



It has been another busy week: the Families First Coronavirus Response Act (FFCRA) went into effect on April 1, 2020; USDOL issued regulations on FFCRA; Governor Baker’s *Act to Address Challenges Faced by Municipalities and School Districts resulting from COVID-19* passed late Friday afternoon; and, many public schools across Massachusetts began implementing Remote Learning programs. We know it can be difficult to keep up with the day to day developments and quickly changing landscape. We encourage you to use these Advisors and the resources on our website to help you manage through this pandemic. Together we can stay on top of the biggest issues facing employers and schools. Let us know what you would like to see in future editions.

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A. UPDATE: Families First Coronavirus Response Act

1. USDOL Issues Regulations

On March 28, 2020, the U.S. Department of Labor (USDOL) released guidance in the form of frequently asked questions concerning the Families First Coronavirus Response Act (FFCRA), which became effective on April 1, 2020. DOL subsequently released temporary regulations concerning the implementation of the Emergency Paid Sick Leave (EPSL) and the Emergency Family Medical Leave Expansion Act (EFMLEA or FMLA+) on April 1, 2020. A copy of the regulations is available on our website and on the DOL’s website under the Wage and Hour Division.

What are some of the key takeaways from the regulations? The FFCRA regulations – all 124 pages – cover a lot of information. But don’t worry, we read them so you wouldn’t have to. Below

we have highlighted some of the key takeaways for quick reference. We also have a more detailed summary and links to the regulations available on our website.

Definitions. Classic FMLA definitions apply to all terms in both the Emergency Paid Sick Leave (EPLS) and the Emergency Family Medical Leave Expansion Act (FMLA+) unless either benefit includes specifies otherwise. For purposes of ESPL and FMLA+ childcare provisions, the definition of child also includes a child 18 years of age or older who is incapable of self-care because of a mental or physical disability.

Telework. The regulations encourage flexible teleworking agreements which allow work to be done during normal work hours or at other agreed times.

Continuous Work Rule. A previous rule known as the continuous work (CW) rule (not designed for Telework) provided that employers had to treat time between the first and last task of the day as compensable time (picture a meter reader who must travel from meter to meter only “working when reading the meter, but must be paid for the travel between worksites). With more non-exempt employees teleworking, the USDOL has suspended the CW rule. The challenge for employers is to ensure there are clear understandings about work hours and the need for employees who are teleworking to track their hours accurately, so that they can be paid for all hours worked.

Quarantine Leave. To take leave under the FFCRA in a quarantine situation (i.e., required to remain at home but not disabled by illness) an employee must be unable to work or telework. The question is whether the employee would be able to work or telework “but for” being required to comply with an isolation or quarantine order.

Emergency Responders. The FFCRA provides that employers of emergency responders may exclude such employees from eligibility under EPSL and FMLA+. The regulations provide some extra guidance. (A more detailed discussion of the merits and mechanics of excluding emergency responders is provided in the next section).

Emergency Responder Defined. The regulations broadly define an emergency responder as: an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or others needed for the response to 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 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 operation of the facility.

Existing Leave and FMLA Benefits Protected. An employer’s election to exclude emergency responders from FFFCRA provisions does not impact those employees’ earned or accrued sick, personal, vacation, or other employer-provided leave under established policies or contracts. Also, emergency responders cannot be excluded from ordinary FMLA leave.

Intermittent Use of EPSL and FMLA+. Intermittent leave is allowed under the FFCRA if both employer and employee *agree* on the intermittent use of leave, but with restrictions depending upon the type of work.

Show-Up Work. In the case of jobs where the employee is expected to leave home and go to the workplace, intermittent leave usage is limited to leave necessary to care for the employee's child whose school or care place is closed, or whose childcare provider is unavailable. The rationale for this limitation is to reduce the risk that employees reporting to the worksite may spread the virus. Employees may not use intermittent ESPL leave for any other qualifying reason. As a result, an employee who takes ESPL must do so until the employee exhausts that leave or no longer has a reason to take leave.

Telework. An employee may take EPSL or FMLA+ leave intermittently, in any agreed increment of time, while he or she is teleworking. While there must be a "clear and mutual understanding" between the parties, the regulations do not require that the agreement be reduced to writing. The agreement should include the increments of time in which intermittent leave may be taken. Obviously, NMP recommends any such agreements be in writing.

