

MARR JONES & WANG

A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

Families First Coronavirus Response Act Update: School Closures

August 28, 2020

With both public and private schools in Hawaii affected by the recent surge in COVID-19 cases, employers should be aware that on, August 27, the U.S. Department of Labor (DoL) issued much needed additional guidance on FFCRA leave and unemployment benefits for parents.

Regarding FFCRA: The DoL Q&A, excerpted below, addresses the different treatment of FFCRA leave based on whether an employee's child is remote learning voluntarily or involuntarily:

98. My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days.

99. My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID-19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See [FAQ 63](#).

Also, as explained more fully in [FAQ 98](#), if your child’s school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child’s remote-learning days because the school is effectively “closed” to your child on those days.

100. My child’s school is beginning the school year under a remote learning program out of concern for COVID-19, but has announced it will continue to evaluate local circumstances and make a decision about reopening for in-person attendance later in the school year. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

Yes, you are eligible to take paid leave under the FFCRA while your child’s school remains closed. If your child's school reopens, the availability of paid leave under the FFCRA will depend on the particulars of the school’s operations. See [FAQ 98](#) and [99](#).

See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

Regarding unemployment benefits: Pandemic Unemployment Assistance (PUA) may be available when schools are closed for individuals “unable or unavailable to work because ‘a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work’ . . . , as described in Section 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act.”

However, the DoL’s August 27 guidance makes clear that individuals cannot receive both paid leave and PUA: “the individual is not eligible for PUA if he or she has the ability to telework with pay *or if he or she is receiving paid sick leave or other paid leave benefits*, regardless of whether the individual is unemployed, partially unemployed, or unable or unavailable to work because of one of the COVID-19-related reasons listed in the statute at Section 2102(a)(3)(A)(ii)(I).” (Emphasis added.) The DoL has a warning for those who try to collect twice: “An individual who continues to claim PUA benefits. . . despite the reopening of schools, may face an overpayment, as well as penalties for fraud and criminal prosecution.”

See http://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_3.pdf (attached to this update).

Private Hawaii employers with fewer than 500 employees and many public sector employers should expect more FFCRA leave requests for at least the next month (currently public school children will be distance learning through October 2), but will also have to carefully document the need for FFCRA leave to receive the tax credit using a form similar to the attached templates.

Our attorneys are available to assist with your COVID-19-related questions and issues.

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DUIO
	DATE August 27, 2020

**ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20,
Change 3**

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH
Assistant Secretary



SUBJECT: Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Eligibility of Individuals who are Caregivers for Pandemic Unemployment Assistance (PUA) in the Context of School Systems Reopening.

1. **Purpose.** States have gained experience administering the PUA program under the CARES Act, Public Law (Pub. L. 116-136), and have identified additional questions about the PUA eligibility of individuals who are caregivers and affected by school systems reopening. The purpose of this Unemployment Insurance Program Letter (UIPL) is to address those questions concerning the PUA program.
2. **Action Requested.** The Department of Labor’s (Department) Employment and Training Administration (ETA) requests State Workforce Administrators to provide the information contained in this UIPL to appropriate program and other staff in state workforce systems as they implement the PUA program.
3. **Summary and Background.**
 - a. Summary – The CARES Act was signed into law on March 27, 2020, and includes the Relief for Workers Affected by Coronavirus Act set out in Title II, Subtitle A. Section 2102 of the CARES Act creates the temporary PUA program, which provides unemployment benefits for individuals who are: 1) ineligible for regular Unemployment Compensation (UC), Extended Benefits (EB), and Pandemic Emergency Unemployment Compensation (PEUC) under Section 2104 of the CARES Act; and 2) unemployed, partially unemployed, or unable or unavailable to work due to one or more of the COVID-19 reasons set out in Section 2102(a)(3)(A)(ii)(I) of the CARES Act.

As school systems are taking various approaches to operating schools in response to the COVID-19 pandemic, states have presented the Department with questions regarding the impact of these various approaches on the PUA eligibility of individuals who are caregivers of students. This UIPL provides guidance for states in evaluating the PUA

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eligibility of these individuals, as well as the intersection of PUA with paid leave made available under the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116-127).

- b. Background – ETA provided operating, financial, and reporting instructions for the PUA program in UIPL No. 16-20, issued on April 5, 2020. ETA addressed questions received during a webinar held on the topic, as well as questions submitted through ETA’s designated e-mail for COVID-19 UI-related inquiries (covid-19@dol.gov) in UIPL No. 16-20, Change 1, issued on April 27, 2020, and UIPL No. 16-20, Change 2, issued on July 21, 2020.

