

NEW FEDERAL PAID LEAVE LEGISLATION

EFFECTIVE APRIL 1, 2020

The following new federal legislation, effective on April 1, 2020, will increase mandatory paid sick leave and provide childcare leave for many Washington school district employees affected by COVID-19:

Federal Emergency Paid Sick Leave Act (EPSLA)

Districts are required to provide all employees with up to eighty (80) hours of paid or partially paid sick leave for COVID-19 related reasons, such as being subject to a quarantine order; experiencing symptoms and seeking medical diagnosis; and caring for others, including children whose schools or daycares have closed.

Federal Emergency Family and Medical Leave Expansion Act (EFMLA)

Districts must provide eligible employees whose children's schools or daycares have closed up to twelve (12) weeks of job-protected leave. The first 10 days of this leave is unpaid (although the employee may substitute accrued paid leave), and the remainder of the leave must be paid at two-thirds of their regular rate.

These new leave requirements overlap with existing federal and Washington state sick and family/medical leave law, and potentially with paid administrative leave for COVID-19-related issues recently negotiated with local labor partners. Wages earned while on EPSLA and EFMLA leave are not subject to the employer's portion of Social Security payroll taxes.

School districts should promptly:

- Implement procedures to approve employee requests for EPSLA and EFMLA leave
- Separately track EPSLA and EFMLA leave

KEY REQUIREMENTS OF THE EMERGENCY PAID SICK LEAVE ACT (EPSLA)

Paid Sick Leave

Full-time Washington school district employees, who are unable to work, including telework, for COVID-19 related reasons, must receive eighty (80) hours of fully or partially paid sick leave (ie: 10 days for an eight-hour employee). This is in addition to other paid sick leave offered by the employer. Part-time employees are entitled to receive paid leave equal to the number of hours that they work on average over a two-week period. EPSLA leave will be in addition to the paid sick leave that most Washington school district employees already receive under state law. Districts should provide a method for employees to request paid leave under the EPSLA and ensure that EPSLA leave will not be charged to the employee's preexisting accrued sick or other paid leave.

Eligibility and Use

EPSLA leave applies to all school districts, regardless of employee headcount, and covers both salaried employees (e.g., teachers and principals) and hourly classified workers. EPSLA leave must be available for immediate use, regardless of how long the employee has worked for the employer. Employees are not required to use other paid leave provided by the employer before using EPSLA leave.

An employee is eligible to use EPSLA leave when one or more of the following five circumstances related to COVID-19 applies:

- 1.The employee is subject to a federal, state, or local quarantine/isolation order.
- 2.The employee has been advised by a healthcare provider to self-quarantine.
- 3.The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis.
- 4.The employee is caring for an individual who is subject to a quarantine order or has been advised to self-quarantine.
- 5.The employee is caring for a child* due to closure of school or place of care, or unavailability of care provider, due to COVID-19 precautions.

**Biological, adopted, or foster child; stepchild; legal ward; or child of a person standing in loco parentis who is under 18 years of age or is 18 years of age or older and incapable of self-care because of a mental or physical disability.)*

The U.S. Secretary of Health and Human Services also has the authority to specify other substantially similar conditions qualifying for leave.

EPSLA does not explicitly address school district substitutes or other temporary employees. EPSLA leave is only available during those hours that an employee would have been otherwise scheduled to work, and districts should consult with legal counsel should a substitute have an expectation of work qualifying them for EPSLA leave.

Compensation

Employees taking EPSLA leave must be compensated at the greater of the employee's regular rate of pay, or the applicable minimum wage, subject to certain maximum limits. For EPSLA leave due to the employee's own COVID-19 situation (circumstances 1-3), compensation is capped at \$511 per day and \$5,110 in aggregate. For EPSLA leave due to caring for other individuals, including children (the last two circumstances listed above), compensation is capped at \$200 per day and \$2,000 in aggregate. Employers must provide EPSLA leave for the total number of hours that the employee would have normally been scheduled to work during the period of the leave. An employee's EPSLA leave ends at the start of the employee's next scheduled shift immediately following the termination of the employee's need for paid sick leave.

Compensation paid for EPSLA leave is not considered "wages" under federal tax law, so school districts are not required to pay the employer's typical share of payroll taxes for Social Security on EPSLA compensation. Districts are still required to pay the employer's share of Medicare taxes (1.45 percent of wages) and withhold the employee's share of payroll taxes. It is important to separately track EPSLA leave to avoid paying the employer's share of Social Security payroll taxes on EPSLA compensation.

Leave Overlap

Depending on the reason that an employee takes EPSLA leave and the terms of local labor agreements, EPSLA leave may overlap with recently negotiated MOUs calling for other paid leave—sometimes called “coronavirus leave” or “civic duty leave”. Employees may elect to use EPSLA leave during the first 10 days of EFMLA leave, which would typically be unpaid. The employer may agree to permit an employee to supplement pay received under EPSLA with other accrued paid leave, up to the employee’s typical earnings.

Guidelines and Notification

Employers are prohibited from discharging, disciplining, or discriminating against any employee who uses EPSLA leave. School districts must post a notice developed by the U.S. Department of Labor of EPSLA in conspicuous places on its premises where notices to employees are customarily posted; employers may satisfy this mandate by emailing or mailing the notice to employees, or posting the notice on an employee-information website.

EPSLA leave is scheduled to expire on December 31, 2020.

