



New Mexico State Personnel Board

State Personnel Office

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General Memorandum 2020-001 (Updated)

To: Cabinet Secretaries, Agency Heads, Elected Officials,
and Human Resource Managers

From: Pamela D. Coleman, Director

Date: March 31, 2020

Subject: UPDATED COVID-19 Administrative Leave

Purpose

In consultation with the Governor's office, and pursuant to State Personnel Board (SPB) Rule 1.7.7.14 in the New Mexico Administrative Code (NMAC), Administrative Leave, the purpose of this memorandum is to authorize paid administrative leave for certain employees subject to the Personnel Act who **are able to work from home or telework** and have one or more of COVID-19-related conditions as defined below, beginning Friday, March 27, 2020.

Please note that we will not be enforcing the reduced pay restrictions under the Families First Coronavirus Response Act. Rather, the pay identified in the Families First Coronavirus Response Act will be offered as administrative leave as set forth below.

This General Memorandum is updated consistent with U.S. Department of Labor guidance as of March 31, 2020.

Background

The COVID-19 pandemic presents an unprecedented challenge to New Mexico. On March 11, 2020, Governor Michelle Lujan Grisham issued Executive Order 2020-004, Order Declaring A State of Public Health Emergency and Invoking the Powers Provided by the All Hazard Emergency Management Act and the Emergency Licensing Act, declaring a public health emergency due to the spread of the COVID-19 in New Mexico.

Through that Order, the Governor invoked the full measure of her authority under, *inter alia*, the All Hazard Emergency Management Act, NMSA 1978, § § 12-10-1 through 12-10-10, and the Public Health Emergency Response Act, NMSA 1978, 12-10A-1 through 12-10A-19. *Id.* That Order remains in effect. *Id.*

On March 13, 2020, the Governor issued Executive Order 2020-005, authorizing and directing the closure of all New Mexico public schools beginning March 16, 2020 through April 6, 2020, due to the public health emergency declared in Executive Order 2020-004.

On March 18, 2020, the federal Families First Coronavirus Response Act (H.R. 6201) was signed into law requiring employers with fewer than 500 employees and government employers to grant eighty (80) hours of paid leave under conditions stated in the Act as well as expand the federal Family and Medical Leave Act (FMLA) (see the Emergency Family and Medical Leave Expansion Act described below).

Paid COVID-19 Leave

Due to the public health emergency declared by the Governor on March 11, 2020, and pursuant to SPB Rule 1.7.7.14, Administrative Leave, I am authorizing administrative leave with pay for one or more of the following COVID-19-related conditions as determined by the department Cabinet Secretary or Agency Head, up to 80 hours. These conditions mirror those stated in the Families First Coronavirus Response Act. This Paid COVID-19 Leave is for employees subject to the Personnel Act who **are unable to work from home or telework, as defined below**, during the COVID-19 public health emergency. Please note special rules for “health care providers and emergency responders” as defined herein.

The COVID-19-related conditions are:

1. The employee is subject to a government quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider or the employee’s Cabinet Secretary or Agency Head to self-isolate due to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis or awaiting results of a COVID-19 test;
4. The employee is caring for an individual subject to a quarantine order or self-isolation;
5. The employee is caring for the employee’s son or daughter under 18 years of age if schools are closed or their caregivers are unavailable because of a public health emergency; or,
6. The employee is experiencing substantially similar conditions as those specified by the federal Secretary of Health and Human Services Department.

To the extent an employee falls under one of more of these categories and is able to work from home or to Telework, they will work from home or telework consistent with the department or agency Telework during Emergencies Policy.

For purposes of this memorandum, “telework” means an employee who is working from home doing their normal/regular job duties, making use of the Internet, email, or phone. “Work from

home” is broader and means that an employee is working from home doing work, including work other than their normal/regular job duties, that may not require Internet, email, or phone.

