

Guidance
Federal & State Leaves
Reopening Schools
for the
2020-21 School Year

McNeil, Leddy & Sheahan, P.C.
271 South Union Street
Burlington, VT 05401
(802) 863-4531

Stitzel, Page & Fletcher
171 Battery Street
Burlington, VT 05401
(802) 660-2555

Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul Street, Ste 400
Burlington, VT 05401
(802) 860-1500

Table of Contents

<u>Introduction</u>	2
<u>Federal Leave Provisions</u>	3-7
<u>Emergency Family and Medical Leave Act Expansion</u>	3-4
<u>Emergency Paid Sick Leave</u>	4-5
<u>Family Medical Leave Act</u>	5-6
<u>Americans with Disabilities Act as Amended</u>	6-7
<u>Vermont Parental and Family Leave Act</u>	7-8
<u>Collective Bargaining Agreement & Employment Agreements and Policies</u>	8
<u>Questions and Answers</u>	9-11
<u>Resources</u>	11

I. Introduction.

Last March, Governor Scott's directive requiring the orderly dismissal of schools required schools to continue to provide instruction remotely, to provide meals to students and to support the childcare needs of essential persons. School districts were directed by the Agency of Education to continue to pay school staff, regardless of whether employees were required to report to work to support the emergency response or their eligibility for entitlements to paid or unpaid leave. With the expiration of the AOE directive, beginning July 1, 2020, school districts should follow their standard school policies, procedures, collective bargaining agreements and applicable state and/or federal laws regarding the payment of wages and employee leave time.

The latest guidance from the Vermont Department of Health and the AOE does not grant work exemptions to any school employees. The guidance identifies individuals who are at higher risk for severe illness from COVID-19. This list includes:

- People 65 years and older
- People of all ages with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma
 - People who have serious heart conditions
 - People who are immunocompromised, including those undergoing cancer treatment, bone marrow or organ transplantation, and those with immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and/or other immune weakening medications
 - People with severe obesity (body mass index [BMI] of 40 or higher)
 - People with diabetes
 - People with chronic kidney disease undergoing dialysis
 - People with liver disease

The guidance encourages employers to develop policies/procedures regarding such circumstances. For employees who fall into one of the above risk categories and are requesting leave, school districts should apply the leave provisions of their collective bargaining agreements and school policies, leave under the Family Medical Leave Act (FMLA), the Vermont Parental and Family Leave (VPFL) and the new leave entitlements under the Families First Coronavirus Response Act (FFCRA). In some instances, employees receive an accommodation under the Americans with Disabilities Act as Amended (ADAA). After conducting the required analysis, an ADA qualified employee may receive reduced hours, leave or other accommodations.

This guide explores each of these leave provisions and their application to schools during the current status of the COVID-19 Pandemic.

II. Federal Leave Provisions.

A. Two new federal leaves were enacted by Congress and signed into law on March 18, 2020. The laws took effect on April 1, 2020 and are intended to help employees and their families during the COVID-19 pandemic. The Emergency Family and Medical Leave Act (EFMLA) is an expansion of the leave under the Family and Medical Leave Act (FMLA), but unlike the previous FMLA law it provides for both paid and unpaid leave. The other leave, Emergency Paid Sick Leave (EPSL), requires employers to provide paid sick leave to be used for specific COVID-19 related reasons. These laws are unique, prior federal law had not previously required employers to provide employees paid leave. Two important points:

1. The new federal leave laws apply to all school districts. The FMLA normally applies to districts with at least 50 employees, but the EFMLA COVID-19 leave law applies to all school districts, regardless of the size of the school district.
2. These leaves apply to both full and part-time employees. Even if your district does not regularly provide leave for part-time employees, these leaves may apply.

B. Emergency Family and Medical Leave Act Expansion (EFMLA).

1. Eligible employees are those:
 - a. Who have been employed for at least 30 days; and
 - b. Employees who are unable to work (or telework) because they need to care for their child whose school is closed, or whose child care provider is unavailable because of COVID-19 or other similar public health emergencies.
2. Implementation
 - a. Notice. Employees must give notice of the need to use foreseeable leave “as soon as practicable.”
 - b. Leave time. The first ten days of leave will be under the EPSL (see C, below). School districts are prohibited from requiring employees to use accumulated paid leave before taking EFMLA leave.
 - c. Pay. After ten days of leave, employees will be compensated at two-thirds of their regular rate of pay based on the number of hours employees would be expected to work. The Act does not address whether an employee may use accumulated paid leave concurrently with EFMLA. An employer may require that any paid leave available to an employee under the employer’s policies to allow the employee to care for his or her child or children

because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason; run concurrently with paid expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. In this situation, the employer must pay the employee's full pay during the EFMLA leave until the employee has exhausted available paid leave. Districts considering this option should discuss tax and retirement issues with their school attorney.

