

School Districts Be Aware: Coronavirus Relief Bill Signed Into Law

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law. The law will go into effect on April 2, 2020, and the obligations discussed below will end on December 31, 2020. While the law includes several provisions designed to stimulate the economy and assist families during the current public health emergency arising from COVID-19 (commonly known as the Coronavirus), two key parts of the law will directly impact school districts as employers.

The FFCRA provides for two weeks of mandatory, paid emergency leave and includes provisions that expand the Family and Medical Leave Act (“FMLA”) for all school districts.

All School Districts Are Required to Provide These Benefits

Generally, all school districts are covered by the law. While the law contains exceptions for certain private employers and exception for health care providers and emergency responders, these exceptions likely do not apply to school districts.

TWO-WEEK PAID EMERGENCY LEAVE

The FFCRA requires that school districts provide one “bucket” of 80 hours of emergency paid leave for all full-time employees. Part-time employees must also be given emergency paid leave based on the number of hours they work, on average, over a two-week period. All employees must be given emergency paid leave regardless of how long they have worked for the school district. The emergency paid leave does not carryover from one year to the next, and school districts do not have to pay out employees for any unused emergency paid leave upon separation from employment.

An employee qualifies for paid leave if the employee is unable to work (or telework) because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to the Coronavirus;
- The employee self-isolates at the advice of a health care provider due to diagnosis of or other concerns related to the Coronavirus;
- The employee is obtaining a medical diagnosis because the employee is experiencing the symptoms of the Coronavirus.

Employees who qualify under the above conditions must be paid at their regular rate of pay or \$511.00 per day, whichever is less. Under these circumstances, each employee’s paid emergency leave is capped at a total of \$5,110.

Under the law, the same “bucket” of 80 hours of paid leave may also be used by an employee who is unable to work (or telework) because:

- The employee is caring for an individual a) who is subject to a federal, state, or local quarantine or isolation order related to the Coronavirus, or b) who is self-isolating at the advice of a health care provider due to diagnosis of or other concerns related to the Coronavirus;
- The employee is caring for the employee’s 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.”
- The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

Employees who qualify for the above conditions must be paid at either 67% of their regular pay or \$200.00 per day, whichever is less. Under these circumstances, each employee’s paid emergency leave is capped at a total of \$2,000.

Calculating the Amount of Leave for Part-Time Employees with Varying Schedules

If a school district is not able to determine with certainty the number of hours a part-time employee would have worked over a two-week period, the school district should use an average of the number of hours that the employee was scheduled per day over the 6-month period ending at the time the employee first takes paid emergency leave. If the employee did not work over the prior 6-month period, the school district should use the reasonable expectation of the employee at the time of hiring as to the average number of hours per day that the employee would normally be scheduled to work.

Paid Emergency Leave Must Be Given in Addition to Other Paid Leaves

The paid emergency leave under the FFCRA must be given in addition to any existing PTO, sick, or other paid leave provided by the school district. School districts cannot require that employees use other forms of paid leave before using the paid emergency leave under the FFCRA. However, unlike an earlier version of this bill that did not become law, the FFCRA does not prevent a school board from modifying its existing leave policies. School boards that have already passed emergency Coronavirus paid leave policies can modify their existing policies to conform with this new required leave so employees are not entitled to both.

School Districts Cannot Require Employees to Find Replacements

An employee who is eligible for emergency paid leave under this law cannot be required to search for and find a replacement employee to cover the employee’s scheduled work hours.

Notice Requirements

The Department of Labor is preparing a notice that school districts must post in conspicuous places on their premises where notices are customarily posted.

Anti-Retaliation

School districts may not discharge, discipline, or discriminate against any employee who takes emergency paid leave in accordance with the law or who has filed a complaint or testified (or will testify) in a proceeding related to this law.

PUBLIC HEALTH EMERGENCY FMLA EXPANSION

The second major component of the FFCRA that directly impacts school districts as employers is the temporary expansion of the federal FMLA. All employees who have been employed by a school district for at least 30 days may qualify for leave under the FFCRA's Family and Medical Leave Expansion Act.

