

ATTENDANCE AND LEAVE MANUAL

POLICY BULLETIN 2020-01

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TO: New York State Agencies and Departments
FROM: Jessica Rowe, Director of Staffing Services
SUBJECT: Guidance Related to Recent State and Federal Law and Policy Changes Due to COVID-19

Introduction

This policy bulletin provides information and implementation guidance on the recently enacted State Paid Sick Leave Law (Chapter 25 of the Laws of 2020) and recent policy guidance issued by the Governor’s Office of Employee Relations (GOER) to Directors of Human Resource Management on March 11, 2020. It also describes New York State’s implementation of the Families First Coronavirus Response Act (FFCRA), which provides for the Federal Emergency Paid Sick Leave Act (FEPSLA) and the expansion of benefits under the Emergency Family and Medical Leave Act (EFMLA) related to employees impacted by COVID-19. The attached chart displays how these laws and policies apply to specific circumstances. Also attached is an employee notice that describes these benefits.

The information contained in this document summarizes our current understanding of the significant revisions to the EFMLA and FEPSLA. **Further guidance will be provided as it becomes available.**

Questions concerning this material should be directed to the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

GOVERNOR’S OFFICE OF EMPLOYEE RELATIONS POLICY GUIDANCE

On March 11, 2020, the Governor’s Office of Employee Relations (GOER) issued policy guidance for employees quarantined due to the novel coronavirus (COVID-19). This policy relates to employees who are placed on mandatory or precautionary quarantine related to COVID-19.

Eligibility

All State employees, regardless of Attendance Rules coverage, are eligible for quarantine leave.

Use of Leave

This policy provides employees leave with pay without charge to accruals, for all workdays within the 14-day period of the quarantine. This leave will be provided regardless of whether employee is symptomatic. If an employee placed on precautionary quarantine can work from home, arrangements should be made to do so. If not, the employee will be placed on leave with pay, without charge to accruals, for all workdays within the 14-day period of quarantine.

CHAPTER 25 OF THE LAWS OF 2020

On March 18, 2020, Chapter 25 of the Laws of 2020 was enacted to provide for a 2-week period of sick leave with pay, without charge to accruals. The law also authorized Paid Family Leave (PFL) benefits for employees with minor children that are subject to mandatory quarantine or precautionary quarantine.

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The Paid Family Leave provision is optional for public sector employers; New York State has opted not to implement this provision.

Chapter 25 of the Laws of 2020 also included an exclusion for employees who had traveled to a country in which the Centers for Disease Control and Prevention (CDC) has issued a level two or three travel health notice; such employees are not entitled to such leave, unless the travel was directed by their employer.

Use of Leave

The policy issued by GOER on March 11, 2020, for employees under Precautionary or Mandatory Quarantine, generally exceeds the quarantine benefits provided by Chapter 25 of the NYS Laws. Therefore, quarantine benefits should be provided to employees under the statewide GOER Policy.

FEDERAL EMERGENCY PAID SICK LEAVE ACT

The Federal Emergency Paid Sick Leave Act (FEPSLA or The Act) provides paid sick leave to individuals who are subject to quarantine or isolation, advised by a health care provider to precautionary-quarantine, or experiencing symptoms of COVID-19 and seeking a medical diagnosis. The Act also provides paid sick leave for employees who are taking care of individuals in certain categories or are caring for a minor child whose school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19 precautions.

The new law took effect on April 1, 2020 and will remain in effect until December 31, 2020. The following describes the State's implementation of this new law.

Basic Requirements

The Act provides that each employer (as defined in the Act), including the State of New York, provide an employee with paid sick leave to the extent that the employee is unable to work due to a qualifying event. FEPSLA leave is considered a leave at full pay, without charge to accruals, for all attendance and leave purposes. Leave under this Act shall be called FEPSLA leave; agencies should add this leave category to their automated or paper timekeeping systems.

Eligibility

All employees, regardless of Attendance Rules coverage, are eligible for FEPSLA leave. There are no minimum service requirements for the FEPSLA benefits. In lieu of these paid benefits, employees may elect to use any available leave accruals.

Categories of Leave

Employees who are unable to work or telework are entitled to FEPSLA for any of the following qualifying events:

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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 (termed precautionary quarantine in New York) due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in (1) or (2) above.
5. The employee is caring for a minor child of such employee, if the school or place of care of the minor child has been closed, or the childcare provider of such minor child 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.

Pay Status/Calculation

An employee's pay on FEPSLA leave is calculated based on their regular rate of pay, subject to specific monetary caps imposed by the FEPSLA.