Among other provisions, FFCRA includes the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA). The Department’s Wage and Hour Division (WHD) administers both of these programs. Additional details are available at <https://www.dol.gov/agencies/whd/ffcra>.

ETA issued UIPL No. 23-20 on May 11, 2020 to remind states of the program integrity functions that are required for the regular UI program and the UI programs authorized by the CARES Act. Addressing improper payments and fraud in the UI program is a top priority for the Department and the entire UI system. During this time of extraordinary UI claims workload, there is a heightened need for states to maintain a steadfast focus on UI functions and activities that ensure program integrity and the prevention and detection of improper payments and fraud across all UI programs.

To help prevent and detect improper payments, states are required to ensure that their employment services, UI, and other workforce partners are engaged with claimants. States are expected to track referrals to possible suitable employment. As an added measure of program integrity, states are also strongly encouraged to provide a mechanism for employers to report information when workers refuse to return to suitable work for reasons that do not support their continued eligibility for benefits.

- 4. **Guidance.** An individual who is: 1) ineligible for regular UC, EB, and PEUC; and 2) self-certifies that he or she is unemployed, partially unemployed, or unable or unavailable to work because “a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work” may be eligible for PUA, as described in Section 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act.

However, as described in Section 2102(a)(3)(B) of the CARES Act, the individual is not eligible for PUA if he or she has the ability to telework with pay or if he or she is receiving paid sick leave or other paid leave benefits, regardless of whether the individual is unemployed, partially unemployed, or unable or unavailable to work because of one of the COVID-19-related reasons listed in the statute at Section 2102(a)(3)(A)(ii)(I).

WHD provides a series of Questions and Answers explaining when an individual may be eligible for paid leave through provisions of FFCRA in the context of school systems reopening. This is available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. The state must treat any paid sick leave or paid leave received by an individual, including EPSLA and EFMLEA, in accordance with the income restrictions set out in 20 C.F.R. 625.13.

Below we provide three scenarios addressing the PUA eligibility of individuals who are caregivers and affected by school systems reopening.

Scenario 1: The school system goes fully online as a direct result of the COVID-19 public health emergency.

When the school system is only providing online instruction, it is not open for students to be physically present at the school, and therefore is considered closed under section 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act. If the individual must stay home because he or she is the primary caregiver for the student(s), the individual may be eligible for paid leave benefits under FFCRA.

If the individual is not receiving paid leave benefits and is unable or unavailable to work because he or she is the primary caregiver for the student(s), the individual may be eligible for PUA. An individual who is permitted to work from home, but must provide such ongoing and constant attention to the student(s) for whom he or she is the primary caregiver that working from home is not possible, may be considered unable or unavailable for work. Provided the individual is not eligible for regular UC, EB, and PEUC, then the individual meets the provisions of item (dd) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act and may collect PUA.

As described in Section 4.a. of UIPL No. 16-20, an individual who is receiving paid leave for part of the week or working part-time hours during the week must report such earnings when filing for PUA. Failure to report such earnings may result in an overpayment. Failure to report such earnings may also result in penalties for fraud and criminal prosecution. These earnings will be deducted from the PUA weekly benefit amount in accordance with 20 C.F.R. 625.13.

Scenario 2: The school system operates in a “hybrid” environment as a direct result of the COVID-19 public health emergency, where students attend school in-person some days of the week, with the rest of the week being done remotely, online.

When the school system is providing a combination of online and in-person instruction, it is not open for certain student(s) to be physically present at the school on those certain days when receiving online instructions, and therefore is considered closed under section 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act. If the individual must stay home to care for the

student(s) on the days of remote instruction, the individual may be eligible for paid leave benefits under FFCRA.

If the individual is not receiving paid leave benefits and is unable or unavailable to work because he or she is the primary caregiver for the student(s), the individual may be eligible for PUA. An individual who is permitted to work from home, but must provide such ongoing and constant attention to the student(s) for whom he or she is the primary caregiver that working from home is not possible, may be considered unable or unavailable for work. Provided the individual is not eligible for regular UC, EB, and PEUC, then the individual meets the provisions of item (dd) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act and may collect PUA.

As described in Section 4.a. of UIPL No. 16-20, an individual who is receiving paid leave for part of the week or working part-time hours during the week must report such earnings when filing for PUA. Failure to report such earnings may result in an overpayment. Failure to report such earnings may also result in penalties for fraud and criminal prosecution. These earnings will be deducted from the PUA weekly benefit amount in accordance with 20 C.F.R. 625.13.