If employees **are unable to work from home or telework**, and fall under one or more of the categories above, those employees may submit a request to their department/agency Human Resources (HR) for Paid COVID-19 Leave beginning March 27, 2020, up to the eighty (80) hours. The State Personnel Office will provide department/agency HR a form for employees to request Paid COVID-19 Leave. Once approved by the Cabinet Secretary or Agency Head and the Director of the State Personnel Office, HR will notify the employee of Paid COVID-19 Leave status. The employee will then be required to follow department/agency leave policy and procedures.

The Paid COVID-19 Leave is in addition to any sick or other leave the employee has accrued and should be coded by HR as “PDCVL” in SHARE with one or more conditions above in the comment bubble on the timesheet. The State Personnel Office will provide agency HR a form to request Paid COVID-19 Leave. Due to social distancing requirements during this emergency, employees may sign and scan the form to HR. If they are unable to do so, they may contact their HR by email or telephone and HR may submit the form on their behalf. HR should include a copy of the email or specific reference to the telephone call on the form.

Cabinet Secretaries and Agency Heads may request, and the Director of the State Personnel Office may approve, additional administrative leave if circumstances warrant and it is in the best interest of the department or agency to do so.

Health care providers and emergency responders as defined below may be eligible to use Paid COVID-19 Leave if they are unable to work from home or telework and meet one or more of the Paid COVID-19 Leave conditions, subject to: the department’s or agency’s essential business operations, and considering the employee’s specific condition(s) above including the health and safety of the employee and others. Once approved by the Cabinet Secretary or Agency Head and the Director of the State Personnel Office, HR will notify the employee of Paid COVID-19 Leave status.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (“EFMLA”) amends the Family and Medical Leave Act to provide for up to twelve (12) weeks of job-protected leave for employees who **are unable to work from home or telework**, as defined above, because of “qualifying need related to a public health emergency as defined”, meaning that the employee must:

Care for a son or daughter under 18 years old if the school or place of care for the child has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Therefore, to the extent that employees exhaust the 80 hours of Paid COVID-19 Leave above and **are unable to work from home or telework**, they may submit a request to their Cabinet Secretary or Agency Head for additional paid administrative leave up to ten (10) weeks, through December 31, 2020, if they meet the following conditions:

1. **The employee is unable to work from home or telework** (if at any point the employee becomes able to work from home or telework, they must do so);
2. The employee has been employed with the State of New Mexico for at least thirty (30) days; and,
3. The employee has a “qualifying need related to a public health emergency” as defined by EFMLA.

EFMLA Leave is available for the number of hours that the employee is normally scheduled to work even if that is more than 40 hours in a week, including overtime, but in no event will the total number of hours paid exceed 80 hours per two-week period as stated in EFMLA.

For EFMLA Leave, the employee must submit a request to their HR. The State Personnel Office will provide department/agency HR the form for employees to request paid EFMLA leave. Due to social distancing requirements during this emergency, employees may sign and scan the form to HR. If they are unable to do so, they may contact their HR by email or telephone and HR may submit the form on their behalf. HR should include a copy of the email or specific reference to the telephone call on the form. Unlike FMLA, EFMLA Leave does not require a medical provider certification.

Once approved by the Secretary or Agency Head and the Director of the State Personnel Office, HR will notify the employee. HR will enter the EFMLA leave in SHARE as “EFMLA” and include in the comment bubble on the timesheet that the employee is caring for the employee’s son or daughter under 18 years of age if schools are closed or their caregivers are unavailable because of a public health emergency.

As with the FMLA, employees who exercise their right to receive paid EFMLA Leave to care for a child due to the employee’s need care for their son or daughter under 18 years of age if schools are closed or their caregivers are unavailable because of the public health emergency are entitled to job restoration to the same or a substantially equivalent position provided they can return to work within the protected leave period, subject to certain exceptions in the EFMLA.

EFMLA does not apply to health care providers and emergency responders as defined below.

