
SAMPLE
COVID-19 EXPANDED FAMILY AND MEDICAL LEAVE POLICY
Pursuant to the Emergency Family and Medical Leave Expansion Act
Enacted as part of the Families First Coronavirus Response Act (“FFCRA”)

Effective Date: April 2, 2020 until December 31, 2020

Section: [insert section number]

The purpose of this Policy is to create paid leave of up to twelve (12) weeks for absences resulting from the need to care for minor children who are home from school or day care due to an emergency with respect to COVID-19, in compliance with the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) which was enacted as part of the Families First Coronavirus Response Act (“FFCRA”), and to educate employees as to their eligibility for “Public Health Emergency Leave” under the EFMLEA. To the extent that it does not contradict or interfere with the application of “Public Health Emergency Leave” pursuant to this Policy or other applicable law, [insert section number] will continue to be utilized to determine traditional FMLA leaves during the effective period of this Policy.

[insert jurisdiction name] complies completely with the FMLA and the EFMLEA and provides “eligible” employees:

1. **Basic Leave Entitlement** of up to twelve (12) weeks of leave in any twelve (12) month period for certain family and medical reasons (see [insert section number]);
2. **Military Family Leave Entitlement** of up to twenty-six (26) weeks of leave in any twelve (12) month period to attend to certain “qualifying exigencies” caused by a relative’s active duty in the military or to care for a servicemember injured while on active duty (see [insert section number]); and
3. **Public Health Emergency Leave** of up to twelve (12) weeks until to December 31, 2020 (this [insert section number]).

This Policy covers all “eligible,” employees of [insert jurisdiction name]. Employees should be aware that the definition of “eligible employee” in this Policy is different from the definition of “eligible employee” in [insert section number] (determining the eligibility of employees to utilize Basic Leave and Military Family Leave under the provisions of the FMLA).

Introduction:

The information listed below describes [insert jurisdiction name]’s policy regarding the rights and obligations of employees and [insert jurisdiction name] regarding the implementation of the EFMLEA, which rights and obligations are a part of the 130-page FFCRA. This information is intended to be a short summary of these lengthy regulations and the specifics of [insert jurisdiction name]’s policies under the EFMLEA. In any particular case, except where [insert jurisdiction name] has chosen a permitted option under the EFMLEA, the precise rights and obligations of employees and [insert jurisdiction name], will be governed by the provisions of the EFMLEA and the FMLA.

Eligible Employee Defined:

Only “eligible” employees may take Public Health Emergency Leave under the EFMLEA.

An employee is eligible for Public Health Emergency Leave if he/she has been employed by [insert jurisdiction name] full or part-time for at least thirty (30) calendar days.

[Whether to exempt “Emergency Responders” from employees eligible to take Public Health Emergency Leave is a decision which must be made by each jurisdiction.]

The Act does not define “Emergency Responders.” As of the printing of this sample policy, the DOL has issued guidance on EFMLEA, but did not provide a definition of the term.

The Homeland Security Act (6 U.S.C. §101) defines “emergency response providers” to include “Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.”

The Homeland Security Presidential Directive HSPD-9 defines “First Responders” to include the “emergency response providers” including in the Homeland Security Act Definition “as well as emergency management, public health, clinical care, public works, and other skilled support personnel (such as equipment operators) that provide immediate support services during prevention, response, and recover operations.”

Jurisdictions who decide to exempt “Emergency Responders” should define that term in their policy. This policy limits the application to police officers, firefighters, paramedics, EMTs, dispatchers, and others included in the definition of “emergency responders,” if any created by the DOL.

Emergency responders (i.e. police officers, firefighters, paramedics, EMTs, dispatchers, and others included in the definition of “emergency responders,” if any, created by the Department of Labor) are exempt from the definition of “eligible employees” and are not entitled to paid sick leave pursuant to this Policy.]

Basis for Public Health Emergency Leave:

An eligible employee is entitled to take paid leave pursuant to this Policy if the employee is unable to work (or telework) because he/she is caring for his/her child under eighteen (18) years of age if the school or place of care has been closed (or the child care provider¹ of such child is unavailable) due to an emergency with respect to COVID-19, declared by the Federal, State or local authority.

Duration and Amount of Public Health Emergency Leave:

Eligible employees are entitled to take up to twelve (12) weeks of Public Health Emergency Leave from the effective date of this Policy until December 31, 2020.

The actual number of hours of leave to which each eligible employee is entitled will depend upon the employee’s normal work week for regularly-scheduled employees or upon a calculation of hours (outlined below) for new employees and employees with varying schedules.

- (1) *Regularly-Scheduled Employees* will be paid for the number of hours the employee would otherwise have been normally scheduled to work (including overtime hours, if any).

- (2) *Employees who have Varying Schedules* will be paid for the number of hours equal to the average number of hours the employee was scheduled to work per day over the six (6) month period ending on the date on which the employee started Public Health Emergency Leave (including any hours for which the employee was on paid leave during that period).
- (3) *Employees who were not employed by [insert jurisdiction name] for the last Six (6) Months* will be paid:
 - a. for the number of hours representing the average number of hours per day which was reasonably expected by the employee to be his/her normal work schedule at the time of his/her hiring.
 - i. If the employee and [insert jurisdiction name] did not have a reasonable expectation of work hours at the time of the employee's hiring or if the employee actually worked more than those expected hours, for the average number of hours per day the employee was scheduled to work over the entire term of his/her employment.

