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FAMILIES FIRST CORONAVIRUS RESPONSE ACT GUIDELINES FOR STATE EMPLOYEES

Background of State Response to Coronavirus

On March 9, 2020, Governor Murphy issued Executive Order No. 103, which declared both a state of emergency and a public health emergency due to the COVID-19 pandemic. Soon after, as COVID-19 continued to spread across New Jersey and an increasing number of individuals required medical care or hospitalization, the Governor issued a series of Executive Orders designed to limit community spread. On March 21, 2020, he issued Executive Order 107, that imposed a shelter in place order, closed all schools, child care centers and non-essential retail businesses, and required all businesses or non-profits, wherever practicable to accommodate telework or work-from-home arrangements and reduce staff on site to the minimal number necessary to continue essential operations.

In response to this rapidly evolving situation, on March 11, 2020, the Civil Service Commission issued new temporary guidelines implementing temporary COVID-19 paid leave for State employees. The purpose of the temporary COVID-19 paid leave was twofold: to address State governmental staffing requirements necessary to ensure the continuation of essential operations, and to provide State employees with greater latitude in applicable leave time procedures to prevent further spread of the virus and to prioritize their health and the health of their immediate family members.

On May 18, 2020, the Governor announced a multi-stage New Jersey's Road Back Plan for the methodical and strategic reopening of businesses and activities based on scientific data and metrics concerning the level of disease transmission risk and essential classification. The State is implementing its reopening process and has begun to relax restrictions on certain businesses and other entities. In particular, on

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May 29, 2020, the Governor issued Executive Order 149, which permitted child care centers to open as of June 15, 2020, and youth summer camps to open as of July 6, 2020.

In conjunction with this reopening process, the CSC is rescinding the temporary COVID-19 paid leave policy for State employees effective pay period # 15, which begins on July 4, 2020.

State employees, both those that utilized temporary COVID-19 paid leave and those that did not, may be eligible for federal leaves described more fully below.

Background of Federal Families First Coronavirus Response Act

On March 18, 2020 the federal Families First Coronavirus Response Act (FFCRA), P.L. 116-127, which creates two new emergency paid leave entitlements in response to the COVID-19 pandemic, was enacted. The Emergency Paid Sick Leave Act (EPSLA) entitles certain employees to take up to two weeks of paid sick leave and the Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the Family and Medical Leave Act to permit certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for purposes related to COVID-19. Both are temporary measures, effective April 1, 2020 and due to expire on December 31, 2020. The State, as an employer, is subject to both the EPSLA and EFMLEA.

The purpose of this guidance is to inform State employers and employees of the requirements of the federal law.

Emergency Paid Sick Leave Act

EPSLA entitles employees, who are unable to work or telework for certain reasons related to COVID-19, to two weeks of emergency paid sick leave without regard to minimum service requirements (i.e., even new employees are eligible). Employees are not entitled to EPSLA if the employer does not have work (or telework) for the employee (e.g., if the office/entity is closed).

Eligibility (29 CFR 826.20)

Note: employers are permitted to exempt certain employees (health care workers and first responders) from coverage under the EPSLA. See below for further information on exempt employees.

Full Pay Leave: *Employees other than exempt health care workers or first responders are eligible for up to two weeks of paid sick leave, at full pay, up to a specified cap, if they are unable to work due to the following reasons:*

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 (“quarantine/isolation”);
2. The employee has been advised by a health care provider to self-quarantine related to COVID-19 (“self-quarantine”); or
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis (“symptomatic”).

Partial Pay Leave. *Employees other than exempt health care workers or first responders are eligible for up to two weeks of paid sick leave at partial pay, up to a specified cap, if they are unable to work due to the following reasons:*

4. Caring for an individual subject to an order described in (1) or self-quarantine as described in (2) (“care for quarantined individuals”);
5. Caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons (“child-care”); or
6. Experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services (“other condition”).

Note: The U.S. Department of Health and Human Services (HHS) has not yet identified any “substantially similar condition” that would allow an employee to take EPSLA. If HHS does identify any such condition, the United States Department of Labor will issue guidance explaining when an employee may take paid sick leave on the basis of a “substantially similar condition.”

