

MEMORANDUM

TO: HR Directors

FROM: Karen Wingo

DATE: March 27, 2020

SUBJECT: Families First Coronavirus Response Act

On March 18, 2020, the “Families First Coronavirus Response Act” (FFCRA or Act) was signed into law. The FFCRA contains two different paid leave types related to the 2019 novel coronavirus (COVID-19) that apply to South Carolina state government agencies and institutions:

- **Emergency Family and Medical Leave Expansion Act (EFMLA):** Expands the federal Family and Medical Leave Act to provide leave for employees who are unable to work, including work-from-home, as a result of having to care for a minor child due to a COVID-19 related closure of a school or childcare center.
- **Emergency Paid Sick Leave Act:** Provides up to 80 hours of paid sick leave for employees for six qualifying reasons related to COVID-19.

Both paid leave provisions take effect April 1, 2020, and both expire Dec. 31, 2020.

The leave provisions of the FFCRA are only for those employees who cannot work, including work-from-home, as a result of COVID-19. As directed by Governor Henry McMaster in his executive orders, state agencies should still first offer work-from-home opportunities to employees to the maximum extent possible and offer paid leave available to employees under the FFCRA only if work-from-home opportunities have been exhausted.

The purpose of this memorandum is to provide information concerning the leave provisions contained in the Act and the implications for South Carolina state government employees and



agencies. The South Carolina Department of Administration will issue further guidance next week regarding implementation of the provisions of the FCCRA, including information regarding how leave under the Act will be accounted for in SCEIS.

Emergency Family and Medical Leave Expansion Act

The EFMLA amends and expands the federal Family and Medical Leave Act (FMLA), on a temporary basis, to provide qualifying employees 12 weeks of leave if the employee is unable to work, including work-from-home, due to the need to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the child care provider is unavailable due to a public health emergency. A public health emergency is "an emergency with respect to COVID-19 declared by a Federal, State, or local authority."

When determining the definition of school or place of care, agencies are encouraged to interpret this as broadly as possible and to include any elementary and secondary schools, and any provider who receives compensation for providing childcare services.

- **Who is eligible to take EFMLA?** Employees are eligible to take leave under the EFMLA Act if they have been employed at least 30 calendar days. This includes employees in non-FTE and non-leave accruing positions. Unlike the other provisions of the FMLA, there are no hours worked requirements for eligibility, and employees are not required to work the normal 12-month period for leave taken pursuant to the EFMLA. If the employee worked as a temporary, time-limited or temporary grant employee and was then transitioned to an FTE position, the total time worked in both positions should be added to determine if the 30-day timeframe has been met.
- **Are there any exceptions?** An employer of an employee who is a health care provider or an emergency responder may elect to exclude from taking EFMLA.
- **Is EFMLA leave paid or unpaid?** The first 10 workdays of the 12 workweeks of leave provided under the EFMLA are unpaid, but in accordance with standard FMLA administration, employees may use any paid leave available concurrently with EFMLA leave during this 10-day period. After the first 10 workdays, paid leave must be provided for the remaining leave taken under the EFMLA. This includes leave taken by employees who do not currently earn leave including temporary, temporary grant and time-limited employees. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even, if that is more than 40 hours in a week.
- **Is the leave paid at the employees' regular rate of pay?** The paid leave provided to eligible employees shall be calculated at two-thirds of an employee's regular rate of pay and should be based on the number of hours the employee would otherwise be normally scheduled to work. Paid leave under the EFMLA is capped at \$200 per day and \$10,000 in the aggregate. Employees can use any accrued leave to augment leave taken pursuant to

the EFMLA up to their regular salary rate.

- **Does the pay include a premium for overtime?** Pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.
- **How is the regular rate of pay calculated for part-time employees?** If a part-time employee (including part-time FTE employees) works a schedule that varies from week to week 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 shall use the following in place of such number:
 - The number equal to the average number of hours that the employee was scheduled to work per day over the six-month period ending on the date on which the employee takes the paid sick time under the Act, including hours for which the employee took leave of any type.
 - 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.
- **Can EFMLA leave be taken intermittently?** Yes, leave under the EFMLA can be taken on an intermittent basis.
- **Does EFMA leave carry-over to next year?** Leave may be used at any time between April 1- Dec. 31, 2020, but paid leave provided under the Act does not carry over from year to year.
- **What notice must be given by employees taking EFMLA leave?** In any case where the necessity for leave under the EFMLA is foreseeable, an employee shall provide the employer with as much notice as is practicable.
- **What certifications or documentation can an agency require?** The normal FMLA certification process is not required for leave taken under the EFMLA. Agencies may request documentation of the school or childcare providers closure but should be flexible in the documentation accepted. For example, a printout or screen shot from a school or provider's website indicating closure related to COVID-19 may be accepted.
- **Do job restoration requirements apply to EFMLA leave?** Yes, the same FMLA restoration to position requirements apply to leave taken under the EFMLA.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act is a new, temporary form of leave that applies to any public agency, including all South Carolina state government agencies and institutions. State employees

may take up to 80 hours of paid sick leave for one of six qualifying reasons outlined below. Employee is defined by the Act as any individual who meets the definition of employee under the Fair Standards Labor Act (FLSA). Therefore, this includes employees who do not currently earn leave including temporary, temporary grant and time-limited employees. Employees are eligible from their first day of employment.