An employee's pay is calculated as follows:

An employee shall be paid at the employee's regular rate of compensation, subject to a cap of \$511 per day for a maximum of \$511 per day and \$5,110 in the aggregate, for those employees who work a 40-hour work week who take leave in the following categories:

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- (precautionary) quarantine due to concerns related to COVID-19; or
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

An employee shall be paid at two-thirds of the employee's regular rate of pay, subject to a cap of \$200 per day and \$2,000 in the aggregate, for those employees who work a 40-hour work week and who take leave in the following categories:

1. The employee is caring for an individual who is subject to an order as described in subparagraph (1) above or who has been advised as described in subparagraph (2) above.
2. The employee is caring for a minor child of such employee if the school or place of care of the minor child has been closed, or the childcare provider of such minor child is unavailable, due to COVID-19 precautions.

An agency must use the following procedure to calculate the number of hours worked for part-time employees who work varied schedules from week-to-week:

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1. Subject to (2) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-month period, ending on the date on which the employee takes the FEPSLA leave, including hours for which the employee took leave of any type.
2. 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.

It should be noted that FEPSLA requires that paid sick leave be paid only up to 80 hours over a 2-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the FEPSLA is capped at 80 hours.

Use of Leave

FEPSLA leave shall be available for immediate use by an employee, for the purposes described above, regardless of how long the employee has been employed by the State. An employee may first use FEPSLA leave for the purposes described above. An agency may not require an employee to use other paid leave provided by the State before the employee uses FEPSLA leave.

Leave shall be used in full day increments, except for the first day.

Amount of Leave

A full-time employee who works a 40-hour work week shall be entitled to 80 hours of FEPSLA leave. Less than full-time employees shall be entitled to a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

In the case of a less than full-time employee whose schedule varies from week-to-week to such an extent that you are unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time, the following procedure shall be used to calculate the number of hours worked:

1. Subject to (2) or (3) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-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.
2. 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. OR
3. If the employee did not work over a full 6-month period, average the hours worked over the period the employee did work.

Employees who work 37.5 hours per week will be entitled to 75 hours of leave in a 2-week period.

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FEPSLA leave does not carry over and expires on December 31, 2020.

FEPSLA leave provided to an employee ends at the beginning of the employee's next scheduled work shift immediately following the termination of the need for paid sick time.

An agency may not require, as a condition of providing FEPSLA leave, that the employee search for or find a replacement to cover the employee's scheduled work times.

Notification

An employee must provide as much notice, as practicable under the circumstances, of the need for leave.

After the first workday (or portion thereof) an employee receives paid sick time under this Act, an agency may require the employee to check in each day.

An employee must provide an agency with notice of a change in status, as soon as practicable, after finding out about that change in status.

Documentation

An agency can require proof consistent with the categories of FEPSLA leave listed above.

Posting and Notice Requirements

Each agency shall post and keep posted, in conspicuous places where notices to employees are customarily posted, a notice, prepared or approved by the Secretary of Labor, of the requirements described in this Act. That notice is available [here](#).

Unlawful Discrimination/Other Rights

It is unlawful for any agency to discharge, discipline, or in any other manner discriminate against any employee who takes FEPSLA leave and who has filed any complaint or instituted or caused to be instituted any proceeding under or related to FEPSLA leave (including a proceeding that seeks enforcement of the Act), or who has testified or is about to testify in any such proceeding.

FEPSLA leave shall not diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law, collective bargaining agreement, or existing policy. There is no entitlement to be paid for any unused FEPSLA leave upon an employee's termination, resignation, retirement, or other separation from employment.

Definitions

1. Employer – the State of New York is a public agency covered by the provisions of this law.
2. Employee – employees of the State of New York.
3. The term "health care provider" has the meaning given such term in section 101 of the Family and Medical Leave Act of 1993 ([29 U.S.C. 2611](#)).

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4. Health care provider and emergency responder – United States Department of Labor (USDOL) guidance on employees who may be included in the exclusion can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

The federal Family and Medical Leave Act (FMLA) was revised to expand benefits for employees impacted by COVID-19. These new Emergency FMLA (EFMLA) benefits are in effect April 1, 2020. The changes are a temporary expansion of benefits and will expire on December 31, 2020. The revisions modify current FMLA eligibility provisions and provide a new category of approved leave: public health emergency leave related to the COVID-19 pandemic. This leave is available to eligible employees who must take leave to care for their minor children because the school or place of care for their children has been closed due to the COVID-19 public health emergency. The law also provides paid leave requirements for employers.

This memorandum provides a brief overview of the revisions to the FMLA. Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

The information contained in this document summarizes our current understanding of the revisions to the FMLA related to COVID-19. Further guidance may be provided as issues are clarified.

