

# MASSACHUSETTS TEACHERS ASSOCIATION

## DIVISION OF LEGAL SERVICES

2 HERITAGE DRIVE, 8TH FLOOR  
QUINCY, MASSACHUSETTS 02171-2119

### INTERIM GENERAL COUNSEL

LAURIE R. HOULE

### DEPUTY GENERAL COUNSEL

RYAN M. LEACH

617.878.8000

1.800.392.6175

FAX: 617.248.6921

### STAFF COUNSEL

MATTHEW D. JONES  
RICHARD A. MULLANE  
QUESIYAH S. ALI  
RYAN P. DUNN  
ASHLEY F. WALTER  
MARK A. HICKERNELL  
JONATHAN M. CONTI  
JENNIFER L. MACDOUGALL

### PARALEGAL

KATHY NAGLE  
SARAH B. KELLEY

To: MTA Local Presidents  
MTA Affiliate Services

From: Laurie Houle, Interim General Counsel  
Matt Jones, Staff Counsel

Cc: Merrie Najimy, MTA President  
Max Page, MTA Vice-President  
Lisa Gallatin, MTA Executive Director-Treasurer

Date: April 7, 2020

Re: Coronavirus, FFCRA, & FMLA

The Families First Coronavirus Response Act (“FFCRA”), which went into effect on April 1, 2020, has raised questions regarding members’ rights under the FFCRA as well as its impact on their rights under the Family Medical Leave Act (“FMLA”). While rights under the FMLA remain unchanged, the FFCRA provides temporary additional rights to paid leave, which this Q&A addresses.<sup>1</sup>

### **FFCRA**

The FFCRA has two sections that provide emergency paid leave for employees, effective from April 1, 2020 through December 31, 2020.

#### ***EMERGENCY PAID SICK LEAVE ACT***

#### **1. What is emergency paid sick leave under the FFCRA?**

The law provides up to 10 days of paid sick leave for employees. Full-time employees are entitled to 80 hours paid sick time. Part-time employees are entitled to the number of hours they normally work on average in a 2-week period. This may be taken intermittently if both the employer and employee agree.

---

<sup>1</sup> This memo provides guidance only and does not have the force of law. It may be subject to change as the DOL issues regulations or future legislation that may be passed at the state or federal level.

## **2. Who is covered by the emergency paid sick leave?**

All public employers, as well as private employers with fewer than 500 employees. All their employees are covered regardless of length of employment, including seasonal and temporary workers.<sup>2</sup>

## **3. Are there conditions that must be met to receive emergency paid sick leave?**

Leave may be used only if the employee is unable to work because of any of the following:

- a. Employee is subject to a federal, state, or local quarantine or isolation order related to coronavirus;
- b. Employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
- c. Employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
- d. Employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to coronavirus; or who has been advised by a health care provider to self-quarantine due to concerns related to coronavirus
- e. Employee is caring for a son or daughter<sup>3</sup> if a school or place of care has been closed due to coronavirus, or the childcare provider of the son or daughter is unavailable due to coronavirus;
- f. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor and Secretary of the Treasury.

## **4. How much are employees paid under the emergency paid sick leave?**

Compensation depends on the reason for the emergency leave. For leave related to an employee's own illness or quarantine (see (a)-(c) above), the employee is entitled to their full rate of pay up to a maximum of \$511 per day, capped at \$5110 total.

For leave related to caring for another person, including needing to care for a child due to closing of school or childcare (see (d)-(f) above), the employee is entitled to 2/3 their regular rate of pay up to a maximum of \$200 per day, capped at \$2000 total.

Because the FFCRA does not diminish other rights or benefits, employees may supplement emergency paid sick leave with accrued paid leave under existing CBAs or policies to attain normal earnings for the period of emergency paid sick leave.

---

<sup>2</sup> The Secretary of Labor may, for good cause, issue regulations that exclude certain health care providers and emergency responders. In guidance (regulations have not issued yet), the DOL includes as potentially part of that exemption anyone employed at a health care center, clinic, post-secondary educational institution offering health care instruction, medical school, pharmacy, and any facility performing laboratory or medical testing.

