



**NEW PAID COVID-19 LEAVE
FOR SCHOOL DISTRICT EMPLOYEES**

March 30, 2020

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

- The federal Emergency Paid Sick Leave Act (“EPSLA”) requires districts to provide all employees with up to 80 hours of paid or partially paid sick leave for certain reasons related to COVID-19, such as when the employee is subject to a quarantine order, experiencing symptoms and seeking medical diagnosis, and caring for others—including children whose schools or daycares have closed.
- The federal Emergency Family and Medical Leave Expansion Act (“EFMLA”) mandates that districts provide eligible employees whose children’s schools or daycares have closed up to 12 weeks of job-protected leave, the first 10 days of which is unpaid (although the employee may substitute accrued paid leave) and the remainder of which is paid at two-thirds of their regular rate.

Congress enacted these laws on March 18, 2020, as part of the broader [Families First Coronavirus Response Act](#) (also known as “H.R. 6201”). These new leave requirements overlap with existing federal and Washington sick and family/medical leave laws—and potentially with paid administrative leave for COVID-19-related issues recently negotiated with local labor partners. Further, these forms of leave have payroll implications, given that 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 and separately track EPSLA and EFMLA leave. This email provides an overview of the key requirements of this new federal legislation pertaining to Washington school districts. An “at a glance” table comparing the critical aspects of the new legislation with existing law is also attached.

Emergency Paid Sick Leave Act (“EPSLA”)

1. Key Requirements

The EPSLA guarantees up to 80 hours of fully or partially paid sick leave to all Washington school district employees who are unable to work (including “telework”) for

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COVID-19-related reasons, in addition to other paid sick leave offered by the employer. Full-time employees must receive 80 hours of paid sick leave—i.e., 10 days for an eight-hour employee—whereas part-time employees will receive leave equal to the number of hours that they work on average over a two-week period.

EPSLA leave applies to all school districts, regardless of employee headcount. Both salaried employees (e.g., teachers and principals) and hourly classified workers are eligible for this leave. EPSLA leave must be available for immediate use, regardless of how long the employee has worked for the employer. A district cannot require an employee to use other paid leave provided by the employer before using EPSLA leave.

An employee may use EPSLA leave when one or more of 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 son or daughter if the child's school or place of care has been closed, or the care provider is unavailable, due to COVID-19 precautions. (For this purpose, "son or daughter" means a 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.

A school district must compensate an employee taking EPSLA leave 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 (the first three circumstances listed above), compensation is capped at \$511 per day and \$5,110 in aggregate. For EPSLA leave due to caring for other individuals, including sons or daughters (the last two circumstances listed above), compensation is capped at \$200 per day and \$2,000 in aggregate.

The employee must receive EPSLA leave for the total number of hours that the employee would have normally been scheduled to work during the period of the leave. EPSLA leave ends as

of the start of the employee’s next scheduled shift immediately following the termination of the employee’s need for paid sick leave.

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 (“Department”) of EPSLA requirements in conspicuous places on its premises where notices to employees are customarily posted. The Department has provided [nonbinding guidance](#) explaining that employers may satisfy this mandate by emailing or mailing the notice to employees, or posting the notice on an employee-information website.

Compensation paid for EPSLA leave is not considered “wages” for certain purposes under federal tax law, therefore school districts are not required to pay the employer’s typical share of payroll taxes for Social Security on such compensation (typically 6.2 percent of wages, up to an income limit). However, 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.

The entitlement to EPSLA leave is scheduled to expire on December 31, 2020. The Department has authority to issue regulations implementing the EPSLA, which may affect the information above.

2. Implications for School Districts

EPSLA leave will be in addition to the paid sick leave that most Washington school district employees already receive under state law. RCW 28A.400.300 requires and authorizes districts to provide certificated and classified employees at least 10 days and up to 12 days of paid leave per year for illness, injury, or emergencies (with part-time employees receiving a prorated amount). Hourly employees—including some substitutes—are also eligible to accrue paid sick leave under Initiative 1433, codified as RCW 49.12.265-.295, which entitles workers to receive at least one hour of paid sick leave for every 40 hours worked. Districts should provide a method for employees to request paid leave under the EPSLA, in which event such leave will not be charged to the employee’s preexisting accrued sick or other paid leave.

