

State of Wisconsin

**DOA – DIVISION OF PERSONNEL MANAGEMENT**

**- CLASSIFICATION AND COMPENSATION BULLETIN -**

**Date:** September 16, 2020

**Locator No:** DPM-0521-CC/POL

**Subject:** **SECOND UPDATE:** Federal Paid Sick Leave and Paid FMLA Leave During the Public Health Emergency Due to the COVID-19 Pandemic

This is the second re-issue of policy bulletin DPM-0521-CC/POL (originally issued on March 31, 2020 and last updated July 13, 2020) on Federal Paid Sick Leave and Paid FMLA Leave During the Public Health Emergency Due to the COVID-19 Pandemic. This re-issue is to incorporate changes to the definition of “Health Care Provider” effective September 16, 2020, in accordance with new federal Department of Labor regulations.

Previous updates included: Section IV was updated to clarify intermittent use of Emergency Paid Sick Leave for employees who are telecommuting. As a result of an update in the Department of Labor’s final rule, Section IX was updated to allow employees to substitute their own available personal paid leave during Emergency FMLA Paid Leave.

The purpose of this bulletin is to provide guidance on implementing federal Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion (FMLA) Acts (collectively, the “Act”).

**SECTION I. SUMMARY OF FEDERAL PROVISIONS**

In brief, the Act provides the following for employees that are unable to work or telework:

- A.** Provides up to 10 days (80 hours) of emergency paid sick leave for all employees.
- B.** Extends federal FMLA protections to any employee with 30 days of service for purposes of providing childcare necessitated by COVID-19 school or day care closures, except for Health Care Providers and Emergency Responders, as determined by the employing agency.
- C.** After the first 10 days of COVID-19 FMLA, provides partially paid FMLA leave for childcare necessitated by COVID-19 closures for the remainder of an employee’s 12 weeks of federal FMLA eligibility, except Health Care Providers and Emergency Responders, as determined by the employing agency.

Because the emergency paid sick leave provisions cover all employees (not just FMLA-eligible employees) and will typically be used by employees prior to FMLA childcare leave, the order of this bulletin corresponds to the order the federal provisions will be used by most employees. However, FMLA will run concurrently with emergency paid sick leave for all employees eligible for FMLA under either the permanent FMLA provisions or these temporary emergency FMLA provisions.

## SECTION II. EMERGENCY PAID SICK LEAVE-- QUALIFYING REASONS

Starting April 1, 2020, all state employees, except elected officials and certain health care providers and emergency responders excluded by agencies, are eligible to use emergency sick leave for the following reasons:

- A. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. **Note:** If an employee is exempted from the safer at home order as an essential employee (including healthcare providers and emergency responders), or other applicable order, this reason would not apply.
- B. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- C. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- D. The employee is caring for an individual who is subject to an order as described in subparagraph A. or has been advised as described in subparagraph B.
- E. 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 child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- F. 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. (No such conditions have been specified by the Secretary of Health and Human Services at the time of original bulletin publication).

**Employees excluded from eligibility.** As permitted by the Act, employees identified as health care providers and emergency responders by their agencies will not be eligible for emergency paid sick leave for the family and child care reasons identified in D. and E., above, and future reasons that may be determined under F., above. However, health care providers and emergency responders will be eligible for emergency paid sick leave for the reasons related to the employee's own health identified under B. and C., above.

Also ineligible are employees laid off, on furlough, or otherwise not permitted to work because of the unavailability of work.

## SECTION III. DEFINITIONS FOR PURPOSES OF FEDERAL EMERGENCY LEAVE PROVISIONS

- A. Agencies will inform employees if they are considered an emergency responder or health care provider in accordance with the following definitions.
  - 1. **Emergency Responder.** Any employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law

enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, dispatchers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the governor determines is an emergency responder necessary for Wisconsin's response to COVID-19.

## 2. **Health Care Provider.**

**The following definition of health care provider applies effective September 16, 2020:**

Anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for [purposes of the FMLA](#).

Any other person who is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. (See list below this paragraph for more detailed definitions of these terms.) This group includes employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services. Finally, employees who do not provide direct health care services to a patient but are otherwise integrated into and necessary to the provision of those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

Diagnostic: Includes taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.

