

Follow up to our Webinar of March 24, 2020

Please understand that questions pertaining to the leave rights of employees are case specific and cannot always be answered in a vacuum. The information below is intended for general purposes only and does not, and is not intended to, constitute legal advice. Finally, please remember that any discussion below concerning the Governor's Order relates only to hourly employees as the Order did not pertain to salaried workers.

1. If a person is afraid that they might catch the virus and won't come to work--is it legal to not pay them at that point?

We recommend taking a measured approach to situations like this. Each case will need to be reviewed on its own merits, but the following are some steps that may be helpful.

Have a conversation with the employee about what their concerns are, during which you can explain all that you are doing to help keep employees safe while at work. If, for instance, the person discloses that they have an underlying health condition that places them at increased risk and this is why they are worried, you can talk to them about getting medical documentation related to their condition, which may qualify them for paid leave under existing leave entitlements (e.g., CBA) or the new federal leave law.

It is also worth considering whether the person can work remotely. This will be a case by case determination based on the employee's job, the school's needs, etc.

And, the person may have other leave entitlements available (e.g., contract sick leave, PTO, or vacation) that they could use while out, provided they meet the criteria for using those entitlements.

If the employee is not available to work (either on site or remotely, to the extent remote work is available), and does not qualify for any of the various leave entitlements available to them, we do not believe that the Governor's order requires you to pay the employee, and you would likely not have to pay them if they are not performing work (although remember that salaried employees must be paid the minimum salary under the law in any week that they perform work, even partial work weeks).

2. Maximum Federal paid time is 2 weeks only for full time staff, right?

How long a full time employee is entitled to paid leave and how much pay they are entitled to under the new federal laws depends on the reason for the leave and that person's rate of pay.

80 hours is the maximum under the new federal Emergency Paid Sick Leave law, and the amount of pay will depend on the person's rate of pay and the reason they are taking the

leave. If the leave is to care for a child because the child's daycare or school is closed, under the federal FMLA Expansion act the maximum leave is 12 weeks (which can be run concurrently with the 80 hours under the federal emergency paid sick leave law) with no pay for the first 10 days and then pay at 2/3 the employee's regular rate, capped at \$200 per day and \$10,000 in total.

3. If the employee needs leave under the new FMLA expansion law is that unpaid, or are we mandated to pay them under the new Federal leave law or Governor's Order?

If the employee is working or available for work, then they would be entitled to pay under the Governor's order. If the employee cannot work, they may be entitled to some compensation depending on the reason. Under the expanded FMLA law (putting aside the new federal emergency paid sick leave law) eligible employees taking leave for the qualifying reason (to care for a child because of a school or daycare closure) are entitled to pay after the first 10 days (which are unpaid) in an amount equal to 2/3 of their regular rate, with a cap of \$200 per day and \$10,000 in total. Employees taking this leave are not available to work and would therefore not have to be paid their regular pay under the Governor's order.

4. Doesn't the Governor's order require payment to employees? Why would the first 10 days of leave be unpaid?

The Governor's order only requires hourly school employees to be paid if they are ready and available to work. For the purposes of answering this question we assume the reference in the question to unpaid time is related to the 10 day window under the FMLA expansion law during which an employee on leave to care for a child due to a school or daycare closure is not paid. An employee qualifies for this leave only if they cannot work (including remotely). If the employee can work on-site or remotely they would not be entitled to leave under these laws and they would be paid under the Governor's order. However, if the employee is at home caring for a child and cannot work, and therefore qualifies for the newly expanded FMLA leave, he or she would not have to be paid for the first 10 days, under the FMLA. But please note two things. First – the employee would almost certainly be entitled to pay under the new federal emergency paid sick leave law. And second, schools are not prohibited from offering paid leave beyond what the law dictates. Although there are costs associated with doing so, there are benefits as well. School boards can balance these costs and benefits and, if employees are covered under a CBA, discuss additional paid leave options with the bargaining agent.

5. We are wondering if we need to pay part-time hourly staff in our Community Programs (Adult Ed) daycare program. It's not a program of our general fund and we are not collecting revenue from parents.

In answering this question we assume that the reference to paying employees is related to the Governor's order, and not the new federal laws. We believe that the Governor's order would apply to part-time hourly employees of the school unit and so these employees should continue to be paid if they are either working or available to do work.

6. We are required to pay employees who may not be working. Some employees have accrued sick, vacation, and personal leave. Others do not. Can we require employees to exhaust their accrued leave first?

In answering this question we assume that the reference to paying an employee who may not be working is related to the Governor's order, and not to the new federal laws. We do not believe that you can require staff covered by the Governor's order who are available to work (even if there is no work for them to do) to use paid leave entitlements prior to being paid their regular wages. If an employee is not able to do the work you need them to do, then you should discuss with them what rights to leave they may have. Accrued, paid leave should be charged only if the employee is unable to work for the reason that the accrued leave is available.

