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COVID-19 & PUBLIC EMPLOYMENT LAW: ANSWERS TO FREQUENTLY ASKED QUESTIONS FOR GEORGIA MUNICIPAL EMPLOYERS

Public Employment Law/COVID-19 FAQs
Series Two: Paid Leave and the Families First Coronavirus Response Act
[UPDATED]

Our City intends to follow the CDC's guidances and recommended practices for minimizing the potential for exposing our employees to COVID-19, including requiring employees to stay home (and sending employees home) whenever they have symptoms consistent with the virus or have been exposed to the virus. Thus far, we have been requiring these employees to use their accrued leave, but we are starting to get lots of questions about whether there are other options?

Q1. The City is concerned about imposing financial hardship on these employees but doesn't have any policy in place that addresses this situation. Is requiring the employees to use their accrued leave the City's only option?

A: The newly-enacted Families First Coronavirus Response Act (FFCRA), discussed in substantial detail below) provides for a limited amount of paid leave for non-excluded employees under certain circumstances. Apart from that, local government employers all over Georgia are struggling with these precise issues. The biggest obstacle to be overcome is presented by the Gratuities Clause of Article III, Section VI, Paragraph VI of the Georgia Constitution, which prohibits public employers from providing "extra compensation" to their employees (i.e., compensation or benefits in excess of what was contemplated or committed to when the employees entered into performance).

Although a full examination of the options available to any given municipal employer for addressing the gratuity problem necessarily depends on its own unique facts and circumstances, your City should be able to glean some useful guidance from the questions and answers that follow.

Q2. Where paid leave is not available or is exhausted under the new federal law, can the City continue to pay these employees? At least the ones who are ready, willing, and able to work but aren't allowed to come in due to symptoms and/or significant risk exposure to COVID-19?

A: **[UPDATED.]** Possibly. First, an employee who performs any aspect of his/her job from home (or from any other remote location) must be compensated for that work. Therefore, regardless of whether the employee can only perform some of his/her job duties and regardless of whether productivity, efficiency, and even work quality are negatively affected, paying employees for work performed away from the workplace is not "extra compensation" and therefore does not run afoul of the Gratuities Clause. Non-exempt employees would be entitled to compensation for time actually worked, whereas exempt/salaried employees would be entitled to their full compensation for any week in which they

perform any work. Note that this approach may necessitate a temporary suspension of any policies and procedures the City may have which prohibit or impose restrictions or limitations on working from home. **[See Series 2, Q22, for discussion of telework under the Families First Coronavirus Response Act.]**

Second, while the availability of this option to a given employee will depend on the nature of his/her job duties, employees who are placed on "standby" or "on-call" status are entitled to be compensated for time spent in that status if certain conditions are met. This entitlement exists under the Fair Labor Standards Act (FLSA) which, as a federal law, supersedes the Gratuity Clause of the Georgia Constitution. For standby/on-call status to trigger an employee's entitlement to compensation, however, it must be sufficiently restrictive as to prevent the employee from using his/her time effectively for his/her own purposes. Typical restrictions that can qualify employees for standby/on-call pay include the requirements:

- That the employee remain in place or subject to some other substantial geographic limitation;
- That the employee check in at regular intervals or remain reachable via telephone, radio dispatch, text, email, etc.; and
- That the employee be able to report to work within a relatively short period of time.

Any municipal employer considering this option is encouraged to do so pursuant to a temporary, emergency standby/on-call pay policy to facilitate the transition back to its previous policies or practices.

Q3. Most employees of our City are not at-will employees; rather, they have property interests in their employment. Therefore, in the past, whenever it was necessary to send an employee home – such as during a workplace investigation or pending a decision on proposed disciplinary action – we always placed him/her on paid administrative leave to avoid a possible due process problem. Why wouldn't that situation apply here?

A: It would apply here – at least for a time. In this context, property interests entitled to due process protection not only attach to continued employment, but also to certain other aspects of employment, such as compensation. Therefore, a temporary, non-de minimis cessation of an employee's compensation can constitute a deprivation of a property interest in much the same way as a termination of employment. Such deprivations should not be effectuated unless or until the employee receives at least some form of pre-deprivation due process.

When the employee is sent home because of symptoms of/exposure to COVID-19, requiring that he/she utilize accrued sick leave would be justifiable and sufficient to avoid a due process problem. But where accrued sick leave is unavailable or exhausted, placing the employee on unpaid leave – without affording him/her any sort of pre-deprivation hearing – would likely constitute a due process violation at some point. Therefore, in this narrow set of circumstances – where an employee with a property interest is sent home due to COVID-19 concerns, cannot work from home, and either lacks or exhausts available accrued sick leave – it would be appropriate for such leave to be with pay until such time as the City can provide the employee with a pre-deprivation hearing. The amount of time that an employee can be left

in leave-with-pay status would vary depending on the circumstances, but municipal employers are cautioned against purposefully delaying the pre-deprivation hearing simply as a means to continue paying the employee in contravention of the Gratuities Clause.

Q4. If working from home, being placed in standby/on-call status, or being placed on paid leave pending a pre-deprivation hearing are not viable options for one of these employees, would he/she be entitled to unemployment benefits?

