I. COVID-19 Emergency Family and Medical Leave Act

Who is an employee under the new Federal COVID-19 Emergency Family and Medical Leave Act from a city perspective?

Any employee who has been employed for at least 30 calendar days. So if the employee wanted to take leave starting April 1st, the employee would have to have been on the employer’s payroll as of March 2, 2020.

Are any employees excluded?

The Secretary of Labor has the authority to exclude health care providers and emergency responders. Those two terms are not yet defined. We are hoping the definition of emergency responder will include essential city employees such as public works employees. Additionally, an employer whose employee is a health care provider or emergency responder may choose to exclude such employee from the application of this act.

Do Cities qualify for the under 50 employee or over 500 employee business exemptions?

No

Under the Emergency COVID-19 Family and Medical Leave Act what is paid?

The first 10 days are not paid. It is the consensus that an employee can use the new paid leave under the Emergency Sick Leave Act for these first 10 days. The employee could also elect to use any other accrued vacation leave, personal leave, or medical or sick leave for these 10 days.

The remaining 10 weeks must be paid at not less than 2/3 of the employee’s salary BUT the total amount for the 10 weeks cannot exceed $10,000.

Could a city choose to pay the employee’s full salary?

Yes

Could a city allow an employee to use accrued vacation or sick leave time to make up the difference?

Yes.

What about an employee with a varying schedule?

If the employee’s schedule varies to the point the employer is unable to determine with certainty the number of hours the employee would have worked, then the employer should calculate the average number of hours the employee was scheduled over the 6 month period prior to the date the employee takes leave. If the employee did not work in the last six months, the employer must pay the hours the employee reasonably expected to work at the time of hiring.
Do you have to restore the employee to the same position when the leave ends?

Generally, yes. There are exceptions if an employer employs 25 or few employees and the position held by the employee no longer exists due to economic conditions or other changes in the operating condition of the employer.

What reasons can an employee take leave under this new Emergency Medical Leave Act?

Employees who are unable to work or telework because they must care for a minor child if the child’s school or place of care has been closed, or if the childcare provider of that child is unavailable due to a COVID-19 emergency.

Also, all the other regular FMLA reasons also apply if your city is generally subject to FMLA.

If a child is out of school and the employee could work a reduced schedule, can the employer require the employee do that instead of taking advantage of this leave?

Most likely no. Under the traditional FMLA, an employer cannot require an employee take a reduced workload instead of utilizing FMLA.

Does this mean all leave under the FMLA is now paid leave?

No. The only type of FMLA leave that is now paid is the new COVID expanded leave for when the employee must care for a child whose school or place of care is closed, or the child care provider is unavailable.

II. Emergency Paid Sick Leave Act

From a city perspective, who is covered?

All employees

Are any employees excluded?

The Secretary of Labor has the authority to exclude health care providers and emergency responders. Those are not defined terms. We are hoping the Secretary of Labor defines the terms broadly.

When does the employer have to provide leave? When an employee is unable to work or telework due to any of the following reasons:

1. The employee being 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 a quarantine or isolation order related to COVID-19. The individual does not have to be a family member. Individual is not defined and could be anyone.
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 childcare provider of such son or daughter is unavailable, due to COVID-19 precautions; or
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.
Can you require documentation of these?

Yes

How much leave must be paid?

Full time employees are entitled to 80 hours.

  For reasons 1, 2, 3 get full pay
  For reasons 4, 5, 6 get 2/3rds pay

Part-time employees are entitled to a number of hours equal to the number of hours the employee works on average over a two-week period.

  For reasons 1, 2, 3 get full pay
  For reasons 4, 5, 6 get full pay

An employee is only entitled to 2 total weeks. For example, the employee may not take two weeks for self-quarantine and then another 2 weeks to care for a child.

Is there a maximum amount?

Yes. The employee is only entitled to a maximum of two weeks BUT if the two weeks are because the employee is actually sick the max payout is $5,110. If the employee uses the two weeks to care for someone else, or to care for a child out of school, the max payout is $2,000 for the two weeks.

Can I require the employee use currently accrued sick leave for this new leave?

No. This is an extra two weeks. The employer must allow the employee to use this new leave first.

What notice does the city have to post?

A notice is provided by the Secretary of Labor. This notice must be placed in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or by posting the notice on an external website. Notices are available at


Can I fire someone for taking this leave?

No.

Does this Act cover employees who have had hours cut due to office closures or social distancing?

It depends. This is a very fact specific analysis. Was the office closed because of a local quarantine or isolation order or merely as a precaution? For example, if your county issued a stay-at-home order necessitating the closing of the office, the employee is likely eligible to use this new sick leave for hours missed post April 1st. If the city limited office hours as a precaution, or as a way to practice social distancing, the employee might not be eligible. The city will have to look at each employee as of April 1st and evaluate if that particular employee meets on of the five eligibility reasons for taking leave pursuant to this new Act.
Does this leave have to be taken for 2 consecutive weeks?
No. The employee may use this leave any time between April 1 and December 31, 2020

III. Things Applicable to Both Laws

When does this go into effect?
The paid leave provisions are effective April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020. Any leave given prior to April 1 will not count towards this new leave requirement.

Are Local Governments Eligible for Tax Credits to pay for these?
No.

Are these wages subject to all federal withholdings?
Yes, they are subject to most withholdings; however, they are not subject to the 6.2% social security payroll tax typically paid by employers on employee’s wages. This is both the employer portion and the employee portion. A city does still need to withhold and match the Medicare Portion.

As an employer, can I make terminations before this law goes into effect?
Kansas remains an at-will state. If there are employees who are no longer needed due to a changing environment, those employees can still be terminated before this law goes into effect. Once the law does go into effect and an employee asserts a right to use this leave, which becomes far trickier situation. Talk to your city attorney about your options ASAP. Most employees will qualify for unemployment; however, in Kansas there is a requirement that the employee has earned a minimum amount in wages. If you have questions about a particular employee, please call your city attorney.

When Does this Law Expire?
December 31, 2020

Where can I find a copy of the Bill?