

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM
Memorandum

TO: Member Relations
FROM: Legal
DATE: June 30, 2020
RE: Treatment of certain COVID-19 leave
CC: J. Indelicato, Jr., E. Rezny

In response to the COVID-19 pandemic, the Families First Coronavirus Response Act (“FFCRA”) was enacted to address several immediate public health issues, including the need for expanded family leave and medical leave. FFCRA¹ went into effect on April 1, 2020 and will sunset on December 31, 2020.

Under FFCRA an employee is entitled to additional paid emergency sick time. Eligibility for FFCRA is determined by the employer. FFCRA allows employers to provide two weeks (up to 80 hours) of paid sick leave to eligible employees who are impacted by COVID-19. An employee qualifies for this additional paid sick leave if the employee is unable to work/telecommute and requires said leave because the employee is:

- (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) advised by a health care provider to self-quarantine related to COVID-19;
- (3) experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
- (6) experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.²

If the employee qualifies for additional paid sick leave pursuant to reasons 1, 2, or 3, the employee shall receive the higher of their regular rate of pay, the federal minimum wage, or state/local minimum wage. If the employee qualifies pursuant to reasons 4, 5, or 6, the employee shall receive two-thirds of the higher of their regular rate of pay, the federal minimum wage, or state/local minimum wage.³

In addition to two weeks paid sick time available under the FFCRA, an employee may be eligible for two additional weeks of unpaid leave and ten additional weeks of paid leave to care for a child whose school or place of care has been closed or whose care provider is unavailable for reasons related to COVID-19.

¹ On March 18, 2020, became Public Law No. 116-127.

² HHS has yet to define “other substantially similar condition”.

³ There are caps in the statute.

The Emergency Family Medical Leave Expansion Act, 29 USC 2601, (“EFMLEA”) was enacted to expand the benefits under the Family and Medical Leave Act of 1993, 29 U.S.C. 2612(a)(1) (“FMLA”). The leave must be taken by the employee between April 1, 2020 and December 31, 2020. Eligibility for EFMLEA is determined by the employer.

The first two weeks of leave taken pursuant to EFMLEA are unpaid, however, the employee may use the two weeks paid leave they are entitled to pursuant to the FFCRA concurrently with the EFMLEA leave to prevent a disruption in pay. Employees may also charge other leave accruals during the first two unpaid weeks at the discretion of the employer. In order to be eligible an employee must have been employed for at least 30 days.

After the first two weeks, the remaining ten weeks are paid at a rate of 2/3rds the employee’s average “regular rate.” The average regular rate is the employee’s average rate of pay⁴ over the last six months.

Under our statutory provisions, a member is credited for the actual paid service performed for an employer which participates in the retirement system (Education Law §503 and RSSL §§446, 513, 609). The Education Law and Retirement and Social Security Law, in general, provide a member shall receive service credit for any day he or she is paid on the payroll of a participating employer. In accordance with these provisions, leave taken pursuant to FFCRA and EFMLEA shall, for accrual of service and calculation of pension purposes, be treated similar to leaves taken using accruals, provided the leave is reported on the employer payroll and within the federally allocated leave allotments.

Treatment of FFCRA and EFMLEA for Pension Purposes

For service crediting purposes, if a member is receiving full salary (i.e. under FFCRA taking paid leave under reasons 1, 2, or 3), they will receive an amount of service credit equal to the amount of time they are on leave. If a member is receiving 2/3rds of their salary (i.e. under FFCRA taking paid leave under reasons 4, 5, or 6 or pursuant to EFMLEA), they will accrue 2/3rds of the service credit they would otherwise have received had they not been on leave.

For final average salary purposes, regardless of whether the member is paid the higher of their regular rate of pay, the federal minimum wage, or state/local minimum wage or 2/3rds of that amount (subject to the caps), only the amount actually paid to the member shall be reported and included in their final average salary for calculation of the member’s pension.

If the leave provided is unpaid (i.e. the first two weeks under EFMLEA), the member will not accrue any service credit for that time.

In accordance with our statutes, a member is credited for the amount of service actually rendered and earned; as such, if a member is not paid by a participating employer or reported on the payroll during a leave, the member will not receive service credit during that time period. Pay from a third-party vendor is not reportable to NYSTRS.

In terms of next steps, employers will require guidance from Member & Employer Services as to how to report salary and service consistent with the above guidelines. Any further questions may be referred to Legal.

⁴ The regular rate of pay includes commissions, tips, piece rates, but may exclude other compensation such as gifts and as with the FFCRA; there is a salary cap.