

MEMORANDUM

TO: New Jersey Municipal Managers Association

FROM: Matthew J. Giacobbe, Esq.
Marina V. Stinely, Esq.

DATE: March 27, 2020

Re: COVID-19 Questions and Answers for Public Sector Employers – **WEEKLY UPDATE**

The coronavirus disease 2019 (“COVID-19”) outbreak is an unprecedented global event that is resulting in myriad issues for municipal, county and state governments. The purpose of this memorandum is to provide additional and updated answers and guidance to frequently asked questions raised by public sector municipal employers when dealing with issues related to the COVID-19 outbreak.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March, 18, 2020, the Federal Government enacted the Families First Coronavirus Response Act (the “Families First Act”). The Families First Act created two programs to assist workers during the COVID-19 outbreak, the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (the “Emergency FMLA Expansion Act”). The U.S. Department of Labor has advised that these laws become effective on **April 1, 2020** and will remain effective until **December 31, 2020**.

EMERGENCY PAID SICK LEAVE ACT

Covered employers under the Emergency Paid Sick Leave Act include: (1) a private entity or individual that employs fewer than 500 employees; and (2) a public agency that employs 1 or more employees.

Under the Emergency Paid Sick Leave Act, an **employee** includes any individual employed by a State, political subdivision of a State, or an interstate governmental agency. Except that an employer of an employee who is a “health care provider” or an “emergency responder” may elect to exclude such employee from the application of the Emergency Paid Sick Leave Act. There is no length of service requirement for an employee to be eligible to receive benefits under the Emergency Paid Sick Leave Act.

Oakland Office: 169 Ramapo Valley Road, UL 105, Oakland, NJ 07436 Tel 973 845-6700 Fax 201 644-7601

Somerville Office: 50 Division Street, Suite 501, Somerville, NJ 08876 Tel 732 583-7474 Fax 201 644-7601

Matawan Office: 955 State Route 34, Suite 200, Matawan, NJ 07747 Tel 732 583-7474 Fax 732 290-0753

For a review of benefits available under the Emergency Paid Sick Leave Act, please see our memorandum dated March 19, 2020.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Covered employers under the Emergency FMLA Expansion Act include: (1) an employer who employs fewer than 500 employees; and (2) any public agency, meaning the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State; or any interstate governmental agency (even if the agency employs more than 500 employees).

An **eligible employee** is an employee who has been employed for at least thirty (30) calendar days by the employer with respect to whom leave is requested. Except that an employer of an employee who is a “health care provider” or an “emergency responder” may elect to exclude such employee from the application of the Emergency FMLA Expansion Act.

Leave taken under the Emergency FMLA Expansion Act counts against an employee’s right to twelve (12) weeks of FMLA leave in a designated 12-month period.

For a review of benefits available under the Emergency FMLA Expansion Act, please see our memorandum dated March 19, 2020.

PAYMENT OF BENEFITS

Employers are required to pay upfront for the benefits under the Families First Act and may receive tax credits for their contributions. **However, those tax credits do not apply to government employers.** See H.R. 6201 §§ 7001(e)(4) and 7003(e)(4).¹

DEPARTMENT OF LABOR GUIDANCE

As of March 26, 2020, the U.S. Department of Labor issued poster guidance on the Families First Act for Federal² and Non-Federal³ employees. Covered employers under the Families First Act **must** post a notice regarding the Families First Act in a conspicuous place on its premises. The notice is not required to be posted in multiple languages but the U.S. Department of Labor is preparing posters in languages other than English.⁴

In addition, the U.S. Department of Labor has issued initial questions and answers that will be followed by the issuance of implementing regulations.⁵

COVID-19 EMPLOYEE ABSENCE SUMMARY

In general, if an employee is absent because he/she is sick with, experiencing symptoms of, or in quarantine due to COVID-19, the employee may be entitled to two (2) weeks (up to eighty (80) hours) of paid leave under the

¹ <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

² https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf

³ https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

⁴ <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

⁵ <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Emergency Paid Sick Leave Act; up to twelve (12) weeks of unpaid leave under the Family and Medical Leave Act (“FMLA”); and may utilize any of his/her accrued leave time during the absence.

If an employee is absent because he/she is caring for a qualifying family member (*e.g., parent, spouse, child*) who is sick with or has symptoms of COVID-19, the employee may be eligible for Emergency Paid Sick Leave Act leave, New Jersey Family Leave Act (“NJFLA”) or FMLA leave; and may utilize any of his/her accrued leave time during the absence.

If an employee is absent because he/she is taking care of a minor child who is at home due to COVID-19 (including school and childcare closures), the employee may be entitled to benefits under the Emergency Paid Sick Leave Act, Emergency FMLA Expansion Act and may utilize his/her accrued leave time during the absence.

NEW JERSEY LEGISLATION UPDATE

On March 25, 2020, the State of New Jersey enacted new legislation concerning family leave and disability benefits and amending various parts of the statutory law (A3900 and S2304). The new legislation expands the scope of the State’s Temporary Disability Insurance (“TDI”) so that workers may obtain TDI or Family Leave Insurance (“FLI”) benefits for COVID-19 related illnesses. To receive TDI benefits, a worker must have a serious health condition, and to receive FLI benefits, a qualifying family member cared for by the worker must have a serious health condition. The new legislation expands the definition of a “serious health condition” for which a worker may obtain TDI benefits and/or FLI benefits.