Preventive: Includes screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

Treatment: Includes performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

Integrated: Those services that are “integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, including bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.”

An employee is not a health care provider merely because their agency provides health care services or because the person provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources

personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital or a similar health care facility.

- B. Son or Daughter.** The term “[son or daughter](#)” has the meaning given in the federal Family and Medical Leave Act of 1993. Reminder: This definition is broader than biological or adoptive children and includes children for whom the employee stands “in loco parentis.”

#### **SECTION IV. ADMINISTRATION OF EMERGENCY PAID SICK LEAVE**

Effective April 1, any eligible employee other than an elected official shall be entitled to use emergency paid sick leave in accordance with Sections II and III. This leave is in addition to any paid leave previously used by, or otherwise currently available to an employee.

- A. Amount of Hours.** The total amount of hours of emergency paid sick leave to which an employee is entitled shall be as follows:
1. For full-time employees, 80 hours.
  2. For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.
  3. In the case of a part-time employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick leave, the employer shall use the following in place of such number:
    - a. Subject to b., a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick leave, including hours for which the employee took leave of any type.
    - b. If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.
- B. Rate of Pay for Employee’s Own Illness or Exposure.** For circumstances identified in Section II, A., B., or C., emergency paid sick leave will be paid at the employee’s regular rate of pay as determined under section 7(e) of the Fair Labor Standards Act, but not to exceed \$511 per day and \$5,110 in total for all such leave due to the employee’s own illness or exposure.
- C. Rate of Pay for Child or Family Care.** For circumstances identified in Section II, D., E., or F., emergency paid sick leave will be paid at two-thirds the employee’s regular rate of pay as determined under section 7(e) of the Fair Labor Standards Act. The two-thirds calculation will be rounded up at the penny. However, pay may not exceed \$200 per day and \$2,000 in total for all such child or family care leave.
- D. Employee Option to Supplement.** In addition to receiving pay at two-thirds of the regular rate, an employee may choose to supplement the additional one-third of their pay by using their own available personal paid leave, but not state-provided paid administrative leave. For example, a full-time employee could receive eight hours of emergency paid sick leave at the two-thirds rate

of pay and also use two and two-thirds hours of vacation or sick leave to receive a full paycheck for eight hours at the employee's regular rate of pay.

- E. Total Hours.** The total combined hours of emergency paid sick leave regardless of reason is limited to 80 hours, or prorated amount for part-time employees.
- F. Immediate Availability.** Starting on April 1, 2020, eligible employees with a qualifying need under Sections II and III may begin to use emergency paid sick leave. An agency may not require an employee to use other paid leave prior to use of emergency paid sick leave.
- G. No Retroactive Application.** Use of emergency paid sick leave is prospective only. It may not be substituted for paid or unpaid leave used prior to April 1.
- H. End of Individual Eligibility.** Eligibility for emergency paid sick leave ends when an employee no longer qualifies for a reason listed in Section II, or has used a total of 80 hours or prorated portion thereof for part-time employees.
- I. Intermittent Paid Sick leave.** Intermittent emergency paid sick leave may be approved for increments of less than a full day only when used for child care due to school/day care closures. This applies for both employees working at the regular workplace and employees teleworking. Intermittent paid sick leave may not be approved for employees staying home due to the personal or family health care issues identified in Section II, A., B., C., D, or F. Employees taking leave for personal or family health care issues who are teleworking may take emergency paid sick leave intermittently but must do so in full-day increments.
- J. No Carryover or Cashout.** Emergency paid sick leave shall not carry over from one year to the next and shall not be available for cashout under any circumstance as unused leave.
- K. Reporting Paid Sick leave in PeopleSoft.** Emergency paid sick leave will be recorded in PeopleSoft using temporary time reporting codes, which will be different from the state paid administrative leave codes.
- L. Additional Administrative Provisions.**
  - 1. Emergency paid sick leave is not counted as hours worked for FLSA purposes.
  - 2. The 80 hours maximum for full time employees or prorated amount for part-time employees is per-employee regardless of the number of positions held by the employee, whether in the same agency or different agencies. Leave hours should be allocated to different positions as instructed by the employee's supervisor.
  - 3. Emergency paid sick leave will count towards the 1,039 hour per-year limit for limited term employees.