Employee Notice and Documentation of Need for Leave. The regulations provide different notice requirements depending on the type of leave an employee wishes to take.

Childcare and School Closure. Where the need for leave is foreseeable, employees must provide notice "as soon as practicable."

EPSL Leave (non-childcare). Employer may require an employee to follow reasonable notice procedures after the first workday or partial workday they are out on leave. Notice need not be given in advance.

Documentation. (Section 826.100 of the Act). Documentation in support of an employee request for EPSL or FMLA+ must include: (1) the employee's name; (2) dates for which leave is requested; (3) qualifying reason for the leave request; and (4) an oral or written statement that the employee is unable to work because of the qualified reason for leave.

Failure to Provide Notice. If an employee fails to give notice, the employer should notify the employee and provide the employee with an opportunity to provide any required documentation prior to denying the request for leave.

Required Information. Depending on the nature of the qualifying reason, an employee may need to provide additional "information" (we note the use of the word "information" rather than "documentation"):

- Employees subject to a Federal, State, or local quarantine order must provide the name of the governmental entity that issued the order.
- Employees who have been advised to self-quarantine by a health care provider must provide the name such health care provider.

- Employees caring for an individual subject to a quarantine or isolation order or an individual advised to self-quarantine by a health care provider must provide the name of the governmental entity that issued the order under which the individual being cared for is subject; or the name of the health care provider that advised the individual to self-quarantine.
- Employees caring for a child whose school or place of care has closed must provide the name of the child, name of the school or place of care that has closed or become unavailable, and a representation that no other suitable person is available to care for the employee's son or daughter during the time period for which the employee takes leave.

Intersection Between EPSL and FMLA+. As anticipated based on earlier guidance, FMLA+ and classic FMLA have a combined maximum of 12 weeks leave. Where an employee has already taken ordinary FMLA leave, the 12 weeks available under FMLA+ is reduced by the amount of ordinary FMLA already taken this year. Where an employee qualifies for leave under both EPSL and FMLA+, an employee may run the two leaves concurrently. This allows the employee to be paid for the full 12 weeks of FMLA+ rather than having the first two weeks unpaid. It is possible that an employee could receive 14 weeks of leave under FFCRA if he or she was to use all 12 weeks of FMLA or FMLA+ and later uses his or her EPSL for a non-childcare related reason.

2. Understanding the Emergency Responder Exemption Options

Should I Be Exempting Our Emergency Responders from the FFCRA? This is a policy question, but we do not recommend a total exemption to the extent that a partial exemption is possible. You may however wish to consider exempting essential public safety personnel from the childcare related provisions of the FFCRA if there is a concern about being able to staff these functions.

Employers have the right under FFCRA to exclude “emergency responders” (see the definition in Section A.1 above) from any or all of the new benefits. USDOL cautions: “[T]o minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.”

Even before the passage of the FFCRA, many Police and Fire Departments, were erring on the side of caution, and placing Police Officers and Firefighters who were exposed to or were exhibiting symptoms of possible illness on “paid leave” without deducting it from their accrued leave. When providing this benefit after April 1, the police officer or firefighter can still get paid leave, but it would be drawn either from the employee's allotment of EPSL sick leave (until exhausted) or from the employee's contractual sick leave, at the employee's option. An employer can also provide an additional grant of sick leave for this purpose or agree to restore sick leave to employee accounts as a way of dealing with the concerns being expressed by public safety unions.

The childcare benefits of EPSL, and more significantly FMLA+, create the potential for an emergency responder otherwise fully capable of working to stay home on (partially) paid leave for up to 12 weeks to care for the employee's child. While an employer should leave room for an exception in extenuating circumstances, allowing this benefit to all emergency responders could

be devastating to the employer's ability to staff these essential functions at a time they are needed most, and when virtually all children are home from school or daycare by order of the Governor.

Don't forget that even if employers exclude emergency responders from FFCRA benefits, they must still provide ordinary FMLA time off and existing accrued sick, personal, vacation under established policies and contracts.

Do employers have to bargain with unions about excluding emergency responders? Yes. As with any election that an employer has the right to make under state or federal law, impact bargaining with affected unions may be required where the decision has an impact on wages, hours and working conditions. To comply with impact bargaining obligations, an Employer should notify the affected Unions about whatever decision is being considered that might impact the rights of emergency responders under the FFCRA.