Documentation (29 CFR 826.100)

An agency can require proof consistent with the categories of EPSLA leave listed in 1 through 6 above. Such documentation includes:

- Employee’s name;
- Date(s) for which leave is required;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work because of the qualified reason for leave:
 - For leave due to quarantine/isolation, employee must provide the name

- of the government entity that issued the Order;
- For leave due to self-quarantine, employee must provide the name of the health care provider who advised the employee to self-quarantine due to concerns over COVID-19;
- For leave due to care for quarantined individuals, employee must provide either:
 - The name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject; or
 - The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19
- For leave due to child care, employee must provide:
 - The name of the son or daughter being cared for;
 - The name of the school, place of care, or child care provider that has closed or become unavailable for reasons related to COVID-19; and
 - A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes paid sick leave.

If an employee is experiencing symptoms of COVID-19 and seeking a diagnosis, an agency may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. The agency may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's [documentation requirements](#) are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

Payment (29 CFR 826.21, 826.22, 826.25)

An employee's pay for EPSLA is calculated based on the employee's regular rate of pay, subject to specific monetary caps.

An employee's pay is calculated as follows:

Employees entitled to full pay (eligible due to quarantine/isolation, self-quarantine, symptomatic individuals) shall be paid at the employee's regular rate of compensation, subject to a cap of \$511 per day and \$5,110 in the aggregate.

Employees entitled to partial pay (eligible due to care for quarantined individual, child care, or other condition) shall be paid at two-thirds of the employee's regular rate of pay, subject to a cap of \$200 per day and \$2,000 in the aggregate. Note: the employer can agree to allow the employee to supplement the amount received from EPSLA with paid accrued leave, up to the employee's normal earnings.

The employee's time base determines the number of EPSLA paid sick leave hours the employee is entitled to receive:

- Full-time employees (defined as those normally scheduled to work at least 40 hours per workweek) receive up to 80 hours of paid sick leave at the employee's regular rate of pay.
- Employees who work less than 40 hours per workweek are entitled to a number of hours equal to the number of hours that the particular employee works, on average, over a 2-week period.

In the case of a less-than-full-time employee whose schedule varies from week to week to such an extent that you are unable to determine with certainty the number of hours the employee would have worked if such employee had not taken EPSLA, the following procedure shall be used to calculate the number of hours worked:

1. Subject to (2) or (3) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-month period, ending on the date on which the employee takes EPSLA, including hours for which the employee took leave of any type.
2. 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. OR
3. If the employee did not work over a full 6-month period, average the hours worked over the period the employee did work.

An agency must use the following procedure to calculate the number of hours worked for part-time employees who work varied schedules from week-to-week:

1. Subject to (2) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-month period, ending on the date on which the employee takes the EPSLA leave, including hours for which the employee took leave of any type.
 2. If the employee did not work over that six-month 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.
- Intermittent employees' departments must:

- Take the past six-months of work and calculate the average number of hours to determine the average daily hour entitlement; if the employee has not worked six months, then;
- The number of hours the employer and employee agreed they would work each week upon hire.

EPSLA benefits cannot be carried over from year to year. Under the Act, the paid sick time must end at the start of the next work shift immediately following the need for the leave.

Applicability of other leave time (29 C.F.R. 826.160)

An employer cannot require that an employee use other leave time prior to using the paid leave time under the EPSLA.

Notification (29 C.F.R. 826.90)

An employee must provide notice of the need for the leave as soon as practicable under the circumstances. An employer may require employees to follow reasonable notice procedures after the first workday (or portion thereof) for which an employee takes EPSLA.

Employer Prohibited Acts (29 C.F.R. 826.150)

It is unlawful for any agency to discharge, discipline, or in any other manner discriminate against any employee who takes EPSLA leave and who has filed any complaint or instituted or caused to be instituted any proceeding under or related to EPSLA leave (including a proceeding that seeks enforcement of the Act), or who has testified or is about to testify in any such proceeding.

Leave in accordance with the EPSLA shall not diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law, collective bargaining agreement, or existing policy. There is no entitlement to be paid for any unused EPSLA leave upon an employee's termination, resignation, retirement, or other separation from employment. The employer may not require that the employee find a replacement as a condition for using this benefit.