**KEY REQUIREMENTS OF THE EMERGENCY FAMILY AND MEDICAL LEAVE
EXPANSION ACT (EFMLA)**

Comparison to FMLA

EFMLA grants eligible employees up to 12 weeks of job-protected leave to care for a child whose school or place of childcare is closed due to a declared public health emergency in relation to COVID-19. EFMLA leave applies all school districts, regardless of employee headcount, and to both salaried employees (e.g., teachers and principals) and hourly classified workers. EFMLA leave differs from typical FMLA leave in the following ways:

	EFMLA	FMLA
Eligibility	Employee must have worked for the district for 30 calendar days (including as a temporary employee).	Employee must have worked at least 1,250 hours for that employer over the 12-month period prior to the leave.

EFMLA

FMLA

Reason for Leave

Employee must be unable to work (or telework) because the employee needs to care for a child under the age of 18 whose school or place of care has been closed, or whose childcare provider is unavailable, due to a public health emergency relating to COVID-19 declared by a federal, state, or local authority.

Employee's own "serious health condition," to bond with a newborn or adopted child, or to care for family members with a "serious health condition" - generally does not grant leave for care of older children without a medical condition.

Compensation

EFMLA leave is unpaid for the first 10 days, but the employee must be allowed to substitute any accrued vacation leave, personal leave, or medical or sick leave, including EPSLA leave. For the remainder of the leave, the employer must pay the employee at two-thirds of the employee's regular rate, up to \$200 a day and \$10,000 in aggregate.

Traditional FMLA leave is unpaid, although employers may require an employee to use accrued paid leave concurrently.

EFMLA and Hours Worked

Districts are required to provide EFMLA leave for the hours that the employee is normally scheduled to work. If the employee's hours have varied over time, making it difficult to determine the number of hours the employee would have working during their EFMLA leave, the employee must be paid according to the average number of hours the employee was scheduled per day over the six-month period ending on the day that the employee begins the EFMLA leave. Any other type of leave taken during that six-month period counts as hours "worked." Employees must give the school district as much notice of the EFMLA leave as is practicable, if the need for leave is foreseeable.

Compensation

Compensation paid for EFMLA leave is not considered “wages” under federal tax law, and school districts are not required to pay the employer’s typical share of payroll taxes for Social Security on EFMLA compensation. Districts must still pay the employer’s share of Medicare taxes (1.45 percent of wages) and withhold the employee’s share of payroll taxes. Districts should separately track EFMLA leave to avoid paying the employer’s share of Social Security payroll taxes on such compensation.

Returning to Work

An employee using EFMLA leave must be restored to the same or equivalent position upon the employee’s return to work. Districts with fewer than 25 employees are not required to restore an employee returning from EFMLA leave to the same or equivalent position if certain conditions are met:

1. The position held prior to leave no longer exists due to economic conditions or other changes in the employer’s operating conditions that affect employment and were caused by a public health emergency during the period of leave;
2. the employer makes “reasonable efforts” to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment;
3. if those reasonable efforts fail, the employer makes reasonable efforts during a year-long “contact period” to contact the employee if an equivalent position becomes available.

Tracking and Leave Overlap

Employers are responsible for designating leave taken by employees for a qualifying condition under EFMLA leave. When an employee provides notice to the school district of an inability to work in order to care for a child due to closure of a school or childcare, the employer should provide notice to the employee of eligibility for EFMLA leave and begin tracking such leave, this includes situations where the employee would otherwise qualify for Washington’s paid family and medical leave (PFML) or paid administrative leave under a local labor agreement.

Leave taken by an employee for EFMLA counts against the employee’s overall entitlement of up to 12 weeks of FMLA leave during a 12-month period – if an employee uses 12 weeks of EFMLA leave to care for a child and then becomes ill, the employee would not be eligible for further FMLA leave during the 12-month period. Likewise, if an employee has used one or more weeks of FMLA leave during the current 12-month period, the employee does not qualify to use those weeks for EFMLA leave.

An employee may supplement EFMLA leave with other accrued paid leave to receive the full amount of the employee’s regular pay – only if the employer agrees. Employee eligibility to use accrued leave for the care of a child without a serious health condition depends on allowed uses for leave under state law, any collective bargaining agreement, and employer policy.

Paid Family Medical Leave (PFML)

Although EFMLA leave is distinct from PFML under Washington law, which does not generally allow leave for care of children other than within a year of birth or placement, an employee could potentially qualify for both EFMLA leave and PFML if the employee has COVID-19 or another serious health condition (entitling the employee to benefits under PFML) and must simultaneously care for a child whose school or daycare is closed (entitling the employee to EFMLA benefits). In situations like this, whether the employee receives PFML compensation, as opposed to job-protected leave, depends on whether the employer has designated EFMLA leave as a “supplemental benefit.” School districts should consult with legal counsel about the potential implications of designating leave as supplemental.

Local Labor Agreement

It is possible that an employee will qualify for leave to care for a child under both the EFMLA and the terms of a local labor agreement, including additional negotiated crisis-related leave. In these situations, the school district should notify the employee that EFMLA and the negotiated leave will run concurrently in order to avoid the employee using negotiated leave and then separately claiming EFMLA leave (subject to collective bargaining obligations).

Temporary Employees

EFMLA does not explicitly address applicability of the EFMLA to school district substitutes or other temporary employees; however, EFMLA states that when an employee has a variable schedule “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,” the employer must use 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 took EFMLA leave, including hours during which the employee took leave of any type. If the employee did not work during such period, the employee is entitled to 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.” School districts that are not employing casual (i.e., day-to-day) substitutes during the period of school closure may assert that a substitute is not scheduled to work any hours and has no reasonable expectation of being hired during that period, thus revoking EFMLA leave. On the other hand, long-term substitutes already hired for a position and expected to provide service will likely be able to use EFMLA leave. School districts should consult with legal counsel about the ramifications of EFMLA leave for temporary workers.

EFMLA leave is scheduled to expire on December 31, 2020.