

# Legislative Update: An Overview of the Federal Response to COVID-19

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# Disclaimer:

**These slides are provided for informational purposes only. They do not constitute, nor should they be considered, legal advice. For legal advice, please consult your school's legal counsel who can advise regarding your particular situation. As the understanding of the Families First and CARES Act is still evolving and more information and guidance will be released in the coming days, please use these slides for internal informational purposes only and do not share beyond your school or post publicly.**

# Legislative History

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- **Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020**
- ***Coronavirus Families First Response Act***
  - ***Paid Sick Leave (Emergency Paid Sick Leave Act)***
  - ***Paid Family Leave (Emergency Family and Medical Leave Expansion Act)***
- ***Coronavirus Aid, Relief, and Economic Security Act (CARES Act)***
  - ***Paycheck Protection Program (SBA Loans)***
  - ***Pandemic Employment Insurance (Unemployment Expansion)***
  - ***Education Stabilization Fund***



## Families First Coronavirus Response Act

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- Passed March 18; Goes into Effect April 1 through December 31, 2020.
- Two components: Paid Sick Leave and Paid Family Leave PLUS employer tax credits
- Not available to employees on furlough ([DOL Q&A #26](#)).
- Posting/emailing requirements: [DOL poster](#).

# Families First Coronavirus Response Act

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- Both PSL and PFL must be offered by employers with less than 500 employees (1-499).
- Both PSL and PFL trigger if an employee is unable to work or telework. What does “unable” mean?
  - “unable to perform that work, either under normal circumstances at your normal worksite or by means of telework.”
  - Ex: If employee and employer agree that employee will work normal # of hours, but they will be at different times such as early in the morning and late at night, leave is not needed because the employee is able to work. (DOL Q&A #18)
  - Ex: If child is home from school or daycare and you are unable to complete your work or the number of hours needed, then you can be entitled to both PSL and PFL for that reason. But “to the extent you are able to telework while caring for your child, PSL and PFL is not available.”

# Families First Coronavirus Response Act

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- How to Calculate Number of Employees?
  - Q&A #2:
    - Count full-time and part-time employees in the U.S.
    - Includes employees on leave
    - Includes any employees for which you have a joint-employer relationship
    - Does not include independent contractors
- Sec. of Labor has authority to exclude businesses with less than 50 employees from offering PSL (for school/ childcare closures reasons) or from PFL, if it would “jeopardize the viability of the business as a going concern.”
  - DOL will issue regulations. Right now via Q&A #4, DOL has said that business will need to document why they fit this exemption.



# Families First Coronavirus Response Act—Documentation

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What type of documentation must an employee provide to take PSL or PFL?

- For PSL—must require that employee provide documentation:
  - Name
  - Qualifying reason
    - Documentation of that reason such as source of quarantine/isolation order or name of health care provider that advised self-quarantine
    - May include copy of quarantine or isolation order or documentation by health care provider advising self quarantine
  - Statement that the employee is unable to work (or telework) for that reason
  - [Employer should maintain documentation for tax credit purposes]
- For PFL—must also require that employee provide documentation:
  - Such as notice of closure from the school, notice from a government website closing schools, an email from the school, etc.
  - [Employer should maintain documentation for tax credit purposes]

.DOL Q&A #15,16

# PSL: Eligibility and Hours

- PSL (available to all employees, no matter how long they have worked at school).
- 80 hours (2 weeks); hours calculation for part-time workers based on average work hours over 2-week period (can look back over 6 months if unknown or hours vary).
- Employers cannot require employees to use other types of paid leave already provided by the employer before the employee can access the paid sick leave under the FFCRA. In other words, employees can use FFCRA paid sick leave before using other leave.
- Failure to comply will be considered failure to pay minimum wages in violation of FLSA, BUT DOL announced a non-enforcement policy through April 17 as long as employers act “reasonably” and make “a good faith effort.” [note: private right of action still possible]
- Can an employee take 80 hours for one eligible reason and 80 hours for another eligible reason? **No.**
  - DOL Q&A #9: Limited to 80 hours of PSL total.