7. What if a doctor advises that the employee is immune compromised and can't work. Does this qualify for FMLA or should they just use their sick time.

If an employee receives a doctor's note saying he or she cannot work due to a medical condition, the employee will mostly likely be entitled to some form of leave, but precisely which form(s) will depend on the details of the particular situation. For example, it is possible that the person in this example would qualify for leave under the new federal emergency paid sick leave law if they are ordered to self-quarantine after seeing their doctor. It is also possible that they would not qualify for leave under the new federal emergency paid sick leave law, but would qualify under the "standard" sick leave and FMLA framework schools have been operating under for many years. Each case will have to be assessed on its own facts, and we hope that the DOL will provide further guidance on these issues.

Right now, it's also important for schools to consider what work can be done remotely and whether employees in situations like this one would be qualified and able to do that work (even if it is not within their usual job duties).

8. We have a worker who flat out refused to work and said she would not come in. Are we obligated to pay her?

We recommend taking a measured approach to situations like this. Each case will need to be reviewed on its own merits, but the following are some steps that may be helpful.

It may be helpful to have an initial conversation with the employee about what their concerns are, during which you can explain all that you are doing to help keep employees safe while at work. If, for instance, the person discloses that they have an underlying health condition that places them at increased risk and this is why they are worried, you can talk to them about getting medical documentation related to their condition, which may qualify them for paid leave under existing leave entitlements (e.g., CBA) or the new federal leave laws.

It is also worth considering whether the person can work remotely. This will be a case by case determination based on the employee's job, the school's needs, and the type of work, etc.

And, the person may have other leave entitlements available (e.g., PTO or vacation) that they could use while out, provided they meet the criteria for using those entitlements.

All of this said, if the employee is not available to work (either on site or remotely, to the extent remote work is available), and does not qualify for any of the various leave entitlements available to them, we do not believe that the Governor's order requires you to pay the employee, and you would likely not have to pay them if they are not performing work (although remember that salaried employees must be paid the minimum salary under the law in any week that they perform work, even partial work weeks).

9. How about someone who is currently out on maternity or paternity leave FMLA and or short term disability. Does anything change for them?

Our view is that nothing changes for these employees in terms of their current leave. They remain out on the leave they have been on until they inform you that they are able to do their job (and, if applicable, their doctor clears them to return to work).

10. What about vacation days – can we require a staff member to use vacation now? We are concerned that if the employee retains the days then when school resumes they will just go out on leave when we need them to work

If staff are working or available to work, under the Governor's order they would need to be paid. If a staff member cannot work and needs to be out on leave, there are a number of entitlements that may allow them to be paid during that time. If the only one they qualify for is vacation, then they may use that time, but if they qualify for another entitlement, they cannot be required to use vacation instead of the other entitlement. For a staff member exercising a leave entitlement that pays less than their regular daily rate, they can be given the choice to use vacation time (assuming your policy allows for this or you've made an exception for this extraordinary situation) before using the other leave entitlement, but cannot be required to do so. Whether the vacation pay can be used when school opens may depend on the contract language / policy and whether approval is required.

Note: The DOL issued guidance on March 26, 2020 clarifying that employers are not obligated to allow an employee to supplement or "top off" the paid leave available under the federal emergency leave laws with their existing paid leave. An employer can permit this if the employee requests it, but the employer cannot mandate that an employee use existing paid leave to supplement the amounts received under these federal emergency leave laws.

11. A staff member is in an at risk category; asthma and over age 65. DOL said she would qualify for unemployment, We have work for her and could address her restrictions. Person believes she should not have to use her available PTO but get full pay.

If an hourly staff member is willing and available to work, they will receive their regular pay under the Governor's order. If they are not able to work, they may be entitled to leave with or

without pay under one of the several leave entitlements that may be available, including the new federal laws. If the staff member qualifies for leave with pay under one of the federal leave laws, they would not need to use their PTO, unless they wanted to gross up their pay in the event the leave entitlement is less than their regular daily rate. As noted above, they can request that they be allowed to “top off” the pay they receive by using existing vacation, sick, personal leave; employers are not obligated to permit this.

12. All employees covered regardless of service - does that include substitutes?

The law is not totally clear on this point, but we believe that the federal emergency leave law would apply to substitutes that are currently employed by the school unit, and the expanded FMLA law would apply to substitutes that are currently employed by the school unit and who have been employed for at least 30 calendar days.

13. If we have someone out due to a daycare closure and they are taking care of their kids, under the FMLA extension do we need to do new paperwork for each one of these scenarios?

