

Q & A: Employee Leave Under The Families First Coronavirus Response Act - Harben, Hartley & Hawkins, LLP

The recently enacted Families First Coronavirus Response Act was signed into law by the President on March 18, 2020. It contains provisions that require additional leave entitlements to employees, including employees of public school districts in Georgia. The questions and answers below are intended to provide as much basic information as we have on the implementation of these leave entitlements before they go into effect on or before April 1, 2020.

This Policy Update will hopefully assist School Districts as they implement these provisions. Given that these provisions are designed to sunset on December 31, 2020, school districts are encouraged to be on the lookout for and follow federal guidance and implement U. S. Department of Labor model notice requirements to be released by March 25th rather than incorporating these emergency elements in policy at this time. As always, legal counsel should be consulted about questions related to specific employee situations.

What parts of the Families First Coronavirus Response Act affect leave available for employees?

The Families First Coronavirus Response Act includes the Emergency Paid Sick Leave Act [EPSLA], which requires a certain amount of paid sick leave to be provided to employees. The Families First Coronavirus Response Act also includes the Emergency Family and Medical Leave Expansion Act [EFMLEA], which

temporarily adds new eligibility categories for leave under the FMLA, along with specific provisions that only apply to those new categories.

EMERGENCY PAID SICK LEAVE ACT

Which school districts are required to provide leave under the EPSLA?

All public school districts are considered employers required to provide additional paid sick leave under the EPSLA, regardless of the number of employees in the district.

Which employees are entitled to paid sick leave under the EPSLA?

All employees are entitled to paid sick time provided by the EPSLA regardless of how long the individual has been employed.

What are the reasons an employee is entitled to paid sick time under the EPSLA?

A school district must provide paid sick time to the extent an employee is unable to work or telework due to one of 6 reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

continued on page two...

LEAVE REQUEST

Read and Follow Procedures on the back

Date: / /

Employee Name: _____

Reason for Leave:			
Annual Leave <input type="checkbox"/>	Sick Leave <input type="checkbox"/>	Compensation <input type="checkbox"/>	Maternity <input type="checkbox"/>
Parental Leave <input type="checkbox"/>	Unpaid Leave <input type="checkbox"/>	Other: _____	

Dates Requested: from / / to / /

* Generalizations for a sample leave request template

The mission of the Georgia School Boards Association is to ensure excellence in the governance of local school systems by providing leadership, advocacy and services, and by representing the collective interests of Georgia school boards of education.

The GSA is a 501(c)(3) nonprofit organization developed for members of GSBA. Dedicated to serving the shared, best-interesting best members and school boards of GSBA, the GSA is committed to an entire community of learning and collaboration, building more efficient and effective local governance.

The Board of Directors is composed of the president, president-elect, vice president, treasurer, immediate past president, and a Director from each of the 10 GSBA districts. The Board is empowered to manage the affairs and business of the Association and employ the executive director.

Copyright 2020 GSBA

“All employees are entitled to paid sick time provided by the EPSLA...”

Q&A Employee Leave, continued from page one...

3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
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.

Is an employee entitled to paid sick time under the EPSLA when they are not assigned any work?

No. Paid sick time under EPSLA is only available when an employee is unable to work or telework for one of 6 specific reasons. If the employee is not assigned any work, then the reason that employee is unable to work is not due to one of those 6 reasons.

Who is a “health care provider” or a “son or daughter” under the EPSLA?

The terms “health care provider” and “son or daughter” have the same meanings under the EPSLA as they do under the FMLA.

How much paid sick time is an employee entitled to receive under the EPSLA?

Full-time employees are entitled to 80 hours of paid sick time.

Part-time employees are entitled to a number of hours of paid sick time equal to the number of hours that such employee works, on average, over a 2-week period.

How do you determine the number of hours a part-time employee works on average over a 2-week period?

If the part-time employee has a regular work schedule, the number of hours an employee is entitled to paid sick time is based on the number of hours the employee would otherwise be normally scheduled for work.

If a part-time employee has a schedule that varies from week to week to such an extent that the employer is unable to determine with certainty the number of hours the employee would have worked if they had not taken paid sick time, a different calculation must be used. In that circumstance, the number of hours would be calculated based on the average number of hours the employee was scheduled per day over the 6-month period immediately preceding the date in which the employee takes paid sick time, including hours during that period in which the employee took leave of any type. If the employee has not been employed for 6 months, then the employer would use the reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.

Within 15 days of the enactment of the EPSLA, the Secretary of Labor will issue guidelines to assist employers in calculating the amount of paid sick time.

Can an employer require periodic updates from an employee taking paid sick time under the EPSLA?

The EPSLA does permit an employer to require an employee to follow “reasonable notice procedures” to continue to receive paid sick time after the first workday an employee receives paid sick time. Presumably, this would allow an employer to require an employee to provide notice of how long their absence is anticipated, and to provide updates every few days regarding their anticipated absence.