- **What are the qualifying reasons for paid sick leave?** An agency must provide paid sick leave if the employee is unable to work (or work-from-home) because:
 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 due to concerns related to COVID-19.
 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 4. The employee is caring for an individual who is subject to an order as described in paragraph 1 or has been advised as described in paragraph 2. Please note that the person being cared for does not have to be related to the employee for the employee to qualify for leave.
 5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter 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.

- **Does Executive Order 2020-11 constitute a quarantine or isolation order?** Yes, Governor McMaster's Executive Order requiring that all non-essential state employees not report to work constitutes a "Federal, State, or local quarantine or isolation order related to COVID-19." Therefore, all employees who are unable to work-from-home and have been ordered not to report to the worksite would qualify for this leave. Agencies must continue to maximize work-from-home opportunities to the maximum extent possible and only require an employee to use paid sick leave if work-from-home opportunities are not available.

- **Are there any exceptions?** An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

- **How are "health care provider" and "son or daughter" defined?** The definitions of "health care provider" and "son or daughter" are the same as those included in the FMLA.

- **How many hours of paid sick leave can be taken?** Full-time employees (those who are regularly scheduled to work 37.5 or 40 hours per week) are entitled to 80 hours of paid leave. The Emergency Paid Sick Leave Act requires that paid sick leave be provided for the

hours the employee would have been normally scheduled to work even if that is more than 37.5 or 40 hours in a week. 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 Emergency Paid Sick Leave Act is capped at 80.

- **Is the paid sick leave paid at the employees' regular rate of pay?** It depends on the reason for leave. If leave is taken for the first three reasons listed in the Act as noted below, the employee is paid their regular rate of pay up to \$511.00 per day or \$5,110 in the aggregate. If leave is taken for any other eligible reason (reasons four through six listed in the Act as noted below), the employee is paid 2/3 of the employee's regular rate of pay up to a maximum of \$200 per day and \$2,000 in the aggregate. Employees can use any accrued leave to augment leave taken pursuant to the Emergency Paid Sick Leave Act up to their regular salary rate.
- **Which qualifying reasons for leave are paid at the employees' regular rate of pay up to \$511.00 per day?**
 1. The employee is subject to a Federal, State, or local quarantine or isolation orders related to COVID-19.
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **Which qualifying reasons for paid sick leave are paid at 2/3 the employees' regular rate of pay to \$200.00 per day?**
 4. The employee is caring for an individual who is subject to an order as described in subparagraph 1 or has been advised as described in paragraph 2.
 5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter 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.
- **Does the pay include a premium for overtime?** Pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.
- **Can paid sick leave be taken intermittently?** Yes, leave under the Emergency Paid Sick Leave Act can be taken on an intermittent basis.

- **Are part-time employees entitled to the same amount of leave?** Part-time employees, including employees in part-time FTE positions, are entitled to paid leave for the number of hours equal to the number of hours that such employee works, on average, over a two-week period.
- **How is the regular rate of pay calculated for part-time employees?** Consistent with the EFMLA, for the Emergency Paid Sick Leave Act, if a part-time employee (including a part-time FTE employee) works a schedule that varies from week to week 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 shall use the following in place of such number:
 - The number equal to the average number of hours that the employee was scheduled to work per day over the six-month period ending on the date on which the employee takes the paid sick time under the Act, including hours for which the employee took leave of any type.
 - 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.
- **Does paid sick leave carry-over to next year?** Leave may be used at any time between April 1-Dec. 31, 2020, but paid leave provided under the Act does not carry over from year to year.
- **What documentation can be required from employees?** Agencies should be flexible in the documentation employees are required to provide when taking leave under the Act and should not require documentation from a health care provider in order to avoid further burdening health care providers. Agencies should track sick leave provided to employees in accordance with the Act and the reason for the leave as listed in the Act.
- **If an employee has other forms of accrued leave, can the agency require them to use those forms of accrued leave first?** No, an employer may not require an employee to use other paid leave before the employee uses paid leave under this Act. The employee may, however, choose to use other paid leave available prior to or instead of the leave provided under the Act.

Implementation of the FFCRA

Agencies must post a notice outlining both leave entitlements of the FFCRA. Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in this Act. Since a large percentage of employees are working remotely, 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.

A copy of the poster may be found on the DOL's website:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Employers must not discharge, discipline or otherwise discriminate against an employee who takes leave pursuant to the FFCRA.

The Division of State Human Resources will continue to closely monitor developments related to COVID-19 and provide additional guidance on implementation of the Act next week. Additionally, DSHR will hold a conference call next week to answer questions about the FFCRA. 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).