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Montana's Municipalities*



## **MUNICIPAL EMPLOYEES, PAID COVID-19 LEAVE AND EXPANDED FMLA:**

### **Summary, Options, and Resources**

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 FFCRA contains two provisions placing new requirements on employers with under 500 employees, including 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 March 26, 2020, following the enactment of the FFCRA, the Governor issued a statewide stay-at-home directive, limiting all travel and work within Montana to Essential Businesses and Operations that goes into effect at 12:01 a.m. on March 28, 2020 ("Order").<sup>1</sup> This order identifies which businesses and activities in the state are considered essential and consequently allowed to continue working and operating under the Order. Importantly, the Order leaves it up to local governments to determine which other functions and employees it considers essential for purposes of complying with the order.

#### **II. Designating Essential Municipal Employees**

The first step in this process is to determine the essential and nonessential functions and employees. Generally speaking, you will likely consider most of your municipal employees essential. Although the Order generally requires all Montanans to stay at home to the greatest extent possible, there is an expansive list of activities that the Governor has recognized as essential. In addition, the Order specifies that the listed essential activities and businesses "shall be construed broadly to avoid any impacts to" these activities and businesses, many of which are conducted or supported by municipal governments:

- *Health Care and Public Health Operations:* persons who provide or need to obtain medical services, public health information, medicine, eye care, medical marijuana, mental health services, and veterinarian care;
- *Human Services Operations:* persons who provide or need to obtain long-term and residential care, determining eligibility for assistance for basic needs, businesses that provide food, shelter, and social services, and disability services;

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<sup>1</sup> See "Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions," available at <https://covid19.mt.gov/Portals/223/Documents/Stay%20at%20Home%20Directive.pdf?ver=2020-03-26-173332-177> (last visited March 30, 2020)

- *Essential Infrastructure*: persons who provide or work in food production and distribution; construction; building management and maintenance; airport operations; operation and maintenance of utilities, including water, sewer, gas, and electricity; transportation; cybersecurity; flood control; roads and highways; solid waste and recycling; and internet and telecommunications;
- *Governmental Functions*: first responders, EMS, courts<sup>2</sup>, law enforcement and corrections, hazmat responders, child protection and welfare, fire protection, and housing shelters. “Local governments are permitted to designate which functions and employees are essential and exempt for the purposes of this [Order], apart from those positions and functions named above.”

The following process may help you in making local decisions with your city attorney about which of your employees are considered essential for purposes of complying with the Order.

- 1) **Governmental Functions Listed in the Order.** The easiest category of municipal employees to designate as essential are the ones specifically identified in the Order as providing essential governmental functions. This includes law enforcement personnel, courts, fire department personnel, and emergency medical services personnel and municipal employees that provide critical support to these functions and employees. The municipality may expect these employees to continue to work during the COVID-19 emergency and in compliance with the Order.
- 2) **Essential Infrastructure Operations Listed in the Order.** The next easiest category of municipal employees to designate as essential are those specifically identified in the Order as providing, offering, operating, maintaining or repairing public infrastructure services and facilities. This includes janitorial staff for any public facilities that remain open and public works employees related to operating and maintaining water systems, sewer systems, roads and streets, and solid waste services. However, you may have administrative positions in these areas that are not critical to keeping public services operating on a day-to-day basis that could either work from home during this time or be deemed non-essential and put on some time of paid or unpaid leave, as applicable.
- 3) **Other Governmental Functions and Employees.** After these initial essential employees have been identified, the next step is to determine what constitutes essential functions for your municipality. Payroll, accounting, human resources, legal and court services, code enforcement, permitting and inspections, fleet maintenance, information technology, or other work necessary to support the essential government functions and infrastructure operations of your municipality or the private sector are potential functions and employees your municipality may wish to designate as essential.

After determining whether employees are essential or non-essential, the next determination to make is whether an employee is able to telework during the COVID-19 emergency. Telework has become the norm for thousands of workers over the past few weeks, and requires little more than access to the internet, a computer device of some type, and a phone. Most meetings are now being held electronically through video or phone conferencing. If the employee’s work is typically done in an office setting, it is likely they can continue to work from home with access to email and the municipality’s network. If an employee can telework, you should encourage or require them to do so. Even if an employee’s normal job duties cannot be completed in whole or in part while teleworking, consider allowing the employee to complete other duties or “back burner” projects such as record management, strategic planning, or training via telework.

### III. Public Health Emergency Leave

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<sup>2</sup> Note that the Montana Supreme Court has also issued orders identifying Montana’s courts and court system as essential functions that must remain open in some capacity during the COVID-19 crisis. These orders are available at <https://courts.mt.gov/> (last visited March 30, 2020.)

For all employees that continue to work – whether essential or non-essential and whether teleworking or not – the FFRCA creates six eligibility criteria for receiving paid 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) **Health Agency Quarantine Order.** Subject to a federal, state, or local health order to quarantine or isolate due to COVID-19. A general state or local directive to stay-at-home or shelter-in-place does not constitute a quarantine or isolation 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 whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19;
- 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 also 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 goes 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 expanded FMLA, which runs concurrently with the paid FFCRA.

The FFCRA applies to any employer with less than 500 employees. It provides a narrow exemption for small business employers with less than 50 employees, but such employers must document why providing the paid leave would jeopardize the viability of the business and receive approval from the Department of Labor. Review this potential exemption carefully with your city attorney before assuming it applies to your municipality.

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. 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 appropriate documentation in support of the reason for the leave and the date(s) for which leave is requested. The employer should then document the reason for the leave, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised them to quarantine, the school that closed, etc.

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.

#### **IV. Expanded Family and Medical Leave Under the FFCRA**

The FFCRA also expanded FMLA protection to employees that cannot work 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 FFCRA 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 FFCRA 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 FFCRA 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.

## V. Options for Non-Essential Employees Without Telework

You've identified your essential and non-essential employees, have them working from home if possible, and are ready to apply the provisions of the paid COVID-19 leave beginning April 1, 2020. What do you do with non-essential employees that can't work from home and don't meet any of the paid COVID-leave criteria?

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.<sup>3</sup> Here are some options to discuss with your city attorney:

- 1) **Accrued Leave.** Allow them to use their accrued vacation and sick leave;
- 2) **Unaccrued 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) **Unpaid Leave, Furlough, or Termination.** If none of these options are available to your municipality, then a non-essential employee may have to be placed on unpaid leave, terminated, or furloughed. Note that once this occurs, other issues such as health insurance eligibility and other benefit interruptions may be triggered. If an employee is placed into one of these statuses, they may be eligible for unemployment benefits under the emergency rules adopted by the State of Montana.

## 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/>

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<sup>3</sup> See "Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures for the operation of local government," available at <https://mtleague.org/wp-content/uploads/2020/03/Directive-on-Local-Government.pdf> (last visited March 30, 2020)