Paid Leave and Unemployment Insurance Provisions Reference Guide for COVID-19

[Executive Order 2020-235](https://governor.ky.gov/attachments/20200316_Executive-Order_2020-235.pdf) (March 16, 2020)

* Orders KRS 341.350 and KAR Title 787 (Unemployment Insurance) to be liberally construed with USDOL guidance to permit Secretary of the Education and Workforce Development Cabinet discretion on how to apply the standards for ability to work, availability to work, work-search activities, and suitable work due to the COVID-19 crisis
* Waives the one week waiting period for unemployed workers before becoming eligible to receive unemployment benefits.

[ORDER](https://governor.ky.gov/attachments/20200325_ORDER_Unemployment-Insurance.pdf) – Lt. Governor/Secretary Education Workforce Development Cabinet - Related to Unemployment Insurance (March 25, 2020)

* Suspends certain provisions of KRS Chapter 341 and KAR Title 787
* Directs Office of Unemployment Insurance to interpret with maximum flexibility or waive:
  + - “Good cause” to include leaving work due to reasonable risk of exposure to infection or to care for a family member affected by the virus
    - Expand coverage to self-employed and those otherwise uninsured individuals who have suffered job loss due to COVID-19
    - Allow employees experiencing a reduction in work hours of more than 10% but less than 60% with no reduction in hourly rate to be eligible for unemployment benefits to compensate the employee for the temporary loss of income
* These flexibilities are in addition to the those contained in E.O. 2020-235 regarding:
  + Waiver of one-week waiting period before becoming eligible for unemployment benefits
  + Able to work and available to work requirements
  + Actively seeking work requirements
  + Suitable to work in the context of COVID-19
* Employers required to provide notice of availability of unemployment insurance at time of employee separation.
* Office of Unemployment Insurance shall provide reasonable means for filing both telephonically and on the internet
* Office of Unemployment shall not allocate charges to employers’ accounts for individuals paid benefits for COVID-19 reasons. State shall seek reimbursement from the federal government.
* Shall construe in accordance with Department of Labor guidance and federal legislation including the Family First Coronavirus Response Act

[SB 150](https://apps.legislature.ky.gov/record/20rs/sb150.html) - Effective 3/30/2020

Grants authority to Governor to waive certain unemployment insurance requirements:

* Ability to work, work-search activities, and suitable work. (Section 1, pp. 2).
* 7 day waiting period before eligible. (Section 1, pp. 2-3).
* Alternative base period to determine if an unemployed worker has earned enough wages to qualify for unemployment insurance benefits. (Section 1, pp. 3).
* Reserve ratio for businesses with 100 employees or less shall not be impacted as a result of employee layoffs due to restrictions imposed by Executive Orders issued during state of emergency. (Section 1, pp. 3).
* Expand coverage to self-insured, self-employed and those employees otherwise not covered by unemployment insurance suffering job loss due to COVID-19. (Section 1, pp. 3).
* Allow employees that have experienced reduced work hours of more than 10% but less than 60% with no reduction in hourly rate to be eligible for unemployment benefits to compensate for temporary loss of income. (Section 1, pp. 3).
* Permit Governor to delay employer unemployment insurance contribution due dates without imposition of penalties or interest against employer. (Section 1, pp. 3).

For Additional Information contact:

Kentucky Career Center: <https://kcc.ky.gov>

[SB 177](https://apps.legislature.ky.gov/record/20rs/sb177.html) - Effective 3/24/2020

* During 2019-2020 school year, local board shall allow emergency leave to any full-time or part-time classified or certified employee if the board determines it is necessary in relation to COVID-19 public health emergency. Employee shall not have to file a personal affidavit to take emergency leave. (Section 4, pp. 2-3).
* Local district may provide required written notices to classified or certified employees regarding salary or nonrenewal of contracts via regular mail or via email address on record in the district. (Section 10, pp. 4).

Employee leave during COVID-19 state of emergency:

This guidance is limited to employee leave taken during the COVID-19 state of emergency and 2019-2020 school year. Local boards should also consult their board policies as well as their board attorney for legal advice.

1. **Personal leave**
   1. Certified employees - KRS 161.154
      1. A local board of education may provide up to three (3) personal leave days per school year to certified employees.
      2. Local boards of education may establish a policy limiting the number of employees who may take personal leave during a single day.
      3. KRS 161.154(3) states: “Personal leave granted under this section shall not be treated as having effect on the provisions of [KRS 161.152](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000010&cite=KYSTS161.152&originatingDoc=NEF467AD0A91211DA8F5EE32367A250AE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) to [161.155](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000010&cite=KYSTS161.155&originatingDoc=NEF467AD0A91211DA8F5EE32367A250AE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) and shall be supported by personal affidavit of the school employee stating that the leave taken is personal in nature; no other reason for or verification of the leave shall be required.”
   2. Classified employees
      1. A local board of education may enact a personal leave policy for its noncertified employees as it deems proper. OAG 77-115.