Pay Status and Rate of Pay During Public Health Emergency Leave:

- (1) *First Ten (10) Days of Leave:* The first ten (10) days of Public Health Emergency Leave will be **unpaid** unless the employee elects to substitute Paid Sick Leave pursuant to [insert section number] (paid at 2/3 regular pay), accrued vacation, personal leave, or sick leave for the unpaid leave.
- (2) *After Exhaustion of Ten (10) Days of Leave:* After exhaustion of the first ten (10) days of Public Health Emergency Leave, the employee will be paid for the remainder of the employee's Public Health Emergency Leave an amount that is two-thirds (2/3) of the employee's regular rate of pay as determined by 29 U.S.C. 207(e).

Maximum Pay Thresholds:

Per Day Pay Maximum: In no event shall an employee be paid more than \$200 per day while taking Public Health Emergency Leave.

Total Leave Pay Maximum: In no event shall any employee receive more than \$10,000 in total compensation while taking Public Health Emergency Leave.

Sequencing of Leave Taken Pursuant to the Emergency Family and Medical Leave Expansion Act and Paid Sick Leave Pursuant to the Emergency Paid Sick Leave Act:

Paid Sick Leave ([insert section number]) taken pursuant to the Emergency Paid Sick Leave Act runs concurrent with the twelve (12) week leave entitlement provided by this Policy, with the Paid Sick Leave being taken first. At the conclusion of the two (2) weeks of Paid Sick Leave, an employee who is eligible for leave pursuant to the Emergency Family and Medical Leave Expansion Act will be entitled to an additional ten (10) weeks of leave pursuant to this Policy.

Concurrent Leaves:

[Whether to allow employees to utilize accrued leaves to “make up” the 1/3 pay they will lose by utilizing Public Health Emergency Leave is a decision which must be made by each jurisdiction.]

This sample policy DOES NOT permit the use of any leave to equalize pay.

Except in circumstances where the employee chooses to substitute paid leave for unpaid leave for the first ten (10) days of Public Health Emergency Leave, employees may not substitute other accrued, paid leaves for the Public Health Emergency Leave provided for in this Policy and must utilize the Public Health Emergency Leave provided for in this Policy prior to utilizing other accrued paid leaves to manage child care needs as described in this Policy.]

Intermittent Leave:

[Whether employees are entitled to utilize Intermittent leave when taking Public Health Emergency Leave is not specifically stated in the EFMLEA and no guidance has been provided as of the day of printing to resolve this issue. Each jurisdiction must determine how it wishes to handle this ambiguity.]

This sample policy DOES NOT permit the use of intermittent leave unless or until the DOL provides guidance requiring employer to allow such leave.

As neither the EFMLEA nor traditional FMLA Leave (as interpreted in 29 CFR §825.202) specifically permit intermittent leave for the care of a healthy child at home due to a school or day care closure related to COVID-19, Public Health Emergency Leave must be taken on a continuous basis (that is, a certain number of days or weeks in a row). Intermittent leave is not permitted. In the event the Department of Labor issues guidance permitting intermittent leave for Public Health Emergency Leave, [insert jurisdiction name] will follow whatever guidance is issued.]

Aggregation of Leave:

[Whether employers who employ both parents of a child needing care are permitted to take 12 weeks of Public Health Emergency Leave each or whether they are required to aggregate that leave for a combined total of 12 weeks is not specifically stated in the EFMLEA and no guidance has been provided as of the day of printing to resolve this issue. Each jurisdiction must determine how it wishes to handle this ambiguity.]

This sample policy DOES NOT permit both parents to utilize a full 12 weeks of Public Health Emergency Leave unless the employees can document that they are both needed to care for the child/children

It is unclear at this time whether EFMLEA leave is aggregated in situations where both parents are employed by [insert jurisdiction name]. However, the Public Health Emergency Leave is only granted where the employee is *needed* to care for the employee’s child. If both employees believe they are needed to care for their child/children, they will need to provide documentation as to the basis for that need.]

Employees may not take more than a combined 26 weeks of FMLA leave (including Basic Leave and Military Family Leave) in a single 12-month period. Employees may not take more than a combined 12 weeks of FMLA Basic Leave and EFMLEA Public Health Emergency Leave in a single 12-month period and may not take EFMLEA Public Health Emergency Leave after December 31, 2020.

Applying for Public Health Emergency Leave and Designation of Leave:

Employees may request Public Health Emergency Leave by contacting [insert relevant job title] by telephone or email. If the leave qualifies as Public Health Emergency Leave, the employee requesting the leave will receive written confirmation of the leave approval.

In the event that the necessity for leave is foreseeable, the employee will provide [insert jurisdiction name] with such notice of the leave as is practicable.

Extensions of Public Health Emergency Leave Beyond Anticipated Period:

If an employee needs leave beyond the date originally requested, the employee must provide reasonable notice to [insert jurisdiction name] as soon as possible and no later than within two business days after learning of the need for an extension of the leave.

Early Return from Leave:

If the employee is able to return to work earlier than expected, the employee must notify [insert jurisdiction name] of this fact and the expected date of return to work no later than two days after the employee learns that he/she will be able to return to work earlier than expected.

Job Restoration Rights:

An employee taking Public Health Emergency Leave must generally either be restored to his/her prior position or to an equivalent position in terms of pay, benefits, responsibilities, and authority. Job restoration may be denied where a job elimination has occurred that would have terminated the employee's job or placed him/her in a different job. Job restoration may also be denied to certain highly compensated employees if necessary to avoid substantial and grievous economic injury to [insert jurisdiction name].

Questions:

Employees with questions concerning the EFMLEA and/or this Policy are encouraged to contact the [insert relevant job title].

INTERPRETATION OF OR EXCEPTIONS TO THIS POLICY:

The [insert relevant job title] is authorized to make interpretations of this Policy. There shall be no exceptions to this Policy.

¹ A "Child Care Provider" is defined as someone who receives compensation for providing child care services on a regular basis, including an "eligible child care provider" as defined by Section 658P of 42 U.S.C. 985n.