

MEMORANDUM

TO: HR Directors

FROM: Karen L. Wingo

DATE: March 30, 2020

SUBJECT: Families First Coronavirus Response Act – Additional Information

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law which included the Emergency Family and Medical Leave Expansion Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSL). The U.S. Department of Labor (DOL) has issued additional guidance concerning the implementation of the FFCRA. This memo is to provide additional information and guidance concerning the Act and the implications for state government employees and employers. The memorandum also provides information for agencies and higher education institutions (collectively “agencies”) on tracking the use of EFMLA and EPSL leave by employees, and implementation of the leave types in SCEIS.

This memorandum and the guidance contained in it are based on information provided by the DOL at the time of issuance. The DOL has indicated that it will promulgate regulations related to the FFCRA in April. If the regulations impact guidance provided by the South Carolina Department of Administration (Admin) on the FFCRA, we will provide follow-up communication.

As a reminder, agencies are still under the directive from Governor Henry McMaster to maximize work-from-home opportunities to the maximum extent possible. EFMLA and EPSL should only be used by employees if the employee is unable to work and/or the agency has exhausted all work-from-home opportunities.



General Questions and Answers

- **What are the requirements for posting the FFCRA notice?**

Employers are required to post the notice by April 1, 2020. Each agency must post the Notice in a conspicuous place on its premises. The DOL has indicated that an employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website. At this time, there is no requirement to post the notice in multiple languages, but the DOL has indicated it is working to translate the Notice into additional languages.

The DOL has indicated that the Notice does not need to be shared with new job applicants or prospective employees because the law only applies to current employees. However, notice of the FFCRA requirements must be provided to new hires. According to the DOL, if you hire a job applicant, you must convey this notice to them, either by email, direct mail, or by posting this notice on the premises or on an employee information internal or external website.

- **Are health care providers and emergency responders eligible to take Emergency Paid Sick Leave and EFMLA leave?** Yes, but the FFCRA permits employers to exclude an employee who is a health care provider or an emergency responder from taking Emergency Paid Sick Leave and EFMLA leave. The DOL has indicated that to minimize the spread of COVID-19, employers are encouraged to “be judicious” when using the definitions of health care provider and emergency responders to exempt health care providers from the provisions of the FFCRA.

Admin recommends that exemptions be applied on an employee or position basis.

The Act permits the Secretary of Labor to issue regulations excluding specific employers. As of the date of this memo, no such regulations have been issued.

- **How is health care worker defined for purposes of Emergency Paid Sick Leave the EFMLA?** For the purposes of identifying employees who may be exempted from Emergency Paid Sick Leave or EFMLA by their employer under the FFCRA, according to the DOL guidance, a health care provider is 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 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 highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

- **How is an emergency responder defined for purposes of Emergency Paid Sick Leave the EFMLA provided by the FFCRA?** For the purposes of identifying employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, according to the DOL guidance, 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, firefighters, 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 highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

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

- **Can EPSL or EFMLA leave be used for absences before April 1, 2020?** No. EPSL and EFMLA cannot be provided retroactively.
- **Can employees take Emergency Paid Sick Leave or EFMLA leave intermittently (i.e. in less than full-day increments) while working from home or the physical workplace?** Yes, if an employee is unable to work their normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, the employee may take paid sick leave intermittently. Similarly, if the employee is prevented from working their normal schedule of hours because they need to care for their child whose school or place of care is closed, or the child care provider is unavailable, because of COVID-19 related reasons, the employee can take expanded family medical leave intermittently.

Intermittent leave must be taken in increments set by the employer.

- **Should agencies update FMLA and Leave policies?** Yes. In addition to the required posters, agency policies concerning FMLA and sick leave should be updated to reflect the leave available under FFCRA. However, since the leave provided by the FFCRA is only effective for a limited period of time, it is recommended that agencies issue amendments to their current policies which include an expiration date of Dec. 31, 2020, rather than making permanent changes to the policies. These amendments can be provided to employees via email or by posting the updates on the agency intranet.
- **If an agency is closed, are employees still eligible for Emergency Paid Sick Leave and EFMLA?** For the purposes of Emergency Paid Sick Leave and EFMLA, the state is considered a single employer and has not closed. Therefore, actions taken by an agency to reduce services or restrict in person visits to the agency do not affect an employee's eligibility for Emergency Paid Sick Leave or EFMLA.
- **If an employee is furloughed on or after April 1, 2020 (the effective date of the FFCRA), is the employee eligible for Emergency Paid Sick Leave or EFMLA leave?** No. If an employee is furloughed because an agency does not have enough work or business for an employee, the employee is not entitled to then take Emergency Paid Sick Leave or EFMLA leave.
- **Can an employee collect unemployment insurance benefits for a period of time in which they receive paid sick leave and/or expanded family and medical leave?** No. If an individual is provided with EPSL or EFMLA, he or she is not eligible for unemployment insurance.

