

# POLICY GUIDE

ADMINISTRATION

1649/page 1 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

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## 1649 FEDERAL FAMILIES FIRST CORONAVIRUS (COVID-19) RESPONSE ACT

The Federal Families First Coronavirus (COVID-19) Response Act (FFCRA) includes the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The EFMLEA expands the Federal Family and Medical Leave Act (FMLA) and the EPSLA provides employees with paid sick leave for specified reasons related to COVID-19.

The provisions of the FFCRA shall apply from April 1, 2020 through December 31, 2020.

### A. Emergency Family and Medical Leave Expansion Act (EFMLEA)

#### 1. Definitions - For the purposes of the EFMLEA:

- a. “Eligible employee” means an employee who has been employed for at least thirty calendar days by the employer with respect to whom leave is requested.
- b. “Employer” means any employer with fewer than five hundred employees.
- c. “Qualifying need related to a public health emergency” means with respect to leave, the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under eighteen years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
- d. “Public Health Emergency” means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.



# POLICY GUIDE

ADMINISTRATION

1649/page 2 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- e. “Child care provider” means a provider who receives compensation for providing child care services on a regular basis, including an ‘eligible child care provider’ (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).
- f. “School” means an ‘elementary school’ or ‘secondary school’ as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

## 2. Relationship to Paid EFMLEA Leave

The FFCRA includes the Emergency Family and Medical Leave Expansion Act (EFMLEA) that amended the Federal Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq. to provide leave to an eligible employee because of a qualifying need related to a public health emergency with respect to COVID-19 - (U.S.C. 2612(a)(1)(F)).

### a. Leave for Initial Ten Days

- (1) The first ten days of this FMLA leave for an eligible employee shall be unpaid.
- (2) If the first ten days of this FMLA leave are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or emergency paid sick leave provided by the EPSLA for the initial ten days under the EFMLEA in accordance with 29 U.S.C. 2612(d)(2)(B).



# POLICY GUIDE

ADMINISTRATION

1649/page 3 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- (3) An employee may not use sick leave under N.J.S.A. 18A:30-1 for a qualifying need related to a public health emergency. However, an employee receiving sick leave under the provisions of N.J.S.A. 18A:30-1 may only use sick leave because of personal disability due to illness or injury, or because the employee has been excluded from school by the school district's medical authorities on account of contagious disease or of being quarantined for such a disease in his or her immediate household.

b. Paid Leave for Subsequent Days

- (1) An employer shall provide paid leave for each day of leave under the EFMLEA that an employee takes after taking such leave for ten days.
- (2) The paid leave for an employee shall be calculated based on:
  - (a) An amount that is not less than two-thirds of an employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)); and
  - (b) The number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under A.2.(b)(4) below).
- (3) In no event shall such paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate.



# POLICY GUIDE

ADMINISTRATION

1649/page 4 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- (4) Varying Schedule Hours Calculation – In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave under the EFMLEA, the employer shall use the following in place of such number:
  - (a) Subject to A.2.b.(4)(b) below, a number equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.
  - (b) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.
- c. Employee Notice to Employer
  - (1) In any case where the necessity for leave under the EFMLEA for the purpose of a qualifying need related to a public health emergency is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.
    - (a) A request for such leave that is foreseeable shall be submitted to the Human Resources Department prior to commencing the leave.



# POLICY GUIDE

ADMINISTRATION

1649/page 5 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- (b) A need for such leave that is not foreseeable shall be submitted to the Human Resources Department within one business day of the first day of the leave being taken by the employee.
  - (c) The employee shall provide to the Human Resources Department the name of the employee's child, the name of the school, place of care, or child care provider that has closed or become unavailable, and a statement that no other suitable person is available to care for the child.
- d. Restoration to Position
- (1) The employee shall be restored to the same or equivalent position held by the employee when the leave commenced pursuant to 29 CFR 825.214. The requirement to restore the employee to the same or equivalent position held when the leave commenced does not apply to an employer who employs fewer than twenty-five employees if all four of the following conditions are met:
    - (a) The employee takes leave under the EFMLEA.
    - (b) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer:
      - i. That affect employment; and
      - ii. Are caused by a public health emergency during the period of leave.