A: **[UPDATED.]** As discussed in greater detail in Public Employment Law FAQs Series 3, the Georgia Department of Labor (GDOL) accepts claims for partial unemployment insurance (UI) benefits when an employer, due to a lack of available work, either temporarily reduces the work hours of employees or lays off/furloughs employees. Under an Emergency Rule adopted by the GDOL, however, claims for partial UI benefits are now being accepted for employees who have been directed by their employers not to return to work due to having been exposed to or having exhibited symptoms of COVID-19 (provided those employees are not using accrued leave to replace one hundred percent of their compensation during the absence). Under these circumstances, the employer must initiate the claim-filing process on behalf of the employee. **[See Series 3, Q1-Q12, for explanation of partial UI claims.]** The GDOL has prepared a video tutorial for employers filing such claims.

Q5. What about employees who have accrued leave available to them? Can the City still file for partial UI benefits on their behalf, at least if they're not using the accrued leave?

A: **[UPDATED.]** As discussed in greater detail in Public Employment Law FAQs Series 3, we are unaware of any requirement that employees who are experiencing reduced hours or who have been temporarily laid off/furloughed exhaust their accrued leave as a prerequisite to qualifying for UI partial benefits. When the employer files for partial UI benefits on behalf of an employee, only his/her gross earnings during the week in question are reported. Accrued leave benefits received by the employee during that week would be reported as gross earnings. On the other hand, if no such benefits are paid out, then they would not be reported – apparently without regard to whether they were otherwise available to the employee.

This is not to say that the GDOL would not inquire into the availability of accrued leave in its processing of the employee's claim or take such information into consideration in making its determination. But employers are being encouraged by the GDOL – at least informally – to err on the side of filing claims for employees so long as there is a shared expectation between employer and employee that the latter will return to work and/or full-time status once the public health emergency has abated. Accordingly, until further notice, the City should file claims for partial UI benefits on behalf of those employees experiencing reduced hours or temporarily laid off/furloughed for reasons relating to COVID-19 – even if they have available to them, but are not using, accrued leave benefits. **[See Series 3, Q5, for explanation of partial UI claims where accrued leave is available.]**

Q6. What about the new federal law? Doesn't it require paid leave for employee absences related to COVID-19?

A: **[UPDATED.]** Yes, although this new law – known as the Families First Coronavirus Response Act (FFCRA) – imposes several significant restrictions on when paid leave is available. Many of these restrictions were not included in an initial version of the proposed legislation which received a great deal of attention. Consequently, there remains some confusion among employers as to what the final version of the legislation actually requires.

The FFCRA contains two provisions requiring paid leave for employees absent from work for reasons relating to COVID-19. One is a form of "Emergency Paid Sick Leave" and the other constitutes a limited expanded, paid form of FMLA leave ("Expanded Paid FMLA Leave"). These two types of paid leave will be addressed in turn.

Note, however, that if an employee is laid off/furloughed by the employer due to a lack of available work – whether before or after the effective date of the FFCRA – the employee is not entitled to Emergency Paid Sick Leave or Expanded Paid FMLA Leave. In fact, if an employee is laid off/furloughed while on Emergency Paid Sick Leave or Expanded Paid FMLA Leave, his/her entitlement to paid leave ends (although the employer must pay for any leave used by the employee up to the effective date of the layoff/furlough). Because of the potential for a retaliation and/or interference claim, you are strongly encouraged to contact your City Attorney, outside labor and employment counsel or, if your City is a GIRMA member, the GIRMA Helpline, before deciding to layoff/furlough an employee while on paid leave under the FFCRA.

Q7. Does the new federal law require the City to continue health insurance coverage for an employee during the time he/she is on Emergency Paid Sick Leave?

A: Yes.

Q8. Does the new federal law require the City to continue health insurance coverage for an employee during the time he/she is on Expanded Paid FMLA Leave?

A: If the City provides group health coverage that the employee has elected, the City is required to continue coverage during his/her Expanded Paid FMLA Leave on the same terms as if he/she continued to work, meaning the employee generally must continue to make any normal premium contributions.

Q9. Does the new law impose any sort of notice requirements on employers?"

A: **[UPDATED.]** Yes. Effective April 1, 2020, employers must post and keep posted, in conspicuous places where notices to employees are customarily posted (i.e., where the "EEO is the Law" Notice is posted), a notice prepared or approved by the Secretary of Labor, setting forth the requirements described in this Act. A model notice is currently available on the Department of Labor's website.

Notwithstanding the foregoing, in apparent recognition of the increased likelihood that many employees will be teleworking or otherwise working remotely, the U.S. Department of Labor (DOL) – the agency charged with responsibility for enforcing the FFCRA's paid leave provisions – has stated that employers may satisfy the law's notice requirement by emailing or direct mailing the notice to employees or by posting it on an internal or external website accessed by employees for work-related information.

The FFCRA does not explicitly require that the employer post this notice in multiple languages, but the DOL has created a Spanish version and reports that it plans to make additional versions of the model notice available in other languages soon.

Q10. Our City laid off/furloughed several employees in March 2020. Does the new law require that they be provided notice?

A: **[UPDATED.]** No. According to the DOL, the FFCRA notice requirement applies only to employees of the City as of the effective date of the Act; i.e., April 1, 2020. This is the case even as to laid off/furloughed employees that the City plans to recall once the public health emergency abates (in fact, employees laid off/furloughed prior to the FFCRA's April 1, 2020 effective date are also ineligible for Emergency Paid Sick Leave and Expanded Paid FMLA Leave).

