



NORTH CAROLINA COMMUNITY COLLEGE SYSTEM

Peter Hans, President

May 21, 2020

MEMORANDUM

TO: CC Presidents
FROM: Jennifer Haygood, Chief of Staff
RE: **OSHR Emergency Leave Provision #4**

The purpose of this memo is to provide colleges updated guidance on leave policy options beyond May 22, 2020. As I communicated by e-mail on May 6, 2020, the Office of State Human Resources (OSHR) extended the State of Emergency Leave Provision #3 through May 22, 2020. We have received notification from OSHR that **State of Emergency Leave Provision #3 will extend to May 25 but will not be extended further.**

OSHR has adopted an Emergency Leave Provision #4 for the period of May 26, 2020 through June 30, 2020, or the start of Phase 3 (as defined by a future executive order issued by the Governor), whichever is first. Provision #4 ends prior versions of the State of Emergency Leave. Going forward, colleges will grant COVID-19-related leave when it is allowed by the Families First Coronavirus Response Act (FFCRA) and have the option of extending paid Emergency Leave for elder care and to employees whose work cannot be performed remotely or for whom reasonable alternative work is not feasible.

Leave Provided by the Families First Coronavirus Response Act (FFCRA)

As you may recall, the leave provided under the FFCRA and OSHR's State of Emergency Leave Provision #3 covered many of the same COVID-19-related situations (see Attachment A - March 25, 2020 memo from Jon Harris as a reference). Beyond May 22, 2020, colleges **may no longer provide State of Emergency Leave for employees experiencing situations covered by the FFCRA.** Instead, colleges must provide federal Emergency Sick Leave and Emergency Family Medical Leave Act (FMLA) leave, as applicable, to eligible employees. Because of the special tax treatment of leave provided by the FFCRA, colleges should ensure this leave is coded appropriately.

As a reminder, under *certain* situations, the rate of pay for FFCRA leave is capped at 2/3 of the employee's regular rate of pay. In such situations, an employee may elect to utilize other preexisting paid leave (such as vacation leave, bonus leave, and sick leave) to supplement the FFCRA paid leave (see Attachment B - April 1, 2020 memo from Jon Harris as a reference).

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Attachments



NORTH CAROLINA COMMUNITY COLLEGE SYSTEM

Peter Hans, President

Paid Emergency Leave for Situations NOT Covered by FFCRA

Under OSHR's Emergency Leave Provision #4, State agencies may continue to extend **up to 208 hours (assuming Leave Provision #4 extends through June 30, 2020) of paid leave at 2/3rds the regular rate of pay** for two additional situations not covered by the FFCRA leave:

- **Elder Care.** Employees unable to work due to elder care needs as a result of the closure of a facility due to COVID-19.
- **Work cannot be performed remotely, or reasonable alternate work is not feasible.** Employees who are not scheduled to work onsite, cannot telework because their position and duties cannot be performed remotely, and reasonable alternate remote work is not feasible or productive.

As usual, colleges are **authorized, but not required** to adopt locally a similar paid Emergency Leave policy. An employee receiving Emergency Leave under this policy may elect to supplement this leave with other preexisting paid leave.

Additional Considerations and Clarifications

- An employee is not eligible for FFCRA Leave or paid Emergency Leave if he/she was on other pre-approved leave, chooses not to work, or is unavailable for reasons other than the allowable COVID-19-related situations and must use available and applicable leave types (vacation leave, bonus leave, sick leave, compensatory time, leave without pay, etc.).
- During the period of May 26 – June 30 or the end of Phase 3, whichever is earlier, OSHR has also extended an additional 80 hours of paid Community Service Leave for State employees. Colleges may consider doing likewise.

Thank you for your continued service to your students and communities. We are all trying to find the right balance between protecting public health and meeting our educational mission. I hope this guidance provides you tools to help address employee needs, while acknowledging practical budget constraints and the need to provide more face-to-face instruction and services on your campuses.

