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**March 31, 2020**

**LABOR RELATIONS UPDATE**

**Federal Medical Leave Act (FMLA) and New York State Paid Leave**

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**Why We Have Prepared This Update**

As a result of the COVID-19 crisis New York State and the Federal Government have added to requirements under the Federal Medical Leave Act (FMLA) and New York State Paid Leave laws, as it relates to certain businesses. Public agencies, which includes School Districts and BOCES, are included in (some) of these changes.

Because of these changes, we have prepared a Labor Update to provide this information to our clients.

This update will discuss both of these laws, and the requirements of each.

**New York State Leave**

1. **What is Paid Leave in NYS?**

It allows for two (2) weeks of paid leave to certain employees if they meet certain, specific eligibility requirements. The law was signed on March 18, 2020 and takes effect immediately. This benefit is not available to employees if they are able to work through remote access or other means.

2. **Does NYS Paid Leave apply to School Districts?**

Yes.

3. **What are the Qualifying Reasons for Taking NYS Paid Leave?**

An employee who is subject to mandatory or precautionary orders of quarantine or isolation issued by New York State (NYS), Department of Health (DOH), local board, or other authorized government agency.

There are exceptions for “paid” leave:

- a. When employee is asymptomatic, no diagnosis, and the person can work from home during period or isolation, there is no paid leave available; or
- b. If the employee engaged in certain foreign travel voluntarily to a country or territory that the CDC listed as Level 2 or 3 risk, and if employee had notice of that designation, and had notice that traveling to the country would preclude them collecting NYS sick leave, there would be no paid leave available. (May be entitled to unpaid leave.)

4. How long is the leave?

For public sector employers, including school districts, the period is fourteen (14) days (ten (10) work days) of paid leave.

5. What is the Rate of Pay?

The employee’s regular pay rate.

6. Are there reinstatement rights?

Yes. In addition, there are anti-discrimination and anti-retaliations protections included.

7. Is paid leave under this new law available retroactively?

Yes. According to recent FAQs released by New York State, an Employee may take quarantine leave “if they are still currently under a mandatory or precautionary order of quarantine or isolation issued by the State, Department of Health, local board of health, or government entity, even if that order was issued prior to the enactment of the COVID-19 quarantine leave.”

8. Can an Employer require an Employee to use their accrued time?

No.

9. Can a Covered Employee take leave under NYS and the Federal FMLA+ and EPSL?

No. The NYS law provides that, to the extent a Federal benefit exists, an employee would not be eligible under state law. Instead, if the NYS law applies to an employee, the NYS law would only supplement where the Federal law does not provide coverage, if at all.

### **United States Emergency Paid Sick Leave (EPSL)**

1. What is EPSL?

EPSL allows for two weeks of paid leave to employees who are ***unable to work or telework*** for certain qualifying reasons. For full-time employees, two (2) weeks is the equivalent of eighty (80) hours at the employee’s regular rate of pay. For part-time employees the pay equals two (2) weeks of pay based on the number of hours the employee works, on average, over a two-week period. If an employee has variable hours of work each week, the employee’s average hours of work over the preceding six (6) months.

The effective date for EPSL is April 1, 2020.

2. Does EPSL apply to School Districts?

Yes.

3. What are the Qualifying Reasons for an employee to be eligible for EPSL?

- a. Is subject to a federal, state, or local quarantine or isolation order;
- b. Has been advised by a health care provider to self-quarantine;
- c. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- d. Is caring for an individual subject (or advised) to quarantine or isolation;
- e. Is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
- f. Is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.

4. What is pay rate for Covered Employees?

- a. If an employee qualifies because he or she is subject to quarantine or isolation order, has been advised by a provider to quarantine or isolate, or is experiencing symptoms and is seeking a medical diagnosis (see, question 4(a),(b), and (c), above), the employee is paid at 100% of their regular rate. (\$511.00 max. per day, \$5110.00 max. aggregate.) **Note:** the language in the statute states the rate is “set at the highest of the employee’s regular rate as determined under the FSLA, or Federal minimum wage, or state minimum wage.
- b. If an employee qualifies because he or she is caring for an individual who is subject to a quarantine or isolation order or has been advised by their provider to quarantine/isolate, is caring for a minor son or daughter whose school/daycare is closed (see, question 4(d), (e), and (f) above), the employee is paid at two-thirds (2/3) of their regular rate. (\$200 max. per day, \$2000 max. aggregate.)