The DOL has also pointed out that employers need not provide the FFCRA notice to applicants for employment, but would have to provide it to new hires (at least those commencing employment prior to the FFCRA's "sunset" date of December 31, 2020).

Q11. What sort of notice must an employee provide of his/her need for Emergency Paid Sick Leave or Expanded Paid FMLA Leave under the new law?

A: Where the need for the Expanded Paid FMLA Leave is foreseeable, the FFCRA requires the employee to provide such notice to the employer as is practicable under the circumstances. As for Emergency Paid Sick Leave, the FFCRA states that after the first workday (or portion thereof) that an employee receives such sick leave, the employer may require the employee to follow its "reasonable notice procedures" in order to continue receiving the benefit.

Q12. When does the new law go into effect?

A: **[UPDATED.]** According to the DOL, the FFCRA goes into effect on April 1, 2020.

The DOL's determination regarding the FFCRA's effective date is not without some controversy, given that the law was enacted on March 18, 2020 with an effective date expressed as being "not later than 15 days after [the date of enactment]." Based on well-established rules for calculating deadlines under federal law, this is April 2, 2020; in fact, in calculating its own deadline for producing a model notice for use by employers – which the FFCRA made due "not later than 7 days after the date of enactment" – the DOL correctly applied the aforementioned rules to arrive at a March 25, 2020 deadline for completion

of this task. Because the DOL is the agency tasked with FFCRA enforcement, however, the City is well advised to accept April 1, 2020 as its effective date.

Finally, irrespective of this confusion over the FFCRA's effective date, the statutory language is explicit that the FFCRA, and its requirements, "shall expire on December 31, 2020."

Q13. Within a few days of the new law being enacted on March 18, 2020, our City had employees going out on leave for various reasons covered by the law (such as to seek medical treatment for symptoms associated with COVID-19 and to self-quarantine upon medical advice). We understood that the new law established a deadline for compliance but didn't preclude employers from complying earlier. Were we wrong?

A: **[UPDATED.]** While the answer to this question is not entirely clear from the text of the FFCRA, the DOL has stated that the FFCRA imposes new leave requirements on employers effective April 1, 2020, such that any prior leave provided to an employee, even if for a reason covered by the FFCRA, does not qualify as FFCRA leave.

Like its determination of the April 1, 2020 effective date, the DOL's position regarding early compliance is difficult to justify, if not understand. As previously noted, the statute, on its face, establishes a compliance deadline rather than a traditional effective date, and there is nothing in the text of the FFCRA which expressly or implicitly precludes post-enactment, pre-deadline compliance. Consistent with this interpretation, on March 20, 2020 – just two days after the FFCRA was enacted – the Internal Revenue Service (IRS), ostensibly in conjunction with the Secretary of Labor, issued a press release stating that employers eligible to claim tax credits for leave provided under the FFCRA (which does not include cities or other local government employers) "can begin taking advantage of [the tax credits]." As such, many employers – particularly those anxious to provide assistance for employees already in need of the FFCRA's leave benefits – opted to begin complying with the Act prior to the compliance deadline.

While the DOL states that the FFCRA's paid leave provisions are not retroactive, this seems designed to prevent an employer from reducing the total amount of paid leave to which an employee is entitled by claiming credit for non-FFCRA he/she took prior to April 1, 2020. By contrast, those employers who opted to provide paid leave benefits under the FFCRA on a pre-deadline basis, in addition to acting in their employees' best interests, would have expressly designated such leave as FFCRA leave. Finally, it bears noting that none of the public policy considerations underlying the FFCRA are served by disallowing employers the option of pre-deadline compliance.

Notwithstanding the foregoing, it remains that an employer's right to begin pre-deadline compliance is, at best, unclear, which your City will want to take into consideration in deciding how it wishes to proceed. In the event a dispute arises over whether an employee's pre-April 1, 2020 leave should be counted against his/her total allotment under the FFCRA, we recommend that you contact your City Attorney, outside labor and employment counsel or, if your City is a GIRMA member, the GIRMA Helpline, before making any final decisions regarding the matter.

Q14. What sort of paid Emergency Paid Sick Leave are employees entitled to under the FFCRA?

A: The FFCRA makes up to eighty (80) hours of paid Emergency Paid Sick Leave available to employees when taken for one of more of the below-stated reasons. The rate and maximum amount of pay varies, however, depending on the reason for the leave. In this regard, an employee is entitled to leave at his/her full regular rate of pay, up to a maximum of $511 per day ($5,110 total), when he/she (a) is unable to work (or unable to telework) and (b) requires leave for a reason relating to:

- Complying with a federal, state or local government-issued quarantine or isolation order related to COVID-19;
- Complying with advice received from a healthcare provider to self-quarantine for reasons related to COVID-19; or
- Experiencing COVID-19 symptoms for which he/she is seeking a medical diagnosis.