<sup>3</sup> "Son or daughter," as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing *in loco parentis*, under 18 years of age.

**5. Do employees have to use their accrued leave before receiving the benefit of the emergency paid sick leave?**

No, emergency paid sick leave may be used prior to any existing paid leave.

**6. Does emergency paid sick leave “carry over” into another year like some accrued leave?**

No; this benefit expires December 31, 2020 and employees are not entitled to reimbursement for unused leave under this provision.

**7. Can employees use emergency paid sick leave if their employer closes, lays-off, furloughs, or reduces hours due to lack of work?**

No, emergency paid sick leave is only available for a qualifying reason set forth above. However, prorated emergency paid sick leave may be available when the reduction in hours is not due to a lack of work but because a coronavirus-related reason prevents an employee from working a full schedule.

**8. Can employees get in trouble for invoking their rights under this law?**

No, the FFCRA prohibits employers from retaliating against employees who utilize emergency paid sick leave.

***EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT***

**9. What is the Emergency Family and Medical Leave Expansion Act (“EFMLEA”)?**

The EFMLEA amends the FMLA to provide for paid leave for childcare needs related to the coronavirus public health emergency for up to 12 weeks leave. It is only available to employees who are unable to work due to the need to care for a son or daughter<sup>4</sup> if the school or child-care has closed or is unavailable due to the public health emergency related to the coronavirus. This may be taken intermittently if both the employer and employee agree.

**10. Who is covered by the EFMLEA?**

All public employers (except most federal employees), as well as private employers with fewer than 500 employees. Employees must be employed for 30 days to be eligible for this leave, which is much shorter than the 12 months required for FMLA.<sup>5</sup>

---

<sup>4</sup> “Son or daughter,” as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing *in loco parentis*, under 18 years of age.

<sup>5</sup> The Secretary of Labor may, for good cause, issue regulations that exclude certain health care providers and emergency responders. In guidance (regulations have not issued yet), the DOL includes as potentially part of that

**11. How much are employees paid under the EFMLEA?**

The first 10 days are unpaid under this provision; however, employees may elect to utilize accrued leave *or* emergency paid sick leave for these first 2 weeks. Employees may take up to 12 weeks total under the EFMLEA.

After the first 10 days, employees are entitled to not less than 2/3 their regular rate of pay (based on the number of hours normally scheduled to work), up to a maximum of \$200 per day, capped at \$10,000 total benefit.

Because the FFCRA does not diminish other rights or benefits, employees may supplement EFMLEA with accrued paid leave under existing CBAs or policies to attain normal earnings for the period of EFMLEA.

**12. Is the 12 weeks covered by the EFLMEA for childcare in addition to the 12 weeks otherwise provided under FMLA?**

No, the FFCRA does not expand the overall amount of FMLA leave available, just the covered reason for leave is expanded as set forth above. The total amount of leave in a 12-month period under the FMLA remains 12 weeks.

**13. Are employees required to provide notice of taking leave under the EFLMEA?**

Yes, if the need for leave is foreseeable, employees must provide notice as practicable.

**14. Can employees use EFMLEA leave if their employer closes, lays-off, furloughs, or reduces hours due to lack of work?**

No, EFMLEA is only available for a qualifying reason set forth above. However, prorated EFMLEA leave may be available when the reduction in hours is not due to a lack of work but because a coronavirus-related reason prevents an employee from working a full schedule.

**15. Is there job protection under the EFMLEA?**

Yes, just like with FMLA, employees who take EFMLEA leave are entitled to return to the same or substantially equivalent position with equivalent benefits, pay, and other terms and conditions of employment.<sup>6</sup>

---

exemption anyone employed at a health care center, clinic, post-secondary educational institution offering health care instruction, medical school, pharmacy, and any facility performing laboratory or medical testing.