Amount of Leave and Pay during Leave

All school districts must provide public health emergency FMLA leave for full and part-time employees. The first 10 working days of this public health emergency FMLA leave is unpaid, but employees may substitute emergency paid leave under the FFCRA or any other accrued paid leave to receive pay during this 10-day period. Unlike normal FMLA leave which is unpaid, after the first 10 days of public health emergency FMLA leave, the school district must pay the employee at two-thirds their regular pay for the number of hours the employee would otherwise be normally scheduled to work. This pay is limited to no more than \$200 per day and \$10,000 in total for each employee.

Calculating Hours of Leave for Employees with Variable Schedules

If a school district is not able to determine with certainty the number of hours an employee would have worked over a two-week period, the school district should use an average of the number of hours that the employee was scheduled per day over the 6-month period ending at the time the employee first takes public health emergency FMLA leave. If the employee did not work over the prior 6-month period, the school district should use the reasonable expectation of the employee at the time of hiring as to the average number of hours per day that the employee would normally be scheduled to work.¹

Qualifying for Public Health Emergency FMLA Leave

Eligible employees may take public health emergency FMLA leave if the employee is unable to work (or telework) due to the need for leave *to care for* the employee's son or daughter under 18 years of age if the school or place of care of the employee's son or daughter has closed, or the child care provider of such son or daughter is unavailable, due to the public health emergency. In any case where the necessity for leave is foreseeable, an employee must provide the school district with as much notice of the leave as is practicable.

Right to Job Restoration and Contact Requirements

School districts must make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, unless the position held by the employee does not exist upon the employee's return due to economic conditions caused by the public health emergency.

If an employee is not restored to his/her former position, a school district must make reasonable efforts to contact the employee if an equivalent position becomes available within one year beginning on the earlier of a) the date on which the employee's need for leave concluded, or b) 12 weeks after the date on which the employee's leave commenced. Additional guidance should be forthcoming from the Department of Labor as to whether such an employee is automatically entitled to this position or if the employee merely has the right to apply for such a position.

Integrating this Leave with Other FMLA Leave

Public health emergency FMLA leave counts toward an employee's total of 12 weeks of "regular" FMLA leave. If an employee has already used some FMLA leave for other qualifying reasons, the amount of public health emergency FMLA is reduced by the amount of FMLA the employee has already taken.

Employees are not able to take this leave intermittently.

Non-Interference and Non-Retaliation

As with any form of FMLA leave, no school district can interfere with the right of an employee to take public health emergency FMLA leave, nor can a school district retaliate against an employee for taking this leave.

TAX IMPLICATIONS

Any wages paid to employees due to either type of FFCRA leave are *not* subject to either FICA or Medicare taxes.

Whereas private employers are eligible for refundable tax credits to offset the cost of these benefits, school districts are not eligible for these tax credits.

CONCLUSION

The FFCRA will inevitably raise many questions for school districts.

The Boardman Clark School Law practice group is available to assist you as you navigate these complex issues in order to plan for this law taking effect on April 2, 2020.

¹ *Note that this calculation for FMLA leave applies to all employees with varied schedules, whereas with respect to emergency paid leave, this calculation only applies to part-time employees.*

PRIMARY AUTHORS



Brian P. Goodman

(608) 283-7529
BGOODMAN@BOARDMANCLARK.COM

- | | | | | | |
|----------------------|----------------|---------------------------|----------------|--------------------------|----------------|
| ■ Michael J. Julka | (608) 286-7238 | ■ Steven C. Zach | (608) 283-1736 | ■ Matthew W. Bell | (608) 286-7239 |
| ■ James K. Ruhly | (608) 283-1738 | ■ Richard F. Verstegen | (608) 283-7233 | ■ Christopher T. Schmidt | (608) 286-7157 |
| ■ William L. Fahey | (608) 286-7234 | ■ David P. Weller | (608) 286-7235 | ■ Brian P. Goodman | (608) 283-1722 |
| ■ JoAnn M. Hart | (608) 286-7162 | ■ Jennifer S. Mirus | (608) 283-1799 | ■ Daniel T. Fahey | (608) 286-7216 |
| ■ Eileen A. Brownlee | (608) 822-3251 | ■ Rhonda R. Hazen | (608) 283-1724 | ■ Eric B. Hagen | (608) 286-7225 |
| ■ Doug E. Witte | (608) 283-7529 | ■ M. Tess O'Brien-Heinzen | (608) 283-1798 | | |

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