

MEMORANDUM

To: Northern California Union Contract Council

From: Brendan Carter - AGC CA, Rocky Miller - Cox Castle, Dwayne McKenzie - Cox Castle

Re: Family First Coronavirus Recovery Act and MLA Requirements

Date: March 31, 2020

AGC of CA published on Friday the Legal Advisory Committee's detailed summary of the DOL's guidance to date on paid leave and paid sick pay requirements of the Family First Coronavirus Response Act (FFCRA). These are separately set forth in the FFCRA as the "Emergency Paid Sick Leave Act" (EPSLA) and as the "Emergency Family Medical Leave Expansion Act" (EFMLEA).

Continued ambiguity has existed on whether the paid leave requirements include requirements for contractors to contribute to some or all of the trust funds in their union labor agreements as part of the new paid leave obligations. Employees can take paid family leave or paid sick leave under the FFCRA rules on and after April 1st through December 21, 2020, provided they meet the criteria for eligibility. The following is further guidance from AGC of California and its Labor Counsel, Rocky Miller and Dwayne McKenzie.

Payment of Health and Welfare Contributions Only Are Required During Emergency Paid Sick Leave and During Paid Family Leave

For contractors that meet the definitions of being covered by the EPSLA and the EFMLEA and that do not obtain a hardship exemption as a "small business" with less than 50 employees, contributions to union labor agreement health and welfare plans are required for employees that qualify under those Acts. Contributions to other benefit plans are not required.

Emergency Paid Sick Leave

1. The wage rates that are established for "paid sick time" in the EPSLA are rates that do not include union labor agreement benefit plan payments. The EPSLA defines sick pay wages by reference to the Fair Labor Standards Act (FLSA). The FLSA wage rate calculation excludes from the wage rate itself the benefit plan payments that must be paid to independent trust funds.
2. The FFCRA contemplates, however, that employers paying sick leave will be paying union health and welfare contributions at the same time. Division G, "Tax Credits for Paid Sick and Paid Family and Medical Leave," expressly provides tax credits for the sick pay wages *and for qualified health plan expenses*.
3. The DOL's FAQ's, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, state in the response to question 30 that the Health Insurance Portability and Accountability Act (HIPAA) requires an employer to maintain the same contribution rate for health absences as when actively at work. Thus, the obligation of an employer to pay for sick leave under the EPSLA includes an obligation imposed by HIPAA to contribute to the health and welfare trust fund for the sick leave hours paid. Some may debate whether this interpretation is technically correct to every aspect of the emergency leaves created in the FFCRA, but it will clearly be the position the DOL takes and enforces unless and until it announces otherwise. Given that reimbursement is automatically provided by the tax credits, the better interpretation is that contributions are required to be made for union health and welfare plans.

Emergency Paid Family Medical Leave

1. The EFMLEA establishes pay for “public emergency leave,” which is leave taken to care for a son or daughter (under 18 years of age) if the relevant school or place of care has been closed, or the relevant child care provider is unavailable, due to an emergency with respect to COVID–19 declared by a Federal, State, or local authority. As with sick leave, the wage rate for public emergency leave is established by reference to the FLSA and is not to exceed caps. Thus, the wage rate required to be paid per the FLSA definitions do not include a requirement to contribute to the individual trust funds included in the applicable union labor agreements.
2. However, the FMLA generally requires employers to maintain medical coverage benefits for employees on FMLA leave. That obligation attaches to public emergency leave. Union health and welfare plan contributions must be paid while employees are on leave.
3. The DOL’s FAQ’s, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> , addresses health plan coverage in the response to question 30. It confirms the FMLA requirement that health plan coverage be maintained during a family or medical leave and references its WHD Fact Sheet 28A: <https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections>.
4. As with sick pay, the FFCRA also expressly contemplates that union health and welfare contributions will be paid by employers. Division G, “Tax Credits for Paid Sick and Paid Family and Medical Leave,” expressly provides tax credits for the “qualified family leave wages” (defined as those paid under the EFMLEA for a public health emergency leave) *and for qualified health plan expenses*.

A Possible Claim that All Trust Fund Contributions Must be Paid Should Fail

A union may be tempted to argue that its labor agreements require that **all** benefit plan contributions must be paid when sick leave and family leave are paid under the FFCRA, because the union labor agreements require trust fund contributions for “all hours worked or paid.” This claim is unlikely. Several unions have already indicated that they will not make this claim. And it is generally inconsistent with historic interpretations of the various labor agreements. The FFCRA payments are akin to disability payments from government programs or insurance companies, neither of which have been considered “hours paid.”

Existing Trust Funds Cannot Be Required To Pay for Leave

Considerable confusion has been prompted by the FFCRA provisions authorizing multiemployer benefit plans rather than individual employers to pay sick leave and public emergency leave. The multiemployer benefit plans to which AGC of California’s contractor members contribute are not currently structured or funded to utilize this authority and have no current funding stream or access to the tax credits that will reimburse costs completely. Negotiations with the unions would be required as would additional guidance for the DOL and IRS. [Utilizing the funds to administer and pay for required sick leave actually emerged as a topic last year but was yet to be needed.]

Existing Trust Funds Could Fund Some Paid Sick Leave and Public Emergency Leave.

Some potential exists for the trustees of various multiemployer funds to pay for some or all of the costs of newly-required leave. As an example, the Southwest Carpenters are requiring the payment of the health & welfare for the duration of an EPSL or EFMLEA paid leave, but the Northern California Carpenters are discussing picking up the cost through the Work Preservation

Committee Fund. Rules of health and welfare plans could be changed by trustees in ways that would negate or reduce the contribution obligation. However, with the economic uncertainty over how long emergency conditions will extend and with the emergency sick leave and public emergency leave being reimbursed fully with tax credits, union leaders and trustees can be expected to be very cautious.