

AFSCME Ohio Council 8

Interoffice Memorandum

To: Sean Grayson, President
First Vice President Marcia Knox
All Regional Directors, Department Heads

From: Kimm Massengill-Bernardin, General Counsel

Re: Public Health Emergency Federal Legislation due to COVID19 Pandemic

Date: March 26, 2020

This Memo discusses three laws addressing the COVID-19 public health emergency (PHE) and the impact this emergency has had on working families. The first two laws are federal and address leave time. The third law is in the form of an Executive Order from the Governor of the State of Ohio and applies only to Ohio. (Note: Congress passed last night the Coronavirus Aid, Relief and Economic Security Act, or the CARES Act, and Ohio passed some legislation yesterday on the COVID-19. I am reviewing those now with the goal of sending a follow-up memo.)

FEDERAL LAWS

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act which contains a number of smaller acts, two of which address employees, wages, and leave: (1) The Emergency Paid Sick Leave Act; and (2) The Emergency Family and Medical Leave Expansion Act. Both Acts cover public and private employers, although the private employers covered under each Act are a little different. The Department of Labor is working on regulations now and has been requested to have them available by the law's effective date.

Here's a quick break down of the two laws.

I. The Emergency Paid Sick Leave Act

- A. Effective date: Within 15 days of the law's enactment on March 18, 2020, which is April 1, 2020. The law expires on December 31, 2020.
- B. Covered Employers:
 - 1. Public employers who employ at least 1 employee
 - 2. Private employers who employ fewer than 500 employees, however, the Act gives the DOL explicit authority to create exemptions for small businesses under 50 employees where the viability of the business is a concern, e.g., servers at restaurants.

C. Covered Employees:

1. Same definition as in the FLSA, which means any employee employed by an employer, including employees of the state and political subdivisions.
2. Full-time, part-time, and temporary employees: All are covered regardless of how long they have worked for the Employer.
3. Health Care Employees: Employees of health care providers or emergency responders are covered unless their employers opt out of the EPSLA provisions, which the Act allows them to do. Without regulations, there are no guidelines as to the requirements for an Employer to opt out at this time.

D. What is the Required Paid Sick Leave?

1. Up to 80 hours sick leave at an employee's regular rate of pay, subject to a \$511 cap per day, if the employee is unable to work or telework for one of the following reasons:
 - a. Are subject to a federal, state, or local quarantine or isolation order;
 - b. Have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
 - c. Are experiencing COVID-19 symptoms and seeking a medical diagnosis.
2. Up to 80 hours sick leave at 2/3 of an employee's regular rate of pay, subject to a cap of \$200 per day, if the employee is unable to work or telework for one of the following reasons:
 - a. Are caring for an individual who is subject to a quarantine or isolation order or has been advised by a healthcare provider to self-quarantine as described above;
 - b. Are caring for his/her child whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 precautions;
 - c. Are experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretaries of the Treasury and Labor.
3. Notes:
 - a. Overtime pay?
It is 80 hours of straight time pay. If an employee would have worked 50 hours, including 10 hours of mandatory overtime, this EPSLA sick leave would cover the 50 hours at straight time, not time and a half for 10 hours. The employee would have 30 hours left of EPSLA sick leave.
 - b. What's the Regular Rate of Pay?
It is based on the employee's average rate of pay over the 6 months prior to the leave. For employees not yet employed 6 months, the average pay rate over the time he/she worked is used.

- c. What if Employee has already used sick leave? ‘Does that count toward the EPSLA sick leave?’
The DOL’s fact sheet states that the EPSLA sick leave starts April 1st even if the Employer has already provided sick leave; however, the Employer could require the use of PTO or sick leave time per its policies for time used before April 1st. An employer, however, cannot require employees to use their own PTO or sick leave benefit under the Employer’s policies in lieu of the EPSLA sick time.
- d. Job Protection?
The Act prohibits Employers from discharging, disciplining or otherwise discriminating against employees for use of EPSLA sick time.
- e. This 80 hours of EPSLA sick leave can be used in conjunction with the expanded FMLA leave. See below.
- f.

II. The Emergency Family Medical and Leave Expansion Act

This Act allows for FMLA leave for a qualifying reason related to a public health emergency (PHE), and provides 2 weeks of unpaid leave followed by 10 weeks of paid leave. The statute is meant to work in conjunction with the EPSLA, which provides 2 weeks of paid sick leave. This FMLA expansion kicks in after those first two weeks. Employees may also use any paid personal, sick, or medical days during the first two weeks.

- A. **Effective date:** Within 15 days of the law’s enactment on March 18, 2020, or on April 1, 2020. The law expires December 31, 2020.
- B. **Covered Employers:**
 - 1. Public employers who employ at least 1 employee, including those who would not be covered under the FMLA because they do not have 50 or more employees working at locations within a 75 mile radius.
 - 2. Private employers who employ fewer than 500 employees; however, the Act gives the DOL explicit authority to create exemptions for small businesses under 50 employees where the viability of the business is a concern, e.g., servers at restaurants.
- C. **Covered Employees:**
Same as under current FMLA, but instead of employees having to be employed at least 12 months and worked at least 1250 hours before being eligible for FMLA, under the expansion for the PHE, employees are covered if they worked at least 30 calendar days immediately prior to the day leave would begin.
- D. **What is a Qualifying Reason?**
If an employee is unable to work or telework due to:
 - 1. The need to care for a family member who is subject to a federal, state, or local quarantine or isolation order, or advised by a healthcare

- provider to self-quarantine, due to COVID-19.
 - 2. The employee is caring for his/her child due to a COVID-19 related school/childcare provider closure.
 - 3. The employee is experiencing any other substantially similar condition specified by the Secretaries of HHS, Treasury, & Labor.
- D. What is the Required FMLA Leave and Rate of Pay?
 - 1. 12 weeks of FMLA leave, but the first 2 weeks are unpaid.
 - 2. The rate of pay is capped at \$200 per day and \$10,000 for the entire 10 weeks.
- E. What about Job Protection while on FMLA leave for the public health emergency?
 - 1. All job protections are still in place, as are other FMLA regulations.
 - 2. Exception: The only exception is for employers with less than 25 employees. Employers need not restore employees to their prior or an equivalent position if all of the following apply:
 - a. Employee took public health emergency (PHE) leave.
 - b. The position no longer exists due to a change in the Employer's economic conditions caused by the PHE.
 - c. Employer made a reasonable effort to restore employee to his/her job
 - d. After failing to find an equivalent job, Employer contacts employee if such a job becomes available during a "contact period," which is one year from date PHE concludes or date leave began, whichever is earlier.

STATE LAW(s)

- I. **Ohio Governor Executive Order 2020-03D – Unemployment Compensation**
<https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-03-d>

The main parts of this Executive Order provide the following:

- A. COVID-19 is made a Class A reportable disease
- B. Unemployed workers will include individuals requested by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19 even if not actually diagnosed with COVID-19.
- C. Workers will not have to wait one week before being eligible for benefits.
- D. Workers will not have to meet work search requirements.
- E. Employers will not be charged for benefits paid due to COVID-19.

II. Ohio Legislature's Bill - TBD