*Employees use of personal leave is not affected by Senate Bill 177 (SB 177). The requirement in SB 177 that local boards waive the requirement of a personal affidavit is only applicable to emergency leave taken pursuant to SB 177. Therefore, employees may continue to use personal leave as provided by local board policy and must present a personal affidavit stating the leave taken is personal in nature.*

1. **Sick leave** – KRS 161.155 (applies to both full time certified and classified staff)
   1. Sick leave may be used if the employee presents a personal affidavit or a certificate of a physician stating the employee was:
      1. ill;
      2. caring for member of their immediate family who was ill; or
      3. mourning a member of his or her immediate family.
   2. KRS 161.155 defines immediate family as:
      1. Spouse;
      2. children (including stepchildren, foster children, grandchildren, daughters-in-law and sons-in law);
      3. brothers and sisters;
      4. parents and spouse's parents;
      5. grandparents and spouse's grandparents; and
      6. any other blood relative who resides in the employee’s home.
   3. KRS 161.155 also provides that a board of education “may allow school district employees and teachers to use up to three (3) days' sick leave per school year for emergency leave pursuant to [KRS 161.152(3)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000010&cite=KYSTS161.152&originatingDoc=N8A09CA200ECE11E9A29DDD079C37D2A9&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_d08f0000f5f67).”
      1. Therefore, if the local board of education permits employees emergency leave, after an employee has exhausted the maximum three (3) days of emergency leave, an employee may to use three (3) days of sick leave if permitted for “reasons designated by the district board of education.”
   4. KRS 161.155 also provides that a local board of education may adopt a plan for a sick leave bank. KRS 161.155 further provides that a local board of education must establish a sick leave donation program. KRS 161.155(8)(b) sets forth when employees may receive sick leave donations. An employee may receive sick leave donations if:

“1. a. The teacher or employee or a member of his or her immediate family suffers from a medically certified illness, injury, impairment, or physical or mental condition that has caused or is likely to cause the teacher or employee to be absent for at least ten (10) days; or

b. The teacher or employee suffers from a catastrophic loss to his or her personal or real property, due to either a natural disaster or fire, that either has caused or will likely cause the employee to be absent for at least ten (10) consecutive working days;

2. The teacher's or employee's need for the absence and use of leave are certified by a licensed physician for leave requested under subparagraph 1.a. of this subsection;

3. The teacher or employee has exhausted his or her accumulated sick leave, personal leave, and any other leave granted by the school district; and

4. The teacher or employee has complied with the school district's policies governing the use of sick leave.”

*The requirement in SB 177 that local boards waive the requirement of a personal affidavit is only applicable to emergency leave taken pursuant to SB 177. Therefore, employees utilizing sick leave are required to present a personal affidavit or a certificate of a physician stating the employee was ill, caring for a member of their immediate family who was ill, or mourning a member of his or her immediate family unless the sick leave is used for emergency leave pursuant KRS 161.152(3).*

*See below regarding the recently enacted* Families First Coronavirus Response Act*, Public Law No. 116-127.*

1. **Emergency leave**
   1. KRS 161.152, which applies to full-time employees (certified and classified), provides that the local board of education may allow a maximum of three (3) emergency days per school year “**for reasons designated by the district board of education**, without loss of salary to the employee and without affecting his sick leave.” (emphasis added) KRS 161.152 further provides that “[p]ersonal leave granted under this section shall not be treated as having effect on the provisions of [KRS 161.155](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000010&cite=KYSTS161.155&originatingDoc=NEEA076D0A91211DA8F5EE32367A250AE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) [sick leave statute], except that school personnel, after using the maximum [3] days . . . may, upon the recommendation of the school district superintendent and approval of the district board of education, use up to three (3) sick-leave days per school year for emergency leave” for reasons designated by the district board of education in its board policy. (See above explanation.)
   2. Therefore, under KRS 161.152 a district may grant emergency leave “for reasons designated by the district board of education.” Examples of reasons adopted by local boards include illness/death of a relative or friend, disasters (flood, tornadoes, fires, etc.), legal proceedings, transportation problems, and illness of the employee if all other leave is exhausted, **and other emergencies as approved by the Superintendent.**
   3. Senate Bill 177 states, in relevant part, the following:
      1. Notwithstanding KRS 161.152 and any other statute or administrative regulation to the contrary, during the 2019-2020 school year, a local board of education shall allow emergency leave to any **full-time or part-time classified or certified employee if the local board determines it is necessary in relation to the COVID-19 public health emergency**. A local board shall **waive any requirement under local policy for an employee to file a personal affidavit in order to take emergency leave allowed pursuant to this section.** (emphasis added)

*Accordingly, for the 2019-2020 school year, SB 177 does not limit the amount of emergency leave days that may be granted in relation to the COVID-19 public health emergency, nor does it require that the local board of education grant emergency leave. Rather, SB 177 provides discretion to the local board of education to grant emergency leave days “if the local board determines it is necessary in relation to the COVID-19 public health emergency.” If a local board of education determines it is necessary to grant emergency leave days in relation to the COVID-19 public health emergency, it must waive any requirement under local policy for an employee to file a personal affidavit in order to take emergency leave in relation to the COVID-19 public health emergency.*

*See below regarding the recently enacted* Families First Coronavirus Response Act*, Public Law No. 116-127.*

For additional information see the Kentucky School Board Association FAQ document regarding emergency leave and SB 177 found at: <https://filecabinet7.eschoolview.com/1365B58C-F95F-4E75-94BB-A29D9A94F1C7/Advocacy/SB177_EmergencyleaveforschoolemployeesduetoCOVID19Pandemic_FAQfromKSBA_03252020_UPDATE_2.pdf>.