- d. Pay Rate. Paid leave is capped at \$200 per day and \$10,000 (\$12,000 when combined with EPSL) in the aggregate.
- e. Duration. The combination of unpaid and paid leave is for a maximum of 12 weeks.

Hours for employees with varying schedules are calculated by taking an average of the hours worked in the six-month period ending on the date employees take leave. If an employee does not work during that period, hours will be based on the reasonable expectation of the hours the employee would work at the time of hiring.

The EFMLA expires on December 31, 2020.

C. Emergency Paid Sick Leave (EPSL)

- 1. Eligibility. An employee who is unable to work due to a need to take leave because the employee:
 - a. Is subject to a federal, state or local quarantine or isolation related to COVID-19
 - b. Has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
 - c. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - d. Is caring for an individual who is subject to a federal, state or local quarantine or isolation or has been advised by a healthcare provider to self-quarantine related to COVID-19
 - e. Is caring for a son or daughter as defined in the FMLA because the school or place of care for the son or daughter has been closed or the care provider is unavailable due to COVID-19 precautions.
 - f. Is experiencing any other substantially similar condition specified by the secretary of health and human services in consultation with the secretary of the treasury/secretary of labor.
- 2. Compensation is determined by the reason for the leave.
 - a. If the leave is for reasons a, b, or c, leave will be paid at the employee's regular rate of pay or the applicable minimum wage,

whichever amount is greater. Compensation will not exceed \$511 per day.

- b. If the leave is for reasons d, e, or f, leave will be paid at two-thirds of the employee's regular rate of pay or the applicable minimum wage, whichever is greater. Compensation will not exceed a daily rate of \$200. Paid sick leave under the Emergency Paid Sick Leave Act is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer may not require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the EPSL. Finally, an employee may elect—but may not be required by the employer—to take paid sick leave under the Emergency Paid Sick Leave Act or paid leave under the employer's plan for the first two weeks of unpaid expanded family and medical leave, but not both.

3. Implementation

- a. EPSL is available for immediate use regardless of how long an individual has worked for the school or district.
- b. Employees cannot be required to use other district-provided leave prior to using emergency sick leave.
- c. Full-time employees are entitled up to 80 hours of leave.
- d. Leave for part-time employees is based on the average number of hours the employee works over a two-week period.
- e. Hours for employees with varying schedules is determined by taking an average of the hours worked in the six-month period ending on the date employees take leave.

The EPSL expires on December 31, 2020.

D. Family Medical Leave Act

The Family and Medical Leave Act (FMLA) provides eligible employees with up to twelve weeks of unpaid leave per twelve-month period. The FMLA applies to all school districts and supervisory unions with 50 or more employees. Employers are required to provide eligible employees with up to 12 weeks of unpaid leave for any of the following reasons:

- employee is unable to work due to a serious health condition
 - to care for a spouse, child or parent with a serious health condition
 - birth and care of newborn child of employee
 - employee's adoption or foster care of a child
1. Eligibility. Employees are eligible for leave if they have worked 1250 hours of more for the employer for the preceding 12 months. Generally,

the employer can deduct leave time in calculating whether an employee has worked the requisite 1250 hours.

2. Health. Common serious health conditions that qualify for FMLA leave are:
 - a. conditions requiring an overnight stay in a hospital or other medical care facility
 - b. conditions that incapacitate an employee (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
 - c. chronic conditions that cause occasional periods when an employee is incapacitated and requires treatment by a health care provider;
3. Certification. Employers may require that the need for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.
4. Other Leaves. School district policies and/or master agreements generally provide that FMLA leave may run concurrently with other paid leave entitlements such as sick leave, personal leave or vacation time consistent with applicable agreements.
5. Benefit Continuation. During FMLA, the employer is required to maintain the employee's health benefits under the same terms as if the employee was working.

E. Americans with Disabilities Act as Amended (ADAA)

The Americans with Disabilities Act as Amended prohibits discrimination on the basis of disability in employment.

- To receive protection under the ADAA, an individual has to meet the legal definition of being a person with a disability.
- The ADAA defines disability as having a substantial physical or mental impairment that significantly impacts a major life activity, having a record of such impairment, or being regarded as an individual who has such an impairment. This includes temporary conditions, if they are significant enough to limit a major life activity.