An employee is entitled to leave at two-thirds his/her regular rate of pay, up to a maximum of $200 per day ($2,000 total), when he/she (a) is unable to work (or unable to telework) and (b) requires leave for a reason relating to:

- Caring for an individual – a family member or otherwise – complying with a federal, state or local government-issued quarantine or isolation order related to COVID-19;
- Caring for an individual – a family member or otherwise – complying with advice received from a healthcare provider to self-quarantine for reasons related to COVID-19;
- Caring for his/her own child if the child's school/place of care is closed or if the child's care provider is unavailable for reasons related to COVID-19; or
- Any other substantially similar condition specified by the Secretary of Health and Human Services (HHS) in consultation with the Secretary of the Treasury and the Secretary of Labor. (Note: To qualify for Emergency Paid Sick Leave under this last criterion, the employee would be required to demonstrate that he/she is suffering from a condition that HHS has identified as "substantially similar to COVID-19; to date, no such conditions have been identified.)

In the case of an employee who works a part-time or irregular schedule, the City must calculate his/her paid Emergency Paid Sick Leave based on the average number of hours he/she worked over the six month-period preceding the need for sick leave. If an employee requiring such leave has worked less than six months, paid leave should be calculated based on the average number of hours the employee would normally be scheduled to work over a two-week period.

Q15. Are part-time employees also entitled to eighty (80) hours of paid Emergency Paid Sick Leave under the new law?

A: No. The amount of paid Emergency Paid Sick Leave to which a part-time employee is entitled is based on the number of hours he/she works, on average, over a two (2) week period.

Q16. For those categories of Emergency Paid Sick Leave which provide for only two-thirds pay, can we allow employees to use paid leave accrued under City policy to supplement those payments to bring them to 100 percent of their regular pay?

A: **[UPDATED.]** Yes. The employee cannot be required to utilize his/her accrued leave in this way, nor can he/she require the employer to allow him to do so. But nothing in the FFCRA prohibits the City and the employee from agreeing to it (so long as the amount received by the employee does not exceed his/her normal earnings).

Q17. When calculating the amount of paid Emergency Paid Sick Leave an employee is entitled to receive, must overtime hours be included?

A: Yes, but the effect is negligible. Under the Emergency Paid Sick Leave provisions of the FFCRA, paid leave generally is calculated based on the employee's regular rate of pay – as defined by the Fair Labor Standards Act – which does not take into account premium rates for overtime. This regular rate of pay is then multiplied by the number of hours the employee would normally be scheduled to work during the relevant work period or, if the work schedule varies too greatly to allow such a determination to be made, by the average number of hours that the employee was scheduled to work over the six-month period preceding the leave.

In either case, this latter component of the calculation may include overtime hours. As previously noted, however, the total amount of Emergency Paid Sick Leave an employee can receive under the FFCRA is capped at eighty (80) hours over a two-week period. As such, an employee who is scheduled to work fifty (50) hours a week may take fifty (50) hours of paid Emergency Paid Sick Leave in the first week but would only be entitled to thirty (30) hours of paid leave in the second week due to the eighty (80) hour cap. Please note that pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

Q18. The Emergency Paid Sick Leave provisions of the new law don't seem to apply to situations where an employee has been diagnosed COVID-19. Am I missing something?

A: No, you're technically correct. But in being diagnosed, it is (hopefully) likely that such an employee would also have received advice from a healthcare provider to self-quarantine. It should also be noted that if your employee is otherwise eligible for traditional FMLA leave (i.e., if he/she has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius), COVID-19 almost certainly qualifies as a serious health condition that would entitle the employee to leave.

Q19. You indicated above that an employee can take Emergency Paid Sick Leave to care for an individual who is complying with either a government-issued quarantine or isolation order or with advice received from a healthcare provider to self-quarantine. Wouldn't that individual have to be a family member?

A: Unclear. The provision of the FFCRA referenced above simply uses the term "individual" with no express or implicit familial connection to the employee. However, in describing the "required compensation" for Emergency Paid Sick Leave taken under these circumstances, the FFCRA refers to it as being taken "for care of family members." While the narrower interpretation would seem to be more consistent with the stated purpose of the Act, prudent employers will err on the side of caution and allow leave to care for non-family members until such time as the DOL clarifies the situation.

Q20. What sort of Expanded Paid FMLA Leave is the City required to provide its employees under the new law?

A: The FFCRA first expands coverage and eligibility under the Family and Medical Leave Act (FMLA) on a temporary basis by:

- Creating a new category of leave applicable to employees who:
  - Are unable to work (or unable to telework); and
  - Require leave to care for their minor children whose schools or places of care are closed or whose childcare providers are unavailable due to the pandemic;
- Requiring that this new category of leave be partially paid; and
- Making this new category of leave available to all public employees.

Note that the pandemic-related closure of the child's school/place of care or the unavailability of the childcare provider is the only qualifying need for leave recognized under the FFCRA's Expanded Paid FMLA Leave provisions (and the only reason allowed for paid leave under those provisions). This is a substantial difference between the version of the FFCRA that was actually enacted into law and prior versions of the Act.

Note also that the FFCRA's Expanded Paid FMLA Leave provisions define "childcare provider" as an individual who provides childcare services on a regular basis and receives compensation for those services. As such, where childcare services were being provided free of charge by a family member, friend or neighbor who is no longer available, the new category of FMLA leave is not applicable. Importantly, this restrictive definition does not apply to the similar qualifying need for Emergency Paid Sick Leave. Thus, an employee qualifies for Emergency Paid Sick Leave due to the pandemic-related unavailability of the childcare provider regardless of whether the provider regularly provides such services for compensation.

Q21. Both the Emergency Paid Sick Leave and the Expanded Paid FMLA Leave provisions apply when the employee needs to care for a minor child whose school or place of care is closed, or whose childcare provider is unavailable, due to the pandemic. Would a grandparent be eligible for paid leave under these provisions?