CC: CC Business Officers
CC Personnel Officers

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NORTH CAROLINA COMMUNITY COLLEGE SYSTEM

Peter Hans

President

Memorandum

To: Community College Human Resources Directors and Business Officers
From: Jonathan Harris, General Counsel
Subject: Families First Coronavirus Response Act and NC Emergency Leave Policies
Date: March 25, 2020

Background Summary

On March 18 President Trump signed the Families First Coronavirus Response Act into law. The Act contains two new employee leave provisions addressing absences due to the COVID-19 pandemic:

- (1) Emergency Paid Sick Leave (Emergency Sick Leave)
- (2) Emergency Family and Medical Leave (Emergency FMLA)

These leave provisions are effective April 1, 2020. We are still awaiting regulations and additional guidance from the U.S. Secretary of Labor.

Key Points

- The new federal law applies to community colleges.
- The new law creates two federal leave entitlements. This means a college must honor an eligible employee’s request to use either Emergency Sick Leave or Emergency FMLA.
- An employee can choose which leave to take when the employee cannot work or telework due to a circumstance related to the COVID-19 outbreak—the new federal leave or the leave a college provides.
- The federal leave provisions contain reductions and caps in pay. The State policies do not.
- The federal leave provisions expire December 31, 2020.
- If a college adopts emergency leave policies consistent with OSHR’s policies, employees are less likely to use the new federal leave provisions.
 - The State policies cover many of the situations covered by federal Emergency Sick Leave.
 - The State policies cover the one and only situation covered by Emergency FMLA, which is needing to take care of child due to a school or childcare closure.

Federal Emergency Paid Sick Leave

Conditions for Use

A college must provide paid sick time to an employee to the extent that the employee is unable to work or telework because:

- (1) The employee is subject to governmental quarantine or isolation order related to COVID-19.
- (2) A health care provider has advised the employee to self-quarantine due to concerns related to 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 an order described in (1) or has been advised as described in (2).
- (5) The employee is caring for a child due to a school or childcare facility being closed or unavailable.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Eligible Employees

- This leave is available for immediate use by the employee, regardless of how long the employee has been employed by the college.

Amount of Emergency Sick Leave Hours

- Full-time employees are entitled to 80 hours of Emergency Sick Leave.
- Part-time employees are entitled to a number of hours equal to the number of hours that such employee works, on average, over a two-week period.
- This leave does not carry over from one year to the next.

Rates of Pay

- If an employee uses Emergency Sick Leave for reasons (1), (2), or (3) above, the employee is paid at their regular rate of pay, **subject to** a \$511 per day cap (\$5,110 aggregate).
- If an employee uses Emergency Sick Leave for reasons (4), (5), or (6) above, the employee is paid at 2/3 of their regular rate of pay, **subject to** a \$200 per day cap (\$2,000 aggregate).

Relationship to Other Leave

- A college cannot require an employee to use other paid leave provided by the college prior to the employee using Emergency Sick Leave.

Federal Emergency FMLA

Conditions for Use

A college must provide an employee paid Emergency FMLA in the following situation:

- The employee is unable to work or telework due to a need to care for a child under 18 years of age if a school or place of care has been closed or is unavailable due to a public health emergency.

Eligible Employees

- Full or part-time employees who have been employed with a college for at least 30 calendar days.

Amount of Emergency FMLA Time

- An employee can take 12 total weeks.

Rate of Pay

- The first ten days **may** consist of unpaid leave, but an employee can elect to use the new Emergency Sick Leave or any other leave the employee has during the first ten days.
- The next ten weeks are paid at a rate of not less than $\frac{2}{3}$ of the employee's regular rate of pay, times the number of hours the employee would normally be scheduled to work, **subject to** a \$200 per day cap (\$10,000 aggregate).