In addition, some school districts have recently negotiated MOUs calling for other paid leave—sometimes called “coronavirus leave” or “civic duty leave”—for employees experiencing a variety of COVID-19-related issues, such as being subject to quarantine or in an at-risk demographic (e.g., workers who are ages 60 and older, immunocompromised, or pregnant). Depending on the reason that an employee takes EPSLA leave and the terms of local labor agreements, EPSLA leave may overlap with such negotiated leave. Districts may evaluate whether to seek modification of the terms of any negotiated leave to align with the EPSLA. Notably, EPSLA leave is not available for an employee who misses work solely because the employee is in an at-risk group or has concerns about being exposed to the virus, unless the employee has been advised by a healthcare provider to self-quarantine.

Employees may elect to use EPSLA leave during the first 10 days of EFMLA leave, which would typically be unpaid, as discussed below. In addition, the Department has opined in separate [nonbinding guidance](#) that an employer may agree to permit an employee to supplement pay received under the EPSLA with other accrued paid leave, up to the employee's typical earnings.

The text of the federal legislation and Department guidance do not explicitly address applicability of the EPSLA to school district substitutes or other temporary employees. However, paid EPSLA leave is only available during those hours that the employee would have been otherwise scheduled to work. Districts should consult with legal counsel about when a substitute has an expectation of work qualifying the employee for EPSLA leave.

Finally, school districts should be sure to separately track EPSLA leave to avoid paying the employer's share of Social Security payroll taxes on such compensation.

Emergency Family and Medical Leave Expansion Act ("EFMLA")

1. Key Requirements

The EFMLA expands traditional unpaid FMLA leave by granting eligible employees up to 12 weeks of job-protected leave to care for a son or daughter whose school or place of childcare is closed due to a declared public health emergency related 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 several key respects:

- **Employee eligibility:** An employee must have worked for the district for 30 calendar days (including as a temporary employee), as opposed to the traditional FMLA requirement that the employee worked at least 1,250 hours for that employer over the 12-month period prior to the leave.
- **Reason for leave:** An employee must be unable to work (or telework) because the employee needs to care for a son or daughter under the age of 18 whose elementary or secondary school or place of care has been closed, or whose childcare provider is unavailable, due to a public health emergency. A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority. Traditional FMLA leave is available for an 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," but it generally does not grant leave for care of older children without a medical condition.
- **Compensation:** EFMLA leave is unpaid for the first 10 days, although the employee must be allowed to substitute "any accrued vacation leave, personal leave, or medical or sick leave" (including EPSLA leave, discussed above). For the remainder of the

leave, the district 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.

An employee must receive EFMLA leave for the hours that the employee is normally scheduled to work. When a school district cannot determine the number of hours that an employee would have worked during the EFMLA period because the employee's hours have varied over time, 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. For purposes of this calculation, if the employee took any type of other leave during that six-month period, such leave counts as hours "worked."

The employee must give the school district as much notice of the EFMLA leave as is practicable, if the need for leave is foreseeable.

Like with traditional FMLA leave, an employee using EFMLA leave generally must be restored to the same or equivalent position upon the employee's return to work. However, school districts with fewer than 25 employees need not 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 because of other changes in the employer's operating conditions that affect employment and are 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; and (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.

Compensation paid for EFMLA leave is not considered "wages" for certain purposes under federal tax law, therefore school districts are not required to pay the employer's typical share of payroll taxes for Social Security on such compensation (typically 6.2 percent of wages, up to an income limit). However, 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.

The entitlement to EFMLA leave is scheduled to expire on December 31, 2020. As with the EPSLA, the Department has authority to issue regulations implementing the EFMLA, which may affect the information above.

