

AFSCME Ohio Council 8

Interoffice Memorandum

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

From: Kimm Massengill-Bernardin, General Counsel

Re: Public Health Emergency Federal Legislation - Follow-up Memo #2
CARES Act - Department of Labor Temporary Regulations regarding
COVID19 Pandemic (Selected Regulations attached)

Date: April 2, 2020

The Department of Labor (DOL) has issued temporary, unpublished regulations related to the CARES Act. The regulations will be officially published on Monday, April 6th, 2020, and may have some changes; however, these unpublished regulations give pretty good guidance on the CARES Act will be implemented/followed. Below are some highlights of the regulations.

1. Employees can look to the following sources for leave and pay during the current pandemic situation:

Current leave banks with their employer
EPSLA (Emergency Paid Sick Leave Act)
EFMLEA (Emergency Family & Medical Leave Expansion Act)
Unemployment Compensation - state and or federal

2. In addition to my previous Memo on the EPSLA, the regulations provided the following insights:

- A. All employees of an eligible employer are covered under the EPSLA except for health care providers and emergency responders as defined in §826.30(c) and (d) if their Employer opts out of the EPSLA. (See also paragraph 6.)
- B. “But-for:” This paid sick leave is available to employees who but for being quarantined or under an isolation order would be able to work either at their regular workplace or by teleworking, but cannot work due to one of the 6 reasons listed in § 826.20(a).

- C. This means that there has to be work available to employee. If the Employer is closed or the employee is laid off or furloughed, there is no work available for the employee, and EPSLA is not available.
- D. Per §826.50(b)(2), once an employee begins taking EPSLA, the employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take this leave. This does not mean the employee has to take all of the leave at once, but it prohibits intermittent leave except for child care reasons.

3. In addition to my previous Memo on the EFMLEA (“Expanded FMLA”), the regulations provided the following insights:

- A. All employees of an eligible employer are covered under the Expanded FMLA who has been on the Employer’s payroll for at least 30 calendar days immediately prior to the day the employee’s leave would begin. See §826.30(b). This is different from the regular FMLA which requires an employee to have worked at least 12 months and 1250 hours prior to being eligible for FMLA. This does not, however, give an employee who has worked 30 days entitlement to regular FMLA. That employee is only eligible for up to 12 weeks for a COVID19-related reason.
- B. This Expanded FMLA leave is not in addition to an employee’s current FMLA entitlement per §826.70(b). The Act provides additional reasons for an employee to take FMLA related to the pandemic. So, if an employee has already used 5 weeks of FMLA leave, that employee has 7 weeks remaining to take for any reason, including the new COVID19 additions.
- C. Under § 826.23(c), the Employer can require an employee to use his/her existing banks of leave (VL, PL, PTO) if the employee is taking the Expanded FMLA leave for reason number (v) or (5) under §826.20(a)(1), which is for the care of his/her child whose school or place of care is closed by order of state, local official/authority, or at the decision of the individual school or place of care due to COVID19 related reasons. (This does not apply to the other COVID19-related reasons listed in §826.20(a)(1).) This pay is at the employee’s full rate because the employee is taking his/her own leave time per §826.24(d).
 - 1. Note: Although the regulations don’t specify this, it is assumed that if the employee does not have leave available under the Employer’s policies for child care, the time would be unpaid by the Employer; however, the employee may qualify for unemployment compensation.
 - 2. Note: An employee can use EPSLA to cover the first 2 weeks of the Expanded FMLA leave.

- D. The Amount of Pay for Expanded FMLA under §826.24 and §826.25:

1. The first two weeks are unpaid.
2. An employee can use his/her EPSLA for those first two weeks, or at the employee's option, the employee can use his/her own leave as applicable per Employer policy. The Employer cannot require an employee to use his/her own leave however, except if the employee is using it for child care (see B above).
3. The next 10 weeks (or however many weeks the employee has remaining after the first 2 weeks, if any) are paid at 2/3 of the employee's average regular rate times the employee's scheduled number of hours for each day leave is taken. This is subject to a limit of \$200/day and \$10,000 for all of the Expanded FMLA leave taken.

E. Intermittent Expanded FMLA per §826.50.

1. Intermittent leave may only be taken if the Employer and employee agree to it whether an employee is using EPSLA (but see #2 below) or Expanded FMLA. This may be an area where the Union and Employer can negotiate to have this available for employees. Any agreement must be in writing.
2. EPSLA may not be used intermittently unless for reason (v) (or 5) under §826.20(a), which is school/child care provider closure.
3. An employee may not take EPSLA leave intermittently if it is for any of the other five reasons under §826.20(a).