Scenario 3: The school system provides students the option to stay home and attend online classes or to attend school in-person full time.

When the school system provides the individual with a choice between full-time in-person instruction and remote learning, it is open for students to be physically present at the school.

If the individual who is the primary caregiver chooses to have the student(s) participate in remote learning instead of in-person instruction, the individual does not meet the provisions of item (dd) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act. Unless the individual meets another listed COVID-19 related reason under items (aa) through (kk) in Section 2102(a)(3)(A)(ii)(I) of the CARES Act, the individual is ineligible for PUA. An individual who continues to claim PUA benefits under item (dd), despite the reopening of schools, may face an overpayment, as well as penalties for fraud and criminal prosecution.

- 5. Inquiries.** We encourage states to contact ETA for technical assistance. Please direct inquiries about PUA and other UI matters to covid-19@dol.gov, with a copy to the appropriate ETA Regional Office.

Please direct inquiries about the paid leave provisions under FFCRA, including questions from employers, to whd-covid19@dol.gov.

- 6. References.**

- Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), including Title II Subtitle A Relief for Workers Affected by Coronavirus Act;

- Families First Coronavirus Response Act (Pub. L. 116-127);
- 20 C.F.R. Part 625;
- UIPL No. 23-20, *Program Integrity for the Unemployment Insurance (UI) Program and the UI Programs Authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Federal Pandemic Unemployment Compensation (FPUC), Pandemic Unemployment Assistance (PUA), and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued May 11, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4621;
- UIPL No. 16-20, Change 2, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Additional Questions and Answers*, issued July 21, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5479;
- UIPL No. 16-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Reporting Instructions and Questions and Answers*, issued April 27, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5899;
- UIPL No. 16-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Operating, Financial, and Reporting Instructions*, issued April 05, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4628; and
- WHD Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

7. **Attachment(s)**. (None).

[COMPANY]
Request Form for Emergency Family Medical Leave

Employees who have worked for [COMPANY] for at least thirty (30) calendar days may be eligible for Emergency Family Medical Leave (EFML) pursuant to the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Families First Coronavirus Response Act (FFCRA). If your need for leave is foreseeable, you must provide notice of your need for leave as soon as practicable. Please provide the information below and submit this form to _____.

Employee Name:	
Employee Home Address:	E-mail:
Employee Cell Phone Number:	
This is a (<i>choose one</i>): <input type="checkbox"/> New request <input type="checkbox"/> Extension of prior request	
Current EFML End Date:	
Anticipated EFML Start Date:	Expected Return to Work Date:
I am requesting EFML because I am unable to work or telework for the following reason:	
<input type="checkbox"/> I need to care for my child(ren) under age 18 (or 18 or older and incapable of self-care due to disability) because my child(ren)'s elementary or secondary school has been closed due to a public health emergency	
<input type="checkbox"/> I need to care for my child(ren) under age 18 (or 18 or older and incapable of self-care due to disability) because my child(ren)'s place of care has been closed due to a public health emergency	
<input type="checkbox"/> I need to care for my child(ren) under age 18 (or 18 or older and incapable of self-care due to disability) because my child(ren)'s childcare provider is unavailable due to a public health emergency	
The name(s), age(s), and school/provider of my child(ren) needing care are as follows:	
Name: _____ Age: _____ School/Provider: _____	
Name: _____ Age: _____ School/Provider: _____	
Name: _____ Age: _____ School/Provider: _____	
____ (<i>initial</i>) I represent that no other suitable person will be providing care for the child(ren) listed above during the period for which I am receiving EFML.	
[SELECT ONE OF THE TWO OPTIONS BELOW]	
OPTION 1: For any child(ren) older than 14, the following special circumstances exist requiring me to provide care during daylight hours:	
OPTION 2: ____ (<i>initial</i>) I hereby certify that there are special circumstances requiring me to provide care for any child(ren) older than 14 during daylight hours.	

Please attach documentation of your need for leave, such as notice of closure or unavailability from your child(ren)'s school, place of care, or childcare provider.