What is the amount of pay an employee is entitled to receive for paid sick time under the EPSLA?

An employee must receive their regular rate of pay for paid sick time taken under the EPSLA. For employees who work in multiple positions with different rates of pay, that amount would be calculated in the same manner as that employee’s hourly regular rate of pay is determined for overtime purposes under the FLSA.

However, the total amount of pay an employee is entitled to receive for paid sick time is capped under the EPSLA, regardless of the regular rate of pay.

[continued on page three...](#)

[Cover Story, continued from page two...](#)

What is the maximum dollar amount an employee is entitled to receive for paid sick time under the EPSLA?

For leave based on the employee's own necessary absence (reasons 1-3 listed above), the total amount of paid sick time the employee receives may not exceed a maximum of \$511 per day and \$5,110 in total.

For leave based on reasons 4, 5 or 6 listed above, the amount of paid sick time an employee receives may not exceed \$200 per day and \$2,000 in total.

Can a school district require an employee to exhaust other types of leave before using the paid sick time under the EPSLA?

No. An employer may not require an employee to use other paid leave provided by the employer before the employee uses paid sick time under the EPSLA.

Are there any notice requirements under the EPSLA?

The EPSLA requires each employer to post a notice of the requirements of the EPSLA in conspicuous places on the premises of the employer where notices to employees are customarily provided. The areas at each location in the district where similar notices to employees are posted, such as equal employment opportunity rights, FLSA/minimum wage rights, FMLA rights, etc., would meet this requirement. The Secretary of Labor will make a model notice publicly available within 7 days of the enactment of the EPSLA.

Are there any other prohibitions in the EPSLA?

An employer may not require an employee to find a replacement to cover the hours during which the employee is using paid sick time under the EPSLA.

The EPSLA also prohibits an employer from discharging, disciplining, or in any other way discriminating against an employee who takes leave under the EPSLA or who has filed a complaint or participated in proceedings related to the EPSLA.

What are the penalties to an employer who fails to provide paid sick time under the EPSLA?

Employers who violate the EPSLA are considered to have failed to pay minimum wages under the FLSA and are subject to the same penalties as the employer would be subject to for such a violation. Those penalties include an automatic doubling of any back pay the employee is entitled to receive, as well as payment of the employee's attorney's fees in seeking to enforce the requirements of the EPSLA.

What are the effective dates of the EPSLA?

The EPSLA becomes effective on April 1, 2020, unless an earlier date is declared by the administration. The EPSLA and its requirements expire on December 31, 2020.

Is an employee entitled to unused paid sick time under the EPSLA when they separate from employment?

No. The EPSLA does not require an employer to pay an employee for any unused paid sick time under the EPSLA when the employee leaves the employer, whether because of termination, resignation, retirement, or other separation from employment.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Which school districts are required to provide leave under the EFMLEA?

All public school districts are required to provide FMLA leave to employees under the requirements of the EFMLEA.

Which employees are entitled to leave under the EFMLEA?

While the FMLA requires an employee to have worked for an employer for at least 12 total months, and for at least 1250 hours in the previous 12 months, leave for the reasons provided under the EFMLEA have a lesser threshold. Any employee who has been employed for at least 30 calendar days is entitled to the leave provided under the EFMLEA.

[continued on page four...](#)

What are the reasons an employee is entitled to leave under the EFMLEA?

The EFMLEA provides an additional reason for which an employee is entitled to take FMLA leave, for a “qualifying need related to a public health emergency.”

A “qualifying need related to a public health emergency” means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

For purposes of this definition, a “public health emergency” means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

Is an employee required to request leave under the EFMLEA?

Yes. Leave for a qualifying need related to a public health emergency must be requested by an employee. Under FMLA’s regulations, that may be accomplished by an employee providing sufficient information to the employer for the employer to reasonably determine whether the FMLA may apply to the leave request. Additionally, FMLA’s regulations do not allow the onset of an employee’s FMLA leave to be delayed due to lack of required notice unless it is clear the employee had actual notice of the FMLA notice requirements. In other words, school districts will need to ensure that each employee is actually informed of the requirements to notify the district of the need for FMLA leave due to qualifying need related to a public health emergency. Otherwise, the district will not be permitted to delay FMLA leave based on the employee’s failure to notify the district.

How much leave is an employee entitled to receive under the EFMLEA?

The leave taken under the EFMLEA is part of the 12-weeks of leave an employee is otherwise entitled to receive each year under the FMLA.

Is the leave under the EFMLEA paid or unpaid leave?

The first 10 days of leave an employee takes for a qualifying need related to a public health emergency may be unpaid leave.

