Federal Response to COVID-19: Q & A

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("FFCRA"). The FFCRA relief package includes two (2) distinct provisions that provide emergency leave to employees: (1) the Emergency Paid Sick Leave Act ("EPSLA"); and (2) the Emergency Family and Medical Leave Expansion Act ("Extended FMLA"). On April 1, 2020, the Department of Labor issued regulations for the FFCRA. Any "Sections" referenced herein refer to said regulations. This Q & A seeks to provide guidance as to how the FFCRA applies to school districts specifically and to address some of the common issues.

Does the FFCRA apply to school districts.

Yes. This law applies to governmental employers with one (1) or more employees. All school districts are subject to the mandates of FFCRA.

Is employee notice required?

Yes. Click here for a link to the FFCRA poster from the Department of Labor. It should be posted in each facility where notices to employees are customarily posted. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through e-mail, or online.

Can a regular teacher be charged leave for days on which their school is closed due to COVID-19?

No. TCA 49-5-716 provides:

A teacher, including a teacher on preapproved leave or other type of leave, shall not be charged with a day of leave for any day on which the teacher's school or the school district is closed due to natural disaster, inclement weather, serious outbreak of contagious illness, or other unexpected event.

This statute only applies to teachers, not hourly workers and other non-teaching staff. You cannot charge a teacher for leave if the district is closed even if they have preapproved leave or are schedule to take another type of leave, including Emergency Sick Pay Leave. Thus, if your district is closed you cannot charge a teacher for any type of leave. The FFCRA provides relief to teachers in Tennessee only if their school is open and they are unable to work for one of the reasons provided.

Notably, it is unclear what effect a district's efforts to maintain some education efforts and learning opportunity, e.g. virtual learning, while the physically closing schools, would have on the definition of "closure" under this statute. If a district has implemented a continuing education plan that requires teachers to telework, then the schools and district may not be considered closed for purposes of applying this law. Please consult with your board attorney for specific guidance.

What are the circumstances that trigger EPSLA?

A school district is required to provide emergency paid sick leave to an employee who is unable to work or ***telework*** because, due to COVID-19, the employee:

1st Reason - Is subject to a federal, state, or local quarantine or isolation order;
2nd Reason - Has been advised by a health care provider to self-quarantine;
3rd Reason - Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4th Reason - Is caring for an individual subject (or advised) to quarantine or isolation;
5th Reason - Is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6th Reason - Is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.

Detailed information about each reason is included below.

Employee concern about contracting COVID-19 is not sufficient to qualify for emergency paid sick leave, but it may entitle the employee to other forms of leave. School districts should consider all circumstances when an employee expresses concern, including but not limited to, ADA implications, risk-factors of the employee, and the safety of other employees if there is a suspected case of COVID-19.

1st Reason - What constitutes a quarantine or isolation order?

Section 826.20(a) provides that quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is whether the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order.

An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would

be unable to work even if he or she were not required to comply with the quarantine or isolation order.

Additionally, Section 826.20(a)(2) explains that an employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

Districts should consider an employee's ability to access the internet at their residence when determining if someone is available for emergency sick leave. Many homes in the state do not have internet access. If this is the case, then the employee would most likely be eligible for emergency sick leave. This is because the order requires the employee to stay home where internet access is not available. A similar situation would occur if an employee loses power at their residence and is unable to telework. The order requires them to stay home, and they do not possess the ability to telework.

The Governor recently issued Executive Orders No. 22 and 23. Executive Order No. 23 amends Executive Order No. 22 and implements a "safer at home" requirement. This Order specifically says, "all persons in Tennessee are required to stay at home, except for when engaging in Essential Activity or Essential Services as defined in this Order", referencing Executive Order No. 22. The list of Essential Services includes employees supporting K-12 schools. As a result, these Orders do not directly impact school districts so long as the activity taking place at the school is for the purposes of facilitating distance learning, providing food or shelter, performing critical research, or performing essential functions, provided that the Health Guidelines set forth in Executive Order No. 22 are followed to the greatest extent practicable.

Many county and cities have additional orders in place that could qualify an employee for emergency sick leave. We encourage you to review those orders with your local board attorney to determine how they apply.

2nd Reason - What constitutes advise from a healthcare provider to self-quarantine?

Section 826.20(a)(3) explains that the advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. And, self-quarantining must prevent the employee from working. An employee who is self-quarantining, is able to telework, and therefore may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-

quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.

3rd Reason - What constitutes experiencing symptoms of COVID-19 and seeking a medical diagnosis?

Section 826.20(a)(4) explains that symptoms that could trigger this are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID-19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.

4th Reason - What constitutes caring for an individual subject (or advised) to quarantine or isolation?

Section 826.20(a)(5) explains that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, 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 self-quarantined or was quarantined.

5th Reason – What constitutes caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions?

An employee may take paid sick leave to care for his or her son or daughter. This includes biological, adopted, foster child, stepchild, legal ward, child of person standing in loco parentis, who is under 18; or 18 years or older who is incapable of self-care due to mental or physical disability. The employee must be unable to work or telework because they are caring for the child because the child's school or childcare facility has closed are is unavailable due to COVID-19.