Yes. On March 26, 2020, the federal DOL issued the following guidance: “If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, under the Emergency Family and Medical Leave Expansion Act, you must require your employee to provide you with appropriate documentation in support of such leave, just as you would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason.” We would recommend using existing FMLA forms (and working to adapt these forms to account for the new reason for qualifying leave) to document and track use of this leave.

14. Do employees use their own sick time first and if they run out, this Federal Emergency Paid Sick Leave law kicks in?

Employees can be given the option of which leave to use first, but an employer cannot require an employee to use his or her paid sick time prior to using leave under the federal emergency leave law.

15. How will short term disability (STD) benefits work during this time? Will eligible employees continue to receive STD benefits or paid for regular scheduled hours?

This will depend on the terms/application of the STD benefit. We would recommend contacting your carrier to discuss how STD will fit within this newly expanded framework of leave entitlements.

16. Do the new federal laws really affect us whereas the Executive Order of the Governor states that we pay all hourly employees?

Yes. Unless/until we hear otherwise regarding the application of the Governor's order, these new laws will impact schools because the Governor's order only applies to hourly employees who are willing and able to work (even if they are not being asked to perform work). If employees cannot work, and are not available to work or refuse available work, then, depending on the reason for the absence from work the employee may be entitled to paid or unpaid leave under these federal laws or their work agreements.

17. If a staff person has used all of their sick time prior to 4/2/20, are we then required to give them another two weeks based on this law?

Yes, if they qualify for leave under the federal emergency leave law. Also, please note that the DOL moved up the effective date of the new federal laws to 4/1/2020.

18. Does the employee need to fill out official FMLA paperwork to qualify?

We recommend documenting leave requests and grants, so that schools have accurate records. We recommend adapting existing FMLA leave forms (at least the designation notice) for FMLA leave requests, and eventually creating expanded forms that account for the new qualifying reason for leave under the FMLA.

We are working to create updated forms and will let clients know when they are available.

19. Is the paid sick leave under the federal emergency laws in addition to sick leave the employee already has?

Yes.

20. Does "all employees" include subs, spares, etc. in this case because they are still employees?

The new federal emergency paid sick leave law covers all employees, including substitutes and spares who are employed by the school unit at the time the law goes into effect. The federal FMLA expansion law covers all employees who have worked for you for at least 30 days.

21. Is this money being paid by the federal gov.? Or it is us paying this?

The money is coming from school units themselves.

22. Assume that under the first two options for paid leave - staff who can work remotely could still work and not take the leave?

An employee only qualifies for leave under the federal emergency sick leave law if they cannot work (or telework) due to one of the qualifying conditions/reasons in the law. So if you determine that remote work is feasible and the staff member is willing and able to do the remote work, then they would not qualify for leave and hourly staff would need to be paid pursuant to the Governor's order.

23. Is there a form to use for the Federal Emergency Paid Sick Leave Law?

Not at this time. Existing FMLA forms may be able to be used for expanded FMLA leave, although most current forms will not be a perfect "fit".

24. What if an employee works in the same building as a coworker diagnosed with COVID-19 and were experiencing similar conditions specified by Secretary HHS.

If the employee is experiencing symptoms s/he should not report to work. This person would almost certainly be eligible for one or more leave entitlements (including the new federal emergency leave law).

25. What if a staff member is already out on an unpaid leave for a non-COVID reason?

If a staff member is already out of work due to a non-COVID-19 related reason, their leave should continue to be treated the same way. They are not available for work and thus should not be paid under the Governor's order.

26. Just to confirm, the Federal Emergency Paid Sick Leave Law applies to hourly and salaried employees, right?

Yes.

27. Does DWLaw have new FMLA forms that include these new qualifying reasons included? Can we have access to these forms?

We are working to develop an addendum to the FMLA forms and will let schools know when they are available.

28. What about those out on medical leave who now want to work at home? Maternity, for example.

Employees currently out on leave should be treated the same now as before all of the changes necessitated by COVID-19 went into effect. So an employee on maternity leave would remain on maternity leave, unless that employee wants to "return" from maternity leave, in which case you would process the request the same way you would if schools were in session and operating

as usual. In other words, if that person can “return” to work and perform the essential duties you assign to them, but the person desires to work remotely, and you determine that remote work is desirable and feasible, they should be paid like any other employee working remotely.

29. Is the FMLA expansion law referring to leave connected to COVID-19?

The expanded FMLA applies to leave needed to care for a child whose school or daycare has closed. Although the law does not say that the school or daycare must have closed due to COVID-19, the practical reality is that is likely the reason or will be assumed to be the reason that schools and daycares have closed.

30. Do we have to employ less than 500 for this to apply?

No. The law applies to all public employers, regardless of size.

31. We are allowing employees to use Sick leave if they have to stay home to care for a child due to school or daycare closure. If the employee exhausts both this new leave and any other paid leave available to them, do we have to continue to pay them?