B. “Zoombombing” And How To Avoid It

What is “Zoombombing” and why should I be concerned? “Zoombombing” or “Zoomraiding” refers to the disruption of a video conference by uninvited/unwanted participants most notably in connection with a public meeting, conference or class. Often the disruption includes offensive language and pornographic images. While named for Zoom, a popular videoconferencing platform, this type of attack can occur on other platforms as well (Webex, Gotomeeting, Google Hangouts, etc.).

On March 30, 2020, the FBI's Boston office issued an advisory stating that the FBI “has received multiple reports of conferences being disrupted by pornographic and/or hate images and threatening language.” Locally they reported that there had been two instances of Zoombombing from Massachusetts schools. Since then we have become aware of several other local examples including the disruption of town and school committee meetings. Anyone using or planning on using Zoom or any videoconferencing platform should take steps to prevent or minimize a disruption. This is particularly pertinent as schools begin to increase their remote learning offerings.

What can I do to prevent Zoombombing? Users of Zoom, and especially those hosting a meeting or using the app to teach a class, need to review their settings. Additionally, you should review the guidance provided by Zoom, including tutorials to better understand how to make your meeting, class or conference less susceptible to uninvited guests. Zoom has published a blog article titled, “How to Keep Uninvited Guests Out of Your Zoom Event.” There is also a very detailed article published by the Anti-Defamation Leagues (ADL) called “How to Prevent Zoombombing.” Both are available on our website.

C. Open Meeting Law During the State of Emergency

What aspects of the Open Meeting Law are public bodies excused from complying with during the State of Emergency? On March 12, 2020, Governor Baker issued an Executive Order (“Order”) suspending certain provisions of the Open Meeting Law (“OML”) for the duration of the COVID-19 state of emergency.

Accessible Public Place and Physical Presence. The Governor’s Order suspends the requirement that the meeting be held in a public place that is physically accessible to members of the public, and the requirement that a quorum of a public body be physically present at the meeting location.

Waiver of Adoption of Remote Participation Rules. The Order also authorizes all members of a public body to participate in a meeting remotely without the need to vote to "adopt" the practice of remote participation.

Alternative Means for Public Access and Participation. The Order requires that the public body provides the public with an alternative, free means of accessing the meetings. The meeting can be done through telephone, internet, or satellite enabled audio or video conferencing or any other technology that enables the public to follow the proceedings in real time. The method chosen by the public body to hold the remote meeting must allow for “active, real-time participation by members of the public” whenever such participation is required under a local ordinance, by-law or charter.

Quorum Required. A quorum of the public body is still required to participate in order to lawfully conduct business.

Meeting Recordings. Although not required by the OML, public bodies are well-advised to provide the public with access to an audio or video recording, transcript, or other comprehensive record of the meeting as soon as possible after meeting in case technological difficulties resulted in someone not being able to participate.

What Remote Participation Procedural Requirements of the OML Are Still in Effect?

- All members of a public body participating remotely must be clearly audible to each other. Text or online chat remains unacceptable as a method of remote participation.
- If a public body member is disconnected from the meeting, that fact and the time the disconnection occurred shall be noted in the meeting minutes.
- At the beginning of the meeting, the public body chair must identify all public body members participating remotely, and all votes taken during the meeting must be conducted by roll call vote.
- At the start of any executive session, each public body member must state that no other person is present and/or able to hear the discussion at the remote location, unless the public body has voted to approve that person's presence.

How Do We Post A Remote Meeting? Public bodies should continue to comply with the OML notice requirements.

- The meeting notice must provide instructions on how the public may access a meeting that is being held remotely.
- A public body must post its meeting notice at least 48 hours in advance of the meeting, excluding weekends and legal holidays, unless it is an emergency meeting as defined by the OML (in which case, the meeting notice will be posted with as much advanced notice as is possible in the circumstances).

- Emergency meetings are generally reserved for circumstances that are unanticipated and require an immediate response to, for example, protect public safety or health. The public body carries the burden of proving that the emergency was "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action" and that the specific matters to be discussed could not wait long enough to post notice 48 hours in advance.