# POLICY GUIDE

ADMINISTRATION

1649/page 6 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- (c) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced with equivalent employment benefits, pay, and other terms and conditions of employment.
- (d) If the reasonable efforts of the employer under A.2.d.(1)(c) above fail, the employer makes reasonable efforts during the period described in A.2.d.(2) below to contact the employee if an equivalent position described in A.2.d.(1)(c) above becomes available.

(2) Contact Period

- (a) The period described under A.2.d. above is the one-year period beginning on the earlier of:
  - i. The date on which the qualifying need related to a public health emergency concludes; or
  - ii. The date that is twelve weeks after the date on which the employee's leave under the EFMLEA commences.

B. Emergency Paid Sick Leave Act (EPSLA)

The FFCRA includes the EPSLA, which provides paid sick time to an employee to the extent the employee is unable to work or (telework) due to a need related to COVID-19. The paid sick time provided by the EPSLA and outlined in B.1. below cannot be taken with any other paid leave time provided by the employer.



# POLICY GUIDE

ADMINISTRATION

1649/page 7 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

## 1. Definitions

### a. For purposes of the EPSLA and this Policy:

(1) “Employee” means an individual who is employed by a private employer with fewer than five hundred employees and public employers with at least one employee.

(2) “Employer” means a private person or entity that employs fewer than five hundred employees and public employers that employ at least one employee.

(a) “Covered employer” includes any person engaged in commerce or in any industry or activity affecting commerce that:

i. In the case of a private entity or individual, employs fewer than five hundred employees; and

ii. In the case of a public agency or any other entity that is not a private entity or individual, employs one or more employees.

(b) “Covered employer” also includes:

i. Any person acting directly or indirectly in the interest of an employer in relation to an employee (within the meaning of such phrase in section 3(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)); and



# POLICY GUIDE

## ADMINISTRATION

1649/page 8 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- ii. Any successor in interest of an employer; and any “public agency”, as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).
- (c) “Covered employer” also includes any “public agency” as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).
- (3) “Employ” and “State” have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).
- (4) “Health care provider” and “son or daughter” have the meanings given such terms in section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611).
- (5) “Paid sick time” means an increment of compensated leave that:
  - (a) Is provided by an employer for use during an absence from employment for a reason described in any paragraph of B.2.a. below; and
  - (b) Is calculated based on the employee’s required compensation under B.1.a.(6) below and the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under (B.1.a.(7) below), except that in no event shall such paid sick time exceed:





# POLICY GUIDE

ADMINISTRATION

1649/page 9 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- i. \$511.00 per day and \$5,110.00 in the aggregate for a use described in B.2.a.(1), (2), or (3) below; and
  - ii. \$200.00 per day and \$2,000.00 in the aggregate for a use described in B.2.a.(4), (5), or (6) below.
- (6) “Required Compensation” subject to B.1.a.(5)(b) above, the employee’s “required compensation” shall be not less than the greater of the following:
  - (a) The employee’s regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)).
  - (b) The minimum wage rate in effect under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)).
  - (c) The minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed.

Subject to B.1.a.(5)(b) above, with respect to any paid sick time provided for any use described in B.2.a.(4), (5), or (6) below, the employee’s required compensation shall be two-thirds of the amount described in B.1.a.(6) above.
- (7) “Varying Schedule Hours Calculation” means in the case of a part-time employee described in B.3.b.(2) below whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the



# POLICY GUIDE

ADMINISTRATION

1649/page 10 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

employee would have worked if such employee had not taken paid sick time under B.2.a. below, the employer shall use the following in place of such number:

- (a) Subject to clause B.1.a.(7)(b) below, a number equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.
- (b) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

## 2. Paid Sick Leave Requirement

- a. An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:
  - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
  - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - (4) The employee is caring for an individual who is subject to an order as described in B.2.a.(1) above or has been advised as described in B.2.a.(2) above.