You do not have to continue to pay them if they have exhausted all of their available leave and are not available to work. However, schools do have the discretion to continue to offer paid leave, this is a local decision that should be made with the school board and involve any local union.

32. Final question on this same topic: what are your thoughts on allowing employees to apply for Sick Bank leave for the child care or COVID-related health issue?

The answer to this question hinges on the language of the current sick bank article, and local conditions. With existing contract or policy leave benefits, and the new federal emergency paid sick leave and emergency FMLA expansion laws, school employees have generous paid leave benefits available to them. These benefits may be sufficient for many employees; they may not be sufficient for others if the current conditions continue for some time. There is no legal prohibition on a school unit offering greater benefits than what the law requires. If additional contract leave benefits (or a relaxation of existing requirements to access certain benefits) are being contemplated, it would be important to consult with your district’s legal counsel to discuss the options and pitfalls to avoid in crafting agreements with local bargaining units.

33. The new FMLA expansion act leave is still "unpaid" leave correct???

The new category of FMLA leave for covered employees who cannot work because they need to take care of a child because of a school or daycare closure is paid at 2/3 the employees regular pay (capped at \$200 per day and \$10,000 total) after the first 10 days (which are unpaid).

34. If an hourly worker was out on unpaid FMLA but is now able to return to work, should we paying again like every other hourly person even if we might not have sufficient work?

Yes, provided that they are able to perform the duties assigned to them.

35. What if childcares reopen but the staff member doesn't dare to send the child due to child's underlying health conditions? Can parent take the newly expanded FMLA? (law says if daycare "closed").

The expanded FMLA would likely not apply in this situation, although the individual may have other leave entitlements they can take advantage of. We would recommend talking with this person to see what you can do in terms of remote work and/or leave that might be available to see if you can come up with a solution that works for everyone.

36. How do you apply for the Federal Emergency Sick Leave? Through FMLA?

The federal emergency sick leave law does not provide a particular mechanism for employees to apply. Where leave is foreseeable, the employee is expected to provide notice of the need for leave to the employer. This process is something school units will need to develop. FMLA forms can be modified to address the expanded FMLA leave.

Note, also, that the DOL guidance issued on March 26, 2020 provides that an employer may require employees to comply with reasonable notice provisions in order to continue to receive paid sick leave under the new federal laws. In particular: "If one of your employees takes paid sick leave under the Emergency Paid Sick Leave Act, you must require your employee to provide you with appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19."

37. We have 2 employees going on maternity leave at the end of April. That normally would be unpaid FMLA, has that changed due to this new addition to FMLA?

No, we do not believe that this would change at this point.

38. Do we have to announce these new laws? Are employees responsible themselves for knowing these?

Yes, you do have to announce them. The law requires employers to post a notice about the laws

in a “public place.” We recommend doing this in physical locations where staff are still working and providing it or making it available digitally as well so all staff can access it. The DOL has indicated that posting on premises coupled with either an email or direct mailing to staff will suffice.

39. Can someone choose to use their sick leave during the FMLA leave after the 10 days to receive full pay? And would we deduct a full day or a 1/3 of a day?

The DOL guidance issued on March 26, 2020 provides that an employee can request to use their accrued sick, personal or vacation leave to “top off” the payments they receive under the federal emergency leave laws. It further states that employers do not have to permit this, and that employers may not require it. Thus, if the employee requests this and the employer agrees, then it is permissible.

40. RE: Federal Emergency Paid Sick Leave Law, if these funds are in addition to the contract benefits employees have, if we are already paying staff 100%, can they also get these additional funds? As a result they are making more money than normal?

We don’t think the intent of any of the new laws are to allow employee to make more than 100% of their pay. If staff are being paid because they are working or available to work, they would not be eligible to receive paid leave under the federal emergency paid sick leave or FMLA expansion laws (which presume that the staff member cannot work). If staff are not able to work for some reason, we do not believe the Governor’s executive order requires them to be paid, and they will likely be eligible for one or more leave benefits. If you have been voluntarily paying staff their full wages, prior to the Governor’s order, you may need to simply reconfigure how that money is being allocated in terms of what entitlements are accounting for it, so that you can maintain accurate records.

41. Is the effective date of the federal emergency paid sick leave and emergency FMLA expansion act still April 2, 2020?

Actually, the US DOL just sent out a notice indicating that the effective date is now April 1.

42. Does the governor's order apply to private schools and staff as well as public schools?

The order on its face does not apply to private schools.

43. Is it advisable to require that food service workers are in the building when the information @ how long this virus lives on surfaces...some saying cardboard above 72 hours. Some schools are delivering lunches home to home. This seems a big liability.

Schools should be sure to follow all CDC and MDOE recommendations concerning hygiene, sanitation, and social distancing.

