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To: Washington Fire Commissioners Association

From: Brian Snure

Re: Impacts of Federal Emergency Family Medical Leave Act and Federal Emergency Paid Sick Leave Act on Fire Protection Districts and Regional Fire Authorities in Washington State.

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**This memorandum is for general educational purposes, is subject to change as more details become available and is not intended to provide legal advice. Please consult legal counsel for advice about specific questions.**

## Background.

On March 18, 2020, the President signed the Families First Coronavirus Response Act. The Act includes two changes that will directly impact fire protection districts and regional fire authorities. First, Division C of the Act creates the Emergency Family and Medical Leave Expansion Act which temporarily modifies the Federal Family Medical Leave Act by extending existing protections and providing for emergency paid leave. Second, Division E of the Act creates the Emergency Paid Sick Leave Act, which establishes mandatory paid sick leave benefits for certain employees. Both provisions go into effect on April 2, 2020 and are set to expire on December 31, 2020. Both Acts are focused narrowly on the impacts of the Covid-19 pandemic and the primary details of the impacts of these new Acts are outlined below.

## Emergency Family Medical Leave Act

**Effective Dates:** April 2, 2020 – December 31, 2020.

**Relationship to Washington State Paid Family Medical Leave.** The relationship between the paid leave required under this Act to Washington State Paid Family Medical Leave is not specifically addressed under the Act and does create certain issues. As of the date of this memorandum, it is my opinion that an employee entitled to paid leave under the Federal Emergency Family Medical Leave Act Law would be entitled to receive the benefit directly from the employer. It would then be up to the State Employment Security Department to address eligibility for any state benefits. In terms of available leave, under current law the State Leave and Federal Leave run concurrently so while the source of the payments may change, the total amount of leave that employees are eligible for is not increased by this new law. I assume the State Employment Security Department will issue some guidance on this issue in the near future.

**Exemption Option.** Sec. 3105 of the Emergency Family Medical Leave Act allows employers of “health care providers” and “emergency responders” to elect to exclude such employees from the Emergency FMLA benefits. This exemption option likely applies to firefighters and EMS personnel but would not apply to employees that do not have EMS or emergency response duties as a primary job duty. The Department of Labor will be issuing regulations that provide further guidance on this optional exemption and it is recommended that any decision to exempt employees be delayed until such guidance is issued.

**Volunteer Exclusion.** Bona fide volunteers as defined under 29USC§203(e)(4) are not considered employees under the Emergency Family Medical Leave Act.

**Employers Covered.** Employers that employ fewer than 500 employees are covered. Employers with fewer than 50 employees may be exempted if compliance would jeopardize the viability of the continued operation of the District. The exemption for small employers is to be addressed by Department of Labor Regulations that have not yet been promulgated and should not be relied on until such time as the regulations are issued.

**Employee Eligibility.** Employees of fire protection districts and regional fire authorities that are not exempted are eligible for Emergency Family Medical Leave Act benefits if they have been employed for at least 30 calendar days.

**Benefit Triggers.** Benefits under the Emergency Family Medical Leave Act are triggered by the employee documenting a “Qualifying Need” which is narrowly defined as follows:

*Employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to a Covid 19 Emergency.*

**Paid Leave Benefits.** Employees documenting a Qualifying Need receive the following benefits.

First Ten Days of Leave. No mandatory paid leave. Employee may, if employee chooses to, use accrued vacation, sick, or other Paid Time Off leave under existing employer policies.

Day 11-Day 84 (12 weeks). Employee entitled to receive paid leave until the Qualifying Need expires or once 12 weeks expire subject to the following pay limits.

- Employees on leave are paid at two-thirds of their regular rate for the usual number of scheduled hours. Special calculations are provided for employees who work variable hours.
- Payments are capped at \$200 per day and \$10,000 in the aggregate.

**Job Restoration:** As with other FMLA leaves, employees must be restored to the same or equivalent position at the end of leave. Employers with fewer than 25 employees are not required to restore the employee to the same or equivalent position at the end of leave if the employee’s position no longer exists due to economic or operating conditions caused by the coronavirus emergency and the employer makes reasonable efforts to restore the employee to an equivalent position at the time and over a one-year period.

## Emergency Paid Sick Leave Act

**Effective Dates:** April 2, 2020 – December 31, 2020

**Relationship to State Paid Sick Leave.** The paid sick leave benefits required under the Emergency Paid Sick Leave Act are in addition to and do not affect basic paid sick leave benefits under Washington state law.

**Exemption Option.** Sec. 5102 of the Emergency Paid Sick Leave Act allows employers of “health care providers” and “emergency responders” to elect to exclude such employees from the Emergency Paid Sick Leave benefits. This exemption would apply to firefighters and EMS personnel but would not apply to employees that do not have EMS or emergency response duties as a primary job duty. The Department of Labor will be issuing regulations that provide further guidance on this optional exemption and it is recommended that any decision to exempt employees be delayed until such guidance is issued.

**Volunteer Exclusion.** Bona fide volunteers as defined under 29USC§203(e)(4) are not considered employees under the Emergency Paid Sick Leave Act.

**Employers Covered.** Public Employers that employ more than one (1) employee are covered. Employers with fewer than 50 employees may be exempted if compliance would jeopardize the viability of the continued operation of the District. It is unclear whether the possible exemption for small employers will apply to public employers and this will not be determined until the Department of Labor Regulations have been promulgated. Until that time any fire district or regional fire authority with one or more part or full time paid employees is covered by this Act.

**Employee Eligibility.** Employees of fire protection districts and regional fire authorities that are not exempted are eligible for the paid sick leave benefits regardless of length of time with employer.

**Benefit Triggers.** An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.

6. The employee is 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.

**Benefits.** Paid sick leave required by this Act is primary and employees must be allowed to use this leave before using any employer provided accrued sick leave.

The amount of paid sick leave required by this Act is limited as follows:

- A. For full-time employees, 80 hours of paid sick leave is required.
- B. For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period is required.
- C. The sick leave benefits will be paid at the employee's regular rate (a maximum of \$511 per day and \$5,110 in the aggregate) for conditions 1-3 listed under Benefit Triggers.
- D. For Benefit Triggers 4-6 listed above, the sick leave will be paid at two-thirds the employee's regular rate (a maximum of \$200 per day and \$2,000 in the aggregate).
- E. If an employee receives regular wages, sick pay, other paid time off or unemployment compensation for any day, those days do not count as leave days for purposes of this benefit.
- F. Paid sick time under this section shall not carry over from 1 year to the next.

**Prohibition.** An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

**Notice Posting Requirement.** Employers are required to post notice of these benefits. The Department of Labor will have a publicly available model notice.