



## Families First Coronavirus Response Act Employee Leave Provisions<sup>1</sup>

On March 18, 2020, the [Families First Coronavirus Response Act](#) (FFCRA), Public Law 116-127, 134 Stat 178, was signed into law. The FFCRA includes paid leave for community college employees affected by COVID-19 through the provisions in the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family Medical Leave Expansion Act (EFMLEA). The legislation is effective April 1, 2020 through December 31, 2020.

Federal relief from the COVID-19 pandemic is rapidly evolving. The U.S. Department of Labor (DOL) has issued regulations, 29 C.F.R. part 826, to clarify the application of the leave provisions. DOL is also regularly updating its [Families First Coronavirus Response Act: Questions and Answers Website](#).

### **General Provisions**

**Q: Do the EPSLA and EFMLEA provisions apply to community colleges?**

A: Both the EPSLA and EFMLEA apply to public agencies, including community colleges. 29 C.F.R. §§ 826.10(a), .40(c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 52-53.

**Q: What notice must a community college provide employees about the FFCRA?**

A: A community college must post the worksite poster developed by the DOL describing the FFCRA requirements, or another notice that provides the information contained in the poster, in a conspicuous place on the college's premises. Alternatively, the college may distribute the notice by email or direct mail or by posting the notice on an employee information internal or external website. The notice must be provided in [English](#), but a [Spanish](#) version of the DOL poster is also available. 29 C.F.R. § 826.80(a)-(d); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act Notice – Frequently Asked Questions](#).

**Q: Are community colleges entitled to a tax credit to offset the cost of FFCRA leave?**

A: While most private employers will receive a tax credit to offset the cost of the leave provided in the FFCRA, the credit does not apply to agencies of the state, including community colleges. Unless this language is amended, there is no mechanism to reimburse community colleges for the cost of the additional paid leave required by the FFCRA.

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<sup>1</sup> An electronic version of this document is available on TASB College eLaw at [tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/families-first-coronavirus-response-act-employee-leave-provisions.pdf](http://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/families-first-coronavirus-response-act-employee-leave-provisions.pdf).

## **Emergency Paid Sick Leave Act**

### **Q: Which employees are protected by the EPSLA?**

A: An employee is eligible for emergency paid sick leave regardless of how long the employee has worked for the college. However, as described by 29 C.F.R. § 826.30(c), an employer may exclude a health care provider, including a person who works at an institution of higher education that provides health care instruction, or an emergency responder, including law enforcement and other personnel necessary to respond to COVID-19, from the leave protections. DOL encourages employers to be judicious in the application of this exemption. 29 C.F.R. § 826.30(a), (c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 52, 56-57.

### **Q: What leave is guaranteed under the EPSLA?**

A: Community colleges must provide up to two weeks, or 80 hours, of emergency paid sick leave to full-time employees, as defined by 29 C.F.R. § 826.21(a), who are unable to work or telework due to a need for leave because of any one or combination of six qualifying reasons. Part-time employees are entitled to compensation for the number of hours equal to the average of the number of hours worked over a two-week period. 29 C.F.R. §§ 826.21, .160(f); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 5-6, 9.

### **Q: What are the qualifying reasons for emergency paid sick leave?**

A: An employee may take emergency paid sick leave if 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, as defined by 29 C.F.R. § 825.102, to self-quarantine because the employee has, may have, or is particularly vulnerable to COVID-19, and the employee cannot work or telework;
3. is experiencing a fever, dry cough, shortness of breath, or other symptoms of COVID-19 identified by the U.S. Centers for Disease Control and Prevention (CDC) while the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a COVID-19 test;
4. is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider, as defined by 29 C.F.R. § 825.102, to self-quarantine because the individual has, may have, or is particularly vulnerable to COVID-19, and, as a result, the employee cannot do assigned work or telework;

5. is caring for the employee's child whose school facility is closed or whose child care provider is unavailable because of COVID-19 concerns and no other suitable person is available to care for the child, and, as a result, the employee cannot do assigned work or telework; or
6. is experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services.

29 C.F.R. § 826.20(a)(1), (3)-(4), (6)-(9); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 7, 61-62, 65, 68-71.

An employee's child for purposes of item 5 includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*. The child must be under age 18 or incapable of self-care because of a mental or physical disability. 29 C.F.R. § 826.10(a); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 66.

For purposes of item 4, *individual* means a member of the employee's immediate family, a person who regularly lives at the employee's home, or a similar person with whom the employee has a relationship that creates an expectation of care by the employee if the person is quarantined or self-quarantined. To qualify, the person must have a personal relationship with the employee and must expect or depend on the employee's care. 29 C.F.R. § 826.20(a)(5); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 7, 63-64.

