



COUNTY ADVISORY BULLETIN

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COVID-19 FAMILY FIRST CORONAVIRUS RESPONSE ACT LEAVE PROVISIONS

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The following is a summary of the leave provisions set forth in the Family First Coronavirus Recovery Act (FFCRA). This memo sets forth the various leave components, however, the Department of Labor is required to issue regulations to implement the FFCRA. These regulations likely will not be issued until at least March 30, 2020. The DOL has issued some limited guidance on its website along with a poster that employers must put up in the workplace. The provisions of the FFCRA are effective beginning April 2, 2020.

Initially, it should be noted the FFCRA exempts health care workers and emergency responders. Therefore, these employees are not entitled to leave under the Act. While the FFCRA does not define these categories (the DOL regulations may provide a definition), it is likely all sworn employees, corrections officers and dispatchers with the Sheriff's Office are considered emergency responders. Emergency responders also include EMTs/paramedics and probably include probation officers. Counties may have the authority to designate other employees who are not traditional emergency responders such as children's services caseworkers. Also, direct care staff at County nursing homes likely are considered health care workers under the law.

Beginning April 1, 2020, the FFCRA provides all full-time and part-time employees (with the exception of health care workers and emergency responders) with two weeks of sick leave for reasons set forth in the law. Employees are entitled to full pay for the two weeks for the following purposes:

1. If the employee is quarantined due to federal, state or local requirements;
2. If the employee is experiencing symptoms of COVID-19; or

3. If the employee is seeking a medical diagnosis relating to COVID-19.

Both full-time and part-time employees are entitled to sick leave at two-thirds of their regular pay for the two weeks set forth in the Act for the following reasons:

1. To care for an individual subject to quarantine for COVID-19;
2. To care for a child under 18 years old due the unavailability of school or childcare for COVID-19 reasons; or
3. For similar conditions as determined by various federal agencies.

For part-time employees the amount of sick leave during the two-week period is equal to the number of hours they normally work in two weeks. Employees must be permitted to use this sick leave before being required to use accrued but unused leave they have earned with the County.

The FFCRA grants an additional ten weeks of FMLA leave for employees who are unable to work due to the unavailability of school or childcare because of COVID-19. (The Act refers to 12 weeks of FMLA leave which includes 2 weeks of the paid sick leave and another 10 weeks for this purpose.) The Act expands eligible employees for this FMLA to those who have worked for the County for at least 30 days instead of the normal one-year requirement. The FFCRA also requires these employees be paid at two-thirds their regular salary for this additional FMLA reason.

The pay for this sick leave is capped by the FFCRA at \$531 per day for the first 80 hours of sick leave if at full pay with a total cap of \$5,310 for the 10 days. The two-thirds pay cap is \$200 per day. The \$200 per day cap applies to the additional 10 weeks of FMLA leave with a total cap of \$10,000.

In my opinion, a County is permitted, but not required, to allow employees to supplement the two-thirds pay for certain leave under the FFCRA by using accrued but unused County leave. For purposes of child, Counties are not required to allow an employee to use sick leave as a supplement because staying home for childcare purposes normally does not qualify for sick leave under County policy, collective bargaining agreements or civil service law. Generally, the County can limit this supplemental leave to vacation, comp time, or personal leave. Of course, it is permissible for the County to allow employees to use sick leave for these purposes if it so chooses.

Teleworking may be an option for some employers during the COVID-19 pandemic. The decision to offer telework is completely up to the employer. An employee cannot insist upon telework under the FFCRA. The DOL has stated: "Under the FFCRA, an employee qualifies for expanded family and medical leave if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:" qualifies for one of the 6 reasons for leave. The emphasis is on the DOL web page. This provision is significant because it appears to allow an employer to require an employee to telework. An employee gets FFCRA leave only if in person or

telework is not feasible due to one of the listed reasons in the law. Specifically, if an employee must be quarantined but is otherwise healthy, telework can be required. Similarly, if an employee stays home due to the unavailability of school or childcare due to COVID-19 and telework is feasible, it can be required. In my opinion, if telework is reasonably available and offered and the employee refuses without a legitimate reason, that person may not be entitled to leave under the Act. These situations must be viewed on a case-by-case basis.

On March 24th, 2020, the Department of Labor (DOL) announced that it will observe a “temporary period of non-enforcement” after the Families First Coronavirus Response Act (FFRCA) goes into effect on April 1, 2020. This period will begin March 18th and continue through April 17th, 2020. The DOL will not bring enforcement actions against any public or private employer for violations of the Act occurring within this 30-day period provided the employer has made reasonable, good faith efforts to comply with the Act.

An employer acts “reasonably” and “in good faith” when the employer (i) remedies any violations, including making all affected employees whole as soon as practicable, (ii) does not violate the act willfully, and (iii) sends the DOL a written commitment of future compliance with the Act. If the employer does not act reasonably or in good faith, the Department has reserved the right to exercise its enforcement authority. After April 17th, 2020, the temporary stay on enforcement actions will be lifted and the DOL will enforce any violations of the Act.

The application of the FFCRA and related state laws continues to change. This memo only contains a brief summary of the law. As issues arise, Counties should consult with legal counsel.

The FFCRA expires on December 31, 2020.