Emergency Family and Medical Leave Expansion Act

The second federal benefit change under the FFCRA is EFMLEA, an expansion of the Family Medical and Leave Act. Like EPSLA, the changes are temporary, expiring on December 31, 2020. Unlike regular FMLA, which provides the employee with a right to retain a job during an absence of 12 weeks, but no promise of pay during the absence, EFMLEA includes some payment. (See "Payment" below.) Agencies are

cautioned that provisions of the EFMLEA must be applied in the context of State leave policy, consistent with attendance rules and negotiated agreements.

Eligibility (29 CFR 826.20, 826.30)

To qualify, the employee must have worked for the employer for at least 30 calendar days and must be unable to work (or telework) due to a need to care for his or her own child under 18 years of age because the school or care center has been closed, or the child care provider of that child is unavailable, due to COVID-19. The employee may also be eligible for EFMLEA to care for a child if his or her child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and the employee is unable to work or telework as a result. The employee is eligible only if there is no suitable person available to care for his or her son or daughter during the period of such leave.

This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer.

Documentation (29 CFR 826.100)

An agency can require proof of eligibility for EFMLEA as follows:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave;
- Oral or written statement that the employee is unable to work (including telework) because of the need to care for his or her own child under 18 years of age where the school or child care center has been closed, or the child care provider of that child is unavailable, due to COVID-19;
- The name of the son or daughter being cared for;
- The name of the school, place of care or child care provider that has been closed or become available due to COVID-19; and
- A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EFMLEA.

Payment (29 C.F.R. 826.24, 29 C.F.R. 826.70, 29 C.F.R. 826.160)

The first two weeks of EFMLEA are unpaid, although employees can elect to use their two weeks of EPSLA (which provides 2/3 pay for COVID-related child care problems), or accrued vacation, administrative or compensatory leave under the State's normal policies. If the employee uses EPSLA for the first two weeks, the benefits run concurrently with those provided under the EFMLEA. The employee may request,

and the employer may agree, to supplement the 2/3 pay under the EPSLA with accrued leave up to the employee's normal earnings for the first two weeks of EFMLEA.

For weeks 3 to 12 of EFMLEA, employees will be paid two-thirds of their salary, up to \$200 per day and \$10,000 in the aggregate. There is also a pay calculation for employees who have varying hours. The maximum daily entitlement and overall total are the same regardless of the employee's time base.

Consistent with 29 U.S.C. 2612(d)(2)(B) (of the FMLA), the employee may elect, or an employer may require, that an employee take vacation, administrative or compensatory leave under the State's normal policies concurrent with the taking of expanded family and medical leave, where the vacation, administrative or compensatory leave would be available to the employee under the circumstances and where that leave is being taken for a qualifying purpose(s) under the FMLA. If the employee elects or the employer requires the employee to take concurrent leave, the employer must pay the eligible employee the full amount to which the employee is entitled under the preexisting paid leave policy for the period of leave, and each day of leave would count as a day of the applicable accrued leave. Alternatively, if the employer and employee agree, the employee could supplement the 2/3 pay under the EFMLEA with applicable accrued leave to bring the employee up to their normal rate of pay. Under those circumstances, each day of supplemented leave would count as 1/3 day of accrued leave.

Thus, for example, if an employee has five days of vacation leave remaining in the year, if the leave is used concurrently with the EFMLEA leave, the first five days of concurrent use would count as five full days of vacation leave. After the vacation leave is exhausted, the employee would receive any remaining paid EFMLEA in the amounts and subject to the daily and aggregate limits of the EFMLEA. Alternatively, if the employer and employee agree to supplementation of the EFMLEA leave, the employee could use the five days of vacation leave to supplement EFMLEA leave for 15 days (1/3 pay each day). Agencies should refer to applicable leave policies and negotiations agreements for further clarification as to the permissibility of requiring concurrent leave.

Period of leave (29 C.F.R. 826.23)

EFMLEA utilizes the same 12-week entitlement as FMLA. If an employee has used any of their 12-week entitlement under FMLA during the current year, as calculated for FMLA purposes, the entitlement under EFMLEA will be reduced by the amount already used. If an employee has exhausted their 12-week entitlement under FMLA, the employee is not eligible for EFMLEA leave.

Notification (29 C.F.R. 826.90)

If leave under this program is foreseeable, an employee shall provide their employer with such notice of leave as is practicable.

Prohibited Acts (29 C.F.R. 826.151)

The FMLA's prohibitions against interference with the exercise of rights, discrimination and interference with proceedings or inquiries apply to employers with respect to eligible employees taking or attempting to take, leave under the EFMLEA.