A: **[UPDATED.]** Possibly. The FFCRA actually refers to a "son or daughter," which is intended to mean the employee's own child, broadly defined as including a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee is standing in loco parentis; i.e., someone with day-to-day responsibilities to care for or financially support a child. According to the DOL, a "son or daughter" is also an adult child (i.e., one who is 18 years of age or older) who (a) has a mental or physical disability and (b) is incapable of self-care because of that disability.

Q22. The eligibility requirements for Emergency Paid Sick Leave and Expanded Paid FMLA Leave both appear to require that the employee be "unable to work (or unable to telework)" due to the reason for the leave. What does "unable to telework" mean?

A: **[UPDATED.]** As an initial matter, an employee is "unable to telework" if City policy prohibits employees from performing work from their homes or other remote locations other than the normal workplace. While nothing in the FFCRA precludes employers from having such policies, it bears noting that the CDC and other public health agencies encourage employers to implement flexible worksites – which expressly includes telework – as a means to promote social distancing during the public health emergency.

Second, the term is more safely construed in its full context as "unable to work (or unable to telework)." According to the DOL, this means that the employer has work for the employee but one of the qualifying reasons prevents the employee from being able to perform that work either (a) under normal circumstances at his/her normal worksite or (b) by means of telework. It follows, therefore, that even if the employee is unable to perform his/her work under normal circumstances and at his/her normal worksite, to the extent he/she remains able to telework notwithstanding the existence of a qualifying reason for leave, neither Emergency Paid Sick Leave nor Expanded Paid FMLA Leave need be provided.

It should also be noted that the DOL has taken the position that an employee is able to work or telework – and therefore not eligible for Emergency Paid Sick Leave or Expanded Paid FMLA Leave – if the employee and the employer agree that, due to the qualifying reason for leave, the employee will work his/her normal number of hours outside his/her normal schedule (whether from the normal work place or from home or some other remote location). This suggests that the City cannot unilaterally impose such alternative working arrangements on the employee and deny leave. At the very least, when the employee contends that he/she is unable to agree to such an arrangement due to the qualifying reason, you are encouraged to contact your City Attorney, outside labor and employment counsel or, if your City is a GIRMA member, the GIRMA Helpline, before denying a request for paid leave. **[See Series 2, Q2, for discussion of telework as a means to avoid Gratuity Clause problems.]**

Q23. Our City's workforce is large enough that we were already required to provide twelve (12) weeks of unpaid leave to eligible employees under the FMLA. Does the new law require that all of this leave be paid leave now?

A: No. The only type of FMLA leave that must be paid leave is the Expanded Paid FMLA Leave newly authorized by the FFCRA (when such leave exceeds ten days). As noted above, this includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, for reasons related to the COVID-19 pandemic.

Q24. Our City's workforce has never been large enough for any employees to be entitled to FMLA leave. Does the new law change all that?

A: No. Only the new category of leave (i.e., leave needed to care for a minor child whose school or place of care is closed or whose childcare provider is unavailable due to the pandemic) is applicable to cities and other public employers regardless of the size of their workforce.

As for the FMLA's pre-existing categories of leave (e.g., leave needed due to the employee's or a covered family member's serious health condition, leave needed due to birth or placement of a child, etc.), the FFCRA does not alter the standard eligibility requirements (i.e., that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius). As such, if an employee was not eligible for any of the pre-existing categories of FMLA leave prior to FFCRA's enactment, he/she is not eligible for such leave now. Only the new category of leave (i.e., leave needed to care for a minor child whose school or place of care is closed or whose childcare provider is unavailable due to the pandemic) would be applicable to an employer whose employees are not otherwise eligible for leave under the pre-FFCRA version of FMLA.

Q25. To what extent is this Expanded Paid FMLA Leave required to be paid leave?

A: The Expanded Paid FMLA Leave provisions of the FFCRA apply only to the above-described new category of FMLA leave. Pursuant to these provisions, the first ten (10) days of leave are provided on an unpaid basis, with subsequent leave to be paid at two-thirds of the employee's regular rate of pay. The FFCRA imposes a cap of $200/day and $10,000 in aggregate. The employee may elect but – in a departure from standard FMLA rules – cannot be required to substitute any accrued vacation leave or sick leave for the ten-day period of unpaid leave (including the Emergency Paid Sick Leave provided by the FFCRA, discussed above).

For an employee who works a part-time or irregular schedule, the City must calculate his/her paid leave based on the average number of hours he/she worked over the six month-period preceding the need for FMLA leave. If an employee requiring such leave has worked less than six months, paid leave should be calculated based on his/her reasonable expectation at hiring of the average number of hours he/she would be scheduled to work.

Q26. Can we allow employees to use paid leave accrued under City policy during the unpaid ten (10) day leave period and/or to supplement the subsequent two-thirds payments to bring the employees to 100 percent of their regular pay?

A: Yes. The employee cannot be required to utilize his/her accrued leave in this way but nothing in the FFCRA prohibits the City from allowing it

Q27. Under the traditional FMLA, an employer is entitled to medical certification confirming the need for requested leave. But what about this Expanded Paid FMLA Leave? Is our City similarly entitled to obtain proof of the employee's need for the leave? For example, can the City require the employee to certify that he/she has a minor child, that the child's school or other place of care (or the person who provides childcare) is unavailable due to the pandemic, that the employee's spouse isn't also taking Expanded Paid FMLA Leave from his/her employer, or that the employee can't telework?

