

**Return to In-Person Instruction:**  
**How to Respond When Employees Request to Take Leave**

On June 26, 2020, the New Jersey Department of Education issued a “Restart and Recovery Plan” in an effort to provide guidance relating to the reopening of our public schools. However, the Plan does not address the various types of leave that may be available to employees when schools reopen for in-person instruction, and how public school boards should respond when an employee seeks to take leave in lieu of returning to work at the beginning of the 2020-2021 school year. The following is a summary of the types of leave that are currently available to school district employees, and the criteria that must be satisfied in order to be eligible for each type of leave.

**Emergency Sick Leave Under the Families First Coronavirus Response Act (“FFCRA”)**

Effective from April 2, 2020 through December 31, 2020, a full-time employee is entitled to a maximum of eighty (80) hours of paid sick leave if he or she is unable to work, or telework from home, due to one or more of the following:

1. The employee is subject to a quarantine or isolation order related to COVID-19.
2. A health care provider has advised the employee to self-quarantine due to COVID-19.
3. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in paragraph (1) above, or has been advised as described in paragraph (2) above.
5. The employee is caring for his/her child, if the school or place of care of the child has been closed, or child care provider is unavailable, due to COVID-19.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

For part-time employees, the maximum amount of paid sick leave will be equal to the number of hours that the employee works, on average, over a two (2) week period. Most employees are entitled to their normal rate of pay except that in no event may such paid sick time exceed \$511 per day and \$5,110 in the aggregate for a use described in paragraphs (1), (2), or (3) above. However, for employees using paid sick leave for any use described in paragraphs (4), (5), or (6) above, the rate is two-thirds (2/3) of their normal pay rate, except that in no event may such paid sick time exceed \$200 per day and \$2,000 in the aggregate. There is no minimal employment period for such leave, which is available for immediate use, regardless of the length of time that the employee has been employed by the employer.

This emergency paid sick leave under the FFCRA is in addition to district-provided sick leave benefits. An employer cannot require an employee to use other paid leave before the employee uses the emergency paid sick leave.

### **Emergency Family Medical Leave Under the FFCRA**

Paid family leave under the FFCRA is limited to circumstances in which an employee is unable to work due to the need for leave to care for a son or daughter under eighteen (18) years of age because the child's school or place of care has been closed, or the child care provider is unavailable due to a public health emergency. The employee also must have worked in the district for a minimum of thirty (30) calendar days in order to be eligible.

Eligible employees are entitled to up to twelve (12) weeks of paid FFCRA emergency family medical leave. The first ten (10) days may consist of unpaid leave, although the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the ten (10) day unpaid leave period. Under New Jersey school law, school employees only are permitted to use sick leave for their own illness. Employees may also be entitled to emergency paid sick leave during the first ten (10) days. The remaining ten (10) weeks are paid at two-thirds (2/3) of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work, with a maximum payment of two hundred (\$200) per day and ten thousand dollars (\$10,000) total, or twelve thousand dollars (\$12,000) when combined with two (2) weeks of FFCRA emergency paid sick leave.

### **New Jersey Earned Sick Leave Law**

The New Jersey Earned Sick Leave Law permits an individual who has worked for their employer for at least one hundred twenty (120) days, to use earned sick leave that they have accrued under law when, during a state of emergency declared by the Governor, or upon the recommendation, direction or order of a health care provider or the Commissioner of Health or other authorized public official, the employee undergoes isolation or quarantine as a result of a suspected exposure to a communicable disease and a finding by the provider or authority that his or her presence in the community would jeopardize the health of others.

However, the Earned Sick Leave Law pertains only to those school employees who are not eligible for paid sick leave under the School Sick Leave Law. That law provides that employees are entitled to the use of their accumulated sick leave days in the event of illness or injury, or because they have been excluded from school by the district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household. Unlike the School Sick Leave Law, the Earned Sick Leave Law also permits eligible employees to use sick leave to provide care during an ill family member's diagnosis, care and recovery.

In addition, employees may or may not be entitled to paid or unpaid leave under the Family Medical Leave Act (“FMLA”) and/or the New Jersey Family Leave Act (“NJFLA”). Depending on the circumstances, an employee may also be entitled to combine either of these types of leave with the FFCRA emergency leave and/or sick leave described above.