1. **Leave under KRS 161.770**
   1. KRS 161.770 provides, in relevant part, the following:

(1) Upon written request of a teacher or superintendent, a board of education may grant a leave of absence for a period of not more than two (2) consecutive school years for educational or professional purposes, and shall grant such leave where illness, maternity, adoption of a child or children, or other disability is the reason for the request. Upon subsequent request, such leave may be renewed by the board. A board of education may pay a sum of money equivalent to all or any portion of salary to a teacher or superintendent who has been granted leave for educational or professional purposes if the person taking said leave agrees in writing to return to employment with the board for no less than two (2) years.

(2) Without request, a board of education may grant leave of absence and renewals thereof to any teacher or superintendent because of physical or mental disability, but such teacher or superintendent shall have the right to a hearing and appeal on such unrequested leave of absence or its renewal in accordance with the provisions for hearing and appeal in KRS 161.790.

* 1. Leave taken under KRS 161.770 due to illness is unpaid leave. OAG 80-151.

*However, see below regarding the recently enacted* Families First Coronavirus Response Act*, Public Law No. 116-127.*

[Families First Coronavirus Response Act](https://www.congress.gov/bill/116th-congress/house-bill/6201/text) (FFCRA) - Effective 4/1/2020

This information is copied from United States Department of Labor Guidance. For Additional Information: <https://www.dol.gov/agencies/whd/pandemic>

The Act requires certain employers, including public school districts, to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor’s (Department) Wage and Hour Division (WHD) administers and enforces the new law’s paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Covered employers must provide to **all employees**:

* *Two weeks (up to 80 hours) of****paid sick leave****at the employee’s regular rate of pay* where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
* *Two weeks (up to 80 hours) of****paid sick leave****at two-thirds the employee’s regular rate of pay* because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

A covered employer must provide to **employees that it has employed for at least 30 days**:

* *Up to an additional 10 weeks of****paid expanded family and medical leave****at two-thirds the employee’s regular rate of pay* where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

**Qualifying Reasons for Leave:**

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

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

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

**Duration of Leave:**

**For reasons (1)-(4) and (6):** A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

**For reason (5):** A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**Calculation of Pay:**

**For leave reasons (1), (2), or (3):**employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a 2-week period).

**For leave reasons (4) or (6):**employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period).

**For leave reason (5):**employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

**Employer Notice:** Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.

**Prohibitions:** Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

**Penalties and Enforcement:** Employers in violation of the first two weeks’ paid sick time or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.  For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

The Kentucky School Board Association has also set forth additional guidance found at: <https://filecabinet7.eschoolview.com/1365B58C-F95F-4E75-94BB-A29D9A94F1C7/Advocacy/EmergencyFederalFMLAandPaidSickLeaveGuidanceDocumentKSBA.pdf>.

[Coronavirus Aid, Relief, and Economic Security Act](https://www.congress.gov/bill/116th-congress/house-bill/748/text) (CARES Act) – Effective 3/27/2020

The CARES Act is largely an emergency funding bill to provide economic relief related to COVID-19. It provides funds to the SEA, LEAs and postsecondary institutions. The CARES Act states, in relevant part, the following:

“CONTINUED PAYMENT TO EMPLOYEES SEC. 18006. A local educational agency, State, institution of higher education, or other entity that receives funds under ‘Education Stabilization Fund’, shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.”

The following information is copied from United States Department of Labor Guidance in [UNEMPLOYMENT INSURANCE PROGRAM LETTER No. 14-20](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390). This information is largely applicable to states in the administration of Unemployment Insurance programs. For additional information related to the CARES Act see the aforementioned letter or: <https://www.dol.gov/newsroom/releases/eta/eta20200402-0>. The Federal-state unemployment compensation program is a federal fund, but each state has its own unemployment program with its own qualification guidelines, benefit amounts and periods. The state programs operate based on federal laws.

“The CARES Act builds upon actions previously taken by the Department, Congress, and the President, by including, among other things, provisions for temporary coverage of individuals who have exhausted their entitlement to regular UC and individuals who are not eligible for regular UC, such as individuals who are self-employed or have limited recent work history. It also provides individuals who are collecting certain benefits with an additional $600 in Federal benefits per week for weeks of unemployment ending on or before July 31, 2020.”

“The programs and provisions in the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program, which remain in place. In addition, some of the programs include new eligibility requirements. These requirements include that individuals are only entitled to benefits if they are no longer working through no fault of their own and that individuals must be able and available to work. While the Act does provide workers some flexibilities, quitting work without good cause to obtain additional benefits would be fraud. Sections 2104(f) and 2107(e) expressly provide that if an individual has obtained the benefit through fraud, the individual is ineligible for any additional benefit payments, must pay back the benefits, and is subject to prosecution under 18 USC §1001.”