## **SECTION V. POSTING REQUIREMENT**

Each agency shall post and keep posted, in conspicuous places on the premises of the agency where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in the Families First Coronavirus Response Act. The [model notice](#) is available on the Department of Labor website.

## **SECTION VI. IMPACT ON OTHER BENEFITS**

Use of emergency paid sick leave is above and beyond other paid leave benefits and will not deplete an employee's regular sick leave or vacation leave accounts.

For purposes of benefit accrual, use of emergency paid sick leave will be treated in a manner similar to regular paid sick leave. This means that for permanent and project employees, continuous service, WRS contributions (by both the employee and employer) and creditable service, annual leave, and sick leave will all continue to accrue while on emergency paid sick leave. For limited term employees, there will be no benefit accrual except as qualifying hours for initial WRS eligibility or creditable service for LTEs who are already WRS-eligible.

## **SECTION VII. IMPACT ON FAMILY AND MEDICAL LEAVE ENTITLEMENTS**

Emergency paid sick leave will run concurrently with federal or Wisconsin family and medical leave whenever applicable. The Emergency Family and Medical Leave Expansion Act does not increase the 12 weeks total per year provided under the federal FMLA, and does not increase allotments provided under the WI FMLA.

## **SECTION VIII. EXPIRATION OF EMERGENCY PAID SICK LEAVE**

The availability of emergency paid sick leave expires on December 31, 2020 or when the employee has exhausted the hours available to them, whichever is earlier.

## **SECTION IX. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

- A. Overview.** The Emergency Family and Medical Leave Expansion Act creates temporary amendments to the federal Family and Medical Leave Act of 1993. These amendments expand the scope of eligible employees, cover child care related to the coronavirus public health emergency, and guarantees paid leave at two-thirds an employee's regular rate for a certain period. **These emergency FMLA provisions apply only through December 31, 2020. The remainder of federal and WI FMLA provisions continue to apply as usual.**
- B. Eligible Employee.** Except for emergency responders and health care providers, "eligible employee" means an employee who has been employed for at least 30 calendar days by the state. These 30 days include days the employee has been identified on payroll, regardless of days worked or on leave. Emergency responders and health care providers, as defined in Section III, above, are excluded from eligibility for these emergency FMLA provisions. Agencies will

inform employees if they are considered an emergency responder or health care provider in accordance with these definitions.

Also ineligible are employees laid off, on furlough, or otherwise not permitted to work because of the unavailability of work.

**C. 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 (or an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability) 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.

1. A “public health emergency” means an emergency with respect to COVID-19 declared by a federal, state, or local authority.
2. The term “[son or daughter](#)” has the meaning given in the federal Family and Medical Leave Act of 1993. Reminder: This definition is broader than biological or adoptive children and includes children for whom the employee stands “in loco parentis.”
3. A “school” means an elementary school or secondary school.
4. A “child care provider” means a provider who receives compensation for providing child care services on a regular basis, including:
  - a. a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law; and satisfies the state and local requirements applicable to the child care services it provides; or
  - b. a child care provider that is 18 years of age or older who provides child care services only to eligible children who are, by affinity or consanguinity, or by court decree, the grandchild, great grandchild, sibling (if such provider lives in a separate residence), niece, or nephew of such provider, if such provider complies with any applicable requirements that govern child care provided by the relative involved.

**D. Unpaid Leave for Initial 10 Days.** The first 10 days of leave taken under these emergency FMLA provisions may be unpaid leave. However, an employee may elect to substitute emergency paid sick leave and any accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave.

**E. Partial Paid Leave for Subsequent Days.** After the first 10 days of paid or unpaid leave taken under these emergency FMLA provisions, the state will provide paid leave equal to two-thirds of an employee’s regular rate of pay. However, this paid leave shall not exceed \$200 per day and \$10,000 total.

1. **Qualifying Need. Emergency FMLA paid leave is available only for a Qualifying Need Related to a Public Health Emergency as defined in B., above, in this section, i.e., the need to care for a son or daughter due to the closing of a school or child care provider.**

The term “[son or daughter](#)” has the meaning given in the federal Family and Medical Leave Act of 1993. This definition is broader than biological or adoptive children and includes children for whom the employee stands “in loco parentis.” Emergency FMLA paid leave is not available for any other reason such as the illness or health concern of the employee or a family member.

2. **Number of Hours.** Emergency paid FMLA leave will be paid for the number of hours an employee would otherwise be normally scheduled to work, or
  - a. Subject to b., a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick leave, including hours for which the employee took leave of any type.
  - b. If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.
3. **Employee Option to Substitute.** After the first two workweeks (usually 10 days) of emergency family and medical leave under the Act, an employee may elect to take available personal paid leave and be paid their regular rate for those hours rather than receiving pay at two-thirds of the regular rate. The paid leave hours will count as hours toward the total allotment of FMLA leave approved. An employee has the option to substitute paid leave for all or a portion of the family and medical leave. If an employee exhausts existing paid leave or elects not to substitute, the employee is still entitled to take remaining emergency family and medical leave at two-thirds of the regular rate, up to \$200 per workday. **Note.** Sick leave may be substituted only through October 8, 2020, which is the expiration of the emergency administrative rule allowing the use of sick leave for the purpose of childcare.

**F. Intermittent Emergency FMLA Leave.** Intermittent emergency FMLA paid leave may be approved for increments of less than a full day. This applies for both employees working at the regular workplace and employees teleworking.

Reminder. Emergency FMLA Paid Leave is not available for employees staying home due to the personal or family health care issues identified in Section I, A., B., C., D, or F. However, where a serious health condition exists, federal and/or state FMLA leave will be applied to eligible employees under the permanent FMLA provisions.

**G. Notice Provided by Employee.** Employees shall provide the employer with notice of the need for leave as soon as is practicable and fulfill any documentation or certification requirements as described in Section X, below.

**H. No Additional FMLA Leave.** The Emergency Family and Medical Leave Expansion Act does not increase the total allotment of FMLA leave available in the calendar year for state employees. The total allotment remains 12 weeks for most federal FMLA leave.



**SECTION X. DOCUMENTATION REQUIRED FOR BOTH EMERGENCY PAID SICK LEAVE AND EMERGENCY FMLA LEAVE**

When using the leave described in this bulletin, employees will be asked to provide the following information depending upon the basis for the requested leave on forms provided by DPM. Employees should provide this information orally or in writing as soon as practicable, and supervisors may request further documentation of the information provided.

- A. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19:** The employee's name, a copy of (or reference to) the safer at home order (or other order), statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. **Note:** If an employee is exempted from the safer at home order as an essential employee (including healthcare providers and emergency responders) this reason would not apply.
- B. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.** The employee's name, name of health care provider who advised, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Supervisors are authorized to request further documentation of the information provided.
- C. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.** The employee's name, name of health care provide who has been contacted, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested is all that is required. Supervisors are authorized to request further documentation of the information provided.
- D. The employee is caring for an individual who is subject to an order as described in Section II, A. or has been advised as described in Section II, B.** Employee's name, name of the individual the employee is caring for, the applicable order (e.g. safer at home order) or name of health care provide who ordered the individual being cared for to self -quarantine (depending on whether individual is being cared for under Section II, A. or B.), statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested is all that is required. Supervisors are authorized to request further documentation of the information provided.
- E. 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.** Name of employee, name of child and name of the school or day care that is closed. Supervisors are authorized to request further documentation of the information provided.

**SECTION XI. REFERRAL OF QUESTIONS**

Employer questions regarding the information included in this bulletin should be directed to John Wiesman by phone at (608) 266-1418 or by e-mail at [john.wiesman@wisconsin.gov](mailto:john.wiesman@wisconsin.gov); or, Scott C. Thompson by phone at (608) 266-1729 or by email at [scottc.thompson@wisconsin.gov](mailto:scottc.thompson@wisconsin.gov).

Employees should contact their local human resources office.

A handwritten signature in black ink, appearing to read 'Malika S. Evanco', written over a horizontal line.

Malika S. Evanco, Administrator  
Division of Personnel Management