If an individual has been separated from employment and is collecting unemployment insurance, they are not eligible for emergency paid sick leave or EFMLA.

For specific information regarding unemployment benefits and COVID-19, agencies and employees are encouraged to visit the South Carolina Department of Employment and Workforce's website: <https://dew.sc.gov/covid-hub>.

- **If I am an employer, may I require an employee to supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under my paid leave policy?** No. Under the FFCRA, only the employee may decide whether to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave.
- **Are student workers eligible for Emergency Paid Sick Leave or EFMLA leave?** If the student meets the definition of employee under the federal Fair Labor Standards Act, the employee is eligible for the leave.

- **If an employee is on leave before April 1, 2020, for any reason, is the employee eligible for Emergency Paid Sick Leave and EFMLA leave?** Yes. So long as the employee meets all other eligibility requirements, they would be eligible for Emergency Paid Sick Leave and EFMLA leave. This leave may not, however, be applied retroactively to leave taken before April 1, 2020.
- **Are employees required to take other types of leave (e.g. annual leave, sick leave and family sick leave) before taking leave allowed under the FFCRA?** No. An employer cannot require an employee to take other leave before taking Emergency Paid Sick Leave or EFMLA leave. The employee may, however, elect to use other leave to supplement the paid leave provided under the FFCRA in order to receive their full salary. Employees may also choose to use other types of leave available before taking emergency paid sick leave or EFMLA leave.
- **How does Emergency Paid Sick Leave and EFMLA leave work together and with other types of leave available to employees?** While each employment situation is different, below is a simplified sequence of leave taken by a typical employee beginning April 1. This is assuming the employee is not considered critical and cannot work from home.
 - Employee begins EFMLA leave and the first 10 days are unpaid. The employee takes Emergency Paid Sick Leave available under the FFCRA concurrently with these first 10 days.
 - Beginning on day 11 of the EFMLA leave, the employee receives pay in accordance with the provisions of the EFMLA subject to applicable daily and aggregate limits. The employee may use other leave types to make up the difference in the benefit provided under the EFMLA and the employee's regular salary if necessary.
 - When the maximum amount of paid EFMLA leave is received by the employee, the employee will continue EFMLA leave for the remainder of the eligible period, but this time the employee will not be paid under the EFMLA. Employees may use leave (i.e. sick leave, advanced sick leave, compensatory time, holiday compensatory time and annual leave) for this unpaid period. This paid leave will run concurrently with the EFMLA leave. This is consistent with the current rules surrounding FMLA and leave.
 - The employee may be advanced sick leave for use during the period of unpaid EFMLA leave in accordance with previously provided guidance.

EFMLA Specific Questions and Answers

- **How is 30 calendar days calculated for purposes of determining eligibility for EFMLA?** An employee is considered to have been employed for 30 calendar days if the employee has been on payroll with any state agency for the 30 calendar days immediately prior to the day the leave would begin. This does not necessarily mean that the employee has actually worked 30 calendar days. For example, if I was placed on payroll beginning March 2, 2020, my eligibility begins 30 calendar days from March 2, 2020, even if I only worked

Monday through Friday of this period.

If an employee has been working for an agency as a temporary employee, and the employee is subsequently hired into an FTE-position, the days previously worked as a temporary employee count toward this 30-day eligibility period.

- **Is the 12 workweeks of leave provided under the EFMLA included in the 12 workweeks of leave provided by the FMLA?** Yes. Employees are limited to a combined total of 12 weeks of leave taken under the EFMLA and FMLA during a calendar year. If an employee has already taken 12 workweeks of FMLA leave during the applicable 12-month period, they may not take additional leave under the EFMLA.

Tracking of FFCRA Leave

- **Is SCEIS developing leave types to accommodate FFCRA leave types?**
Yes, and more guidance regarding use of those leave types will be distributed in April.
- **When will those leave types be available in the system?**
The implementation timeline has those leave types going live on or around April 20.
- **How should agencies track employees' use of FFCRA leave types before leave types are available in SCEIS?**
Admin is developing a sample tracking spreadsheet that agencies can use to track FFCRA leave. A copy of that tracking spreadsheet will be available in the next few business days.
- **How will employees request leave under FFCRA?** The Division of State Human Resources (DSHR) has created a suggested communication for agencies to provide to their employees, as well as forms to be used by employees to request leave under the FFCRA.

DSHR will continue to closely monitor developments related to COVID-19 and provide additional guidance as needed. If you have questions regarding the information in this memo, please contact your agency's human resources consultant (803-896-5300) or me (803-422-8645).