44. What about maternity leave?

If an individual is on maternity leave, then they (and/or their doctor) have indicated that they are not available for work. Neither the new FMLA emergency expansion act nor the federal emergency paid sick leave law require pay for this reason. Whether an employee is to be paid will depend on the contract language, and the district's practice.

45. If we send people home, do they use sick pay or do we pay them regular pay?

It will depend on the reason you send them home. If you send them home because they are sick, then they can utilize available sick leave (potentially including leave under the new federal emergency paid sick leave law, depending on the reason for the sick leave). If you send an hourly employee home due to the lack of work but they are available for work, then you would continue to pay them under the Governor's order.

46. How do we have the timecards reflect the hours work if some districts are paying people for all hours if they are not truly working all of those hours?

You can adjust the timecard format to collect the time when they are available for work, and the time when they actually work. One school district recently created an "earning reason code" labeled COVID-19 so unworked, paid time can be tracked.

47. How do we handle the employee whose family member may have been exposed to Covid-19 and the employee chooses to self-quarantine?

This will depend on additional facts, but the employee may be able / available to do some work from home and thus could be eligible for pay under the Governor's order. If the employee is not available for work because s/he is under a government directive to quarantine, is under a doctor's order to stay home, or is having symptoms and seeking a diagnosis, then leave under the new federal emergency leave law may be available after 4/1/2020. Some reduced compensation may be available if the employee needs leave to care for an individual under a quarantine directive. If the family member is sick, and the family member is a parent, spouse or child (or an immediate family member under a broader contract definition) of the employee, then the employee may utilize some of their available sick leave to care for the family member.

48. If a staff member works and is also available at other times, must we pay them for all budgeted hours or only the hours worked?

If the hourly employee is available for work for their regular hours (ex. 7.5 hours) and only performs work for a portion of the time that they are available for work (ex. 2 hours), then you would pay them for the 7.5 hours.

49. How does the Executive Order work when the town you work in has shelter in place order?

This will depend on the scope of the shelter in place order, the employee's job, and whether some or all of that job can be done remotely. The MDOE commissioner has clarified that education and nutrition are essential functions.

50. Do we continue to pay the Pay Average out to school-year employees during this time or reconcile and pay out hours "booked".

If the hourly employee is working and available for work, then you would continue to pay the employee for the regularly scheduled hours. If the employee elected to have their hours averaged, then you would continue to honor this election.

51. What about Long Term Subs that would have been called back. Are they to be paid versus a regular sub?

Whether long term substitutes should be paid will depend on the facts, including whether they had a contract or a reasonable expectation of continued employment. If the LT sub was working regularly up to the date of the Governor's order and the school expected the LT sub to continue to work, and the LT sub remains available for work, then we believe s/he should be paid.

52. So, this paid Federal Emergency Paid Sick Leave ONLY applies to employees that have COVID-19, family member who have COVID-19, daycare not school closure or have similar conditions. NOT because they think they might catch it?

The federal emergency sick leave law allows for paid leave for the following reasons: to comply with a federal, state, or local quarantine or isolation direction, to self-quarantine following a doctor's order, to seek care for active symptoms/diagnosis for COVID-19, to care for an individual under a quarantine directive, because the employee's child's school or daycare is closed, and/or because the employee is experiencing substantially similar conditions specified by the Secretary of HHS. It does not require pay for individuals if they are simply concerned that they will become infected.

53. High Risk would be regular FMLA or Federal Emergency Paid Sick Leave?

This will depend on the nature of the underlying condition, whether the individual is under a government order to quarantine or isolate, a doctor's order to quarantine, or if the employee has active symptoms and is seeking medical attention.

54. Can we require employees to exhaust all of their leave time before they can access the 2 weeks of leave available under the Federal Emergency Paid Sick Leave law?

No.

55. Our CBA pays out unused vacation time at the end of the school year, and we pay out a personal and sick leave incentives for unused personal and sick days. So, this law will allow an employee to receive paid leave without using their leave time?

If an employee is eligible under the federal emergency sick leave law or the expanded FMLA, then you would not charge the employee's contract leave during the period of leave covered by the federal laws (which includes leave taken under the new laws from 4/1 through 12/31). If the employee needs leave prior to or beyond the period they have leave available under these new laws, then they may have additional contract leave available to them (depending on the nature of the absence). The new laws also do not prohibit employers from allowing employees to use existing available leave benefits, including those available under a collective bargaining agreement (provided the terms of the agreement allow for it), prior to taking leave under the new laws, if the employee so chooses, but an employer cannot require this.

56. Will this new FMLA Expansion law allow every hourly employee to stay home and collect \$10k?

No. The FMLA expansion law only applies to employees who are not capable of working because they need to care for their own child(ren) due to a school closure or due to a closed daycare. The leave window is capped at 12 weeks, and the rate of pay is capped. Furthermore, the US DOL has offered guidance stating that employees must submit documentation in support of the need for leave under the FMLA expansion law, which may include a notice of closure published in a newspaper or in an email. The FMLA also permits employers to require periodic reports about the employee's status and intent to return to work.