The new definition states that during a state of emergency (or as found to be needed by the Commissioner of Health or other public health authority) a “serious health condition” shall also include:

- (1) An illness caused by an epidemic of a communicable disease;
- (2) A known or suspected exposure to a communicable disease; or
- (3) Efforts to prevent the spread of a communicable disease, which:
 - a. In the case of FLI benefits, results in the issuance by a healthcare provider or other public health authority of a determination that the presence in the community of the worker’s family member may jeopardize the health of others;
 - b. In the case of FLI or TDI benefits, results in the recommendation, discretion, or order of a healthcare provider or authority that the worker, or a family member in need of care by the worker, be isolated or quarantined because of suspected exposure to the communicable disease that could jeopardize the health of others.

The new legislation eliminates the seven (7) day waiting period for disability benefits if the disability is for an epidemic-related cases, as described above.

The new legislation also amends the New Jersey Family Leave Act so that employee rights to reinstatement be provided to workers who take leave due to the epidemic-related cases, described above.

In addition, the new legislation amends the New Jersey Earned Sick Leave law to permit employees to use earned sick leave for inability to work because of epidemic-related cases, as described above, and for inability to work because a child’s school or place of care is closed or because of a state of emergency due to an epidemic or other public health emergency.

NEW JERSEY ADMINISTRATIVE UPDATE

The New Jersey Department of Community Affairs has advised that, on an emergency basis, it is temporarily relaxing the Uniform Construction Code regulatory provisions concerning Minor work (N.J.A.C. 5:23-2.17A), Inspections (N.J.A.C. 5:23-2.18), and Certificate requirements (N.J.A.C. 5:23-2.23).⁶ The Department of Community Affairs has also issued new guidance for construction offices on State and local plan review and inspections.⁷

FREQUENTLY ASKED QUESTIONS AND ANSWERS

<i>COVID-19 SCENARIOS</i>	<i>ANSWERS</i>
<p>1. Is there new legislation that permits healthcare providers (including physical therapists, occupational therapists, etc.) to be performed virtually?</p>	<p>On March 19, 2020, the State of New Jersey enacted an Act concerning the use of telemedicine and telehealth to respond to COVID-19 (A3860 and S2289). Under the Act, for the duration of the public health emergency declared in response to the COVID-19 pandemic, any health care practitioner shall be authorized to provide and bill for services using telemedicine and telehealth. Under the Act, the Commissioner of Health shall waive any requirement or regulation necessary to facilitate the provision of health care services using telemedicine and telehealth, with the exception of the restriction on collection, exchange, transmission, or use of confidential patient health information.</p> <p>On March 22, 2020, the New Jersey Department of Banking and Insurance issued a Bulletin (https://www.state.nj.us/dobi/bulletins/blt20_07.pdf), which requires all health insurance companies, health maintenance organizations, health service corporations and other entities issuing health benefits plans in New Jersey to grant any requested in-plan exceptions for individuals to access out-of-network telehealth providers if network telehealth providers are not available, including physical therapists, occupational therapists and speech therapists, among others.</p>
<p>2. What benefits are available to an employee who is absent from and unable to work because the employee has been determined by his/her medical provider to be high risk with respect to COVID-19?</p>	<p>The employee may be entitled to benefits under the Emergency Paid Sick Leave Act (two (2) weeks of fully paid time off). However, the employee <u>must</u> provide documentation that his/her healthcare provider advised that the employee self-quarantine due to risk of exposure to COVID-19.</p> <p>The employee may also utilize his/her accrued leave, including: paid sick leave, personal and vacation days.</p> <p>Leave taken by an employee for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.</p>

⁶ https://www.nj.gov/dca/divisions/codes/alerts/pdfs/COVID_RelaxMod.pdf

⁷ https://www.nj.gov/dca/divisions/codes/alerts/pdfs/COVID_memo.pdf

<p>3. Could an employee, who is deemed to be essential (e.g., maintenance staff), work from home?</p>	<p>Generally, an essential employee’s duties and tasks require the employee to report to work and could not work from home.</p> <p>It is important to review the public employer’s job descriptions and duties to ensure an accommodation could not be provided to the employee.</p>
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In addition to these brief answers, please review updates from State and Federal agencies, as new information and guidance is provided daily.

Helpful Links

<https://www.nj.gov/labor/worker-protections/earned-sick/covid.shtml>

<https://nj.gov/csc/employees/covid.html>

<https://www.nj.gov/health/cd/topics/ncov.shtml>

https://www.nj.gov/health/cd/topics/covid2019_schoolbusiness.shtml

<https://www.dol.gov/newsroom/releases/eta/eta20200312-0>

<https://www.dol.gov/agencies/whd/pandemic>

<https://www.dol.gov/agencies/whd/fmla/pandemic>

<https://www.osha.gov/Publications/OSHA3990.pdf>

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>