Additionally, an employee does not need to take such leave if another suitable individual— such as a co-parent, co-guardian, or the usual child care provider—is available to provide care. Childcare provider also includes a family member or friend that regularly cares for the employee's child.

What constitutes telework for purposes of FFCRA?

Section 826.10 defines "telework" broadly. It includes "work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace." Employees are considered to have the ability to telework if: (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform work from the employee's location; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

The Department has determined that an employer allowing such flexibility during the COVID-19 pandemic shall not be required to count all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID-19 related reasons on the following schedule: 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays.

This allows an employee, for example, to help teach children whose school is closed or assist the employee's parents who are temporarily living with the family, reserving work times when there are fewer distractions. Of course, the employer must compensate the employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between the employee's first principal activity at 7 a.m. and last at 9 p.m.

How much emergency sick leave pay is an employee entitled to?

For Reasons 1-3 identified and discussed above, the employee is entitled to full pay. For Reasons 4-6, the employee is entitled to 2/3 pay.

How much emergency paid sick leave is available?

Up to two weeks, which is 80 hours for full-time employees and the average hours worked in a two-week period for part-time employees.

How much emergency sick leave is a part-time employee entitled to?

Section 826.21(b)(3) states that, in the absence of an agreement regarding the expected number of hours worked each day, a part-time employee with a varying schedule who has been employed for fewer than six months "is entitled to up to the number of hours of paid sick leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type." An employer may also use twice the number of hours that an employee was scheduled to work per workweek, on average, over the six-month period.

Keep in mind that these laws would not apply when a part-time substitute is not directly employed through a school system, but rather employed through a third-party agency.

Can existing sick leave be used to satisfy the emergency sick leave pay under EPSLA?

No. This emergency sick leave pay is in addition to any paid leave already provided by the school district. Employees can utilize this benefit without first exhausting other leave accrued under existing policy.

What benefit does Extended FMLA provide?

Employees are entitled to 12 weeks of job-protected leave if they are unable to work or telework because the employee is needed to care for the employee's son or daughter because their school or childcare facility is closed due to COVID-19. Extended FMLA only applies in this situation.

What is the definition of son or daughter under Extended FMLA?

The definitions are the same as those of the FMLA and are broadly defined. Son or daughter includes biological, adopted, foster child, stepchild, legal ward, child of person standing *in loco parentis*, who is under 18; or 18 years or older who is incapable of self-care due to mental or physical disability. "*In loco parentis*" means "in place of a parent" and would probably include a grandparent or other relative primarily responsible for the child at a given time, even in the absence of a legal order to that effect.

Is a qualifying employee entitled to pay during the 12-week Extended FMLA?

Yes. The first 10 days is unpaid. For the last 10 weeks, the employee is paid at 2/3 their regular rate. However, payment is capped at $200/day and $10,000 total for the total leave period.

Can Emergency Paid Sick Leave work in conjunction with Extended FMLA?

Yes. If the employee satisfies criteria for both, i.e. they are caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions, then they could be paid under EPSLA for the first ten days of the Extended FMLA period and then paid under Extended FMLA for the remaining 10 weeks.

What is the maximum time an employee can receive under the FFCRA?

The maximum time an employee can receive depends on each individual employee and the given facts of the situation. For example, an employee could be experiencing COVID-19 symptoms or required to self-quarantine due to exposure to someone that contracted the virus. This situation would qualify for emergency sick leave. Once the sick leave is expended, the employee could be eligible for Extended FMLA for an additional 12 weeks. Every situation should be analyzed on a case by case basis to ensure each employee is receiving the leave they are entitled to under the law.

Is an employee entitled to continued health insurance coverage when utilizing benefits under FFCRA?

Yes. Section 826.110 explains that an employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.

Can a district request verification for the need to miss work to care for a son or daughter under Extended FMLA?

Yes. FMLA allows an employer to request sufficient information to determine eligibility. Extended FMLA does not modify that provision. However, considering the recommended COVID-19 safety precautions, the district should consider using any available remote means, e.g. phone call to day care, rather than requiring documentation the employee might need to physically retrieve from the school or daycare.

Is there a duration of employment requirement for EPSLA and Extended FMLA?

No and Yes. Emergency Paid Sick Leave is available to all employees regardless of when their employment started or whether they are 12-month employees. For Extended FMLA, the employee must have been employed for 30 days prior to beginning the leave.

Section 826.30(b)(1)(i) further explains that an employee is considered to have been employed for at least 30 calendar days for purposes of Extended FMLA eligibility if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin. This also includes employees that were laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated.

In contrast, to be eligible to take traditional FMLA leave for other reasons, employees generally need to have worked for the employer for at least twelve months, have 1,250 hours of service in the twelve-month period prior to the leave, and work at a location where the employer has at least 50 employees within 75 miles.

May an employee take Emergency Sick Leave or Extended FMLA intermittently?