2. Implications for School Districts

As with traditional FMLA leave, employers are responsible for designating leave taken by employees for a qualifying condition as EFMLA leave. Thus, when an employee provides notice to the school district of an inability to work 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—including in situations where the employee would otherwise qualify

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for Washington’s paid family and medical leave (“PFML”) or paid administrative leave under a local labor agreement.

Leave taken by an employee per the EFMLA counts against the employee’s overall entitlement of up to 12 weeks of FMLA leave during a 12-month period, according to Department guidance. In other words, 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 due to the employee’s own serious health condition during the 12-month period. Likewise, if an employee has exhausted one or more weeks of FMLA leave during the current 12-month period, the employee does not qualify to use those weeks for childcare under the EFMLA.

The Department has opined in nonbinding guidance that 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. Whether an employee is eligible to use accrued leave for care of a child without a serious health condition will depend on allowed uses for leave under state law, any collective bargaining agreement, and employer policy.

EFMLA leave is distinct from PFML under Washington law, chapters 192-500 through 192-810 WAC, which does not generally allow leave for care of children other than within a year of birth or placement. However, an employee could potentially qualify for both EFMLA leave and PFML, such as when 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 such situations, whether the employee may receive PFML compensation—as opposed to job-protected leave—may depend 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.

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 such 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 claiming a separate entitlement to EFMLA leave (subject to collective bargaining obligations).

The text of the federal legislation and Department guidance do not explicitly address applicability of the EFMLA to school district substitutes or other temporary employees. However, the 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 takes EFMLA leave, including hours during which the

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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 such employee would not be entitled to use EFMLA leave. However, 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.

Finally, school districts should be sure to separately track EFMLA leave to avoid paying the employer’s share of Social Security payroll taxes on such compensation.

Conclusion

School districts with questions about how these new paid leave requirements affect their organizations may contact any of the Porter Foster Rorick attorneys listed below.

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Abbreviations Used

EE: Employee

ER: Employer

At a Glance: Family and Medical Leave
Families First Coronavirus Response Act (Effective April 1, 2020)

	Amount of Leave	Qualifying Reasons	EE Eligibility	Compensation Rate	Return from Leave	Concurrent w/ Other Leave?	Misc.
Emergency Family and Medical Leave Act (EFMLA)	Up to 12 workweeks in a 12-month period. ¹	Care for EE's child if the school or place of care is closed or the childcare provider is unavailable due to the COVID-19 emergency. ²	Employed by ER for ≥ 30 calendar days prior to the need for leave. ³ ERs may exclude healthcare providers and emergency responders. ⁴	First 2 workweeks (10 days) are unpaid (unless EE elects to use other accrued paid leave). ⁵ For the remaining 10 workweeks, EEs are entitled to pay ≥ 2/3 the EE's regular rate, up to a maximum of \$200/day and \$10,000 total. ⁶	ERs with ≥ 25 EEs: FMLA provisions apply (see below). ERs with < 25 EEs: not obligated to restore EE under certain conditions. ⁷	EE may use other accrued paid leave during the first 10 days. For remainder of leave, ER may agree to permit EE to supplement EFMLA leave with accrued paid leave, up to EE's normal earnings. ⁸	Supplements the preexisting FMLA. Expires December 31, 2020. Any wages paid for EFMLA leave are not subject to employer portion of Social Security payroll taxes. ⁹