57. If I have an employee that doesn't want to work and doesn't care if he or she receives pay and doesn't want to do professional development, do I have to pay him or her?

If an employee refuses reasonable offers of work that the supervisor determines must be done, they should not be considered to be available and should not be entitled to compensation. The employee may be entitled to use personal time or vacation time for the absence, depending on the contract requirements.

58. If I have subs that we hired at the beginning of the school year to work the 175 students days, do we have to continue to pay them even if they can't work?

If the LT sub was working up to the date of the Order and the district expected the LT sub to continue to work, and the LT sub remains available for work, then we believe s/he should be paid.

59. Does the Governor's order apply to salaried employees?

No, the order expressly applies to hourly workers.

60. Our district is not requiring remote learning and I have been directed to pay them their regular hours for the remainder of the school year. Do they still need to submit a time sheet if they are not working?

We recommend having employees submit timecards for the time that they are available for work. The employee's availability may change from week to week, and the time sheet can serve as the employee's verification of their status for the week.

61. Is this pay subject to regular payroll taxes and benefit deductions?

If a school pays the federal emergency paid sick or FMLA childcare leave, it should run the leave through payroll and subject the leave to the EMPLOYEE share of Social Security (6.2%), Medicare (1.45%), and federal income tax withholding. However, the paid leave is NOT subject to EMPLOYER share of Social Security tax (6.2%).

With respect to the employer share of Medicare tax (1.45%), the law says that the paid leave is subject to the employer share of Medicare tax but any employer otherwise eligible for the tax credit can increase the amount of the tax credit available for the amount of the employer share of Medicare paid on the paid leave.

62. What about Ed techs that are pay averaged covered under CBA - they are available if we call on them...but have not called on them to come in yet to work?

If the hourly employee is available for work and the school cannot identify work for them to do, then we believe that the Governor's Order requires the employee to be paid through this "school year."

63. Is there guidance on stipends for events that are not taking place this spring?

The Governor's order does not discuss the payment of stipends. We believe that the answer should be determined based on the stipend agreement and the collective bargaining agreement, if any.

64. If the school year is shortened by the Commissioner, how does this affect paying hourly workers their regular rate of pay through the school year? If CBA specifies a specific # of days - is this the rule?

This is not clear, and we will need further guidance from the Governor or the Commissioner. Certainly, the answer to the question will involve a close assessment of the applicable collective bargaining agreement.

65. How should we handle workers whose hours regularly fluctuate like drivers?

For full time employees, they get 80 hours of leave under the new federal emergency sick leave law. For PT employees, you calculate the leave based on the number hours the employee is

normally scheduled to work in a 2 week period. If the schedule varies, then you look at the 6 month average to calculate the daily hours.

66. Does the Federal Emergency Paid Sick Leave grant additional Sick Leave? Over and above what they already receive by contract or policy?

Yes.

67. Please clarify where the \$200 per day comes from - from Employers?

Yes, the compensation is paid by employers.

68. Can we require frequent documentation that the daycare/school is closed?

Although not specified in the law itself, we believe that schools can ask employees to confirm in writing on a periodic basis that their child's school / daycare remains closed. The DOL guidance issued this week states that employees can be required to check in periodically and follow reasonable notice procedures to continue receiving paid leave under these laws. It should not be difficult for the employee to provide an email from the school / daycare about the closure and to provide something in writing stating that they remain unable to come to work.

69. Are substitutes entitled to unemployment compensation?

There are a number of eligibility requirements for unemployment benefits, including whether the employee has sufficient qualifying wages. There are also several reasons why one could be denied unemployment, including a discharge for misconduct, not being a US Citizen, being self-employed, refusing suitable work, etc. This is a case by case determination.

70. Is there a requirement to notify substitute teachers that they will not be needed during the closure?

This will depend on what has been communicated to substitutes already. Most substitutes are informed at the time that they apply that their work is only "as needed" and that they will be called only if they are needed.

71. Can you please address a situation where an employee can't work due to immunodeficiency. Does the employee need to use sick time or does this fall under the 2 week emergency paid leave act and not deducted from sick pay.

The answer will depend on the circumstances. However, if the employee is not able to work due to a medical condition and provides a doctor's note that they cannot work, then they should be entitled to use their available sick leave. If the employee has been ordered by the government to quarantine, ordered by a doctor to self-quarantine, or is seeking care due to COVID19 symptoms, then they will likely be eligible for up to 2 weeks of paid leave under the new federal

emergency sick leave law. Also, they may be entitled to standard FMLA leave if otherwise eligible.