**Q: Under what conditions is an employee considered unable to work?**

A: As required to qualify for emergency paid sick leave, an employee is considered unable to work or telework for COVID-19 related reasons, if the community college has work for the employee and one of the qualifying reasons, listed above, prevents the employee from being able to perform the work. If the college and employee agree to a schedule outside of normally scheduled work hours and the employee can perform the work without a COVID-19 reason preventing it, then leave is not necessary. U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 18-19.

**Q: What is telework?**

A: *Telework* is work an employee is permitted to perform away from the employee's normal workplace, such as work performed at the employee's home. An employee is able to telework if there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing the work. An employee may telework during the employee's regular work hours or at other times agreed to

by the employer and employee. The employee must be paid for the hours actually worked. 29 C.F.R. § 826.10(a); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 17.

**Q: *How much pay may an employee on emergency paid sick leave receive?***

A: The rate of pay for emergency paid sick leave depends on the reason the employee requests leave. If the employee requests leave for one of the first three reasons listed above, the leave is provided at full pay, capped at \$511 per day or \$5,110 for ten days. Leave for reasons four to six, above, is provided at two-thirds of an employee's regular pay, with a maximum of \$200 per day or a total of \$2000 over ten days. 29 U.S.C. §§ 826.22, .25; U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 7-8.

**Q: *What qualifies as quarantine or an isolation order?***

A: A *quarantine or isolation order* includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by federal, state, or local government authorities that cause the employee to be unable to work even though the employer has work that the employee could perform. Emergency paid sick leave based on an isolation or quarantine order is not available if the employer has work for the employee and the employee is able to telework. 29 C.F.R. §§ 826.10(a), .20(a)(2) U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 60.

**Q: *What precedence does emergency paid sick leave take in the order of available leave?***

A: Community colleges must allow an employee to use emergency paid sick leave before accessing any leave provided under law, with the exception of leave under the EFMLEA, or local policy and may not require the employee to use other accrued leave before accessing emergency paid sick leave. Any paid leave the college provides through local policy or emergency resolution will not be credited against the employee's paid leave entitlement under the EPSLA. 29 C.F.R. § 826.160(b).

### **Emergency Family and Medical Leave Expansion Act**

**Q: *Which employees are protected by the EFMLEA?***

A: Under the EFMLEA, an employee is eligible if the employee has been on the employer's payroll for 30 calendar days. However, as described by 29 C.F.R. § 826.30(c), an employer may exclude a health care provider, including a person who works at an institution of higher education that provides health care instruction, or an emergency responder, including law enforcement and other personnel necessary to respond to COVID-19, from the leave protections. The DOL encourages employers

to be judicious in the application of this exemption. 29 C.F.R. § 826.30(b)-(c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 14, 53, 56-57.

**Q: *What leave is an eligible employee guaranteed to under the EFMLEA?***

A: The FFCRA amends the federal Family and Medical Leave Act (FMLA) by adding, through the EFMLEA, an additional reason for leave. Under the EFMLEA, eligible employees can access up to 12 weeks of leave (EFML) if the employee is unable to work or telework due to the need to care for the employee's minor child if the child's school facility is closed or child care is unavailable due to a public health emergency. To qualify, there must be no other suitable person available to care for the child. 29 C.F.R. §§ 826.20(b), .23; U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 7, 68-70, 72.

An employee's child for purposes of the law includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*. The child must be under age 18 or incapable of self-care because of a mental or physical disability. 29 C.F.R. § 826.10(a); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 66.

**Q: *Under what conditions is an employee considered unable to work?***

A: If an employee is unable to perform work or telework due to child care responsibilities, as described above, the employee is entitled to EFML. However, if the community college and employee agree to a schedule outside of normally scheduled work hours and the employee can perform the work, then EFML is not available. 29 C.F.R. § 826.20(b); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 18-19.

**Q: *Is EFML paid?***

A: The first two weeks of EFML is unpaid, but an employee may have an emergency paid sick leave balance available or may have the option to request leave accrued under the college's paid leave policy to run concurrently. The remaining 10 weeks of available leave will be paid at two-thirds of the employee's regular rate, up to a maximum of \$200 a day or \$10,000 total. 29 C.F.R. §§ 826.24-.25, .60, .160(c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 7-8.

**Q: *How does the EFMLEA interact with existing FMLA provisions?***

A: Because the EFMLEA is an amendment to the existing FMLA, the existing provisions from the FMLA will apply unless amended by the emergency provisions. For example, as required under the FMLA, an employee taking paid leave under the EFMLEA is entitled to job restoration to the same or equivalent position upon return to work, with certain limitations. 29 C.F.R. § 826.130.

Additionally, the total leave available under the FMLA is a total of 12 weeks combined for all FMLA reasons, including the EFMLEA provisions, in the 12-month period established by a community college under policy DEC(LOCAL). Therefore, if an employee has taken eight weeks of unpaid leave during the established 12-month period for the birth of the employee's child, the employee will only have four weeks remaining in the same 12-month period to take EFML. Note, an employee may only take a total of 12 weeks of EFML, regardless of whether a new 12-month period begins during the EFML eligibility period. 29 C.F.R. § 826.70(a)-(e).