A: **[UPDATED.]** According to the DOL, if an employee takes Expanded Paid FMLA Leave to care for his/her child whose school or place of care is closed, or whose childcare provider is unavailable, due to COVID-19, the employer may require the employee to provide documentation in support of such leave – to the extent consistent with the certification rules for traditional FMLA leave. Examples of permissible documentation would include a closure notice published in a newspaper or posted on a government, school, or daycare website, or a confirmatory email from a school/daycare employee or childcare provider. Additionally and/or alternatively, requiring the employee to sign a certification providing substantially as follows should also be permissible:

In support of my request for Expanded Paid FMLA Leave pursuant to the Families First Coronavirus Response Act, I hereby certify that I am unable to work or telework due to a need for leave to care for my son or daughter who is under 18 years of age and who:

(___) attends a school or daycare that has been closed due to the COVID-19 public health emergency; or

(___) is cared for by a childcare provider who regularly provides such services for compensation but is unavailable due to the COVID-19 public health emergency.

Q28. Does the new law allow for intermittent leave? Our City has an employee who qualifies for the expanded FMLA leave, but he/she plans to split the childcare time with his spouse so they both can work half-days.

A: **[UPDATED.]** Under the circumstances described, the City may – but is not required to – allow the employee to use his/her Emergency Paid Sick Leave or Expanded Paid FMLA Leave intermittently. Specifically, where the qualifying need for paid leave under the FFCRA is to care for the employee's child if the child's school/place of care is closed or if the child's care provider is unavailable for reasons related to COVID-19, then the employee and employer can agree that the leave will be taken intermittently.

Conversely, unless the employee is teleworking as provided below, Emergency Paid Sick Leave for other qualifying reasons related to COVID-19 must be taken in full-day increments. Specifically, such leave cannot be taken intermittently if the qualifying reason is for:

- Complying with a federal, state or local government-issued quarantine or isolation order related to COVID-19;
- Complying with advice received from a healthcare provider to self-quarantine for reasons related to COVID-19;
- Experiencing COVID-19 symptoms for which he/she is seeking a medical diagnosis;
- Caring for an individual – a family member or otherwise – complying with a federal, state or local government-issued quarantine or isolation order related to COVID-19; or
- Caring for an individual – a family member or otherwise – complying with advice received from a healthcare provider to self-quarantine for reasons related to COVID-19.

Once a non-teleworking employee begins taking paid sick leave for one or more of these qualifying reasons, he/she must continue to do so each day until either (a) paid leave is exhausted or (b) the qualifying reason abates. The FFCRA imposes this restriction because if an employee is infected or potentially infected with COVID-19, or caring for an individual who is infected or potentially infected, a key purpose for the paid sick leave is to prevent the employee from spreading the virus to others.

These health and safety concerns do not apply, however, when a teleworking employee seeks to use his/her paid leave on an intermittent basis. In fact, as part of its commitment of encouraging employers and employees to collaborate to achieve flexibility and meet mutual needs, the DOL has expressed its support for voluntary arrangements combining telework and intermittent leave. To this end, an employee may take paid leave under the FFCRA intermittently while teleworking (a) if the employer allows it and (b) if the employee is unable to telework the normal hours due to one of the qualifying reasons. In that situation, the DOL states that the employer and employer may agree that the employee will take paid FFCRA leave intermittently while teleworking, and that the leave may be taken in any agreed-upon increment.

Q29. Doesn't the new law say that its Expanded Paid FMLA Leave provisions don't apply to employers with over 500 employees? Our City has more than 500 employees – does that mean we're excluded from the Expanded Paid FMLA Leave provisions?

A: No. All local government employers are covered by the FFCRA. The 500-employee cap applies only to private sector employers.

Q30. Our City's workforce is large enough that our eligible employees have traditional FMLA rights in addition to those granted them by the new law. Does the new law entitle them to twelve (12) weeks of this new category of leave in addition to the twelve (12) weeks they are already entitled to under the FMLA?

A: No. For such employees, the Expanded Paid FMLA Leave provisions of the FFCRA simply adds a new category of leave. It does not expand the amount of leave to which they are entitled. Therefore, if such an employee has already exhausted his/her FMLA allotment for the year, he/she is not entitled to the Expanded Paid FMLA Leave. This, however, would have no effect on his/her entitlement to Emergency Paid Sick Leave.

Q31. If an employee goes out on this new category of FMLA leave, do the same job restoration requirements apply? Does it matter whether our City's workforce is large enough for our employees to have leave and restoration rights under the traditional provisions of the FMLA?

A: **[UPDATED.]** As a general rule, the DOL interprets the FFCRA as requiring employers to provide the same or a nearly equivalent job to an employee returning to work following either type of paid leave. As previously noted, however, the FFCRA does not protect an employee from employment actions – such as a layoff/furlough, position elimination, hours reduction, etc. – that would have occurred and affected the employee regardless of whether he/she took the leave.