72. What about long term subs who have been working in a position all school year?

Although not addressed in the Governor's order, if the LT sub was working up to the date of the Order and the district expected the LT sub to continue to work, and the LT sub remains available for work, then we believe s/he should be paid.

73. Do these updates to the Family Emergency Paid Sick Leave Law apply to salaried as well as hourly workers?

Yes.

74. Are School Nutrition and Transportation Essential in a shelter in place?

The Commissioner notified the education community on March 25 that education and nutrition service are essential functions.

75. What if staff members aren't doing work because they don't understand technology to this level?

Although this will obviously depend on the nature of the job and the complexity of the technology, our understanding is that most technology being utilized is something anyone can learn with proper guidance and instruction, as necessary. The administration can provide supports, tutorials and short training modules to assist. The district's technology director can also answer questions and would likely be willing to field calls. If the employee is not willing to take simple steps to follow these tutorials to do the work, then a strong argument can be made that the employee is not available to do the work that the employer has determined needs to be accomplished.

76. Assigning work to Ed Tech's – should the assignment be done by administration as opposed to the teacher, who in general practice provides work assignments for Ed Tech's.

Yes, although the teacher's input on what is needed should be considered. The administration could also set parameters and empower teachers to delegate work within those parameters.

77. Do we treat maternity leave as we would if school was in session (Family Medical, and access to sick leave)?

Yes.

78. If taking FMLA for child care reasons, would it be leave without pay, or do we use sick leave?

It is important to distinguish between the different types of “child care” leave. Now, FMLA leave is available as follows:

- Leave for childbirth (generally unpaid, but may be paid with sick leave under contract language with doctor's note)
- Leave for bonding (generally unpaid, but will depend on benefit language in the contract)
- Leave for adoption (generally unpaid, but will depend on benefit language in the contract)
- Leave to care for a child with a serious health condition (generally unpaid, but will depend on sick leave language in the contract and the application of the state’s family sick leave law)
- Leave because the employee’s child’s school has closed (paid under the law after 10 days, but limited to 12 weeks and subject to a cap)
- Leave because the employee’s child’s daycare has closed (paid under the law after 10 days, but limited to 12 weeks and subject to a cap)

79. If the employee refuses to work - can we require them to use vacation time?

If the employee refuses all work, then a strong argument can be made that they are not available and are not entitled to compensation. Although they should not be entitled to compensation under the Governor's order, it is possible that they could utilize available vacation leave depending on the language in the contract. And, schools do have the discretion to allow employees to remain out of work with pay in these situations, although this is a local decision that should be made with the school board and involve any local union.

80. If someone has no sick time available and calls out sick for Covid19 symptoms do we pay them anyway? What if they call out because they broke their leg?

If an individual is not available to work because of reasons related to COVID-19, and they have no available sick leave, sick bank access, or personal leave, then the leave would be unpaid prior to 4/1. Thereafter, if the employee is out due to active symptoms, to seek a diagnosis, to a government order to quarantine, or because of a doctor's order to self-quarantine, then they would be entitled to 2 weeks of pay under the federal Emergency Paid Sick Leave law. If additional leave is necessary, they may be entitled to standard FMLA leave, but that leave is unpaid unless they have accrued and unused paid time that can be utilized.

81. What if they are out of sick/personal time, but are in high risk category so can't do any of the available work?

Whether they are entitled to pay will depend on the nature of the job, the nature of the work the district needs to be completed, and whether the work could possibly be done remotely. The school should carefully assess whether there is work that the employee could do, including remotely. If the employee cannot do any assigned work, and has no leave available, then they

may go unpaid through March 31. Under the new federal emergency sick leave law, if they are in a high risk category and are *self-quarantining due to a doctor's order, due to a government directive, or seeking treatment for active symptoms*, then they would be entitled to pay in the amount set under the law for up to 2 weeks of sick leave.

82. If an employee cannot work and are not available because of needing to care for their own children, are we obligated to pay them?

It will depend on the reason the employee is needed to care for their children. If the leave is required because the employee's child's school or daycare has closed, then they would be entitled to some pay under the new federal emergency sick leave law when that law takes effective on 4/1. They may also be entitled to some pay under the federal FMLA Expansion act.

83. Do we treat maternity leave as we would if school was in session (Family Medical, and access to sick leave)?

Yes.

84. What if the current labor market forces employees to take care of their own children, and they cannot work because of this. Should we use sick leave, or time without pay?

It will depend on the reason the employee is needed to care for their children. If the leave is to care for their own child due to the child's school / daycare closure, then as of 4/1 they would likely be entitled to compensation under the new federal emergency sick leave law (up to 2 weeks) and some compensation under the newly expanded FMLA. Thereafter, whether the leave is paid will depend on the contract language and whether the school unit wants to expand the benefits it offers its employees and whether it can do so in light of other budget pressures.