Tax Treatment of Federal Leave Payments

- The leave payments under both federal leave provisions are not considered wages for social security tax (OASDI) withholding purposes. Therefore, this tax should not be withheld from employee payments. Employers do not have to pay their matching share either.
- Medicare taxes should still be withheld from employee payments. Employers still pay their matching share.
- Colleges are not eligible for the refundable payroll tax credits private businesses can receive.

Status of State of Emergency Leave for State Employees

Currently, the State has four policies in effect regarding leave for employees during the COVID-19 pandemic. They are:

- (1) The Communicable Disease Emergency Policy
- (2) State of Emergency Leave Provision #1
- (3) State of Emergency Leave Provision #2
- (4) State of Emergency Leave Provision #3

The Communicable Disease Emergency Policy

An employee is granted paid leave under the State's existing¹ Communicable Disease Policy for the following reason:

- If the employee is quarantined by a public health official, the employee is granted paid leave until the specified period ends or the employee becomes ill with the communicable disease, whichever comes first.

State of Emergency Leave Provision #1

The Office of State Human Resources (OSHR) adopted State of Emergency Leave Provision #1 on March 13. It gives agencies the discretion to grant up to 80 hours of paid leave.²

An employee can take State of Emergency Leave #1 for the following reason:

- The employee is experiencing symptoms potentially related to COVID-19.

State of Emergency Leave Provision #2

OSHR adopted State of Emergency Leave Provision #2 on March 17. It gives agencies the discretion to grant up to 96 hours of paid leave, from March 16 - 31.

An employee can take State of Emergency Leave #2 for the following reasons:

- (1) The employee is a "high risk" individual who cannot telework.
- (2) The employee is caring for a "high risk" individual and cannot telework.
- (3) The employee cannot telework because their position and duties cannot be performed remotely and reasonable alternative remote work is not feasible or productive.
- (4) The employee cannot work because they have childcare or eldercare needs due to COVID-19 related facility closings.
- (5) The employee is sick due to symptoms consistent with COVID-19.
- (6) The employee is caring for a dependent with symptoms consistent with COVID-19.

State of Emergency Leave Provision #3

OSHR adopted State of Emergency Leave Provision #3 on March 25. It will be effective April 1 – April 30. It gives agencies the discretion to grant up to 176 hours of paid leave for the same reasons listed in State of Emergency Leave Provision #2.

¹ OSHR's website indicates that due to the COVID-19 emergency, this policy is under review. It has not been rescinded yet, so it is still in effect.

² This leave does not have a definite expiration date. It continues in effect until further notice or until the state of emergency declaration is lifted.



NORTH CAROLINA COMMUNITY COLLEGE SYSTEM

Peter Hans

President

Memorandum

To: Community College Human Resources Directors and Business Officers
From: Jonathan Harris, General Counsel
Subject: **Additional Information Regarding the Families First Coronavirus Response Act**
Date: April 1, 2020

Introduction

This is a follow-up to the Families First Coronavirus Response Act (FFCRA) memo sent out on March 25, 2020. The first memo discussed the basic provisions of the two new federal leave provisions—Emergency Paid Sick Leave and Emergency FMLA, along with OSHR’s State of Emergency Policies. This memo will discuss some additional information related to the federal leave provisions. It will also cover some of the questions we have received at the System Office.

Temporary Non-Enforcement by the U.S. Department of Labor

The U.S. DOL will not bring enforcement actions against employers for violations of the Act through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. This gives colleges a little more time to fully understand the Act and to think through implementation of the Act.

U.S. Department of Labor “Questions and Answers” Site

U.S. DOL has updated their FFCRA Questions and Answers (Q&A) site. We encourage you to read the Q&As on the site. The Q&As cover a range of questions and scenarios that colleges might see in the coming days or weeks. The site is at this link:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Employer Posting Requirement

The FFCRA requires employers to “post in conspicuous places on the premises of the employer where notices to employees are customarily posted.” Employers must post the notice by April 1. The U.S. DOL model notice can be found here:

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

U.S. DOL also has a Frequently Asked Questions section devoted solely to the posting requirement. It can be found at this link:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

One posting FAQ of note:

1. Where do I post this notice? Since most of my workforce is teleworking, where do I electronically “post” this notice?

Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. 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.