Furthermore, with respect to the Expanded Paid FMLA Leave, cities with fewer than twenty-five (25) employees are excluded from the job restoration requirement if the employee's position is eliminated due to reasons relating to the public health crisis. Before this exclusion will apply, however, the City must make reasonable efforts to restore the employee to a position equivalent to the position he/she held when the leave commenced, with equivalent pay, benefits, and other terms and conditions of employment. Moreover, if those efforts fail, there is a one-year period during which the City must attempt to contact the employee if an equivalent position becomes available. This one-year period is measured from the earlier of the date on which the need for leave concluded or twelve (12) weeks after the date on which the employee's leave commenced.

Because of the potential for a retaliation and/or interference claim, you are strongly encouraged to contact your City Attorney, outside labor and employment counsel or, if your City is a GIRMA member, the GIRMA Helpline, before deciding not to restore an employee returning from Emergency Paid Sick Leave or Expanded Paid FMLA Leave to the same or a nearly equivalent job.

Q32. Does the new law apply to all employees?

A: **[UPDATED.]** Any full-time or part-time employee with a qualifying need is entitled to utilize the Emergency Paid Sick Leave provisions of the FFCRA, while the Act's Expanded Paid FMLA Leave provisions are only applicable to such employees after thirty (30) days of employment.

It should also be noted, however, that municipal employers may exempt "emergency responders" – and, if applicable, "healthcare providers" – from coverage. The FFCRA does not define the term, "emergency responders;" according to the DOL, however, "an 'emergency responder' is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, [and] public works personnel."

Furthermore, the DOL has determined that the term, "emergency responder" includes other employees "with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency," as well as employees "who work for such facilities employing [emergency responders] and whose work is necessary to maintain the operation of the facility. Finally, the term includes any employee "the [Governor] determines is an emergency responder necessary for [the] State's … response to COVID-19."

While employers are granted a great deal of discretion in determining which employees qualify as emergency responders under these standards, that is not to say that the exercise of such discretion will not be subject to scrutiny. In fact, the DOL encourages employers "to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA." As such, in extending emergency responder status to any employee whose position is not included in the above-quoted list, the City is strongly advised to create a written record setting forth the relevant factual circumstances (i.e., why the employee's "work is necessary to maintain the operation of [a] facility [employing other emergency responders]," why he/she possesses "skills or training in operating specialized equipment," or why he/she possesses "other skills needed to provide aid [in connection with the] declared emergency").

Q33. Regarding emergency responders, is there a deadline by which our City has to decide whether to exercise the option to exempt them from the FFCRA's Emergency Paid Sick Leave and Expanded Paid FMLA Leave provisions?

A: **[UPDATED.]** No. There is nothing in the text of the FFCRA that would preclude the City from taking a "wait and see" approach on the emergency responder exemption, although it would be advisable to manage the expectations of these employees by letting them know that City reserves the right to invoke the exemption and that it will make that decision based on the circumstances existing at the time a request for Emergency Paid Sick Leave and/or Expanded Paid FMLA Leave is received from such an employee.

Furthermore, there is also nothing in the text of the FFCRA that would preclude the City from implementing the exemption even after some emergency responders have been permitted to take Emergency Paid Sick Leave and/or Expanded Paid FMLA Leave. For that matter, there is nothing in the

FFCRA that would preclude the City from implementing the exemption and revoking Emergency Paid Sick Leave and/or Expanded Paid FMLA Leave that was previously approved for emergency responders. Again, it is advisable that these employees be notified in advance of the potential for such eventualities in order to better manage their expectations. Additionally, while not a requirement imposed by the FFCRA, it would be prudent for the City to identify – in advance and in writing – the changed circumstances that warrant implementing the exemption and revoking leave previously approved for emergency responders.

Elarbee Thompson's Public Sector Group has developed three variations of Notices for use by GMA and its members for this purpose.

Q34. How is the thirty (30) day eligibility period calculated for purposes of the Expanded Paid FMLA Leave?

A: An employer is considered to have employed a particular employee for the requisite period of time once it has had him/her on its payroll for the thirty (30) calendar days immediately prior to the day his/her leave would begin.

Q35. Our City recently hired several persons who had been working for us for several months through a temp agency that suspended operations due to the pandemic. How would their eligibility period be determined for Expanded Paid FMLA Leave purposes?

A: **[UPDATED.]** The days any such employee previously worked for the City as a temporary employee must be counted toward his/her thirty (30) day eligibility period. Thus, because the employees referenced in your question worked as temporary employees for the City "for several months" prior being hired, they all satisfy this eligibility requirement.

Q36. Our City's workforce is large enough that our eligible employees had FMLA rights prior to enactment of the new law. What do we do when an employee requests leave that is covered by both the traditional FMLA and the new law's Emergency Paid Sick Leave provisions?

A: The two most likely scenarios where such dual coverage would occur are when the employee (a) is diagnosed with COVID-19 – very likely a serious health condition – and is the subject of a qualifying quarantine or isolation recommendation or order or (b) is caring for a covered family member diagnosed with COVID-19 who is the subject of such a quarantine or isolation recommendation or order.

While the FFCRA imposes substantial restrictions on the employer's ability to regulate how its employees utilize their leave entitlements, nothing in the Act purports to prohibit an employer from running traditional FMLA leave concurrently with Emergency Paid Sick Leave. It would appear, therefore, that under the scenarios described above, the City may treat the employee's time on paid Emergency Paid Sick Leave as running concurrently with his/her time on FMLA leave (provided the City's FMLA policy authorizes or requires the concurrent use of available paid leave and FMLA leave).