Health Care Providers and Emergency Responders

Health care providers and emergency responders serving during this challenging time are essential in providing critical services for the health and safety of the citizens of New Mexico.

Consistent with U.S. Department of Labor guidance as of March 31, 2019, and for purposes of the “health care providers and emergency responders” exclusions identified in this memorandum:

“Health care provider” is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar agency or department. This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain

the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. The Cabinet Secretary or Agency Head will determine the employees who fall into these categories as well as those who are necessary for health and safety reasons or to prevent the spread of the COVID-19 virus or necessary for the agency's response to COVID-19. The Governor may also determine who is a health care provider necessary for the state's response to COVID-19.

"Emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of 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 medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and other 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 the operation of the facility. The Cabinet Secretary or Agency Head will determine the employees who fall into these categories as well as those who are necessary for health and safety reasons or to prevent the spread of the COVID-19 virus or necessary for the agency's response to COVID-19. This also includes any individual that the Governor determines is an emergency responder necessary for the state's response to COVID-19.

Part-Time Employees

Part-time employees who are unable to work from home or telework are eligible for Paid COVID-19 and EFMLA Leave under the same conditions as stated herein. This includes employees in career, term, and temporary appointments subject to the Personnel Act and who have been employed with their department/agency for at least thirty (30) days.

Calculating Paid COVID-19 Leave or EFMLA

Subject to the limitations stated herein (for example, the 80-hour-per-two-weeks cap for full-time employees), and mirroring the direction of the Families First Coronavirus Response Act, the department or agency HR will enter Paid COVID-19 Leave or EFMLA hours into SHARE based on the employee's average number of work hours in a two-week period (the employee's normal hours scheduled). If the normal hours scheduled are unknown, or if the employee's schedule varies, the department or agency may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, the department or agency may use the number of hours that the employee and the department or agency agreed that the employee would work upon hiring. And if there is no such agreement, the department or agency may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of their employment.

Unable to Work from Home or Telework

Consistent with Department of Labor guidance as of March 31, 2019:

An employee is **“unable to work from home or telework”** if the department/agency has work or duties for the employee and one of the COVID-19 qualifying conditions set forth in this memorandum prevents the employee from being able to perform that work at home or by telework. If the department/agency agrees that the employee will work the normal number of hours, but outside of the employee’s normally scheduled hours (for instance early in the morning or late at night), then the employee is able to telework or work from home and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule. Departments and agencies should consider all viable options for work from home, telework, and flexible work schedules and collaborate with employees to achieve flexibility and meet mutual needs.

Intermittent Leave

Consistent with Department of Labor guidance as of March 31, 2019:

Paid leave covered by this memorandum cannot be taken intermittently if the leave is being taken because:

- The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider or the employee’s Cabinet Secretary or Agency Head to self-isolate due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who either is subject to a quarantine order or self-isolation related to COVID-19 or has been advised by a health care provider to self-isolate due to concerns related to COVID-19;
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

This limitation is imposed because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of this memorandum is to provide such paid leave as necessary to keep the employee from spreading the virus to others.

In contrast, if the employee and the employee’s department/agency agree, the employee may take paid leave intermittently if the employee is taking the leave to care for a son or daughter under the age of 18 whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. All other rules regarding paid leave, including, but not limited to the special rules for health care providers and emergency responders, pursuant to this memorandum apply.

Interaction with FMLA

For PAID COVID-19 LEAVE, the employee can receive up to 80 hours of PAID COVID-19 LEAVE regardless of how much leave the employee has taken under the FMLA.

For purposes of this memorandum, and given the school closures in this state, we will not be enforcing U.S. Department of Labor guidance that EFMLA will count towards the employee's FMLA entitlement (if applicable). If an employee has taken some or all of 12 workweeks of leave under FMLA during the employee's current 12-month period, the employee may still take up to 10 weeks as provided in this memorandum for EFMLA

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