

MEMO RE FFCRA AND SUBSTITUTE TEACHERS

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The purpose of this memorandum is to address whether school districts must offer leave to daily substitute teachers under the Family First Coronavirus Response Act (FFCRA), Public Law No: 116-127 (2020).

The Trust appreciates the following firms peer reviewing this document: Udall Shumway, DeConcini McDonald Yetwin & Lacy, Sims Mackin, and Hufford, Horstman, Mongini, Parnell & Tucker. Please contact the Trust or local counsel if your District requires legal advice.

Issue: Must school districts offer leave to daily substitute teachers under the FFCRA?

The FFCRA provides for two types of leave: emergency paid sick leave and expanded family and medical leave (Expanded FMLA). 29 C.F.R. § 826.21 and 29 C.F.R. § 826.23. It applies to any employee who has been employed for thirty days and specifically includes part time employees. 29 C.F.R. § 826.21

The preamble to the federal regulations states that employees who would otherwise not be employed to work are not entitled to either emergency paid sick leave or Expanded FMLA leave. The publication states as follows:

An employee subject to one of [quarantine order] may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. That said, he may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.

85 Fed. Reg. 19,339 (April 6, 2020).

School districts employ daily substitute teachers to work as needed in the classrooms. Most of these individuals would have likely worked periodically for the districts for at least thirty days. Typically, substitute teachers do not sign any type of contract with the school district and do not have any set hours or schedule.

The school districts have been closed by executive order for the remainder of the school year. During the school closures, school districts have not continued to pay daily substitute teachers. Most school districts do not have work for the daily substitute teachers to complete as a part of providing distance learning to students under HB 2910.

In my opinion, school districts are unlikely to be required under federal law to provide emergency paid sick leave or expanded FMLA leave because the school districts do not have work for the daily substitute teachers to perform during the closures.

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