5. Is Overtime counted?

Yes. Pursuant to clarification by the Department of Labor (DOL) an employer should factor in any overtime an employee is typically scheduled to work in determining his or her rate of pay. However, the amount of paid sick leave is capped at eighty (80) hours over a two-week period. (So, for example, this could be paid fifty (50) hours in week one, and thirty (30) hours in week two.)

The DOL has also stated that pay does not need to include a premium for overtime hours under either EPSL or FMLA+.

6. How long must an Employee be employed to be covered?

There is no requirement. If the employee is employed, even for one (1) day, then the employee may be eligible.

7. If an employee is caring for someone who is not a family member, are they eligible for EPSL?

The statute makes clear it can be an “individual” and does not require it be a family member. An earlier version stated, “family member” but this was changed to “individual”. This change seems to indicate that the person does not have to be a “family member” in order to be eligible for EPSL.

8. What does “is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services” (See 3(f) above), mean?

An employee would be required to demonstrate she or he is experiencing a condition that has been specifically identified by the Secretary of Health and Human Services. The Secretary has not yet identified any conditions like COVID-19. Therefore, an employer would not yet be required to grant an

employee leave under this provision until the Secretary of HHS has identified “substantially similar condition(s).

9. Can a School District require an employee to use accrued time before using EPSL, or FMLA+?

No. There is a specific prohibition in the legislation that employers cannot require the use of an employee’s accrued time first. An employee may choose to use it, or not. It is entirely up to the employee. An employee must be able to use EPSL first, before using other leave.

Any leave taken prior to the effective date could be taken as accrued leave. It also would not be eligible for reimbursement or credit, if any.

**Enhanced Family Medical Leave Act, or FMLA+**

1. What is FMLA+?

FMLA+ allows employees twelve (12)-weeks of job-protected leave if an employee is **unable to work or telework** because the employee is needed to care for a minor son or daughter because the child’s school or childcare facility has been closed or the child’s childcare provider is unavailable due to the public health emergency.

The effective date for FMLA+ is April 1, 2020.

2. Does FMLA+ apply to School Districts?

Yes.

3. What are the Qualifying Reasons for an employee to be eligible for FMLA+?

Caring for a minor son or daughter whose school district or day care provider is closed, the childcare provider is closed, or unavailable due to reasons related to COVID-19. For purposes of this provision, USDOL Guidance of the traditional FMLA provisions which defined “son or daughter” extended this definition to mean an adult child who (1) has a mental or physical disability and (2) is incapable of self-care because of that disability.

4. Is FMLA+ paid?

Yes, however, the first two (2) weeks are unpaid. However, if eligible, an employee can take the first two (2) weeks of unpaid FMLA+ as EPSL. EPSL runs concurrently with leave provided under FMLA+.

5. What is the Rate of Pay for an employee who is out on FMLA+?

After the first ten (10) days leave is paid at 2/3 of the employee’s regular rate of pay, based on the number of hours an employee would otherwise be scheduled.

Use of the FMLA+ for the purposes outlined above does impose a cap of a maximum rate of pay of \$200.00/per day, and a maximum payment per employee of \$10,000.00 in the aggregate.

6. Are there job protection/reinstatement rights?

Yes. As with “FMLA Classic” the employee must be reinstated to their position or a substantially similar position, with a specific and detailed exception for employers with twenty-five (25) or less employees.

7. Is the Federal Government reimbursing School Districts for payments under FMLA+ (and EPSL)?

No. In the past, tax-exempt employers, like School Districts, have been allowed to claim a credit against social security tax for wages paid to employees. This has not been extended under the FFCRA, or in any other recently passed legislation. This means that, as of today, the EPSL is an unfunded mandate. While Congress may consider additional legislation which could provide public sector employers with financial relief, there is no guarantee at this point.