### **Intermittent Leave Due to Unavailability of Child Care**

Pursuant to guidance issued by the United States Department of Labor (“DOL”), intermittent leave may be available for employees who cannot work or telework because their child care provider is unavailable due to COVID-19, but only if the employer agrees and the employee and employer agree on a schedule for the leave. While the DOL guidance “encourages employers and employees to collaborate to achieve flexibility,” it explicitly indicates that an employer may voluntarily permit intermittent leave for this reason, but is not obligated to grant such leave.

### **Other Requests for Leave**

While it should be anticipated that some employees may request not to return to work solely due to a general sense of fear, worry, or anxiety about working on-site during COVID-19, there is currently no legal obligation to permit such employees to work remotely or take a leave of absence. In the absence of any documented medical condition that may otherwise entitle the employee to leave, the only type of leave available to such an employee would be accrued vacation and/or personal days, or unpaid leave as approved by the administration. However, if the employee’s reason for wishing not to return to work is predicated upon an existing disability, then further inquiry will be needed to determine the extent to which the district may be obligated to afford reasonable accommodations that would permit the employee to perform essential job functions.

### **Obligation to Post Notice to Employees**

All schools are obligated to post and keep posted, in conspicuous places on the premises where notices to employees are customarily posted, a notice, to be prepared or approved by the DOL Secretary, of the requirements described in the Act. The notices are available at:

- [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- <https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/1422-spanish.pdf>

The DOL has indicated that “an employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.” Accordingly, absent further guidance, an employer’s notice obligation to its employees may be satisfied by sending the notice to all employees via email or direct mail, or posting the notice physically in a building or on an internal or external school district website, or any combination of these options.

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| <u>Type of Leave</u>  | <u>Criteria for Eligibility</u>  | <u>Length of Leave</u>   | <u>Amount of Pay</u>   | <u>Effective Period</u>           |
|---|--|--|--|-----------------------------------|
| <b>FFCRA<br/>Emergency<br/>Sick Leave</b>                   | Employee is unable to work or telework because he or she:<br>(1) Is subject to quarantine or isolation order due to COVID-19;<br>(2) Has been advised by a health care provider to self-quarantine due to COVID-19;<br>(3) Has COVID-19 symptoms and is seeking a diagnosis.<br>(4) Is caring for an individual who is subject to an order as described in (1), or has been advised as described in (2);<br>(5) Is caring for his/her child, if the child’s school or place of care has been closed or the child care provider is unavailable due to COVID-19; <b>or</b><br>(6) Has any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. | <u>Full-time employees:</u> Maximum of eighty (80) hours.<br><u>Part-time employees:</u> Maximum length of leave equals the number of hours that the employee works, on average, over a two (2) week period.<br><br>This type of leave is in addition to regular sick leave, and an employer may not require an employee to use other paid leave before using the leave. | <u>If the leave is for the reasons described in paragraphs (1), (2), or (3):</u> Normal pay, limited to a maximum of \$511/day and \$5,110 in the aggregate.<br><u>If the leave is for the reasons described in paragraphs (4), (5), or (6):</u> Two-thirds (2/3) of normal pay, limited to a maximum of \$200/day and \$2,000 in the aggregate. | April 1, 2020 – December 31, 2020 |
| <b>FFCRA<br/>Emergency<br/>Family<br/>Medical<br/>Leave</b> | (1) Employee is unable to work due to the need for leave to care for a child under 18 years because the child’s school or place of care has been closed, or the child care provider is unavailable due to a public health emergency; <b>and</b><br>(2) Employee must have worked in the District for a minimum of thirty (30) calendar days.   | Up to twelve (12) weeks, but the first ten (10) days, as applicable, may be either: <ul style="list-style-type: none"> <li>• Unpaid leave;</li> <li>• Paid vacation or personal; or</li> <li>• FFCRA emergency sick leave.</li> </ul>  | After the first ten (10) days, the remainder of the leave must be paid at two-thirds (2/3) of normal pay, limited to a maximum of \$200/day and \$10,000 in the aggregate (or \$12,000 in the aggregate, if combined with two (2) weeks of FFCRA emergency sick leave).  | April 1, 2020 – December 31, 2020 |
| <b>NJ Earned<br/>Sick Leave</b>                             | (1) Governor-declared state of emergency, <b>or</b><br>(2) Upon the recommendation, direction or order of a health care provider or the Commissioner of Health or other authorized public official, the employee undergoes isolation or quarantine as a result of a suspected exposure to a communicable disease and a finding by the provider or authority that the employee’s presence in the community would jeopardize the health of others; <b>and</b><br>(3) Employee must have worked in the district for a minimum of one hundred twenty (120) calendar days; <b>and</b>   | Employees accrue one (1) hour of earned sick leave for every thirty (30) hours worked up for forty (40) hours or five (5) full days every year.  | Full amount of the employee’ normal pay.   | Indefinitely                      |