After the first 10 days of leave under the EFMLEA, an employer must provide paid leave for each day of leave taken for a qualifying need related to a public health emergency.

May an employer substitute available paid leave for unpaid leave taken under the EFMLEA?

As with leave for other reasons under the FMLA, an employee’s otherwise available paid leave may be substituted for the otherwise unpaid leave under the EFMLEA. However, it appears under the language of the EFMLEA that, unlike with other reasons for FMLA leave, it is solely the employee’s decision as to whether available paid leave is to be substituted for the unpaid leave under the EFMLEA. That said, this particular provision of the EFMLEA is not entirely clear. While the EFMLEA only specifies that an employee may elect to substitute paid leave for the first 10 days of unpaid EFMLEA leave, that substitution is done “in accordance with” another existing provision of FMLA that permits an employer to require substitution of paid leave for other specified reasons. Because EFMLEA itself did not specify that an employer may require substitution of paid leave for the first 10 days of unpaid leave under EFMLEA, the safest course of action is to permit the employee to elect whether to substitute paid leave for the first 10 days of unpaid leave under EFMLEA.

What is the amount of paid leave an employee is entitled to receive under EFMLEA?

The amount of paid leave an employee is entitled to receive under the EFMLEA is two-thirds of the employee’s regular rate of pay, up to a maximum of \$200 per day and an aggregate of \$10,000.

How is the amount of paid leave determined for hourly employees under the EFMLEA?

The amount of paid leave for hourly employees is two-thirds of their regular rate of pay for the number of hours the employee would otherwise be normally scheduled for work, up to a maximum of \$200 per day and an aggregate of \$10,000. For those employees whose schedule varies from week to week to such

continued on page five...

Cover Story, continued from page four...

an extent that an employer is unable to determine the number of hours the employee would have worked if they had not taken leave, the same method is utilized as under the EPSLA for such variable hour employees.

What are the effective dates of the EFMLEA?

The EFMLEA becomes effective on April 1, 2020, unless an earlier date is declared by the administration. The entitlement to leave for a qualifying need related to a public health emergency under the EFMLEA ends on December 31, 2020. ■



**The 2020 GSBA
Policy Workshop
Thursday, June 4
Savannah Hyatt Regency
2 W. Bay Street**

As of now, we are looking forward to presenting an awesome workshop for you! We are closely monitoring the situation and have held registration to begin in late April which allows time for the latest updates.

For more information concerning the workshop, conference, and more, please visit gsba.com. Board members and superintendents, remember you can use the [GSBA Hub](#) for networking during this time of social distancing.

Monthly Policy Alerts



JANUARY:

Litigation: No policy implications

Legislation:

The following has no policy implications and is provided for informational purposes only.

A new law in the United States that raises the federal minimum age for the sale of tobacco products from 18 to 21 is now in effect, according to an announcement from the U.S. Food and Drug Administration. The legislation was passed by a bipartisan Congress and signed into law by President Trump on December 20th as part of a massive spending package. The law, among other things, makes it illegal for a retailer to sell to anyone under the age of 21 not just traditional tobacco products like cigarettes and cigars, but also encompasses e-cigarettes and vaping cartridges. The FDA promises to “provide additional details on this issue as they become available,” stating its intent to issue a final rule within 180 days.

State Board Rules: No policy implications

FEBRUARY:

Litigation: No policy implications

Legislation:

The 2020 Session of the General Assembly so far has focused primarily on organizational and budgetary matters. No legislation with policy implications has been enacted into law but tune into the GSBA Capitol Watch Online for regular updates.

continued on page six...

Continued from page five...

State Board Rules:

The State Board amended student rules as outlined below:

Rule 160-5-1-.10 Student Attendance

Policy code impacted: *JB, JBD, or other policy concerning student attendance or absences*

Issue: The State Board amended its student attendance rule a couple of years ago to allow school systems to grant excused absences for “any other absence not explicitly defined herein but deemed by the local school board of education to have merit based on circumstances.” The rule was recently further amended to clarify that such excused absences based on circumstances can include “non-school sponsored activities” if makeup work was completed satisfactorily, a long-standing requirement for all excused absences.

Action to be taken:

School systems that wish to include in their student attendance policies the optional category of excused absences “based on circumstances” and have not already done so may refer to GSBA’s sample policy in the June 2018 Policy Update, item 9. The sample language authorizes the Superintendent or designee to determine whether an absence merits being excused. Such language is broad enough to cover non-school sponsored events, unless the school system wants to specifically mention their inclusion.

Rule 160-5-1-.28 Student Enrollment and Withdrawal

Policy code impacted: *JBC, JBCA, JBCE or other policy concerning student enrollment or withdrawal*

Issue: The State Board amended the rule by adding two new requirements enacted during the 2019 legislative session.