It should be noted, however, that public employers, like private employers, do not have to pay FICA or Medicare for wages paid to employees on leave granted under the FFCRA.

8. How long must an Employee be employed to be eligible for FMLA+?

The Department of Labor has said the employee is eligible if they have been “on the payroll” for thirty (30) days. So, if you have had an employee on the payroll for the thirty (30) calendar days immediately prior to the day the leave would begin, they would be covered.

**Can EPSL or FMLA+ be used intermittently, or does it have to be used in one block?**

It depends.

Unless a person is teleworking, paid sick leave for qualifying reasons must be taken in full-day increments and not intermittently if the leave is being taken because:

- An employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- An employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- An employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- An 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
- An employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

In contrast, if requested by the employee, and the employer agrees, an employee may take paid sick leave intermittently under the FMLA+ if the employee is caring for a minor child whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19 related reasons.

**Documentation—Is It Required as it is Under EPSL and FMLA Classic?**

Yes. DOL has released additional regulations to cover some aspects of EPSL and FMLA+. In either case, appropriate documentation must be submitted.

This could include quarantine or isolation orders from a Health Department or other agency, a healthcare providers’ recommendation for the employee to self-quarantine/isolate due to COVID-19 related reasons, or a notice of a school or child care provider closure(s) posted on a government, school, or day care website, published in a newspaper, or an email from an employee or official of the school, daycare, or child care provider.

**Policy & Notification Requirements**

1. Does an employer have to provide Notice to Employees?

Yes. Employers must post and keep posted in conspicuous places where notices to employees are customarily posted, a notice of the requirements in the new legislation. The Department of Labor published a model and approved form of this notice.

2. Does an employer need to update existing FMLA policies and procedures related to the changes to FMLA?

Yes. Every public sector employer needs to either:

- (a) Update existing policies, or create an addendum to existing policies; or
- (b) Create new policies if the employer did not previously have an FMLA policy.

### Miscellaneous

1. Were there other changes in the FFCRA (H.R. 6201) that could effect School Districts?

Yes. These changes included changes to greater flexibility for school meal services, additional food assistance under the SNAP program, unemployment enrichment, and free COVID-19 testing.

2. What if Employees were laid off or furloughed before the effective date of April 1, 2020? Are they covered under FMLA+ or EPSL?

The Department of Labor has made clear that EPSL and/or FMLA+ are not available to an employee on furlough, temporary layoff, reduced work hours, or who actually has been laid off prior to April 1, 2020.

3. Is the paid leave under EPSL and FMLA+ in addition to the twelve (12) weeks unpaid leave under FMLA Classic?

No. The FFCRA has simply added new qualifying criteria and payment for certain leave. So, if an employee has already used a portion of “FMLA Classic”, then the amount used would be subtracted from the total of twelve (12) weeks, to determine how much time is left to use under EPSL and/or FMLA+.

4. Can Employees “top off” EPSL or FMLA+ payments with accrued paid time off to make their paycheck “100%”?

No, unless the Employer agrees (or has agreed in the past) to allow “topping off”.

5. What if a healthcare provider provides documentation an employee cannot work because of a chronic condition that may make him or her more susceptible to COVID-19 infection, such as asthma, lung disease, autoimmune disorder, or other condition? Are they entitled to EPSL and/or FMLA+?

They would only be entitled to FMLA+ or EPSL if they meet a qualifying reason. However, they may be eligible under FMLA Classic, which is unpaid. Each situation would have to be reviewed carefully and documented appropriately.

The information presented in this update is subject to change as regulations continue to be crafted, and as additional legislation continues to work its way through the Federal and State governments. Should this occur and as we get new information, we will provide any necessary updates.

As always, should you have any questions, please email one of our Labor Relations Specialists, or call (315) 361-5522 and leave a message, and one of our staff members will return your call.