<sup>6</sup> An employer with fewer than 25 employees may not have to restore an employee under the EFMLEA if that position no longer exists due to economic conditions or other operating conditions caused by the public health emergency. However, the employer must make a reasonable effort to restore the employee to an equivalent position or, if unavailable, then make reasonable efforts to contact the employee for a period of 1 year if an equivalent position become available.

## FMLA

### **16. Is there official guidance on the coronavirus crisis and the FMLA?**

Yes. The U.S. Department of Labor Wage and Hour Division (“U.S. DOL”), which oversees the FMLA, has issued guidance which is available here:

<https://www.dol.gov/agencies/whd/fmla/pandemic>.

### **17. What does the U.S. DOL guidance say?**

The general point of the guidance is that the requirements of the FMLA are unchanged and apply equally to the situation of a pandemic as to other situations. Rules for eligibility for FMLA leave are the same. Similarly, rules for qualifying for FMLA leave are the same. If an employee or a family member is ill from coronavirus to the extent that they have a “serious health condition,” they would be eligible for up to 12 weeks of unpaid FMLA leave.

### **18. What is a “serious health condition?”**

Not all illnesses are “serious health conditions” that trigger FMLA eligibility. Generally, before an illness becomes a “serious health condition,” there must be three consecutive days of incapacity from work coupled with ongoing treatment. Conditions that require inpatient hospital care are also “serious health conditions.” The requirements for a “serious health condition” are discussed in detail in U.S. DOL Opinion Letter FMLA-87, which is available here: <https://www.dol.gov/agencies/whd/opinion-letters/fmla/fmla-87>.

### **19. May a healthy employee use FMLA leave to stay home from work to avoid exposure to coronavirus?**

No. Although U.S. DOL encourages employers to be flexible in requiring employees to report to work to help stop the spread of coronavirus, a healthy employee cannot use FMLA leave because they do not have a “serious health condition.” If a family member is ill with a “serious health condition” caused by coronavirus, the employee may take FMLA leave on the same basis as any other illness. If an employee has been exposed to coronavirus, they may be quarantined or required to self-isolate under state and local public health laws and regulations, but that does not affect FMLA eligibility. The Emergency Paid Sick Leave Act, however, covers up to 10 days as set forth above.

**20. If an employee is on FMLA leave but the students are not attending a physical school, does the time students are not at school due to coronavirus count against my FMLA leave?**

Yes. Although students are not attending school, educational activities are continuing remotely so the schools are not “closed” for FMLA purposes. This applies whether the FMLA leave started before districts closed their physical schools or during the time of remote teaching.

**21. If an employee is out on sick leave, does the time students are not attending a physical school due to coronavirus count against my sick leave?**

The answer to this question is governed by the collective bargaining agreement and not the FMLA. However, similar principles to those governing FMLA may apply to sick leave. When collective bargaining agreements do not have a specific provision covering a situation, the past practice under the agreement can be an aid for interpretation. Since the schools are not “closed,” the period students are absent could count against sick leave. This applies whether the FMLA leave started before districts closed their physical schools or during the time of remote teaching. This question could be clarified by collective bargaining.

**22. What if an employee has a non-coronavirus issue that would qualify for FMLA leave or sick leave that prevents returning to normal work after the public health emergency ends?**

If you have an issue that may require an extended absence after students return to class in their physical school buildings, it would be prudent to raise the issue with the employer now so your employer knows when what to expect when schools reopen. Your local union can assist you in dealing with your employer.

**23. Can employees on FMLA leave or sick leave when the district closed the physical school buildings and moved to distance learning end leave earlier than planned?**

This is a complicated question that may vary depending on the facts. An employee seeking to return from approved leave early should consult their local union to assist in discussions with the district. Employees using FMLA leave for parental leave should be cautioned, however, that they may not be able to jump in and out of FMLA leave. That is, parental leave must be taken continuously so once teaching moves back into the district’s physical buildings, they would not be able to “resume” parental leave at that time (though FMLA leave would remain available for other qualifying reasons).