Do the New Leave Provisions Apply to Contract or Temporary Employees?

General Eligibility Provisions

Under the new law, an employee is eligible for Emergency Sick Leave immediately. An employee is eligible for Emergency FMLA if they have been employed for 30 days.

For Emergency FMLA, this eligibility requirement is very different from the eligibility requirement for “Regular” FMLA. For Regular FMLA, the employee must be employed with a college for at least 12 months and have worked 1250 hours during the 12 months preceding the leave. The eligibility requirements for Regular FMLA likely exclude many short-term temporary and contract employees due to falling short of the required 1250 hours. With these requirements removed for Emergency FMLA, more of these employees will qualify.

An employee’s particular situation still has to meet one of the covered COVID-19 related situations listed under Emergency Sick Leave or Emergency FMLA in order to take either type of leave.

Contract Employees

Contract employees are eligible for Emergency Sick Leave and Emergency FMLA if they are still under contract with the college. The college would not have to pay for either type of leave once the term of the contract ends. Colleges should review their contracts for any language that automatically renews a contract.

Temporary Employees

Temporary employees are eligible for Emergency Sick Leave and Emergency FMLA. If a college is using a temporary employment agency, the agency, rather than the college **might** be responsible for paying for the leave. The U.S. DOL has a Fact Sheet on these “joint employer” situations at the link below. **CAUTION:** U.S. DOL has not updated this Fact Sheet to reflect the changes in employee eligibility, so ignore those provisions for Emergency FMLA eligibility purposes. The analysis on joint employers is still valid:

<https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment>

Counting Hours for Part-Time Employees

For Emergency Sick Leave, leave for part-time employees is based on their average number of work hours in a two-week period. For Emergency FMLA, leave for part-time employees is based on the number of hours the employee would be normally scheduled to work. For part-time college employees that have irregular schedules, see US DOL Q&A #5 and #6.

Employee Furloughs

If an employee has been furloughed prior to April 1 or after April 1, the employee is not eligible to take either type of leave. See US DOL Q&A #13, #23, #24, and #26.

Can an Employee Use Other College Leave in Conjunction with Federal Leave?

Yes, under certain conditions. See U.S. DOL Q&A #31, #32, #33

Can an Employee Receive Unemployment Benefits While Taking Federal Leave?

No. See U.S. DOL Q&A #29.

Can an Employee Use Emergency FMLA if They Already Used Regular FMLA?

It depends how much Regular FMLA the employee has used. For Regular FMLA, an employee can take 12 workweeks of leave in a 12-month period. The addition of Emergency FMLA did not change the total amount of FMLA leave an employee can take. Therefore, if an employee used two weeks of Regular FMLA in January 2020, the employee would have ten weeks of total FMLA remaining to be used on either Emergency FMLA or Regular FMLA. If an employee used all 12 weeks from September 2019 to November 2019, the employee could not take Emergency FMLA. See U.S. DOL Q&A #44 and #45.

Quarantine and the Governor's Recently Issued "Stay-at-Home" Executive Order

The Governor's "Stay-at-Home" Order does not mean that every college employee is now subject to a governmental quarantine or isolation order for the purposes of qualifying for Emergency Sick Leave. As Professor Diane Juffras from the UNC School of Government explains, "quarantine" and "isolation" are legally defined terms in public health law and are distinct from a general "stay-at-home" order. For more details, see her blog post:

<https://canons.sog.unc.edu/does-a-local-shelter-in-place-order-qualify-as-an-isolation-or-quarantine-order-for-the-purposes-of-the-emergency-paid-sick-leave-act/>