

FAQ FOR ARIZONA SCHOOL DISTRICTS ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On Wednesday, March 18, 2020, Congress passed and President Trump signed H.R. 6201 also known as the Families First Coronavirus Response Act (FFCRA"), which, by its terms, takes effect not later than fifteen days after its enactment and remains in effect until December 31, 2020.

The purpose of this FAQ document is to provide information to Arizona School Risk Retention Trust ("Trust") members on how the FFCRA affects Arizona school districts and their employees with respect to two parts of the FFCRA: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

The Trust appreciates the following firms peer reviewing this document: Udall Shumway, DeConcini McDonald Yetwin & Lacy, Sims Mackin, and Hufford, Horstman, Mongini, Parnell & Tucker. Please contact the Trust or local counsel if your district would like legal advice.

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GENERAL INFORMATION

1. My school district has over 500 employees. Does the FFCRA apply to my district?

Yes. Although the FFCRA does not apply to private corporations that employ 500 or more employees, it applies to all “public agencies” that employ one (1) or more employees.

2. The U.S. Department of Labor (“DOL”) has issued an FAQ that says that the FFCRA is effective April 1, 2020, but that is less than fifteen days after its enactment. What date applies?

The FFCRA states the leave provisions “shall take effect not later than 15 days after the date of enactment.” Since President Trump signed the FFCRA on March 18, 2020, this date would be April 2, 2020. However, the DOL has indicated the requirements apply as of April 1, 2020.

The DOL guidance is available at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

EMERGENCY PAID SICK LEAVE ACT

3. Who qualifies to take Emergency Paid Sick Leave?

Division E of the FFCRA, which is called the “Emergency Paid Sick Leave Act,” requires covered employers to provide a covered employee with up to eighty (80) hours of emergency paid sick leave (“Emergency Paid Sick Leave”) at up to their daily rate of pay if the employee is unable to work (or telework) for the following coronavirus related reasons:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to the coronavirus;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to the coronavirus;
- The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider;
- The employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
- The employee is experiencing any other condition substantially similar to the coronavirus, as specified by the U.S. Department of Health and Human Services.

4. The Governor of Arizona has ordered that employees stay at home subject to listed exceptions. Is this the equivalent of a quarantine or isolation order?

Probably not. Under CDC guidelines, a “shelter in place” or “stay at home” order is different from a quarantine or isolation order. The Governor’s Executive Orders related to COVID-19 are at: <https://azgovernor.gov/executive-orders>. CDC guidelines related to COVID-19 are at: <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>

5. Is there a cap on the dollar amount of Emergency Paid Sick Leave an employee gets paid while using that leave under the FFCRA?

Yes. If the employee is on leave due to any of the first three reasons listed above, the amount they may be paid is capped at \$511 per day or \$5,110 in the aggregate. If the employee is on leave for the last three reasons, the amount of Emergency Sick Leave they may be paid is two-thirds of their regular rate of pay capped at \$200 per day or \$2,000 in the aggregate.

6. Does the FFCRA define “health care provider” and “son or daughter”?

The FFCRA adopts and incorporates the definitions of the terms “health care provider” and “son or daughter” set out in Section 101 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2611 (the “FMLA”).

The term “health care provider,” as used in the FFCRA regarding Emergency Sick Leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

The term “son or daughter” means the employee’s child, which includes the employee’s biological child, adopted child, foster child, stepchild, legal ward, or a child for whom the employee stands in loco parentis – someone with day-to-day responsibilities to care for or financially support a child.

7. Does the FFCRA apply to part-time employees and, if so, how are their hours of Emergency Paid Sick Leave calculated?

Yes. Part-time employees are covered. The amount of Emergency Paid Sick Leave is the number of hours such employee works, on average, over a 2-week period. The DOL does not provide specific guidance regarding whether substitute teachers are considered part-time employees. If the individual is a person directly employed by the school district for at least 30 calendar days, the individual is a qualified employee. DOL guidance states that “temporary” employees may count days previously worked toward this 30-day eligibility requirement.

8. Can the school district require the employee to use other paid time off before taking Emergency Paid Sick Leave?

No. The FFCRA states that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses Emergency Paid Sick Leave.

In addition to the new types of leave available, District employees may use accrued leave in accordance with applicable District policies.

9. Can Emergency Paid Sick Leave be taken on an intermittent basis?

No intermittent leave can be taken under the FFCRA unless the employer and employee agree. Additionally, an on-site worker cannot take Emergency Paid Sick Leave intermittently unless it is taken to care for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions. Further, the District has the discretion to deny any intermittent sick leave request to care for a son or daughter under FFCRA. A teleworker can take Emergency Paid Sick Leave **intermittently if the** employer agrees and the employee is unable to telework her normal schedule for any qualifying reason.