**Notice and Documentation of Leave**

**Q: *May a community college require an employee to provide notice regarding the use of emergency paid sick leave or EFML?***

A: A community college may implement a reasonable procedure to require notice after the first workday an employee uses emergency paid sick leave or EFML for a reason other than child care, described above. If an employee requests emergency paid sick leave or EFML for child care and that leave was foreseeable, the employee must provide notice as soon as practicable. 29 C.F.R. § 826.90(a)-(b); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 16.

**Q: *What documentation must an employee provide regarding the use of emergency paid sick leave or EFML?***

A: An employee must provide the community college documentation prior to taking emergency paid sick leave or EFML as described by 29 C.F.R. § 826.100. In addition to basic information, such as the reason for leave and a statement that the employee is unable to work for that reason, the employee must provide documentation relevant to the reason for leave. For example, an employee taking leave based on a quarantine or isolation order must provide the name of the entity that issued the order. An employee taking leave to self-quarantine must provide the name of the health care provider advising the self-quarantine. An employee taking leave for child care purposes must provide the child's name, the name of the school or child care

provider that is no longer available, and a representation that no other suitable person will be caring for the child during the period of leave. 29 C.F.R. 826.100(a)-(e); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 16.

A community college may also consider requiring documentation described by the IRS. If the FFCRA provisions are amended to permit community colleges to receive a tax credit to offset the cost of FFCRA leave, currently only provided to private employers, then the colleges will be required to provide documentation consistent with the IRS requirements to receive the credit. U.S. Internal Revenue Serv., [COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 44.

Note, if an employee uses non-EFML leave for a serious health condition related to COVID-19, the community college may continue to require medical certification under the existing FMLA certification requirements. U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 16.

**Q: *How long must a community college retain documentation of leave?***

A: A community college is required to retain documentation of emergency paid sick leave and EMFL provided by the employee for four years. If the employee provides oral notice of the reasons for leave, the college must document the statements and retain the documentation for four years. 29 C.F.R. § 826.140(a); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 15.

**Use of Leave and Supplemental Pay**

**Q: *May an employee use emergency paid sick leave and EFML intermittently?***

A: A community college may allow an employee to use emergency paid sick leave or EFML intermittently if an employee is unable to telework during the employee's normal schedule because of a qualifying reason. According to the DOL, the college may agree to allow an employee to use intermittent leave in any increment. 29 C.F.R. § 826.50(a), (c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Question 20.

If an employee is working on site rather than teleworking, the ability to take intermittent leave depends on the reason for leave. Employees working on site must take emergency paid sick leave in full-day increments if leave is taken for reasons one to four and reason six, above. Additionally, once an employee who is on site begins taking leave for those reasons, the employee must continue to use the leave until exhausted or there is no longer a qualifying reason for the emergency paid sick leave.

These restrictions are intended to help prevent the spread of the COVID-19 virus. However, employees working on site requesting emergency paid sick leave or EMFL to care for a child whose school or child care is unavailable may take the leave intermittently if the employer agrees. 29 C.F.R. § 826.50(b); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 21-22.

The DOL encourages collaboration with employees to create arrangements that combine onsite work or telework and intermittent leave to meet the needs of the community college and employees. U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 20-22.

**Q: *Must emergency paid sick leave and EFML run concurrently?***

A: If an employee who needs to take leave for child care is eligible for both emergency paid sick leave and EFML, then the two leaves will run concurrently to the extent the leave is available. 29 C.F.R. § 826.60(a).

**Q: *May a community college allow an employee to use leave available under the college's paid leave policies to supplement the pay received while on emergency paid sick leave or EFML?***

A: Since an employee's pay received while on emergency paid sick leave or EFML may not be equivalent to the employee's normal earnings, a community college may, but is not required to, allow an employee to supplement the employee's pay by applying leave the employee has accrued under the college's paid leave policy. As described above, the first two weeks of EFML is unpaid. During that time, to the extent an eligible employee has emergency paid sick leave available, the leave runs concurrently with EFML. The employee and the college may agree to supplement the emergency paid sick leave or EFML with local paid leave. 29 C.F.R. § 826.60; U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 32.

During the remaining EFML period, the community college may permit or require the employee to take available local paid leave, consistent with the existing FMLA rules on concurrent use of leave. After the local paid leave is exhausted, the employee must be paid for EFML consistent with the EFML provisions. 29 C.F.R. § 826.23(c); U.S. Dep't of Labor, Wage and Hour Div., [Families First Coronavirus Response Act: Questions and Answers](#), Questions 31, 33.

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*Updated April 2020*