Eligibility

The FMLA eligibility criteria for employees impacted by the COVID-19 public health emergency has been substantially expanded. Employees absent due to the COVID-19 are only required to have worked for New York State for a period of 30 calendar days. The requirement of one cumulative year of State service and 1,250 hours prior to the qualifying event **does not** apply to absences for the public health emergency leave related to COVID-19.

All employees meeting the 30-day requirement are entitled to the EFMLA benefits described below, regardless of their eligibility for Attendance Rules coverage (i.e., hourly and per diem employees). It should be noted that the normal FMLA eligibility criteria still applies to all other conditions for which an employee seeks FMLA.

Amount of Leave to be Granted

Eligible employees are entitled to 12 work weeks of public health emergency leave from April 1, 2020 through December 31, 2020. Any FMLA an employee used prior to April 1, 2020, for reasons other than those related to COVID-19, is subtracted from this additional 12 weeks of EFMLA Leave. This new period of FMLA does not provide an additional 12 weeks of leave entitlement, but rather provides a new qualifying reason for which leave can be taken. Employees are still limited to a total of 12 week of FMLA for 2020.

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Eligible employees are now allowed to take leave due to a qualifying need related to the COVID-19 public health emergency. The EFMLA defines a public health emergency as a COVID-19 emergency declared by a federal, state, or local authority.

The only qualifying need is that the employee is unable to work or telework because the employee is needed to care for the employee's minor child under age 18 due to an elementary or secondary school or place of care closure, or due to the unavailability of a child care provider, because of a COVID-19 public health emergency. Employees who have a child, age 18 or older, who is incapable of self-care because of a mental or physical disability shall be eligible for public health emergency leave.

Pay During Leave

The first 10 days of COVID-19 public health emergency leave may be unpaid, although employees have the option to substitute any type of available paid leave (i.e., FEPSLA, vacation, personal leave, or sick leave). The Federal Emergency Sick Leave may run concurrently with this 10-day period.

After the first 10 days, the employee is entitled to be paid for the leave. Under normal circumstances, the leave is paid at two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would normally be scheduled to work. The amount of paid leave is capped at \$200 a day, but may not exceed a total of \$10,000. For employees who work variable hours, the employer should calculate the average number of hours the employee was scheduled to work for the six-month period prior to the date the leave begins, including hours for which the employee took leave of any type (e.g., vacation, sick leave, etc.). If the employee works variable hours, but has not worked for the employer for 6 months, the employer must use the average number of hours the employee reasonably would have been expected to work at the time of hire.

COVID-19 public health emergency leave shall be used in full day increments only.

Intersection of FEPSLA and EFMLA

Employees taking paid sick leave because they are unable to work or telework due to a need for leave because they (1) are subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self (precautionary)-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, will receive for each applicable hour the greater of:

- Their [regular rate of pay](#);
- The federal minimum wage in effect under the FLSA; or
- The applicable State or local minimum wage.

In these circumstances, an employee is entitled to a maximum of \$511 per day, or \$5,110 total over the entire 2-week paid sick leave period.

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An employee is entitled to compensation at two-thirds of the greater of the amounts above if the employee is taking paid sick leave because they are: (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self (precautionary)-quarantine due to concerns related to COVID-19; (2) caring for their child whose school or place of care is closed, or because their childcare provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services.

Under these circumstances, the employee is subject to a maximum of \$200 per day, or \$2,000 over the entire 2-week period.

If the employee is taking EFMLA, they may take paid sick leave for the first 10 days of that leave period, or they may substitute any accrued vacation leave, personal leave, or sick leave available under State policy. For the following 10 weeks, they will be paid for their leave at an amount no less than two-thirds of their regular rate of pay for the hours they would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, the employee will not receive more than \$200 per day or \$12,000 for the 12 weeks that include both paid sick leave and EFMLA when the employee is on leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

It should be noted that employees cannot use existing leave entitlements (e.g., sick leave, vacation, or personal leave) to supplement their pay while using FEPSLA or EFMLA COVID-19 public health emergency leave.

Documentation

An employee must submit appropriate documentation to support the use of public health emergency leave to the extent practicable.

Return to Work

An employee must be restored to the same or a substantially equivalent position.

Notice Requirements

An employee who needs COVID-19 public health emergency leave is required to provide the employer with as much notice as is practicable.

Exclusions

The FEPSLA and EFMLA provisions allow employers to exclude healthcare providers or emergency responders from the provisions of the Act. **State agencies interested in exercising this option must consult with GOER and receive prior approval from their Deputy Secretary.** Healthcare providers or emergency responders responding to the COVID-19 public health emergency should continue to report

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to their agencies. United States Department of Labor (USDOL) guidance on employees who may be included in the exclusion can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions>.