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|  | (4) Employee is not eligible for paid sick leave under the school sick leave law (see below).   |  |  |              |
| <b>NJ School Sick Leave</b>                  | (1) Employee has an illness or injury (employer may request medical documentation); <b>or</b><br>(2) Has been excluded from school by the District’s medical authorities due to a contagious disease or being quarantined for such disease in his/her immediate household.  | All school district employees are entitled to a minimum of ten (10) school days of paid sick leave per school year, with the maximum number of days determined by the district.  | Full normal rate of pay for each the minimum ten (10) sick leave days.   | Indefinitely |
| <b>Family Medical Leave Act (FMLA) Leave</b> | FMLA leave may be available to an employee if the following conditions apply:<br>(1) Employee needs to care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition; <b>or</b><br>(2) Employee needs to take medical leave because he/she is unable to work due to a serious health condition; <b>and</b><br>(3) Employee has worked for the employer for at least twelve (12) months and worked at least 1,250 hours over a twelve (12) month period.  | Up to twelve (12) weeks of job-protected unpaid leave in a twelve (12) month period, with continued health benefits to be provided throughout the period of leave. Employees may take FMLA leave on an intermittent or reduced schedule basis in some circumstances. | Unpaid leave.  | Indefinitely |
| <b>NJ Family Leave Act (NJFLA) Leave</b>     | NJFLA leave may be available to an employee if the following conditions apply:<br>(1) Employee needs to care for a new child or a family member with a serious medical condition (NJFLA does not apply to an employee’s own serious health condition); <b>and</b><br>(2) Employee must provide 15 days’ notice when taking intermittent leave to care for a family member with a serious health condition; “reasonable and practicable” notice when taking consecutive leave to care for a family member with a serious health condition; 30 days’ notice for other leave; and in emergent circumstances, as much notice as possible. | Up to twelve (12) weeks of job-protected family leave for every twenty-four (24) month period to employees of covered employers to care for a new child or a family member with a serious medical condition.   | The leave may be either unpaid or paid by using family leave benefits available through the State’s paid family leave insurance (FLI) program. | Indefinitely |

**Frequently Asked Questions:**  
**How to Respond When Employees Request to Take Leave**

Although many inquires related to school employees returning to work in person and requests to take leave will require a fact-sensitive review and analysis of the specific circumstances involved, the following are general answers to frequently asked questions on this issue.

- (1) **Question:** In the event that a district sends an employee home from work due to having a fever or any other symptoms of COVID-19, does the FFCRA immediately apply to permit the employee to use some of his or her 80 hours of paid sick leave?

**Answer:** Yes, the employee may take up to 80 hours of sick leave under the FFCRA if he or she is experiencing any COVID-19 symptoms and is seeking a diagnosis. This leave is available immediately regardless of how long the employee has worked in the district, and the district may not require the employee to use other paid leave before using emergency sick leave under the FFCRA.

- (2) **Question:** May an employee use the emergency paid sick leave and/or emergency paid family medical leave available under the FFCRA for multiple reasons, if applicable?