85. If an employee doesn't want to work because they have underlying medical conditions but have no exposure to COVID 19 what leave are they eligible for?

If the employee is worried about contracting the virus, but has had no exposure and has no symptoms, is not subject to a doctor's order to quarantine or a government directive to quarantine, and refuses available work, then s/he should not be entitled to compensation. The school should speak with the employee to discuss the employee's desire not to work and see if there is work that the employee could do and work to explain the steps the school is taking to ensure a safe working environment.

86. What if an hourly person decides they can't work because they have young children and it is too hard to work from home with no daycare?

If the employee cannot work because their own child's daycare has closed, then the employee may be entitled to leave and pay under the newly expanded FMLA and/or the new federal emergency sick leave law.

87. An hourly worker was out due to injury prior to the Governor's order, has not gotten cleared to come back and did not qualify for workers comp- has now run out of sick leave and pay is set on a pay averaging process for full year- do we pay them?

We believe that the obligation under the Governor's order is to honor the status quo. The employee was not in pay status due to a medical condition making the employee unavailable for work. If the employee is not cleared to return to work then the employee is not available for work. If the employee's absence from work is not related to COVID, or due to the closure of a daycare or school, then the employee should remain in unpaid status. Based on the information set out in the question above, it does not appear that the employee would qualify for paid leave under the new federal emergency paid sick leave law or emergency FMLA expansion laws.

88. So, if an employee is ill and runs out of earned time, do they then go on unpaid leave?

If an employee is ill, runs out of all available leave (FMLA, contract leave, state leave, federal leave (including leave under the new federal emergency sick leave law if the illness is COVID-19), as applicable), then an assessment should be made as to whether the employee has a disability and requires a reasonable accommodation (which may include a period of unpaid leave). It would also be important to analyze the leave provisions of the applicable contract and consult with counsel to ensure that you are honoring the employee's statutory and contract rights.

89. An employee is scheduled 35 hours and works from home for only 30 hours - are we required to pay them their regular scheduled hours?

If they are available for the 5 remaining hours and there is not enough work for them, then yes – they should be paid for their regularly scheduled hours.

90. If an employee was out for medical leave, would have been able to return this week but is now high risk and doctor says can't work ... do they continue to get paid without using sick time?

In this situation, it would be important to understand the doctor's restrictions. If the employee would not be available for any work due to the doctor's order, the school would only be required to pay the employee if they qualify for pay under the new federal emergency sick leave law (up to 2 weeks of pay commencing on the effective date of 4/1/20) or if they have available paid leave by contract or policy. If the employee has paid leave available to him or her prior to 4/1 or after the 2 weeks of federal paid leave runs out, then the employee could utilize that leave.

91. Can Ed Techs be asked to do minor projects in classroom such a painting or cleaning?

There is no restriction in the Governor's Order regarding the type of work except that the work is something that the employee is qualified and able to do. If the employee is willing to help with minor projects, then it is unlikely that this will generate any disputes with the union.

92. What if an employee is sick, is able to go to the doctor but is refusing to go to the doctor? Doctor provides a statement of what employee said, e.g., no fever, no sore throat, but no statement that is medically able to work. Can we refuse return to work?

If the employee indicates that they can work, and denies having symptoms, then it is difficult to exclude the employee. The EEOC has stated that employers do have the ability during the period of a pandemic to take the temperature of employees to ensure that they do not have a fever; however, they caution that not all cases of COVID19 present with a fever. Importantly, any information obtained about the results of the tests but me kept confidential in a separate medical file. If the employee presents at work and appears to be sick, then the employer can send the employee home.

93. The reduced benefit for daycare: employee makes \$18/hr for 8 hours = \$144/day so nothing is reduced correct?

This would depend on which law the employee is taking leave under. Under the new federal emergency leave law, it is correct that there would be no reduction. The law provides for regular pay, up to a \$200/day cap. If the leave is under the newly expanded FMLA, the pay is 2/3 the employee's regular rate, with a cap of \$200/day, so there would be a reduction under this law. That said, there is no prohibition in the law from either allowing employees to use other qualifying leave to make themselves whole (although there is a prohibition against forcing them to do so) or paying these employees the difference, if the school unit decides in its good judgment that it makes sense to do so. To be clear: the school is not required to allow the employee to "top off", and the school cannot force an employee to do so.

94. Does the FMLA expansion act provide 12 weeks of leave in addition to the 12 weeks an employee has available under the standard FMLA?

No. The DOL has clarified that an employee's eligibility for leave under the FMLA expansion act depends on how much leave s/he has already taken during the 12 month period that the employer uses for FMLA leave. Because expanded FMLA leave is a type of FMLA leave, if an employee has used some portion of the total 12 week allotment, then s/he can use the remaining portion to care for his/her child in the event the child's school or daycare has closed.