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**MUNICIPAL EMPLOYEES, PAID COVID-19 LEAVE AND EXPANDED FMLA:
Revised 9/23/2020
Summary, Options, and Resources**

Update 9/23/2020:

The information listed in the body of this announcement was released in April and again updated in June 2020. This information is again being released with the following update:

On August 3, 2020 the US District Court for the Southern District of New York found portions of the FFCRA to be invalid. As a result, revisions were made to clarify workers' rights and employers' responsibilities under the FFCRA. These revisions do not alter the leave, but rather provide for clarification.

According to the Department of Labor's website, the revisions do the following:

- Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
- Reaffirm and provide additional explanation for the requirement that an employee have employer approval to take FFCRA leave intermittently.
- Revise the definition of "healthcare provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
- Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.
- Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

To learn more about FFCRA visit <https://www.dol.gov/agencies/whd/pandemic>

Please contact Angela Simonson HR Consultant at MMIA if you have questions about how these revisions impact your city/town at asimonson@mmia.net or 406-495-7017.

Previously released June 2020:

The current COVID-19 crisis raises many questions about how and when municipal employees should be directed to work from home, placed on paid leave, allowed to draw paid vacation or sick leave, or placed in an unpaid leave status. This memo is intended to help you walk through the process of making these determinations with your city attorney, in compliance with existing and new federal and state laws related to the COVID-19 crisis.

I. Background

On March 18, 2020, Congress passed H.R. 6201, the Families First Coronavirus Response Act (FFCRA). The United States Department of Labor issued regulations for the FFCRA on April 6, 2020. The FFCRA contains two provisions placing new requirements on private employers with under 500 employees and all government employers. The first requires paid leave for employees under six triggering events; the second requires modified paid leave and job protection for 12 weeks for employees that must care for a child because of a school or daycare closure. The FFCRA is effective April 1, 2020 to December 31, 2020.

On April 22, 2020, the Governor announced the State of Montana entering Phase One of the reopening plan. This phase removed the requirement for identifying essential services and non-essential services along with the employees falling under applicable positions. During Phase One, many employees continued to work remotely or remained in furlough status due to lack of work or requirements for small group size with social distancing.

On May 19, 2020, the Governor announced the State of Montana moving to Phase Two of the reopening plan effective June 1, 2020. Phase Two allows for groups up to 50 to gather and expands the capacity for many businesses. In addition to capacity size increasing, the Phase Two order has removed the previous requirement for a 14-day quarantine when entering Montana from another state or country. With Phase Two, there is not a quarantine order of any type.

II. Employer Paid Leave

For all employees that continue to work/telework the FFCRA creates six eligibility criteria for receiving paid leave, beyond the employee's accrued sick or annual leave, as a result of the COVID-19 emergency. For all of your employees that are working in any capacity on or after April 1, they are eligible for a one-time allocation of paid leave if they are:

- 1) Quarantine Order. Subject to a federal, state, or local government order to quarantine or isolate due to COVID-19. As of June 1, 2020, under Phase Two of the reopening plan, the State of Montana does not have a quarantine order, nor has the Federal government issued such an order.
- 2) Medical Quarantine Order. Advised by a health care provider to self-quarantine due to COVID-19;
- 3) COVID-19 Symptoms. Experiencing symptoms of COVID-19 and are seeking a medical diagnosis;
- 4) Caregiver for Quarantined. Caring for an individual who is either subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to COVID-19;
- 5) Caregiver for Child. Caring for a son or daughter under the age of 18, or a son or daughter over 18 who is incapable of self-care due to a disability, whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19. Caregivers also qualify if they must care for a son or daughter over 18 ;
- 6) Other Conditions. Experiencing a substantially similar condition specified by the Secretary of Human Health and Services.

Full-time employees that are eligible under (1), (2), or (3) receive 80 hours of paid leave at their regular pay, up to a maximum of \$511 per day or \$5,110 total. Part-time employees eligible under these same triggers receive their regular pay up to the maximum amounts, but the amount of paid leave is based on the number of hours they are regularly scheduled to work. If their hours fluctuate, then the employer can use a 2-week average of hours worked for the past 6 months to determine paid leave for part-time employees.

Full time employees that are eligible under (4), (5), or (6) receive 80 hours of paid leave at 2/3 their regular pay, up to a maximum of \$200 per day or \$2,000 total. Part-time employees eligible under these same triggers also receive 2/3 their

regular pay up to the maximum amounts, but the amount is based on their regular work schedule or a 2-week average of hours worked for the past 6 months.

Reason for Leave	Daily Pay Rate	Total Maximum Pay
Quarantine or isolation order	Regular rate of pay, up to maximum of \$511/day for 10 days	\$5,110
Advice from a health care provider to self-quarantine		
Experiencing symptoms of COVID-19 and seeking a medical diagnosis		
Caring for an individual subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine	2/3 regular rate of pay, up to maximum of \$200/day for 10 days	\$2,000
Caring for own child whose school or place of care has closed, or whose care provider is unavailable due to COVID-19		
Experiencing other substantially similar condition specified by the secretary of health and human services		

FFCRA went into effect on April 1, 2020 and is not retroactive, so any paid leave granted, authorized, or used prior to that date is considered in addition to the paid leave that becomes available on that date. There is no waiting period or length of service that must be met before any employee is eligible for the FFCRA paid leave. An employee that receives the paid leave under FFCRA because they are caring for a child whose school or daycare is closed is also eligible for the new paid expanded FMLA, which runs concurrently with the paid FFCRA.