# PSL: Eligibility and Uses

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- PSL is available when an employee is unable to work (or telework) for 6 reasons related to COVID-19:
  - Is subject to a federal, state, or local quarantine or isolation order; (reason 1)
  - Has been advised to self-quarantine by a health-care provider; (reason 2)
  - Is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (reason 3)
  - Is caring for an individual who is subject to a federal, state, or local quarantine or isolation order or has been advised to self-quarantine by a health-care provider; (reason 4)
  - Is caring for their son/daughter because the child's school or care provider has been closed or the care provider is unavailable because of COVID-19 precautions; (reason 5) or
  - Is experiencing another "substantially similar condition" as designated by the U.S. secretary of health and human services. (reason 6)
- Can be generally divided up into 2 groups:
  - Employee needs to care for themselves (reasons 1-3)
  - Employee needs to care for another. (reasons 4-5)

# PSL: Pay and Tax Credits

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- Leave to Care for Yourself Amount of Pay Owed:
  - Regular rate of pay, federal minimum wage, or state/local minimum wage (whichever is higher) (DOL Q&A #8)
  - Limits: \$511/day and \$5,110 total
- Leave to Care for Others Amount of Pay Owed:
  - 2/3 of regular rate of pay
  - Limits: \$200/day and \$2,000 total
- Employer Payroll Tax Credit
  - Employer can receive a credit against their payroll tax obligations for COVID-19 PSL provided to employees, up to the limits cited above. If amount exceeds payroll tax obligations, employer can get a refund.

# PSL: Intermittent Use

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- Can an employee take PSL intermittingly?
  - If teleworking: **Yes**, if the employer agrees and the employee is unable to telework their normal schedule for one of the 'qualifying reasons' for taking PSL. DOL is encouraging collaboration and flexibility and is supportive of these arrangements. (DOL Q&A #20)
    - Ex: work from 1:00-2:30, take leave from 2:30-4:00, and return to teleworking at 4:00.
  - If at usual worksite: **No**. Must be taken in full-day increments and taken until the leave is used up or the qualifying reason for the leave no longer exists (for safety reasons to rest of workplace). Unless the reason you are taking PSL is to care for a child whose school/care has closed. That leave can be taken intermittingly. (DOL Q&A #21)



# Families First Coronavirus Response Act—Paid Family Leave

Paid Family Leave (available to all employees who have worked at school for at least 30 days)

- Based off of regular FMLA, but it is very different in many respects.
- Must provide 12 weeks of job protected leave to employees who cannot work (or telework) because they need to care for a son/daughter under 18 whose school or care provider is closed due to public health emergency (\*note the eligible reasons are much more limited than the PSL).
  - Does not turn regular FMLA into paid leave.
  - Can take leave intermittently (telework or at worksite) with employers' permission and you come to an agreement. DOL encourages collaboration and flexibility. (DOL Q&A #20, 22)
- Employer can decide to make the first 10 days of PFL unpaid, **BUT** employee can substitute in other paid leave that is available (likely will chose to use the 10 days of PSL).
- After the first 10 days, employee must be paid 2/3 of their regular pay (with a limit of \$200/day and \$10,000 total).
- Employer can receive credit against their payroll tax obligations (plus refund if \$ paid for PFL exceeds payroll tax obligations) just like they can for PSL.

## Example: PSL + PFL for Care of Child

Employee A has worked for School for 6 months. She requests leave because her three children are home from school that has been closed due to coronavirus and she cannot telework.

- Employee A is entitled to both PSL and PFL.
- Employee A must provide documentation to employer such as notice of closure of the school or the order closing schools in the state.
- Employee A elects to take the first (unpaid days of PFL) by substituting in her PSL time.
- Therefore employee A will receive 12 total weeks of job protected leave at 2/3 her regular rate of pay, with a cap of \$200/ day and \$12,000 total.
- School will be eligible for a payroll tax credit of that same amount.