Existing Federal and Washington Laws

Federal Family Medical Leave Act (FMLA)	Up to 12 workweeks in a 12-month period. ¹⁰ Up to 26 workweeks in a 12-month period for military caregiver leave. ¹¹	1. Birth or placement of a child. 2. Care for a family member (spouse, child, or parent) who has a "serious health condition." 3. EE's own "serious health condition" makes the EE unable to perform the functions of the position. 4. Any qualifying exigency leave related to military service. ¹²	Employed by ER for ≥ 12 months, has ≥ 1,250 hours of service over the previous 12-month period, and ER has ≥ 50 EEs. ¹³	Unpaid (unless an EE elects, or ER requires, EE to use accrued paid leave). ¹⁴	Must be restored to same or equivalent position and have no loss of employment benefits accrued prior to leave (exception exists for highly compensated EEs). If the EE would have been laid off, the EE can still be laid off. ¹⁵	Runs concurrently with other paid leave if EE elects or ER requires. ¹⁶	ER designates leave under FMLA. ¹⁷ Special rules apply for instructional employees of school districts, such as teachers and paraeducators. ¹⁸
Washington Paid Family and Medical Leave (PFML)	Up to 12 workweeks per year generally. Up to 16 or 18 workweeks in certain circumstances (e.g., employee requires both medical and family leave or has serious health condition related to childbirth).	1. Birth or placement of a child. 2. Care for a family member (spouse, child, parent, spouse's parent, sibling, grandchild, grandparent) who has a "serious health condition." 3. EE's own "serious health condition." 4. Qualifying exigency leave related to military service.	EE has worked ≥ 820 hours in Washington during the qualifying period.	Partial wage replacement, up to 90% of average weekly pay and up to a maximum of \$1,000 per week.	Rights are the same as FMLA (see above), but they <u>only</u> apply to an EE who has worked 1,250 hours for that employer over the last 12 months where the employer has at least 50 EEs (same as the FMLA). ¹⁹	ER may designate accrued leave as "supplemental benefit." Runs concurrently with FMLA in theory, but in practice, the state will most likely not know whether an EE has used FMLA leave.	EEs apply to the Washington Employment Security Department (ESD) for eligibility and benefit determinations.
Washington Family Care Act (FCA)	If under the terms of a CBA or applicable ER policy an EE is entitled to paid time off, then an ER must allow an EE to use such time off for the qualifying reasons regarding family care.	1. Care for a child of the EE with a health condition that requires treatment or supervision. 2. Care for a family member (spouse, parent, spouse's parent, or grandparent) who has a "serious health condition" or an emergency condition.	All EEs with a paid time off benefit per the applicable CBA or ER policy.	See the applicable CBA or ER policy.	See the applicable CBA or ER policy.	See the applicable CBA or ER policy.	



At a Glance: Sick Leave

Families First Coronavirus Response Act (Effective April 1, 2020)

	Amount of Leave	Qualifying Reasons	EE Eligibility	Compensation Rate	Return from Leave	Concurrent w/ Other Leave?	Misc.
Emergency Paid Sick Leave Act (EPSLA)	Full-time EEs: 80 hours. Part-time EEs: hours that such EE works on average over a 2-week period. ²⁰	<ol style="list-style-type: none"> Subject to a federal, state, or local quarantine or isolation order related to COVID-19. Advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. Experiencing symptoms of COVID-19 and seeking a medical diagnosis. Care for an individual who is subject to quarantine/isolation order or has been advised by healthcare provider to quarantine. Care for EE's child if the school or place of care has been closed or childcare provider is unavailable due to COVID-19 precautions. <p>The U.S. Secretary of Health and Human Services also may designate substantially similar conditions.²¹</p>	All EEs. ERs may exempt healthcare providers and emergency responders. ²²	<p>For reasons 1–3: 100% of pay up to \$511/day and \$5,110 total.</p> <p>For reasons 4–5: 2/3 of pay up to \$200/day and \$2,000 total.²³</p>	Unlawful to discharge, discipline, or discriminate against any EE who uses EPSLA. ²⁴	<p>ER cannot require an EE to use other paid leave provided by the ER before the EE uses EPSLA.²⁵</p> <p>ER may allow EE to supplement benefits with preexisting leave entitlements, up to normal earnings.²⁶</p>	<p>Expires December 31, 2020.</p> <p>Any wages paid for EPSLA leave are not subject to employer portion of Social Security payroll taxes.²⁷</p>