[OPTIONAL. REMOVE BOX OR REVISE LANGUAGE DEPENDING ON WHAT YOU ALLOW]

I am requesting (*choose one*): Continuous leave Intermittent leave

If you are requesting intermittent leave, please describe the nature, including dates and/or intervals (e.g., each Tuesday and Thursday; 8:00 a.m. to noon daily; etc.) of the intermittent leave you are requesting:

Substitution of paid leave. Pursuant to the FFCRA, the first two weeks of your leave are unpaid. However, you may be eligible for Emergency Paid Sick Leave ("EPSL") provided through the FFCRA. If so, the EPSL will run concurrently with the first two weeks of EFML. If you are not eligible for, or if you have exhausted, EPSL, you may use any other accrued paid leave during the first two weeks of EFML. Please indicate below how many hours you elect and plan to use. **[MODIFY BASED ON TYPES OF LEAVE OFFERED]**

Vacation/PTO ___ hrs Sick leave ___ hrs Personal leave ___ hrs Other ___ hrs

[THE FOLLOWING LANGUAGE IS OPTIONAL] For the remaining period of EFML during which you are paid 2/3 of your wages (if applicable), you may use any accrued paid leave to supplement the 2/3 pay. Please indicate below how many hours you elect and plan to use. **[MODIFY BASED ON TYPES OF LEAVE OFFERED]**

Vacation/PTO ___ hrs Sick leave ___ hrs Personal leave ___ hrs Other ___ hrs

I certify that the above information is accurate and complete. I understand that providing false or misleading information regarding the need for EFML or any FFCRA qualifying event will be grounds for corrective action, up to and including termination. I further understand that if I fail to report to work on or before the scheduled return date indicated above or fail to contact _____ regarding my absence from work beyond such scheduled date of return, my employer may take corrective action.

Employee Signature:

Date:

Approved Denied

Signature:

Date:

[COMPANY]
Request Form for Emergency Paid Sick Leave

You may be eligible for Emergency Paid Sick Leave (EPSL) under the Emergency Paid Sick Leave Act (EPSLA) and the Families First Coronavirus Response Act (FFCRA). Please complete the information below and submit this form to _____ as soon as practicable to support your use of EPSL.

Employee Name:	
Employee Home Address:	E-mail:
Employee Cell Phone Number:	
This is a (<i>choose one</i>): <input type="checkbox"/> New request <input type="checkbox"/> Extension of prior request Current EPSL End Date:	
Anticipated EPSL Start Date:	Expected Return to Work Date:
I am requesting EPSL because I am unable to work or telework for the following reason(s): <input type="checkbox"/> 1. I am subject to a federal, state, or local quarantine or isolation order related to COVID-19 <input type="checkbox"/> 2. I have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19 <input type="checkbox"/> 3. I am experiencing symptoms of COVID-19 and am seeking a medical diagnosis <input type="checkbox"/> 4. I am caring for an individual who is subject to an order as described in paragraph 1 above, or who has been advised as described in paragraph 2 above. <input type="checkbox"/> 5. I am caring for my child who is under 18 (or is 18 or older and incapable of self-care due to disability) and whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions. <input type="checkbox"/> 6. I am experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.	
For reasons 1, 2, and 4, please identify the government entity ordering the quarantine/isolation, or the healthcare provider advising self-quarantine, and attach documentation supporting the request: 	
For reason 4, please also identify the individual's name and relationship to you: Name: _____ Relationship: _____	
For reason 5 only, please complete the following and also attach documentation of your need for leave, such as notice of closure or unavailability from your child's school, place of care, or childcare provider: Name: _____ Age: _____ School/Provider: _____ Name: _____ Age: _____ School/Provider: _____ Name: _____ Age: _____ School/Provider: _____	
<p><i>(this section continued on next page)</i></p>	

[OPTIONAL. REMOVE OR REVISE THE FOLLOWING DEPENDING WHAT YOU ALLOW]

I am requesting (*choose one*): Continuous leave Intermittent leave

If you are requesting intermittent leave, please describe the nature, including dates and/or intervals (e.g., each Tuesday and Thursday; 8:00 a.m. to noon daily; etc.) of the intermittent leave you are requesting:

____ (*initial*) I represent that no other suitable person will be providing care for the child(ren) listed above during the period for which I am receiving EPSL.

[SELECT ONE OF THE TWO OPTIONS BELOW]

OPTION 1: For any child(ren) older than 14, the following special circumstances exist requiring me to provide care during daylight hours:

OPTION 2: ____ (*initial*) I hereby certify that there are special circumstances requiring me to provide care for any child(ren) older than 14 during daylight hours.

I certify that the above information is accurate and complete. I understand that providing false or misleading information regarding the need for EPSL or any FFCRA qualifying event will be grounds for corrective action, up to and including termination. I further understand that if I fail to report to work on or before the scheduled return date indicated above or fail to contact _____ regarding my absence from work beyond such scheduled date of return, my employer may take corrective action.

Employee Signature:

Date:

Approved Denied **Signature:**

Date: