



NDSBA
NORTH DAKOTA SCHOOL
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FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, the U.S. Congress passed the *Families First Coronavirus Act*, H.R. 6201 (Act). The Act was signed into law by President Trump later the same day. The Act was revised slightly from the bill passed by the House of Representatives on March 14, 2020. The Act does several things, including providing access to free COVID-19 testing, enhancing food assistance, increasing Medicaid funding, and providing paid leave and unemployment benefits to workers. The following is a broad summary of the provisions most relevant to public schools and their employees.

Paid FMLA Leave and Paid Sick Leave Provisions

In addition, the Act provides certain paid leave and job protections related to school closures and government employees, including teachers. The following is detailed information regarding those provisions relating to paid FMLA leave and paid sick leave under the Act:

Which Employers and Employees Are Covered by the Act?

Both the paid FMLA and paid sick leave provisions apply only to private employers with *fewer than 500 employees* and certain public employers who employ 1 or more employees. Public school districts in North Dakota are considered covered employers under the Act.

Both provisions allow an employer of an employee who is a healthcare provider or an emergency responder to elect to exclude the employee from the application of these two provisions.

In addition, they both allow subsequent U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.

FMLA Expansion for COVID-19

The Act amends the FMLA to allow an employee who is unable to work (or telework) to take leave due to a need to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency." A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.

Unlike the original bill, the closure of the child's school or childcare is the only reason allowed under the added FMLA provisions, and the only reason allowed for paid leave under the FMLA.



Paid Sick Leave for COVID-19

The Act also adds a paid sick leave obligation. Employers with fewer than 500 employees or public employers that employs 1 or more employees must immediately make available **80 hours of paid sick leave for full-time employees (or the equivalent of the average number of hours over two weeks for part time employees)** for the following reasons (which are slightly different than in the original bill):

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 healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the 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.

Amount of Pay

Under the FMLA provisions, when leave is needed due to a school or day care closure, the employer can provide the first 10 days of leave unpaid, then subsequent absences for this reason must be paid at 2/3rds the employee's regular rate of pay (up to 10 work weeks). The Act includes a cap on paid FMLA leave of \$200 a day and \$10,000 in aggregate. If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave.

For paid sick leave, workers taking leave for themselves will have to be paid at least their normal wage or the applicable federal, state, or local minimum wage, whichever is greater. Workers taking time off to care for family members must be paid at two-thirds of the foregoing rate. Sick leave is capped at \$511 per day and \$5,110 in the aggregate for leave taken in categories (1) through (3) described above (i.e., on one's own behalf), and capped at \$200 per day and \$2,000 in the aggregate for leave taken in categories (4) through (6) (i.e., to take care of another).

Effective Date

Both the proposed FMLA changes and the proposed paid sick leave take effect not later than 15 days after the Act was signed into law and would remain in place until the end of 2020.



Is leave job protected?

Yes, the Act offers job protection. However, the FMLA's requirement that an employee be restored to the same or equivalent position after leave does not apply to an employer with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

The employer must make reasonable efforts to restore the employee to the same or an equivalent position, and if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period beginning on the earlier of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date the employee's leave started.

Who pays for the sick time or leave?

Employers must pay the benefits, but they will receive a tax credit from the federal government for doing so.

Is the paid sick leave in addition to current leave provided by the employer?

Employers with existing paid leave policies will be required to provide workers with the sick leave under this emergency program. In addition, an employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act.

At what rate is the paid sick leave accrued?

The entire 80 hours of paid sick leave is available immediately. There is no accrual rate or period.

Which employees are eligible for these benefits?

The new FMLA provisions would apply to employees who have been employed for at least 30 calendar days. The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius would not apply.

The paid sick leave requirements would apply to all employees under covered employers.

What notice must an employee provide for leave?

The FMLA provisions require employees to provide the employer with "notice of leave as is practicable."



The paid sick leave provisions state that after the first workday (or portion thereof) that an employee receives paid sick leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.

Is carryover required for unused emergency paid sick leave?

The Act's paid sick provisions state that unused paid sick leave does not carry over from one year to the next.

Can an employee who takes emergency paid sick leave be required to find a replacement worker?

The Act's paid sick leave provisions state that an employer may not require an employee to find a replacement worker when the employee takes such leave. In addition, an employer is prohibited from discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer related to such emergency leave.

Must an employer pay out unused emergency paid sick leave provided by the Act if the employee separates from its employment?

An employer is not required to pay unused paid sick leave provided under the Act if an employee separates from employment.

Who bears the financial burden?

Employers will initially front the costs of sick leave wages; however, they will be reimbursed for 100% of those costs through a tax credit by the federal government within three months. The costs will be paid through a refundable tax credit against the Social Security payroll tax imposed on employers. The reimbursement will cover not only wages paid, but also the employer's contribution to employee's health insurance premiums. If the sick leave payments costs exceed the Social Security tax bill, the federal government will reimburse the employer to cover the remaining costs.

The United States, state governments and local governments are specifically excluded from the tax credit. As things now stand, there is nothing in place to provide federal, state and local governments, including school districts, with any reimbursement for the cost of the additional paid leave required by the bill.

EMERGENCY UNEMPLOYMENT STABILIZATION

With respect to the expected increase in claims for unemployment compensation, the Act provides:

- \$1 billion for emergency grants to states for activities related to processing and paying unemployment insurance benefits.



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- \$500 million of that amount would be used to provide immediate additional funding to all states for staffing, technology, systems, and other administrative costs, so long as they met basic requirements about ensuring access to earned benefits for eligible workers. Those requirements are:
 - Require employers to provide notification of potential unemployment insurance eligibility to laid-off workers.
 - Ensure that workers have at least two ways (for example, online and phone) to apply for benefits.
 - Notify applicants when an application is received and being processed and if the application cannot be processed, provide information to the applicant about how to ensure successful processing.
- \$500 million would be reserved for emergency grants to states which experienced at least a 10% increase in unemployment.
- States that experience an increase of 10% or more in their unemployment rate (over the previous year) and comply with all the beneficiary access provisions will qualify for 100% funding for Extended Benefits.
- Extended benefits are triggered when unemployment is high in a state and provide up to an additional 26 weeks after regular unemployment insurance benefits exhausted. This section also suspends the financial penalty for states that waive the usual one-week waiting period for benefits.

The National School Boards Association issued FAQs relating to the Act, which can be found on *COVID-19 Resources* page on NDSBA's website (www.ndsba.org) .

The situation regarding the COVID-19 pandemic is constantly evolving. NDSBA will continue to provide ongoing guidance as the situation unfolds and additional issues arise. In the meantime, please feel free to contact NDSBA by phone or email with questions.