**Answer:** Yes. For example, an employee who has been advised by a health care provider to self-quarantine due to COVID-19 is entitled to take up to the maximum of 80 hours of FFCRA sick leave. In addition, the employee would be entitled to FFCRA family medical leave, if unable to work due to the need to care for a child under 18 because the child's child care provider is unavailable due to COVID-19. The employee also would be entitled to emergency sick leave based upon another, separate reason provided in the FFCRA, such as caring for an individual who is subject to quarantine or isolation order due to COVID-19, but the 80-hour maximum would still apply to the leave cumulatively, regardless of the reason(s).

- (3) **Question:** How should the district respond when an employee requests to take leave because the employee is particularly vulnerable to COVID-19?

**Answer:** Under federal regulations, FFCRA sick leave is available if a health care provider advises an employee to self-quarantine based on a belief that: (a) the employee has COVID-19; (b) the employee may have COVID-19; or (c) the employee is particularly vulnerable to COVID-19; *and* following the advice of a health care provider to self-quarantine renders the employee unable to work, either in person or by telework. The district may require the employee to submit documentation from a health care provider stating that he or she meets the criteria in either (a), (b), or (c) above, and is unable to work on-site or remotely due to following the health care provider's advice. Depending upon the nature of the documentation from a health care provider, the employee may or may not also be able to take Earned Sick Leave, School Sick Leave, and/or FMLA leave, as well.

- (4) **Question:** How should the district respond when an employee requests to take leave because he or she is caring for an individual who is particularly vulnerable to COVID-19?

**Answer:** The regulations state that an employee would be eligible for emergency sick leave if he or she is caring for an individual who is particularly vulnerable to COVID-19, and a health care provider has advised that individual to self-quarantine based on a belief that: (a) the individual has COVID-19; (b) the individual may have COVID-19 due to known exposure or symptoms; or (c) the individual is particularly vulnerable to COVID-19. The district may require documentation from a health care provider stating that the individual meets the criteria in either (a), (b), or (c) above.

- (5) **Question:** Who constitutes an “individual” for purposes of determining whether an employee is entitled to take emergency sick leave to care for an individual who is subject to quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19?

**Answer:** The regulations define the term “individual” as an employee’s immediate family member, a person who regularly resides in his or her home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. However, the term “individual” does not include persons with whom the employee has no personal relationship.

- (6) **Question:** If an employee has a child under 18 and the child’s school or place of care is not closed, and/or child care provider is not unavailable, but the employee is uncomfortable having the child attend school or receive care from the available child care provider, is the employee entitled to take FFCRA family medical leave?

**Answer:** FFCRA family and medical leave is available to an employee who is unable to work or telework due to a “need to care for his or her son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19.” However, the need exists “*only if no suitable person is available to care for his or her son or daughter during the period of such leave.*” Therefore, an employee who is merely uncomfortable with his or her child returning to an open school or child care would not be eligible for FFCRA family and medical leave.

- (7) **Question:** If an employee is entitled to maternity or parental leave pursuant to the provisions of a collective negotiations agreement or otherwise, is that employee also entitled to take any paid sick or family and medical leave under the FFCRA?

**Answer:** The FFCRA generally does not preclude an employee from combining its emergency sick leave and/or emergency family and medical leave with any other type of leave of absence, such as a maternity or parental leave.

**(8) Question:** If an employee has a child under age 18 who is particularly vulnerable to COVID-19, and requests to take leave because he or she is caring for that child, is the employee entitled to take FFCRA emergency sick leave?

**Answer:** Yes, the employee is entitled to take FFCRA emergency sick leave if the child meets any of the following criteria: (a) the child has COVID-19; (b) the child may have COVID-19 due to known exposure or symptoms; or (c) the child is particularly vulnerable to COVID-19. The district may require documentation from a health care provider stating that the child meets the criteria in either (a), (b), or (c) above.

School districts are encouraged to consult with legal counsel as appropriate to determine the proper handling of employee leave requests, which may vary based upon the specific circumstances involved. Finally, because of the constantly changing nature of the federal and State governmental response to the COVID-19 pandemic, school boards should be aware that the above information is subject to modification at any time.

The Busch Law Group will continue to provide legal updates on this and other significant COVID-19 related issues as necessary. Should you have any questions or concerns, our attorneys are always available to assist you.

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