D. New Federal and State Laws Affecting Employers (As of April 3, 2020)

Governor Baker signs into law An Act to Address Challenges Faced by Municipalities and School Districts Resulting from COVID-19

On April 3, 2020, Governor Baker signed into law Chapter 53 of the Acts of 2020, which was previously House 4617 (amended from House 4598). The relevant portions of the law are highlighted below:

Town Meeting Delays and Monthly Budgets. The bill permits delays of town meetings beyond June 30th. The bill also allows the town moderator during the public health emergency to recess and continue a town meeting previously called to a time, place, and date certain for up to 30 days. The town moderator may renew the recess for up to 30 days at a time but not more than 30 days following the date of rescission of the state of emergency. The bill also allows municipalities to carry over budgets on a month to month basis at FY20 spending levels if the FY21 budget cannot be approved until after June 30th because of the state of emergency.

Taxes and Municipal Services. The bill extends the state income tax filing deadline to July 15, 2020, from April 15, 2020. Municipalities are allowed to waive late-payment penalties for tax bills and extend the due date for property taxes to no later than June 1st. The bill provides that a city or town shall not terminate an essential service of any resident (e.g., water, trash collection or electricity) for nonpayment of taxes or fees with a due date on or after March 10, 2020, made after its respective due date but before June 30, 2020, if the non-payment resulted from a demonstrated inability to pay due to the COVID-19 outbreak or the declaration of a state of emergency. The inability to pay means a financial hardship of a resident which includes, but is not limited to, loss of employment, serious illness or death of someone within the home.

Permitting. Permits are not automatically granted, approved, or denied because a local permitting authority is unable to act on the permit within a time period required by law. The bill tolls hearing timelines until 45 days after the end of the state of emergency. Additionally, any permit that is currently valid does not lapse or expire during the state of emergency. Permits applications may be filed electronically and permit granting authorities may conduct meetings and public hearings remotely.

Retired Municipal Employees. The bill removes the cap on the number of hours and amount of compensation for municipal retirees who return to work for the municipality during the state of emergency.

Alcohol. The bill allows restaurants and bars licensed to sell alcohol to offer beer and wine for takeout and delivery with food.

E. Pending Legislation (As of April 3, 2020)

UPDATE: Police and Fire Unions Seek Chapter 41, Section 111F Coverage for COVID-19 Related Absences.

Police and Fire unions continue to pressure their employers for a contractual presumption that all COVID-19 related absences are presumed job related as they continue to press the state legislature for passage of a bill that would similarly provide that COVID-19 absences would be presumed job related for certain first responders.

Bargaining Requests for Presumption. NMP advises that employers refrain from granting what would amount to a presumption under M.G.L. c. 41, §111F for all COVID-19 absences, as this would shift any healthcare costs from employer provided health insurance to the employer's budget (and in some instances might bypass 111F insurance coverage). This does not prevent the employer from determining 111F coverage on a case by case basis. Transferring these absences to the category of 111F injuries may impair future eligibility for federal or state reimbursement of sick leave expenditures should those become available in future bills.

Electronic Testimony Regarding S. 2602 and H. 4611, An Act relative to emergency hazard health duty. Legislators want to hear from municipal officials regarding these bills **by 5 p.m. on Monday, April 6, 2020**. Lisa Adams, the MMA's point person on these bills has put out the following information on this "virtual hearing" on the bills.

Please email your comments directly to:

House Chair **Harold Naughton** at Harold.naughton@mahouse.gov AND
Senate Chair **Michael O. Moore** at Michael.moore@masenate.gov.

- **Include** PUBLIC SAFETY TESTIMONY in the subject line.
- **Include** your name, organization, and phone number in the email.
- **Include** the MMA in the cc line when you send the email, ladams@mma.org

Let us know if you need any assistance (i.e., talking points) in connection with this important testimony.

F. COVID-19 Postings on NMP Website

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website (www.nmplabor.com). Also, our attorneys continue to be available by email, telephone and video conference to answer any questions and provide any advice. The following is a list of the new materials added to our website since our last Advisor:

- Massachusetts Stay-at-Home Advisory Extended
- FBI Warns about "Zoombombing"
- USDOL Issues FFCRA Regulations

If you have any questions or would like to discuss the information above in more detail, please feel free to contact:

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