

Q & A to Supplement Federal COVID-19 Response Act Summary
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I. COVID-19 Emergency Family and Medical Leave Act

Who is an employee under the new Federal COVID-10 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. 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.

Who is a health care provider?

A health care provider has been defined by the Department of Labor as anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the Governor determines is a health care provider necessary for the state's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department of Labor encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

Who is an emergency responder?

For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the Governor determines is an emergency responder necessary for that state's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department of Labor encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

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. The Department of Labor has stated 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 medial 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. Moreover, the DOL has made it clear that an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual— such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.

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

What documentation can a city require?

An employee requesting to take this new Emergency FMLA leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

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; however, the employer and the employee could agree to have the employee take the COVID-19 FMLA intermittently. The Department of Labor is encouraging employers and employees to collaborate to achieve flexibility and meet mutual needs.

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

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school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

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To minimize the spread of the virus associated with COVID-19, the Department of Labor encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

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. An employee requesting paid sick leave to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave

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 2/3rds 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.

What is a Full Time Employee?

For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

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

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

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?

Generally No. The Department of Labor on Sunday March 29th released guidelines stating these employees would not be eligible even if the closure was due to a Federal, State, or local directive. The DOL reached this determination because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19. However, in the Rules and Regulations, released on April 1st, the DOL also states that the key test is whether the employee is unable to work even though his or her employer has work that the employee could perform but for the stay at home order. This analysis seems to be splitting hair and will be fact specific. If for example, the library is closed to the public and as such, staff is not needed to deal with the public, the decrease in hours is not due to a specific qualifying reason, but rather, because there is not work for the employee.

The employee may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents the employee from working a full schedule. The city will have to look at each employee as of April 1st and evaluate if that particular employee meets one of the five eligibility reasons for taking leave pursuant to this new Act.

What records does the city have to keep?

An employer is required to retain all documentation provided for four years, regardless of whether leave was granted or denied. If an Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.

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. Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken 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 either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
or
5. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

Unless the employee is teleworking, once the employee begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until the employee has either (1) used the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. If the employee no longer has a qualifying reason for taking paid sick leave before the employee exhausts the paid sick leave, the employee may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

Sick leave may be taken intermittently if it is being taken to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.

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 1st 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. A city does still need to withhold and match the Medicare Portion. (There is the consensus opinion of the law; however, we are still awaiting IRS guidelines that could change this interpretation)

It is very clear that the Employer does not have to pay the 6.2% match. This will not make a city whole. This is 6.2% of only the wages paid for the leave. What is not clear is whether the EMPLOYEE has to pay their portion of the Social Security Tax. Up until this morning relying on the bill brief, I would have said no. This morning; however, in the guidance released by the IRS related to the Tax Credits (which cities do not qualify for) the IRS seems to state that any employees taking this leave will be responsible for the Social Security tax. What this means is that I have no idea what the correct answer is because the federal government has said two different things. Stay tuned for future updates.

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. Talk to your city attorney about your options. 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.

If an employee was furloughed on or after April 1st, can the employee still get paid sick leave or expanded FMLA Leave?

No. If the city furloughs employees because it does not have work for the employees, these employees will not be eligible for paid sick leave or expanded family and medical leave but the employees may be eligible for unemployment insurance benefits. This is true even if the city closed the employee's worksite pursuant to a Federal, State, or local directive.

If the city reduces an employee's scheduled work hours, can the employee use paid sick leave or expanded family and medical leave for the hours that he or she is no longer scheduled to work?

Generally No. The Department of Labor on Sunday March 29th released guidelines stating these employees would not be eligible even if the reduction in hours was due to a Federal, State, or local directive. The DOL reached this determination because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19. However, in the Rules and Regulations, released on April 1st, the DOL also states that the key test is whether the employee is unable to work even though his or her employer has work that the employee could perform but for the stay at home order. This analysis seems to be splitting hair and will be fact specific. If for example, the library is closed to the public and as such, staff is not needed to deal with the public, the decrease in hours is not due to a specific qualifying reason, but rather, because there is not work for the employee.

The employee may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents the employee from working a full schedule.

When Does this Law Expire?

December 31, 2020

Where can I find a copy of the Bill?

<https://www.congress.gov/bill/116th-congress/house-bill/6201/text#HDC8838D40C3C4652AAF325D708952511>