Under “Enrollment,” O.C.G.A. § 20-2-150 (e) permits parents or guardians on active U. S. military duty to enroll their dependent children in school before physically establishing residency in the school system. The parent or guardian may present a copy of the official military orders to the school in the attendance zone in which the family will be residing, to a school in which

space is available for additional enrollment under the district’s transfer procedures, or to a public school authorized under state transfer laws.

Under “Withdrawal,” O.C.G.A. § 20-2-785 requires schools to make a DFCS referral for an assessment if a child is withdrawn from a public school without filing a declaration of intent to establish a home study program and the child stops attending school for a period of 45 days. DFCS is then required to conduct an assessment, which is limited to determining whether such withdrawal was to avoid educating the child.

Action to be taken:

School systems are encouraged to rely on the SBOE rule and local procedures, paperwork, or handbooks rather than including proof of enrollment or withdrawal details in local board policy.

MARCH:

Litigation: No policy implications

Legislation:

As of this writing, no legislation with policy implications has been enacted into law during the 2020 Session of the General Assembly. Please monitor GSBA Capitol Watch Online to keep up with what’s happening as Crossover Day approaches.

State Board Rules:

Policy code impacted: *Likely none immediately. Perhaps later, IHF or IHF(6), or other graduation information or plans.*

Issue: The State Board amended its Rule 160-4-2-.48, High School Graduation Requirements for Students Enrolling in the Ninth Grade for the First time in the 2008-2009 School Year and Subsequent Years, to align with an Every Student Succeeds Act amendment to Georgia’s State Plan recently approved by the U. S. Department of Education.

The Rule was amended to define a state-defined Alternative Diploma for students with the most significant cognitive disabilities who are assessed using an alternate assessment aligned to alternate academic achievement standards. The Alternative Diploma, which will be standards-based and aligned with Georgia’s requirements for a regular high school diploma, will be first awarded to students who enter the ninth

continued on page seven...

Continued from page six...

grade for the first time in the 2020-21 school year upon their graduation (end of the 2023-24 school year for four-year high school students).

The Rule provides details regarding the cohort of students who receive a regular diploma (students with significant cognitive disabilities who entered the 9th grade for the first time prior to the 2020-21 school year) and the cohort of students who receive an Alternative Diploma (students with significant cognitive disabilities who enter the 9th grade for the first time on or after the 2020-21 school year). Finally, the Rule amendment deleted the requirement that students score “proficient” on the Georgia Alternative Assessment now that state law no longer requires any gateway assessment for high school graduation.

Action to be taken:

School systems are encouraged to rely on the SBOE rule and any graduation guidance that may be issued by the Georgia Department of Education as the Alternative Diploma is implemented rather than adopting the amended state graduation Rule or summarizing its details in local board policy.

Policy Reminder

Policy code impacted: *GANA or JGCC or information concerning infectious diseases*

Issue: Based on widespread concerns for the potential spread of the coronavirus, the Georgia Department of Public Health (DPH) has issued on its website various memos, fact sheets and materials for schools concerning the coronavirus, preventive measures, and links to updated information from the Centers for Disease Control (CDC). Not surprisingly, such advice stresses the importance of first knowing what is required by state and local policies.

State Board Rule 160-1-3-.03 Infectious Diseases requires school systems to develop a policy “related to the impact of infectious diseases on school system management and operations.” The local policy should align with the State Rule’s mandate that “operational decisions related to employees or students infected with communicable diseases shall be made in conjunction with the school nurse, state and/or local public health agency representatives, health care professionals, and school system administrators.”

If a school or system has “reasonable suspicion to believe that an employee or student has an infectious disease, school authorities shall counsel that person immediately, or if the person is a minor, notify his or her parent or guardian of the need to obtain an appropriate medical evaluation.” Obviously, the school system must limit the disclosure of health-related information of its employees and students in accordance with state law and the Family Educational Rights and Privacy Act.

Action to be taken:

Districts should familiarize employees with the SBOE rule and local infectious disease policy requirements. As stressed in all available information, communication with the local health department is vital. Any decisions regarding school or community operations affected by health matters will not be made in isolation but will involve the affected agencies and public health authorities in consultation with the CDC. Those conversations need to take place well in advance of an actual outbreak of a particular disease.

Meanwhile, schools should continue to educate students and parents about basic preventive hygiene as recommended in the DPH and CDC material. Schools are reminded that they probably have, either in their safety plans or historical archives, information developed during some past or anticipated medical catastrophe, such as pandemic flu or the zika virus.

Now would be a good time to evaluate and tweak as needed the district’s previous success in providing an education to students on snow days or allowing teachers to work remotely during unforeseen emergencies. Further, it could be worthwhile to review any waivers that may grant flexibility for employee and student absences if the need arises. As always, districts should consult with legal counsel before implementing plans that may affect employee or student legal rights. ■