F. If an employee has already exhausted their regular FMLA leave, they are still entitled to EPSLA time per §826.60.

4. Notice by Employee to Employer of Need for Leave per §826.90 & 826.100

- A. An employer may require reasonable notice from employee of need for EPSLA or Expanded FMLA time after the first workday (or portion thereof) for any reason other than §826.20(a)(1)(v) for child care. If the need for EPSLA time is for child care and it was foreseeable, the employee has to provide notice as soon as practicable. If the employee fails to give notice, the employer "should" give the employee an opportunity to provide the required documentation prior to denying the leave.
- B. See §826.100 for documentation required prior to taking EPSLA or Expanded FMLA leave. This does appear to be contradictory to the Notice language in §826.90 discussed above. Perhaps this will be clarified before Monday when the regulations are published.

5. **Employers Must Maintain Health Care Coverage per §826.110**
Similar to regular FMLA, Employers must maintain health care coverage while employees are on EPSLA and/or Expanded FMLA.
6. **EPSLA & Extended FMLA for Health Care Providers and First Responders**
 - A. §826.30(c) allows an employer to opt out of the EPSLA and Expanded FMLA for specified health care providers.
 - B. §826.30(d) allows an employer to opt out of the EPSLA and Expanded FMLA for specified emergency responders.
 - C. Both definitions are broad.
 - D. Health care providers and emergency responders will still be eligible for regular FMLA and other leave benefits per the FMLA and Employer policies and CBAs.
7. **Unemployment Compensation - state and federal**
 - A. Ohio State Unemployment Compensation
 1. **Ohio Governor Executive Order 2020-03D – Unemployment Compensation**
<https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-03-d>
 2. 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.
 - B. Federal Legislation on Unemployment Compensation
 1. Under the CARES Act, 3 programs were created:
 - a. Pandemic Unemployment Compensation (PUC)
 - b. Pandemic Emergency Unemployment Compensation (PEUC)

- c. Pandemic Unemployment Assistance (PUA)
- 2. Pandemic Unemployment Compensation (PUC)
 - a. Provides for \$600 per week to be paid to unemployed employees on top of their regular unemployment compensation (UC) for an extra 13 weeks on top of the 26 weeks Ohio currently provides.
 - b. It's a flat amount.
 - c. Will be paid with regular UC or at a separate time, but on a weekly basis. So, for example, one could get the regular UC together on Mondays, or the regular UC payment on Mondays and the PUC payment on Fridays.
 - d. The PUC is effective from the date the bill was signed until July 31, 2020.
- 3. Pandemic Emergency Unemployment Compensation (PEUC)
 - a. Provides an additional 13 weeks of state UC benefits after someone has exhausted all regular state UC benefits.
 - b. To receive PEUC, worker must be actively engaged in searching for work, however, a state must provide flexibility in meeting such search requirements where that worker is unable to search for work due to COVID-19 related reasons. i.e., illness, quarantine, or movement restrictions.

NOTE: In Ohio, the governor has waived this work search requirement in his Executive Order.

- 4. Pandemic Unemployment Assistance (PUA)
 - a. Intended to provide UC to workers who would not normally get UC, or who have exhausted their state UC benefits. Examples of workers covered are those self-employed, independent contractors, freelancers, people seeking part-time work, and workers without a long work history and don't qualify for state UC benefits.
 - b. You are not eligible for PUA if:
 - 1) You are eligible for state UC benefits
 - 2) You are eligible to telework or are otherwise being paid sick leave or other leave/pay.
 - c. Up to 39 weeks available.
 - d. Program runs from January 27, 2020 to December 31, 2020.
 - e. Workers need to provide self-certification that:
 - 1) They are partially/fully unemployed: OR
 - 2) Unable and unavailable to work because of one of the following:
 - a) Diagnosed with COVID19 or have symptoms and seeking diagnosis;
 - b) Household member diagnosed with COVID19;

- c) Providing care for someone diagnosed with COVID19;
- d) Providing care for a child or household member who can't attend school or work because of COVID19;
- e) They are quarantined or been advised to self-quarantine;
- f) They were scheduled to start work and do not have a job due to COVID19;
- g) They became the breadwinner for a household because the head of household has died as a direct result of COVID19;
- h) They had to quit their job as a direct result of COVID19;
- i) Their place of employment is closed as a direct result of COVID19; or
- j) They meet other criteria established by the Secretary of Labor.