



## *Office of Congressional Workplace Rights*

September 21, 2020

### **INTERIM GUIDANCE ON IMPLEMENTING THE FEDERAL EMPLOYEE PAID LEAVE ACT IN THE LEGISLATIVE BRANCH**

#### **What is the Federal Employee Paid Leave Act and what does it do?**

The Congressional Accountability Act (CAA) applies the rights and protections established by Title I of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§ 2611-15) to covered employees in the legislative branch. In general, the FMLA, as applied by the CAA, provides eligible employees the right to take a total of 12 workweeks of unpaid leave during any 12-month period for specified family and medical reasons, including: 1) for the birth of a son or daughter, and to care for the son or daughter; and (2) for placement with the employee of a son or daughter for adoption or foster care.

The FY 2020 National Defense Authorization Act, signed into law as Public Law No. 116-92 on December 20, 2019, includes provisions of the Federal Employee Paid Leave Act (FEPLA). FEPLA guarantees most eligible Federal civilian employees up to 12 weeks of “paid parental leave” (PPL), i.e., paid leave in connection with a birth or placement. As discussed below, FEPLA includes provisions expressly applicable to the legislative branch that both: (1) change the eligibility rules for employees to take protected leave for births or placements under the FMLA; and (2) permit employees to substitute PPL and other paid accrued leave for unpaid FMLA leave for such births or placements.

This interim guidance is being issued by the Office of Congressional Workplace Rights (OCWR) pending FEPLA amendments by the OCWR Board of Directors to its substantive FMLA regulations pursuant to the CAA rulemaking procedures at 2 U.S.C. § 1384.

#### **When are the Paid Parental Leave provisions of the FEPLA effective?**

Section 7603(c) of FEPLA provides that the amendments to the CAA concerning PPL are not effective with respect to any birth or placement for adoption or foster care occurring before October 1, 2020. Thus, by law, PPL will be available to covered employees only in connection with a birth or placement that occurs on or after October 1, 2020.

## **SECTION 1: INTERIM GUIDANCE CONCERNING ELIGIBILITY FOR UNPAID FMLA LEAVE FOR BIRTHS OR PLACEMENTS**

*This Section contains interim guidance on questions concerning eligibility under FEPLA for unpaid FMLA leave related to births or placements. Guidance on questions concerning substitution of PPL under FEPLA for unpaid FMLA leave for births and placements appears below in Section 2.*

### **Which employees in the legislative branch are eligible for FMLA leave for births or placements?**

For purposes of leave with respect to any birth or placement, all covered employees in the legislative branch will be eligible for job-protected leave under the FMLA immediately upon commencement of employment. “Covered employee” means any employee of: (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Office of Technology Assessment; (10) the Library of Congress; (11) the John C. Stennis Center for Public Service Training and Development; (12) the China Review Commission; (13) the Congressional Executive China Commission; or (14) the Helsinki Commission. See 2 U.S.C. § 1301(a)(3).

### **In order to be eligible to take FMLA leave for births or placements, must an employee meet the general eligibility requirements under the FMLA of having been employed by any employing office for at least 12 months, and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave?**

No. Although the CAA defines the term “eligible employee” for FMLA Title I purposes as a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months, the FEPLA amendments at section 7202 expressly provide that these requirements shall not apply to an employee in the legislative branch with respect to FMLA leave for births or placements.

### **Where may I find guidance about the use of FMLA leave in the legislative branch for the birth or placement of a child?**

Please refer to the [Substantive Regulations Adopted by the Board of Directors of the Office of Compliance and Approved by Congress Extending Rights and Protections under the Family and Medical Leave Act of 1996](#), found at OCWR.gov, under the “Final Regulations” tab. Please note, however, that these Regulations do not yet include the changes to the law discussed in this Interim Guidance.

## **SECTION 2: INTERIM GUIDANCE CONCERNING SUBSTITUTION OF PAID PARENTAL LEAVE FOR UNPAID FMLA LEAVE FOR BIRTHS OR PLACEMENTS**

### **What is “paid parental leave” under FEPLA?**

Paid parental leave is paid time off from a covered employee’s scheduled tour of duty that is “substituted” for unpaid FMLA leave in connection with a birth or a placement with the employee for adoption or foster care. The entitlement to PPL expires 12 months after the date of birth or placement.

### **What does the term “substitute” mean?**

Generally, FMLA leave is unpaid leave. However, under certain circumstances, the FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute PPL and accrued paid leave (such as annual or sick leave) for unpaid FMLA leave. The term “substitute” means that paid leave will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay during the period of otherwise unpaid FMLA leave.

### **What is the paid leave entitlement under FEPLA?**

For leave taken for a birth or placement, an employee may elect to substitute for unpaid FMLA leave — (1) up to 12 workweeks of PPL in connection with the occurrence of a birth or placement; and (2) any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.

