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TO: Agency Personnel Managers/Officers

FROM: Jackie Graham, State Personnel Director

DATE: April 28, 2020

RE: Families First Coronavirus Response Act (FFCRA) - UPDATE 2

This updated memorandum serves as guidance for state agencies regarding the return to work of state employees and the implementation of the Families First Coronavirus Response Act (FFCRA), specifically the **Emergency Paid Sick Leave Act (EPSL)** and the **Family and Medical Leave Expansion Act (FMLA+)** provisions. **As a reminder, Governor Kay Ivey has instructed that all essential and non-essential employees, if possible, be allowed to telework or have flexible schedules.** Employees whose jobs do not allow for teleworking or flexible schedules will remain on the Governor authorized paid emergency leave until April 30, 2020. If an employee remains unable to telework or come to the workplace after April 30, 2020, accumulated leave should be utilized by the employee in order to remain in full pay status. In addition, employees with childcare needs or COVID-19 related conditions may qualify for additional leave under the provisions of the FFCRA as described below.

[FEDERAL] EMERGENCY PAID SICK LEAVE ACT (EPSL)

Applies to **ALL STATE EMPLOYEES** regardless of length of service except for Health Care Providers or Emergency Responders who may be excluded from coverage of the FFCRA by the employer as described in more detail below. Full-time employees are entitled to 80 hours of EPSL leave, while part-time employees are entitled to an average number of hours worked in a two-week period. Although the law provides for limitations on the amount of pay an employee may receive under this law, Governor Ivey has authorized the EPSL leave to be paid at the employee's regular rate of pay, rather than the more restrictive two-thirds pay and other statutory limitations of the FFCRA.

This law was effective April 1, 2020 and expires on December 31, 2020. The provisions of the EPSL became available to employees who have been deemed essential, meet the eligibility criteria, **but are unable to telework**, on April 1, 2020. Agency heads have the authority to allow these employees to utilize the Governor authorized paid emergency leave through April 30, 2020.

All other employees may remain on the Governor authorized paid emergency leave through April 30, 2020 and, if eligible, may access FFCRA paid sick leave beginning May 1, 2020. **Agencies CANNOT count an employee's time on the Governor authorized paid emergency leave against any FFCRA entitlement.**

The eligibility criteria for receiving this leave is as follows:

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 because of COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual subject to or advised to quarantine or isolation.
5. The employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19.
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services. For information as to what may be considered substantially similar conditions, please go to: <https://www.cdc.gov/coroavirus/2019-ncov/need-extra-precautions/grou-s-at-higher-risk.html>.

Additional Notes:

This law requires that the employer allow the **employee** to choose whether to first use the EPSL leave provided by this law, and then use any remaining accrued sick, personal, compensatory, or annual leave in accordance with the Rules of the State Personnel Board. **In any case, the employer CANNOT require the employee to use accrued leave prior to utilizing the EPSL leave.**

EPSL leave for any reason other than childcare must be taken in one continual block of time until the need for taking leave no longer exists. Appointing authorities may, however, allow employees critical to agency operations who are taking EPSL leave due to school or daycare closure to take such leave intermittently – in full day increments only - on a case-by-case basis.

The U.S. Department of Labor and Governor Ivey have encouraged employers to implement highly flexible telework and work schedule arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities.

FAMILY AND MEDICAL LEAVE EXPANSION ACT (FMLA+)

Applies to **ALL STATE EMPLOYEES** who have been employed for at least 30 calendar days. However, a Health Care Provider or Emergency Responder may be excluded by the employer as described in more detail below.

This law was effective April 1, 2020 and will expire on December 31, 2020. For employees who are unable to telework and who are on Governor authorized paid emergency leave, the 12 weeks of FMLA+ will become available on May 1, 2020. The FMLA+ provisions became available to essential employees who meet the eligibility criteria, **but are unable to telework**, on April 1, 2020. Agency heads have the authority to allow essential employees who are unable to telework to utilize the Governor authorized paid emergency leave through April 30, 2020. **Agencies CANNOT count an employee's time on the Governor authorized paid emergency leave against any FFCRA entitlement.**

This new FMLA+ leave is for parents who are caring for their children, under 18 years of age, whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions. Caring for a child over the age of 18 may qualify under certain conditions.

Please note that the FMLA+ does not create an additional 12-week FMLA leave entitlement. Employees who have already taken FMLA leave during the preceding 12-month period will have the remaining portion of FMLA leave available. For example, if an employee has used 4 weeks of FMLA leave, he or she will have the remaining 8 weeks of leave to use for childcare as described above.

The **employee alone** must be providing care for the child during the period for which the employee is receiving this type of leave. For example, if there is a co-parent, co-guardian, or another individual present to care for the child, this leave is not available.

Full-time employees are eligible for up to 12 weeks (40 hours per week). **Part-time employees** are eligible for leave for the number of hours that the employee is normally scheduled to work over that 12-week period. The first two weeks of the 12 weeks are unpaid under FMLA+. An employee may elect to use any accrued leave to cover the initial two weeks of unpaid leave OR may choose to be paid pursuant to the EPSL outlined above.

After the initial two weeks of the FMLA+, employees will be required to use their accumulated leave in conjunction with the FMLA+ leave. If the employee exhausts his or her leave, the remainder of the FMLA+ time will be paid at two-thirds of his or her regular rate of pay up to a maximum of \$200 per day, or a total of \$10,000, over the entire FMLA+ period, as required by the FFCRA. FMLA+ leave may be taken intermittently with the approval of the appointing authority but **MUST** be taken in full day increments.

Restoration to Position after Leave Ends:

As with the original FMLA law, the FMLA+ leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon his or her return to work.

DOCUMENTATION FOR LEAVE UNDER FFCRA

The following documentation is required when an employee is requesting leave under the FFCRA. Forms for this leave usage have been provided to departmental personnel managers/officers.

1. Employee's name
2. Date(s) of leave
3. The FFCRA qualifying reason for the leave request:
 - i. Quarantine - Name of governmental entity or health care professional ordering or advising quarantine or self-quarantine. If providing care for an individual, provide the person's name and relationship to employee.
 - ii. Childcare - Name and age of child (or children) and the name of the school or place of care that has closed. The employee must provide a statement that no other suitable person is available to care for the child during the period of the requested leave. If the child is over 18 and is in need of care, the agency personnel manager should be consulted.
4. A statement that the employee is unable to work, including telework, for one of the six qualifying reasons of the FFCRA
5. An employee must also provide his or her supervisor with a set schedule of the time off needed for childcare

HEALTH CARE PROVIDER AND EMERGENCY RESPONDER

A "Health Care Provider" may be excluded from coverage of the EPSL and FMLA+ by the employer.

A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, entities or institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the Governor determines is a health care provider necessary for Alabama's response to COVID-19.

An “**Emergency Responder**” may also be excluded from coverage of the EPSL or FMLA+ by their employer.

An emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such 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, 911 operators, child welfare workers and service providers, 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 Alabama's response to COVID-19.

Additional Notes:

Employees who are on the FFCRA two-thirds pay are being paid for their full work schedule. Therefore, no usage of accumulated leave is allowed or necessary.

The employee should provide the employer with as much notice as possible.

Each agency must post a notice about these FFCRA requirements in a conspicuous place such as on a bulletin board or sent electronically to employees, as some may be teleworking. The notice may be found at:

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

The agency may not dismiss, discipline, or otherwise discriminate against an employee who takes EPSL or FMLA+ leave under the FFCRA or files a complaint or other proceeding under or related to the FFCRA.

The provisions of neither the EPSL nor FMLA+ continue past December 31, 2020.