# POLICY GUIDE

ADMINISTRATION

1649/page 11 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

### 3. Duration of Paid Sick Time

- a. An employee shall be entitled to paid sick time for an amount of hours determined under B.3.b. below.
- b. The amount of hours of paid sick time to which an employee is entitled shall be as follows:
  - (1) For full-time employees, eighty hours.
  - (2) For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a two-week period.
- c. Paid sick time under the EPSLA shall not carry over from one year to the next.

### 4. Employer's Termination of Paid Sick Time

- a. Paid sick time provided to an employee under the EPSLA shall cease beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time under B.2.a. above.



# POLICY GUIDE

ADMINISTRATION

1649/page 12 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

5. Prohibition

- a. An employer may not require, as a condition of providing paid sick time under the EPSLA, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

6. Use of Paid Sick Time

- a. The paid sick time under B.2.a. above shall be available for immediate use by the employee for the purposes described in the EPSLA, regardless of how long the employee has been employed by an employer.

b. Sequencing Leave Time

- (1) An employee may first use the paid sick time under B.2.a. above for the purposes described in the EPSLA.
- (2) An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under B.2.a. above.

7. Notice

- a. Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in the EPSLA.
- b. Not later than seven days after the date of enactment of this Act, the Secretary of Labor shall make publicly available a model of a notice that meets the requirements of B.7.a. above.



# POLICY GUIDE

ADMINISTRATION

1649/page 13 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

## 8. Prohibited Acts

- a. It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who:
  - (1) Takes leave in accordance with the EPSLA; and
  - (2) Has filed any complaint or instituted or caused to be instituted any proceeding under or related to the EPSLA (including a proceeding that seeks enforcement of the EPSLA), or has testified or is about to testify in any such proceeding.

## 9. Enforcement

- a. Unpaid Sick Leave - An employer who violates B.2. through B.6. of this Policy shall:
  - (1) Be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206); and
  - (2) Be subject to the penalties described in sections 16 and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216; 217) with respect to such violation.
- b. Unlawful Termination - An employer who willfully violates B.8. above shall:
  - (1) Be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)); and
  - (2) Be subject to the penalties described in sections 16 and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216; 217) with respect to such violation.



# POLICY GUIDE

ADMINISTRATION  
1649/page 14 of 15  
Federal Families First Coronavirus  
(COVID-19) Response Act

## 10. Rules of Construction

### a. Nothing in the EPSLA shall be construed:

- (1) To in any way diminish the rights or benefits that an employee is entitled to under any:
  - (a) Other Federal, State, or local law;
  - (b) Collective bargaining agreement; or
  - (c) Existing employer policy; or
- (2) To require financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for paid sick time under the EPSLA that has not been used by such employee.

## 11. Guidelines

- a. Not later than fifteen days after the date of the enactment of the EPSLA, the Secretary of Labor shall issue guidelines to assist employers in calculating the amount of paid sick time under the EPSLA.

## 12. Reasonable Notice

- a. After the first workday (or portion thereof) an employee receives paid sick time under the EPSLA, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.
- b. The request for such leave shall be submitted to the Human Resources Department, who may request documentation from the employee in support of the emergency paid sick leave.



# POLICY GUIDE

ADMINISTRATION

1649/page 15 of 15

Federal Families First Coronavirus  
(COVID-19) Response Act

- c. The documentation shall include a signed statement containing the following information: the employee's name; the date(s) for which leave is requested; the COVID-19 qualifying reason for leave; and a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- d. An employee requesting to take emergency paid sick leave under the EPSLA or the EFMLEA to care for his or her child must provide the following information: the name of the child being care for; the name of the school; place of care; or child care provider that closed or became unavailable due to COVID-19 reasons; and a statement representing that no other suitable person is available to care for the child during the period of requested leave.

## 13. Regulatory Authorities

- a. The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of Title 5, United States Code:
  - (1) To exempt small businesses with fewer than fifty employees from the requirements of B.2.a.5. when the imposition of such requirements would jeopardize the viability of the business as a going concern; and
  - (2) As necessary, to carry out the purposes of the EPSLA, including to ensure consistency between the EPSLA and Division C and Division G of the FFCRA.

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