### **Can an employing office require an employee to use accrued paid annual, vacation, personal, family, medical, or sick leave before allowing the employee to use paid parental leave?**

No.

### **How does the use of unpaid FMLA leave for other purposes affect an employee’s ability to use paid parental leave under FEPLA?**

Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period,<sup>\*</sup> any use of unpaid FMLA leave for a purpose other than birth or placement may reduce an employee’s ability to substitute PPL for a birth or placement. Thus, for example, if an employee has used 3 weeks of unpaid FMLA leave before the birth or placement, that employee’s entitlement to 12 weeks of PPL may be reduced to 9 weeks.

### **When may paid parental leave be used?**

Paid parental leave may be used only “in connection with the birth or placement involved” (2 U.S.C. 1312(d)(2)(A)).

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<sup>\*</sup> An employee may have up to 26 weeks of FMLA unpaid leave during a single 12-month period in order to care for a covered servicemember.

**What happens if I do not use all my paid parental leave during the 12-month period following birth or placement?**

There are no carryover provisions for any unused PPL. An employee may not be paid for unused or expired PPL. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

**Can an employing office require an employee to submit documentation in support of a request to substitute paid parental leave?**

When an employee requests FMLA leave for a birth or placement, an employing office may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation such as a child's birth certificate or a court document. It is the employee's choice whether to provide a simple statement, or instead to provide other documentation. Employing offices may not use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise his or her FMLA rights.

An employing office also may, but is not required to, request documentation of the child's date of birth or placement date when necessary to determine eligibility for FMLA leave. An employing office may also request documentation of the need for absences required prior to the placement for adoption or foster care, such as counseling sessions, court appearances, consultations with attorneys or doctors, or travel to another country to complete an adoption.

An employing office may not require an employee to provide a medical certification for leave to bond with a newborn child or for a child placed for adoption or in foster care.

**What pay is an employee entitled to receive during paid parental leave?**

The pay an employee receives when using PPL shall be the same pay the employee would receive if the employee were using annual leave.

**Can an employing office require an employee to agree to return to work after the employee's paid parental leave ends?**

No. FEPLA expressly provides that legislative branch employees using parental leave under the FMLA are not subject to the limitations that apply in the executive branch whereby employees may be required to agree in writing to work for the executive branch agency for at least 12 weeks after returning from leave.

**Can an employing office recover the amount of government contributions for maintaining an employee's health coverage while on paid parental leave if the employee fails to return?**

No. FEPLA expressly provides that PPL applies to covered employees in the legislative branch without regard to the limitations that may apply in the executive branch, state and local

governments, and private sector, whereby an employer may recover the premiums for maintaining coverage under a group health plan if the employee fails to return from PPL.

### **Does FEPLA permit substitution of paid parental leave on a retroactive basis?**

Yes, under limited circumstances for births or placements occurring on or after October 1, 2020. If an employing office determines that an otherwise eligible employee who could have made an election during a past period to substitute PPL was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute PPL for applicable unpaid FMLA leave on a retroactive basis. Such a retroactive election will be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time.

If an employing office determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute PPL, the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of PPL for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute PPL for the applicable unpaid FMLA leave.

### **How does paid parental leave apply in cases of multiple births or placements in the same time period?**

If an employee has multiple births or placements on the same day, the multiple-child birth/placement event is considered to be a single event that initiates a single entitlement of up to 12 weeks of paid parental leave.

If an employee has one or more births or placements during the 12-month period following the date of an earlier birth or placement, each subsequent birth or placement event will result in a 12-month period commencing on the date of birth or placement with its own 12-week limit. Any use of paid parental leave during a given 12-month period will count toward that period's 12-week limit. Thus, when such 12-month periods overlap, any use of paid parental leave during the overlap will count toward each affected 12-month period's 12-week limit.

For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement. Those two 12-month periods would be June 1-May 31 and October 1-September 30, respectively. The overlap period for these two 12-month periods would be October 1-May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event.

**What are the general responsibilities of employing offices under FEPLA?**

Employing offices are responsible for the proper administration of FEPLA, including the responsibility of informing employees of their entitlements and obligations.

**SECTION 3: MISCELLANEOUS****How does FEPLA address active duty service in the National Guard or Reserves?**

Effective December 20, 2019, FEPLA amended the general eligibility provisions of the FMLA (as applied by the CAA) to provide that, for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty (as defined in 29 U.S.C. § 2611(14)) by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

As noted above, however, under the CAA, all covered employees, including members of the National Guard or Reserves, are eligible for unpaid FMLA leave for births or placements without regard to these eligibility requirements. Therefore, this FEPLA amendment is only relevant in determining whether an employee is eligible for unpaid leave for specified purposes in the FMLA other than births or placements.

**As a covered employee in the legislative branch, what do I do if I believe that my rights under the FMLA provisions of the CAA as amended by FEPLA have been violated?**

For more information, please contact the OCWR using the information below. Confidential advising is available.