- In order to receive protections under the ADA in employment or the classroom, a person must also be a “qualified individual”.
- A qualified individual is someone who has the required background and can perform the essential functions and meet technical standards, with or without reasonable accommodations.

Qualified employees may be eligible to request an unpaid leave under the ADAA as an accommodation. If an employee requests a leave of absence or other accommodation under the ADAA school districts are encouraged to consult with their school attorney regarding the applicable ADAA analysis.

III. Vermont Parental and Family Leave Act (VPFLA)

Vermont Parental and Family Leave Act (VPFLA) provides similar protections to employees as FMLA. The VPFLA applies to all public or private employers with 10 or more employees (15 or more employees for medical leave).

1. Eligibility. Employees must work an average of 30 hours/week for the preceding 12 months.
2. Types of Leave.
 - a. Family Leave for the serious illness of employee or family member
 - i. A “serious illness” is defined as one requiring inpatient care or continuing treatment by a health care provider. Unlike the FMLA, there are no state regulations to provide guidance on “serious illness”. The federal regulations are frequently applied or utilized to provide guidance.
 - b. Parental Leave for the pregnancy, birth or adoption of a child under the age of 16.
 - c. Family Member. Family Leave can be taken to allow an employee to care for the serious illness of the employee’s child, stepchild or ward who lives with the employee, foster child, parent, spouse, or parent of the employee’s spouse.
 - d. Benefit Continuation. All employee benefits continue for the duration of the leave under the same terms and conditions as if the employee were working. The employer and employee contribute to benefits at the same level as if the employee was working regularly.
 - e. Utilization of Paid Leave. At the employee’s option he/she may utilize up to 6 weeks of accrued paid leave time during VPFLA leave.
3. Duration. Employees may take up to 12 weeks annually.

IV. Collective Bargaining Agreement & Employment Agreements and Policies

Throughout Vermont, employee leave provisions exist in every school district's collective bargaining agreement. Sick leave, personal leave and vacation time are paid leave provisions that employees may utilize relating to personal circumstances, both health and family, as it relates to returning to work for the 2020-2021 school year. The use of such leaves is generally limited to the purposes specified in the collective bargaining agreement or employment policy or individual contract. It should be noted that the VPFLA specifically provides that an employee may use his/her paid accumulated leave time during any VPFLA. The FMLA notes that employee paid leave may be utilized, but no entitlement exists.

In addition to paid leave time, almost every collective bargaining agreement includes one or more unpaid leave provision. Examples include child rearing or family leave and a general or unspecified leave of absence. In such instances the granting of such leaves is non-discretionary, that is if the employee request satisfies the identified criteria in the contract, the leave shall be granted by the school board or the superintendent. Generally, such non-discretionary leaves are limited to family or child rearing leave. When a leave is discretionary, the approving authority is required to exercise its discretion to consider, evaluate and approve or deny the leave request. In considering discretionary leave requests, the approving authority is required to exercise both discretion and a level of consistency in its decision making. The failure to exercise this discretion by denying such a request out of hand may provide a reasonable basis for a grievance. Although such leave is discretionary, each individual decision works to form a "practice" or "pattern" of decisions. This "practice" or "pattern" can serve as the basis for an employee or the local union challenging the decision through the grievance process in the master agreement. Consequently, the superintendent should have a picture of both the spectrum of such leave requests and maintain an informal record of the general nature and final action on each request.

V. Other

In addition to the leaves outlined above, other special considerations may be available to those at higher risk who are interested in returning to work. These considerations may include, but are not limited to:

1. Personal Protective Equipment (PPE) (e.g., N95 masks, face shields, body protection, protective barriers, gloves) to limit exposure.
2. Remote work may be considered if an employee can efficiently and effectively conduct all the essential functions of their job remotely.

Questions & Answers

Q1. What if an employee has more than one qualifying event under EPSL (e.g., needs to quarantine for 14 days, then later experiences symptoms of COVID-19)?

A. Paid leave under EPSL is a total of up to two weeks combined for all qualifying events. However, employees may access their available and appropriate paid leaves under contract for any additional time needed with acceptable medical certification. Unpaid leave may also be an option.

Q2. Are employees permitted to use accrued sick, personal or vacation leave this year?

A. Employees may use sick time if they are sick or experience another qualifying event. Likewise, they can use other contractual leave if the circumstances are as identified in the contract or personnel policy. Boards will need to decide how to handle COVID related leave for employees where they do not qualify for contractual or statutory leave or if they exhaust the available leave because of exposure.

