telework) due to the need to care for to the employee's child or children whose school or place of care (i.e., childcare facility) has been closed, or whose child care provider is unavailable for reasons related to the COVID-19 pandemic.</li> </ul>
Amount of Leave	12 weeks in the applicable 12-month period (including leave under the EFMLEA).	12 weeks between April 1 and December 31, 2020 (including leave under the FMLA).
Employer Notice Requirements	<ul style="list-style-type: none"> <li>• General Notice must be posted in a conspicuous place where employees or job applicants may view it; distribution to all employees is also required.</li> </ul>	<ul style="list-style-type: none"> <li>• FFCRA poster must be posted in a conspicuous place where employees or job applicants may view it; distribution to all employees is also required.</li> </ul>
Employee Notice Requirements	<ul style="list-style-type: none"> <li>• At least thirty (30) days before the leave is to begin if the need for the leave is foreseeable based on birth or placement of a child or planned medical treatment;</li> <li>• As soon as practicable under the circumstances if 30 days' notice is not practicable.</li> </ul>	<ul style="list-style-type: none"> <li>• As soon as practicable if foreseeable;</li> <li>• Notice may not be required in advance, but only after the first workday (or portion thereof) for which an employee takes EFMLEA leave.</li> <li>• If an employee fails to give proper notice, the school district should give him or her notice of the failure</li> </ul>

		and an opportunity to provide the required documentation prior to denying the request for leave.
Paid Versus Unpaid	Unpaid.	<ul style="list-style-type: none"> <li>• First 10 days (two weeks): Unpaid (but employee may be entitled to pay under the EPSLA during that time or may use available paid leave).</li> <li>• Up to 10 additional weeks: Paid at two-thirds (2/3) of the employee's regular rate of pay up to a maximum of \$200 per day (up to \$10,000 total for the 10 weeks).</li> </ul>
Documentation Required	Applicable Medical Certification (DOL Forms WH-380-E or WH-380F) from the employee's or the employee's family member's health care provider;	<p>Employee must provide the following documentation:</p> <ol style="list-style-type: none"> <li>1. A verbal or written statement that the employee is unable to work or telework due to a qualifying need under the EFMLEA related to the COVID-19 public health emergency;</li> <li>2. The name(s) of the employee(s) and/or daughter(s) being cared for;</li> <li>3. The name of the school, place of care, or childcare provider that has closed or become unavailable for each child who is being cared for; and</li> <li>4. A verbal or written representation that no other suitable person will be caring for the child or children during the period for which the employee is requesting EFMLEA leave.</li> </ol>
Substitution of Paid Leave	The employee may elect, or the employer may require the employee, to substitute available paid leave consistent with the employer's leave policies. Paid leave runs concurrently (not consecutively) with unpaid FMLA leave.	Employee may elect, or employer may require, employee to substitute only paid leave that would be available under the employer's leave policies to care for a child whose school or care facility has closed related to COVID-19. Paid leave runs concurrently (not consecutively) with unpaid FMLA leave.

<p>Use of Intermittent Leave (leave taken in separate periods of time, rather than one continuous period)</p>	<p>Permitted for certain reasons only (e.g., when medically necessary for foreseeable planned medical treatment for a serious health condition). Minimum increment rules apply;</p>	<p>Permitted only if the employer and the employee agree. Intermittent leave may be taken in any increment of time agreed to by the employer and the employee. Applicable to teleworking only when employee is unavailable to telework due to need to care for child under the EFMLA-qualifying reason.</p>
<p>Recordkeeping Requirements</p>	<p>For a minimum of three years:</p> <ul style="list-style-type: none"> <li>• Basic payroll records, including daily and weekly hours worked;</li> <li>• Dates of FMLA leave and hours of leave if less than a full workday;</li> <li>• Copies of required FMLA notices provided to employees;</li> <li>• Documents describing employee benefits and paid or unpaid leave policies;</li> <li>• Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statements;</li> <li>• Records and documents relating to medical certifications or other medical information (must be maintained as confidential medical records in separate files from the usual personnel files).</li> </ul>	<p>All records required by the FMLA regulations, plus</p> <p>For four years:</p> <ul style="list-style-type: none"> <li>• All documentation provided by employee to support request for EFMLEA leave, whether leave is granted or denied;</li> <li>• Documentation of any verbal information or representations an employee is required to provide under the EFMLEA.</li> </ul>