Provisions Applicable to EPSLA and EFMLEA

The following provisions apply to both EPSLA and EFMLEA

Intermittent Leave under EPSLA and EFMLEA (29 C.F.R. 826.50)

An employee may take EPSLA or EFMLEA intermittently (in separate periods of time, rather than one continuous period) if both the employer and employee agree, under the following circumstances:

- *Reporting to the Worksite:* The ability of an employee to take EPSLA or EFMLEA intermittently while reporting to the worksite depends upon the reason for the leave.
 - The employee may take up to the entire two weeks of EPSLA or the full 12 weeks of EFMLEA intermittently to care for the employee's son or daughter whose school or place of care or childcare provider is unavailable due to a COVID-19 related reason.
 - Intermittent use of EPSLA benefits is not available for leave taken for the following reasons: quarantine/isolation, self-quarantine, symptomatic, care for quarantined individuals or other reason. Once an employee begins taking EPSLA for one or more of those qualifying reasons, the employee must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take EPSLA.
- *Teleworking:* If the employee is teleworking or otherwise working from home, the employer and employee may agree that the employee may take EPSLA for any qualifying reason or EFMLEA intermittently and in any agreed increment of time (but only for those periods of time when the employee is unavailable to telework because of a COVID-19 related reason).
- *Calculation of Leave:* If leave is taken intermittently, only the amount of leave actually taken may be counted toward the employee's leave entitlements.

Exemptions from EPSLA and EFMLEA (29 C.F.R. 826.30)

Agencies may exempt certain categories of employees from coverage under the EPSLA or the EFMLEA. These include:

- *Health care providers*, which includes anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
- *Emergency responders*, which includes anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

Employees that have been designated as "essential" by an Appointing Authority are still entitled to EPSLA and/or EFMLEA unless they fall within the health care provider or emergency responder categories listed above, as determined by the appointing authority. However, the "essential" designation can have an impact for other types of leave (i.e., use of accumulated vacation leave not related to family leave).

Employees exempted from EPSLA and EFMLEA may still be eligible to use accumulated vacation leave, sick leave or administrative leave pursuant to *N.J.A.C. 4A:6-1 et seq.* Employees should consult their supervisors and Human Resources Office with questions about eligibility. Departments should consider any requests to use accumulated leave on a case-by-case basis.

Health Care Coverage Under EPSLA and EFMLEA (29 C.F.R. 826.110)

While an employee is taking leave under the EPSLA or EFMLEA, the employing agency must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.

Posting and Notice Requirements Under EPSLA and EFMLEA (29 C.F.R. 826.80)

Each agency shall post and keep posted, in conspicuous places where notices to employees are customarily posted, a notice, prepared or approved by the Secretary of Labor, of the requirements described in this Act. That notice is available [here](#).

Tracking

Departments must develop a mechanism to manually track all pay provided to employees under these programs. The tracking mechanism must include the employee's name, dates the entitlements were used, days/hours of leave, and total amount paid to the employee.

Timesheet Documentation

Employees must clearly document on their timesheet in the comments section, or location as defined by the department, the leave which they are using.

Resource Links

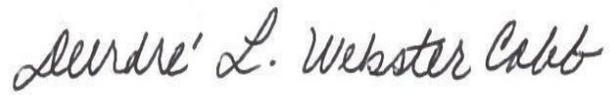
Additional guidance from the United States Department of Labor (USDOL) can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (English) and https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/Ley%20Familias%20Primer%20en%20Respuesta%20al%20Coronavirus_formatted.pdf (Spanish)

Employee rights poster, created by USDOL available here:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

CSC FREQUENTLY ASKED QUESTIONS FOR EMPLOYEES STATE EMPLOYEE LEAVE TIME AND STAFFING – COVID-19 available at:

<https://www.state.nj.us/csc/Coronavirus%20FAQs.FINAL.pdf>

GUIDELINES FOR STATE EMPLOYEE LEAVE TIME AND STAFFING – COVID-19
available at: <https://www.nj.gov/csc/COVguidelines.FINAL.pdf>

A handwritten signature in black ink that reads "Deirdre L. Webster Cobb". The signature is written in a cursive, flowing style.

Deirdre L. Webster Cobb, Esq.
Chair/Chief Executive Officer