If an employee is not teleworking, once the employee begins taking paid sick leave for one or more of the qualifying COVID-19 related reasons, the employee must continue to take Emergency Paid Sick Leave each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave.

If an employee takes Expanded FMLA leave to care for the employee's son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, intermittent leave may be available. Please see answer to question 15 below.

If the employee does not use all of the Emergency Paid Sick Leave, subject to the full-day increment requirement set out above, the employee may use the remaining balance at a later time, until December 31, 2020, for a qualifying COVID-19 related reason.

10. Can an employee utilize Emergency Sick Leave for less than a full day?

The DOL states that, unless an employee is teleworking, "paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments." In certain situations, the employer and employee can agree to less than full day increments.

11. Can an employee take Emergency Paid Sick Leave twice (e.g. for a self-quarantine and then again if the employee experiences symptoms later and is seeking a diagnosis)?

Employees are entitled to 80 hours of Emergency Paid Sick Leave for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period for any combination of qualifying reasons. However, the total number of hours for which an employee receives Emergency Paid Sick Leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

An employee may take Emergency Paid Sick Leave as many times as the employee qualifies, up to a total of 80 hours/2 weeks until 12/31/20, subject to the full day increment requirements and subject to the caps described above.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

12. What qualifies an employee to use leave provided by the Emergency Family and Medical Leave Expansion Act (“Expanded FMLA”)?

Division C of the FFCRA requires school districts to provide Expanded FMLA to full-time and part-time employees who have been employed for at least 30 days and who are unable to work (or telework) due to any of the qualifying reasons, including because they must care for a son or daughter whose school or place of care has been closed or a child care provider is unavailable due to public health emergency.

13. How long may an employee use Expanded FMLA?

The Expanded FMLA can be for up to 12 weeks. The first 10 days may be unpaid if solely taken as Expanded FMLA for a qualifying reason, generally to care for a son or daughter because his or her school or place of care is closed, or his or her childcare provider is unavailable. Other paid leave may be used, at the employee’s option, during the first two weeks.

14. Is there a cap on the dollar amount paid for leave during the Expanded FMLA?

Under this part of the FFCRA, the first 10 days in which an employee takes Expanded FMLA may, in limited situations, be unpaid. An employee may elect to substitute any accrued paid vacation leave, personal leave, or medical or sick leave for unpaid leave, but the employer cannot require that. After 10 days of leave, an employer is required to provide Expanded FMLA at an amount not less than two-thirds of an employee’s regular rate of pay up to \$200 per day or \$10,000 in the aggregate.

15. Can the Expanded FMLA be taken on an intermittent basis?

Yes, if the school district approves the use of intermittent leave. For instance, upon agreement, if the child is at home because his or her school or place of care is closed, or child care provider is unavailable, the employee may take paid Expanded FMLA on Mondays, Wednesdays, and Fridays to care for the employee’s child, but work at the normal worksite or remotely on Tuesdays and Thursdays.

16. If an employee is home with a son or daughter because his or her school or place of care is closed, or his or her childcare provider is unavailable, does the employee get paid sick leave, Emergency Family Leave, or both – how do they interact?

The DOL states that the employee may be eligible for both types of leave. The employee may take both Emergency Paid Sick Leave and Expanded FMLA for qualifying reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks (up to 80 hours) of paid leave if the employee qualifies for such leave.

In the scenario presented in the question above, the Emergency Paid Sick Leave Act would provide for paid leave for the first 10 workdays of Expanded FMLA at two-thirds of the employee's daily rate of pay capped at \$200 per day or \$2000.

Generally, the Act provides that employees of covered employers are eligible for:

- *Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay* where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- *Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay* because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
- *Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay* where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

17. Is leave taken under the Expanded FMLA provision in addition to the time allowed under the Family Medical Leave Act?

No. An employee may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including Expanded FMLA. Expanded FMLA expires on December 31, 2020.

18. What documents can a district require?

DOL regulations will be forthcoming. Initial DOL guidance provides that employees must provide documentation in support of a need for paid sick leave as specified in applicable IRS forms, instructions, and information.

Districts may also require employees to provide additional documentation in support of a need for Expanded FMLA to care for your child whose school or place of care is closed, or childcare provider is unavailable. For example, this may include a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the employee from an employer or official of the school, place of care, or child care provider.

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