# More information on PSL & PFL Tax Credit

- ❑ Employer is eligible to receive dollar for dollar tax credits for amounts paid for PSL & PFL up to the daily & aggregate limits. The tax credit is based on the employer contribution to the payroll tax (Social Security and Medicare).
- ❑ DOL has promised [immediate](#) dollar for dollar offset.
  - ❑ Ex: Employer owes \$8,000 in payroll taxes this upcoming quarter and has paid \$5,000 in PSL/PFL benefits. Employer can hold back the \$5,000 they have paid out in benefits and submit only \$3,000 in their next payroll tax deposit.
- ❑ DOL has also promised expedited refunds
  - ❑ Ex: Employer owes \$8,000 in payroll taxes but has paid out \$10,000 in PSL/PFL benefits. Employer can zero out their next payroll tax deposit and submit a request for an accelerated refund payment with the IRS for the remaining \$2,000. We expect more guidance but at this time, the IRS is saying they expect to process refund requests within 2 weeks.
- ❑ Note on Religious Schools:
  - ❑ This credit is based on the payroll tax. It is possible for churches and certain church-controlled organizations to claim an exemption from paying employer's share of payroll taxes if they are opposed to the payment of these taxes for religious reasons. This exemption is not automatic, it must be claimed. If a school has determined they are a church-controlled organization and have the payroll tax exemption, they will not be eligible for this tax credit.



# Coronavirus Families First Response Act (CARES Act)

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- **Coronavirus Families First Response Act (CARES Act)**
  - **\$2.2 Trillion**
    - **\$349 Billion in loans for small business focused on helping business with payroll (and other costs ); loan forgiveness if workers are kept employed and paid**
    - **\$250 Billion in expanded unemployment benefits**
    - **\$30.75 Billion for Education Stabilization Fund (\$13.5 billion for K-12)**

# CARES Act: Paycheck Protection Program (Small Business Administration)

- \$349 billion (modifies an existing SBA program called 7(a) loans).
- Who is Eligible?
  - Small businesses (including 501(c)(3) nonprofits like independent schools):
    - With 500 or less employees (full time or part-time)
    - Who were open on February 15, 2020 and had employees to whom they paid salaries and payroll taxes.
- What are the Terms of the Loan?
  - Loans are provided through SBA/Treasury approved banks, credit unions, and other lenders.
  - Amount any business can receive is based on a formula tied to payroll costs (250 percent of average monthly payroll), with a maximum of \$10 million.
  - Must make “a good faith assertion” that the loan is necessary because of COVID-19 related uncertain economic conditions; that they will use the \$ to maintain workforce and other eligible uses; and that they are not receiving other funds from the SBA for the same purpose.
  - Borrow & lender fees; collateral and personal guarantee requirements; and other normal requirements are waived.
  - Payments of principal, interest, and fees deferred for at least 6 months, up to a year.
  - Max. interest rate is 4%.

# PPP: Eligible Uses of Loan

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- What are the Eligible Uses for the Loan?
  - Payroll costs
    - Compensation
    - Vacation, parental, family, medical, or sick leave
    - Severance payments
    - Payments for group health care benefits (including insurance premiums)
    - Retirement benefits
    - State and local taxes employment tax payments
  - Interest on mortgage payments or other debt obligations (that were incurred before February 15, 2020)
  - Rent payments
  - Utility payments



# PPP: Eligible Uses of Loan

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## ■ Loan Forgiveness

- Borrowers can apply for and receive loan forgiveness for loan amounts they used for eligible purposes (the payroll costs, interest on mortgage/rent, utilities) for the 8 weeks since the origination of the loan.
- Amount forgiven can't exceed principal borrowed.
- Amount forgiven will be reduced if there is a reduction in employees as compared to the prior year or if there is a reduction in pay for any employee by more than 25% of last calendar quarter.
- Any part of the loan that is not forgiven turns into a 10-year loan, with 4% interest.
- More guidance and information will be forthcoming.