Q3. Can an employee take leave under EFML intermittently if their child's school or childcare provider closes for short periods of time throughout the 2020-21 school year?

A. Guidance from the U.S. Department of Labor (DOL) suggests if the employer and the employee agree, the employee may take sick leave intermittently to care for their child whose school or place of care is closed or whose child care provider is closed because of COVID-19 related reason. For example, if the child is at home for the reasons cited above, the employee may take paid sick leave three days a week to care for the child, but work at their regular worksite on the other two work days. The DOL encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if the employer and the employee agree to intermittent leave on a day-by-day basis, the DOL supports such voluntary arrangements.

We encourage school districts to consult with their legal counsel regarding the issues of school and child care closure and intermittent leave for employees. The federal guidance is continuing to evolve during the Pandemic.

Q4. If an employee exhausts EFML and/or ESPL leaves, can he/she access available paid leaves under the master agreement or employment contract?

A. Once available EFML and/or EPSL are exhausted, employees may access their available paid leaves under their contract for the qualifying reasons as outlined below:

1. For reasons outlined in II C. 1. a,b,c, on page 3 under EPSL above, employees may be able to access their available vacation, personal, floating holidays or sick leave with acceptable medical certification.

2. For reasons outlined in II C. 1. d,e,f, on page 3 under EPSL above, employees may be able to access their available vacation, personal, floating holidays or family leave with acceptable certification. Sick leave cannot be accessed for these reasons.

Q5. If an employee exhausts all available EFML and/or EPSL leaves and all available and appropriate paid leaves under the contract and still need additional leave, what are the options?

A. Depending on the circumstance, unpaid leave may be considered. It is important to note that extended periods of unpaid leave may result in the loss of health and other insurances under the District's group plan. In this event, employees are able to continue their health insurance coverage at their own expense under COBRA for up to 18 months.

Employees ordered to self-quarantine *may* also be eligible for unemployment insurance if the leave is unpaid. Guidance from the U.S. Department of Labor provides individuals may be eligible for Pandemic Unemployment Assistance (PUA) due to concerns about exposure to the coronavirus only if they have been advised by a healthcare provider to self-quarantine as a result of such concerns. For instance, an individual whose immune system is compromised by virtue of a serious health condition, and who is therefore advised by a healthcare provider to self-quarantine in order to avoid the greater-than-average health risks that the individual might face if they were to become infected by the coronavirus may be eligible for PUA if all other eligibility requirements are met. It is important to note that PUA needs to be reauthorized by Congress.

Q6. If an employee accesses leave under EFML and/or EPSL, will this leave count against their annual 12 weeks of FMLA leave should a different FMLA qualifying event occur?

A. Any leave taken under EFML and/or EPSL should be counted as FMLA leave for those who qualify. This means that if an employee uses leave under EFML and/or EPSL, the leave available under FMLA during the same 12-month period will be reduced by the amount of leave taken if the employee has another qualifying event (e.g., birth/adoption of a child, serious health condition for the employee or a covered family member).

Q7. What if an employee comes into close contact with someone who is diagnosed with COVID-19 at work and is required to quarantine?

A. The issues associated with employees experiencing quarantine are complex and fact dependent. We recommend that school districts consult with their legal counsel on a case by case basis to discuss the underlying circumstances, master agreement provisions and federal and state leave provisions as it relates to the specific reason for the employee's quarantine.

Q8. What if an employee is approved for leave (paid or unpaid) and the District switches to remote instruction?

A. There may be several options available to school districts depending upon the underlying purpose of the leave and the employee's circumstances. For example, the leave may or may not be COVID-19 related, the leave may be an accommodation under the ADA. Each of the

different categories/purposes for the leave may require a different analysis and considerations. We recommend that school districts consult with their legal counsel on a case by case basis to discuss the underlying circumstances of the leave, applicable master agreement provisions and federal and state laws.

Resources:

[VT Department of Health page on COVID-19:](https://www.healthvermont.gov/response/coronavirus-covid-19)

<https://www.healthvermont.gov/response/coronavirus-covid-19>

[VT Agency of Education page on COVID-19:](https://education.vermont.gov/covid19)

<https://education.vermont.gov/covid19>

[CDC page on COVID-19:](https://www.cdc.gov/coronavirus/2019-ncov/index.html)

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

[BC/BS COVID-19 resource page:](https://www.bcbsvt.com/health-and-wellness/coronavirus-update)

<https://www.bcbsvt.com/health-and-wellness/coronavirus-update>

[U.S. Department of Labor:](https://www.dol.gov/agencies/whd/pandemic)

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