Q37. What happens if an employee qualifies for both Emergency Paid Sick Leave and Expanded Paid FMLA Leave due to the need to care for a minor child whose school or place of care is closed because of the pandemic? Do the two forms of leave run concurrently?

A: According to the DOL, while such an employee would be eligible for both types of leave, in the end they would combine for a total of no more than twelve (12) weeks of paid leave. In this regard, the Emergency Paid Sick Leave entitlement is for an initial eighty (80) hours of paid leave, which in most instances would cover the first ten (10) unpaid days of Expanded Paid FMLA Leave (unless the employee chooses to cover the unpaid leave period with paid leave accrued under the City's policy). Thus, after the first ten (10) workdays/two (2) workweeks elapse, the employee will have exhausted his/her paid Emergency Paid Sick Leave and will transition to the paid portion of his/her Expanded Paid FMLA Leave and begin receiving two-thirds of his/her regular rate of pay for the hours he/she would have been scheduled to work in the remaining ten (10) weeks, after which the employee will have exhausted his/her leave under both the Emergency Paid Sick Leave and the Expanded Paid FMLA Leave provisions of the FFCRA.

Q38. Can employees be required to exhaust their accrued leave before taking paid leave under the new law?

A: No. As previously noted, however, employees have the option of using their accrued leave to cover the ten (10) day unpaid portion of Expanded Paid FMLA Leave under the FFCRA (or they can use their paid leave under the Emergency Paid Sick Leave provisions of the new law for this purpose). Employees may also choose to supplement the two-thirds pay with any accrued leave otherwise available to them to achieve 100 percent of their regular rate of pay.

Q39. What happens if an employee qualifies for both Emergency Paid Sick Leave and Expanded Paid FMLA Leave due to the need to care for a minor child whose school or place of care is closed because of the pandemic? Do the two forms of leave run concurrently?

A: According to the DOL, while such an employee would be eligible for both types of leave, in the end they would combine for a total of no more than twelve (12) weeks of paid leave. In this regard, the Emergency Paid Sick Leave entitlement is for an initial eighty (80) hours of paid leave, which in most instances would cover the first ten (10) unpaid days of Expanded Paid FMLA Leave (unless the employee chooses to cover the unpaid leave period with paid leave accrued under the City's policy). Thus, after the first ten (10) workdays/two (2) workweeks elapse, the employee will have exhausted his/her paid Emergency Paid Sick Leave and will transition to the paid portion of his/her Expanded Paid FMLA Leave and begin receiving two-thirds of his/her regular rate of pay for the hours he/she would have been scheduled to work in the remaining ten (10) weeks, after which the employee will have exhausted his/her leave under both the Emergency Paid Sick Leave and the Expanded Paid FMLA Leave provisions of the FFCRA.

Q40. What happens if an employee doesn't exhaust his/her paid Emergency Paid Sick Leave or paid Expanded Paid FMLA Leave by the end of the year? Do we have to pay it out? Does it carry over into 2021?

A: No. The FFCRA does not require employers to pay out any unused Emergency Paid Sick Leave or Expanded Paid FMLA Leave upon separation or to allow employees to carry over any such leave into the next year.

Q41. At least where the employee requesting Emergency Paid Sick Leave or Expanded Paid FMLA Leave is not personally ill, can he/she be required to find a replacement before granting leave?

A: No.

Q42. What are the penalties for non-compliance with the new law?

A: Violations of the Emergency Paid Sick Leave provisions of the FFCRA are treated as violations of the Fair Labor Standards Act. The penalties include lost wages, liquidated damages, and awards of attorney's fees and costs. Intentional violations may result in fines up to $10,000 and, in the case of repeat offenders, criminal penalties.

Violations of the Expanded Paid FMLA Leave provisions are treated as violations of the FMLA. The penalties include lost wages and benefits, other actual monetary losses, liquidated damages, and awards of attorney's fees and costs. Non-monetary remedies such as reinstatement are also available.

The DOL, which is charged with enforcement of the FFCRA, has announced that it will observe a "temporary period of non-enforcement" for the first thirty (30) days after the Act takes effect, so long as the employer "has acted reasonably and in good faith to comply with the Act." For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the Act in the future.

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This Public Employment Law FAQ Series was prepared by the Public Sector Group of Elarbee, Thompson, Sapp & Wilson, LLP, a legal practice group specializing in the representation of state and local government clients throughout Georgia primarily in matters relating to labor and employment. It was designed to serve as a comprehensive guide for the benefit and use of the Georgia Municipal Association and its membership during the declared public health emergency relating to COVID-19.

This series was prepared based on the most current information and legal analysis available; however, because the legal landscape relating to the pandemic is necessarily fluid, this resource will subject to periodic updates and revisions. As such, it is not intended, and should not be interpreted or relied upon, as legal advice. GMA members are encouraged to consult with their attorneys or outside counsel as needed. Elarbee Thompson's

Public Sector Group is also available for consultation by contacting R. Read Gignilliat (404.582.8442 / gignilliat@elarbeethompson.com) or Sharon P. Morgan (404.582.8406 / morgan@elarbeethompson.com). As always, GIRMA members may contact Elarbee Thompson's Public Sector Group directly via the GIRMA Helpline (800.721.1998 / girmahelpline@elarbeethompson.com).

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