# PPP: Federal Financial Assistance and Other Issues

- Federal Financial Assistance (FFA)
  - Certain federal laws only apply to recipients of FFA
    - Some laws such as the Age Discrimination Act, Title VI of the Civil Rights Act, and Title IX of the Education Amendments, and section 504 of the Rehabilitation Act apply if an organization is the recipient of FFA under any program.
    - Other laws (like FERPA) apply if a school is a recipient of FFA from the U.S. Department of Education.
  - NAIS is currently analyzing whether participation in PPA would make a school a recipient of FFA.
    - At this time, we believe schools who receive a PPA loan may not be recipients of FFA (as to Age Discrimination Act, Title VI, and Title IX), because there is an exception for loan guaranty contracts.
    - The law on section 504 is less clear.
    - PPP will not trigger the application of FERPA, because it is not a program administered by the Department of Ed.
    - **NOTE: The analysis on this issue is still evolving and may involve consultation with the SBA for clarification and guidance.** For religious schools, we may need clarification and guidance on whether loan funds can be used for a religious purpose, as traditionally this is not allowed.

# CARES Act: Unemployment Insurance

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- Unemployment Provisions in Families First Coronavirus Response Act
  - \$1 billion in state grants to help process and pay unemployment benefits:
    - 50% goes to states for increased \$ for administration and
    - 50% goes to states that have seen increase in claims as long as they waive waiting periods/search for work requirements, etc.
- Pandemic Unemployment Assistance (Relief for Workers Act)
  - Expands unemployment benefits through December 31, 2020, unless otherwise noted.
    - Expands eligible reasons for obtaining unemployment (does not include an employee who can telework with pay or is receiving paid sick leave or other paid leave benefits).
    - Increases benefits by \$600 week for up to 4 months (on top of state benefits).
    - Extends unemployment benefits by another 13 weeks.
    - There is a provision for the federal government to provide payments to states to reimburse nonprofits for 50% of their unemployment benefit costs. This is important for nonprofits who opt-out of paying unemployment taxes and instead choose to reimburse the state when there is a claim.



# Education Stabilization Fund

- Amount (\$30.75 billion)
  - \$13.5 billion for K-12 Elementary and Secondary School Emergency Relief Fund
    - Grants go out via formula to the States
    - 90% then go out via formula to the school districts (LEAs)
- Uses of Funds
  - Any allowable use under ESEA (and other federal education laws)
  - Providing school leaders with resources needed to “address the needs of their individual schools”
  - Address needs of vulnerable populations including low-income students, students with disabilities, ELL, racial and ethnic minorities, etc.
  - Developing and implementing procedures and systems to improve preparedness and response
  - Training and PD on sanitation and how to minimize spread of infectious disease
  - Purchasing sanitation and cleaning supplies
  - Coronavirus response activities like planning for and coordinating during closures (including how to provide technology for online learning and how to make sure education services can continue to be provided)
  - Purchasing education technology (included hardware, software and connectivity and assistive or adaptive equipment for students with disabilities)
  - Providing mental health services and supporting
  - Planning and implementing summer learning and supplemental after school programs
  - “other activities that are necessary to maintain operation of and continuity of services in LEAS and continue to employ existing staff of the LEA”

# Education Stabilization Fund

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- Private School Language (section 18002 or 18003)
  - LEA “shall provide equitable services” . . . “to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools”
    - Did add in provide equitable services . . . “in the same manner” as provided under section 1117 (which is Title I). It is our understanding that equitable services will be required for the funds generally, not just the funds used for Title I, but this and some other issues will have to be fleshed out in guidance.
  - Usual public control of funds language The control of funds for the services and assistance provided to a non- public school under subsection (a), and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds, materials, equipment, and property and shall provide such services (or may contract for the provision of such services with a public or private entity).
    - Due to this language, schools should not become recipients of federal financial assistance.