The FFCRA applies to any private employer with less than 500 employees and all government employers. It provides a narrow exemption for small private business employers with less than 50 employees, but the regulations provide that public employers may not obtain an exemption from the FFCRA. Employers may exclude health care providers and emergency responders from mandates under FFCRA. It is important that if employers choose to exclude health care providers and/or emergency responders, that such exclusions are applied in a fair and consistent manner. For example, an employer may exclude such employees from the paid expanded FMLA, but allow them to use the 2 weeks pay for other reasons however they must apply this standard consistently among this class of employees.

- Employers must post notice of these paid leave provisions beginning April 1, 2020; posting can be done via the entities website or by emailing all employees and should also include notice posted with other employment notices in the workplace. At this time there are no forms for approving the FFCRA leave. If an employee requests paid FFCRA leave, the employee must provide the employer with a request that includes the following: their name, dates of the requested leave, the reason for leave and a statement attesting to being unable to work because of the stated reason. If an employee is requesting paid expanded FMLA, they must provide a request that includes the above information in addition to the name of their child(ren), the name of the school, place of

care or child care provider that has closed or unavailable and a statement that no other suitable person is available to care for their child.

While normally written medical documentation would be obtained, it is highly unlikely that the employee will be able to obtain a letter or note from their health care provider either advising a quarantine or releasing them to return to work during this crisis. Employers should instead document the information provided with as much detail as possible. An employee that takes leave due to COVID-19 related illness should not be allowed to return to work, other than telework, until their applicable quarantine has expired.

III. Expanded Family and Medical Leave Under the FFRCA

The FFRCA also expanded FMLA protection to employees that cannot work/telework because they are caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19. Unlike the emergency paid leave for COVID-19 that applies to all employees, the expanded FMLA only applies to employees that have worked for the employer for a minimum of 30 days.

The first ten days of this expanded FMLA is not paid, but for the remaining 10 weeks the employee is entitled to receive modified pay. If an employee qualifies for this paid leave, they are eligible to receive paid leave at 2/3 their regular rate, up to a maximum of \$200 per day and \$10,000 aggregate. This expanded FMLA leave can be used intermittently, but only with the employer's approval.

An employee may use their own paid accrued leave for the first 10 days of this expanded FMLA leave, or it may begin with the paid leave under the new FFRCA paid emergency leave. For example, if an employee wishes to begin this leave on April 1, they would first receive the paid leave under the emergency paid leave above, which provides 2/3 of their pay for 10 days of sick leave based on their full or part time status. When that leave expires, they would continue to receive the same paid leave for an additional 10 weeks under the expanded FMLA provisions. If an employee uses the FFRCA emergency paid leave beginning April 1 because they are ill with COVID-19, and later needs to use the expanded FMLA, they are still entitled to 12 weeks of expanded FMLA leave, but during the first 10 days of that leave the employee could use their own accrued leave, other paid leave the employer may provide to them, or take leave without pay.

Nothing in the FFRCA changes any other provision of FMLA. Employees are still eligible to take regular FMLA leave if they have worked for an employer with at least 50 employees for at least 12 months with at least 1,250 hours of service over the previous 12 months. While the circumstances under which COVID-19 may constitute a "serious health condition" triggering FMLA protection are not clear, there is a likelihood it will be treated as such by the Department of Labor and employers should err on the side of caution in providing FMLA protection to those diagnosed with or caring for someone diagnosed with COVID-19.

IV. Options for Employees Ineligible for or Exhausting FFCRA Leave

FFCRA Employer Paid Leave is a one-time allotment of up to 80 hours for very specific qualifying reasons. If an employee exhausts this leave or is not eligible for the leave, there may still be options for helping the employee remain in a paid status. The Governor issued a directive on March 24, 2020 which specifically authorizes local governments to modify their vacation and sick leave policies to minimize the economic impact of this emergency on their employees. Here are some options to discuss with your city attorney:

- 1) Accrued Leave. Allow them to use their accrued vacation and sick leave;
- 2) Non-Accrued Leave. If or once they have exhausted their vacation and sick leave, allow them to accrue negative balances of sick or vacation leave for the duration of the emergency;
- 3) Sick Leave Bank. If your municipality administers a sick leave bank for donating unused sick leave balances, grant them paid sick leave from the bank.
- 4) Paid Administrative Leave. Authorize these employees to work on paid administrative leave;
- 5) Telework Arrangement. If the employee is not unable to work due to illness, and their position fits for a telework arrangement, the municipality is encouraged to allow telework whenever possible and feasible with business operations.
- 6) Unpaid Leave. If none of these options are available to your municipality, then such an employee may have to be placed on unpaid leave. Note that once this occurs, other issues such as health insurance eligibility and other benefit interruptions may be triggered.

Resources

The U.S. Department of Labor is the first place to go for fact sheets, FAQs, and notice posters for you to use and print. <https://www.dol.gov/agencies/whd/pandemic>

The Montana Department of Labor has information regarding paid COVID-19 leave as well as expanded unemployment eligibility resulting from COVID-19. <http://dli.mt.gov/employer-covid-19>

The Montana League of Cities and Towns has posted numerous Employment Policies and Guidance documents from these and other sources related to the implementation of these laws, including examples of what other Montana municipalities are doing with respect to their employees. <https://mtleague.org/covid-19/>