

Expanded Family Medical Leave (FMLA) under FFCRA

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Expanded Family Medical Leave

The purpose of this policy is to provide a family and medical leave policy in compliance with DIVISION C—Emergency Family And Medical Leave Expansion Act; Public Law 116-127, titled Families First Coronavirus Response Act (FFCRA), during the period beginning on April 1, 2020, and ending on December 31, 2020, because of a qualifying need related to a public health emergency.

Eligibility

In lieu of the definition in sections 101(2)(A) and 101(2)(B)(ii) of the Family Medical Leave Act of 1993, as amended, the term 'eligible employee' means an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested during the period that the Act is in effect, *and has not been excluded as an Emergency Responder, or as one who provides, or supports the provision of, essential government functions.*

Additional Definitions

QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY—The term 'qualifying need related to a public health emergency', with respect to leave, 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.

PUBLIC HEALTH EMERGENCY—The term 'public health emergency' means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

CHILD CARE PROVIDER—The term 'childcare provider' means a provider who receives compensation for providing childcare services on a regular basis, including an 'eligible childcare provider' (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

SCHOOL—The term 'school' means an 'elementary school' or 'secondary school' as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

Leave Limits and Pay

The first 10 days (weeks 1-2) for which an employee takes leave under the E-FMLA may consist of unpaid leave. An employee may elect to substitute any accrued vacation leave, personal leave, emergency medical leave as provided under the Emergency Sick Leave Act of the FFCRA or medical or sick leave for unpaid leave.

Subsequent leave (weeks 3-12) will be compensated at two-thirds (2/3) the employee's regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work.

In the case of an 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 leave under the Act, the employer shall use the following in place of such number:

(i) 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 such leave, including hours for which the employee took leave of any type.

(ii) 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.

In any case where the necessity for leave under the Act is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.

Job Restoration

SEC. 104 of the Family Medical Leave Act

EMPLOYMENT AND BENEFITS PROTECTION

(a) RESTORATION TO POSITION.

(1) **IN GENERAL.** Except as provided in subsection (b), any eligible employee who takes leave under the Act for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) **LOSS OF BENEFITS.** The taking of leave under the Act shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) **LIMITATIONS.** Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or
(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

Circumstances described in Section 104(a)(1) shall not apply with respect to an employee of an employer who employs fewer than 25 employees if the conditions described in paragraph (2) are met.

(2) CONDITIONS. The conditions described in this paragraph are the following:

(A) The employee takes leave under the Act.

(B) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer—

(i) that affect employment; and

(ii) are caused by a public health emergency during the period of leave.

(C) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

(D) If the reasonable efforts of the employer under subparagraph (C) fail, the employer makes reasonable efforts during the period described in paragraph (3) to contact the employee if an equivalent position described in subparagraph (C) becomes available.

(3) CONTACT PERIOD. The period described under this paragraph is the 1-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 on which the employee's leave under section 102(a)(1)(F) commences.

DISCLAIMER: The letters and publications written by the MTAS consultants were written based upon the law at the time and/or a specific sets of facts. The laws referenced in the letters and publications may have changed and/or the technical advice provided may not be applicable to your city or circumstances. Always consult with your city attorney or an MTAS consultant before taking any action based on information contained in this website.

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