Existing Washington Laws

RCW 28A.400.300	Up to 12 days per year.	Illness, injury, and emergencies.	All certificated and classified EEs under Title 28A RCW.	100% of pay.	Sufficient cause is required for discharge, and appropriate use of leave would not meet this standard.	See the applicable CBA or ER policy.	Only applies to school districts.
Paid Sick Leave per Initiative 1433	At least 1 hour of sick leave for every 40 hours of work.	<ol style="list-style-type: none"> Mental or physical illness, injury, or health condition. Need for medical diagnosis, care, or treatment of a condition above. Need for preventative medical care. Care for a family member (spouse, child, parent, spouse's parent, registered domestic partner, grandparent, grandchild, or sibling) under provisions 1, 2, or 3, above. Workplace closed by order of a public health official for any health-related reason or EE's child's school or place of care has been closed for such a reason. Domestic Violence Leave Act reasons under Chapter 49.76 RCW. 	<p>All EEs meeting the definition under the Minimum Wage Act (RCW 49.46.010)-exempts salaried professionals.</p> <p>EEs begin accruing immediately but are not entitled to use sick leave until 90th calendar day after starting employment.</p>	100% of pay.	Unlawful to discriminate or retaliate against EE who uses paid sick leave.	See the applicable CBA or ER policy.	Employers may provide more generous paid sick leave policies permitting use of paid sick leave for additional purposes.



LEGAL AUTHORITIES

Federal and State Family and Medical Leave Laws

Federal Emergency Family and Medical Leave Act (EFMLA): H.R. 6201, 116th Cong. (2020).

Federal Family Medical Leave Act (FMLA): 29 U.S.C. § 2611 *et seq.*; 29 C.F.R. Part 825.

Washington Paid Family and Medical Leave (PFML): Title 50A RCW; chapters 192-500 through 192-810 WAC.

Washington Family Care Act (FCA): RCW 49.12.265–.295; Chapter 296-130 WAC.

Federal and State Sick Leave Laws

Federal Emergency Paid Sick Leave Act (EPSLA): H.R. 6201, 116th Cong. (2020).

RCW 28A.400.300.

Paid Sick Leave, Initiative 1433: RCW 49.46.200–.210; WAC 296-128-600 *et seq.*

ENDNOTES FOR FEDERAL LEGISLATION

¹ H.R. 6201 § 3102 (amending 29 U.S.C. § 2612(a)(1)).

² H.R. 6201 § 3102 (new § 110(a)(2) to 29 U.S.C. § 2611 *et seq.*).

³ H.R. 6201 § 3102 (new § 110(a)(1)(A) to 29 U.S.C. § 2611 *et seq.*).

⁴ H.R. 6201 § 3105.

⁵ H.R. 6201 § 3102 (new § 110(b)(1) to 29 U.S.C. § 2611 *et seq.*).

⁶ H.R. 6201 § 3102 (new § 110(b)(2) to 29 U.S.C. § 2611 *et seq.*).

⁷ H.R. 6201 § 3102 (new § 110(d) to 29 U.S.C. § 2611 *et seq.*).

⁸ U.S. Dep't of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (2020).

⁹ H.R. 6201 § 7005.

¹⁰ 29 U.S.C. § 2612(a)(1).

¹¹ 29 U.S.C. § 2612(a)(3).

¹² 29 U.S.C. § 2612(a)(1).

¹³ 29 U.S.C. § 2611(2).

¹⁴ 29 U.S.C. § 2612(c)–(d).

¹⁵ 29 U.S.C. § 2614.

¹⁶ 29 U.S.C. § 2612(d).

¹⁷ 29 C.F.R. § 825.301.

¹⁸ 29 C.F.R. § 825.600 *et seq.*

¹⁹ RCW 50A.35.010.

²⁰ H.R. 6201 § 5102(b)(2).

²¹ H.R. 6201 § 5102(a).

²² H.R. 6201 § 5102(a).

²³ H.R. 6201 § 5110(5).

²⁴ H.R. 6201 § 5104–5105.

²⁵ H.R. 6201 § 5102(e).

²⁶ U.S. Dep't of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (2020).

²⁷ H.R. 6201 § 7005.