One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently. Section 826.50(c) provides that if an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. This section intentionally affords teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business.

An employee may not take intermittent leave due to the unacceptably high risk that the employee might spread COVID-19 to other employees when reporting to the employer's worksite. Once such an employee begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until the employee either uses the full amount of paid sick leave or no longer has a qualifying reason for taking paid sick leave.

When is the FFCRA effective?

The FFCRA is effective on April 2, 2020. It is not retroactive so any leave accruing prior to that date will not qualify for EPSLA or Extended FMLA. The law contains a sunset provision and will expire on December 31, 2020.

Are substitute teachers eligible for unemployment insurance if they are losing wages through no fault of their own?

This is a very fact-specific inquiry and we recommend you contact your board attorney for specific guidance. Generally, the legal obligations of the district depend upon whether the substitute was scheduled to work during a period of closure, the term of the employment relationship, and any contractual agreement that may be in place with the substitute. Many districts have elected to pay all substitutes for the time in which they were scheduled to work prior to the closure, especially if there has been a long-term employment relationship. It is possible the substitute would be eligible for unemployment insurance, depending on the circumstances.

Will school districts be reimbursed for the benefits provided under FFCRA?

Under the existing law, no. Private employers will be reimbursed through refundable tax credits. However, this was not extended to local governments. This will be a major point of emphasis for school districts in advocating for a 4th Federal Stimulus Package.

If a school system has decided to pay all employees regular pay for the entire period of a closure, does it comply with FFCRA?

Yes, unless there are employees that qualify for EPSLA or Extended FMLA outside of the period of closure. From a benefits standpoint, full pay to all employees would meet or exceed any required payments under FFCRA for the period of closure. However, depending on when the schools reopen or implement a continuing education plan, employees might still qualify for these benefits, which are effective through December 31, 2020.

Can an employee's use of regular FMLA leave affect their ability to use Extended FMLA?

Yes. An employee's ability to take Extended FMLA leave depends on his or her use of FMLA leave during the 12-month FMLA leave year pursuant to 29 C.F.R. § 825.200(b) for a reason unrelated to COVID-19. If an employee has already taken such leave, the employee may not be able to take the full twelve weeks of expanded family and medical leave under the Extended FMLA. For example, if the employer uses the calendar year as the twelve-month FMLA leave year and an employee took three weeks of leave in January 2020 for the employee's own serious health condition, the employee would only have nine weeks of expanded family and medical leave available.

Additionally, employees are limited to a total of twelve weeks of expanded family and medical leave under the Extended FMLA, even if the applicable time period (April 1 to December 31, 2020) spans two twelve-month leave periods under the FMLA. Finally, for employees who are eligible to take leave under the FMLA and the Extended FMLA, and who take leave to care for a service member with a serious injury or illness, the total amount of leave available to the employee will be calculated as set forth in 29 CFR 825.127(e).

What is the process for an employee to request benefits under FFCRA?

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. As provided in § 826.100, such documentation must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested;

(3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. An employee requesting paid sick leave under § 826.20(a)(1)(i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. An employee requesting paid sick leave under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons. An employee requesting paid sick leave under § 826.20(a)(1)(iv) to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave under § 826.20(a)(1)(v) or expanded family and medical leave to care for his or her child must provide the following information: (1) the name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Can a school board suspend the two-reading requirement for policy adoption?

Yes. For policies that require immediate action or effect, such as those for FFCRA compliance, a board may vote to suspend the requirement that a policy be approved on second reading so that it may take immediate effect.

Does FFCRA protect an employee from employment actions, such as layoffs?

No. The new statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. This provision tracks the existing provision under the FMLA in 29 CFR 825.216. The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

Does FFCRA require an employer to retain related records?

Yes. Section 826.140 explains that an employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his

or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.

What are prohibited actions under FFCRA?

Section 826.150(a) explains that, under the EPSLA, employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding. An employee may maintain, on behalf of the employee and any other similarly-situated employees, an action in any federal or state court of competent jurisdiction to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees.

Section 826.151(a) explains that, for purposes of the Expanded FMLA, employers are subject to the prohibitions that apply with respect to all FMLA leave, which are set forth at 29 U.S.C. 2615. Specifically, employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right; discriminating against an employee for opposing any practice made unlawful by the FMLA; or interfering with proceedings initiated under the FMLA, including Extended FMLA.

Can a school system require a teacher to provide a certificate of health if the teacher is suspected of having COVID-19?

Yes. Tennessee has addressed this issue specifically by statute. TCA 49-5-404 provides, "No person who has any contagious or communicable disease in a form that might endanger the health of school children shall teach in any school, and any teacher must submit to a physical examination by competent physicians when so required by the local board of education."

This does not apply to non-teaching staff. All requests for a certificate of health should also comply with the Americans with Disabilities Act (42 U.S.C.A. §§ 12101 *et. seq*) and the associated regulations (29 C.F.R. Chapter XIV, Part 1630 *et. seq*).