Commissioners Handbook
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CHAPTER 66

EMPLOYEE BENEFITS

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66.01 INTRODUCTION

Employee fringe benefits and leave policies are an integral part of total compensation for county employees. Although few employees recognize this fact, fringe benefits may be as or more valuable than annual pay adjustments because of federal and state tax advantages. This section will deal with insurance coverage, retirement, deferred compensation, and types of leave authorized by state civil service law and regulations.

66.02 INSURANCE (ORC SECTIONS 305.171 and 307.441)

Counties are authorized to contract for, purchase, or otherwise procure the following types of group coverage for county employees, officers, and their immediate dependents:

1. Hospitalization, surgical care, major medical care or medical care, sickness or accident insurance.
2. Disability-income insurance.
3. Dental care.
4. Eye care.
5. Hearing aids.
5. Prescription drugs.
6. Group life insurance.
7. Liability based on official performance of duties.

8. Group legal services.

9. A health and wellness benefit program through which the county provides a benefit or incentive to county officers, employees, and their immediate dependents to maintain a healthy lifestyle, including, but not limited to, programs to encourage healthy eating and nutrition, exercise and physical activity, weight control or the elimination of obesity, and cessation of smoking or alcohol use.

County commissioners also can contract for plans of group insurance and health care services with health care corporations and health maintenance organizations if the following conditions are met:

1. Each county officer or employee has the option to participate in such an alternative plan offered by an insurance company.

2. If such a plan costs more than the regular county program, the employee or officer personally must pay the difference.

3. Each county officer or employee has the right to switch to the other plan each year at a time determined by the commissioners.

4. Insurance benefits that are administered through a health and welfare trust fund, which is jointly administered by the county and a union through a collective bargaining agreement may provide any of the services listed above and do not have to be bid.

Generally, the purchase of health insurance is exempt from traditional, competitive bidding, but is subject to an alternative procedure described in ORC Section 307.86(F). For details on these procurement provisions, please see Sections 20.21 and 67.13 of this *Handbook.*

The board of county commissioners may establish and maintain a health savings account program whereby county officers or employees may establish and maintain health savings accounts in accordance with section 223 of the Internal Revenue Code. Public moneys may be used to pay for or fund federally qualified high deductible health plans that are linked to health savings accounts or to make contributions to health savings accounts (O.R.C. Section 305.172)

66.021 SELF INSURANCE (ORC SECTIONS 305.171, 9.833)

The county commissioners may provide any of the benefits listed in ORC Section 305.171 (A)-(D) through an individual or joint self-insurance program as provided in ORC Section 9.833. (See Chapter 67 of this *Handbook).*

66.022 CAFETERIA PLANS (ORC SECTION 305.171)

The county commissioners may provide health insurance through a cafeteria plan authorized through Section 125 of the Internal Revenue Code. As part of such a plan, the county can offer an officer or employee the option of a cash payment not to exceed 25% of the cost of the premiums that would otherwise be paid for the employee's benefits.

66.023 CASH PAYMENTS IN LIEU OF COVERAGE (ORC SECTION 305.171)

The county commissioners can adopt a policy authorizing county appointing authorities to make a cash payment to county employees and officers who waive insurance coverage. The payment cannot exceed 25% of what would otherwise be paid in premiums. No cash payment in lieu of a health benefit shall be made to a county officer or employee unless the county officer or employee signs a statement affirming that the county officer or employee is covered under another health insurance or health care policy, contract, or plan, and setting forth the name of the employer, if any, that sponsors the coverage, the name of the carrier that provides the coverage, and the identifying number of the policy, contract, or plan.

Counties should be careful in considering such plans to cost out the likely impact and to ensure that the costs of the payments do not exceed the likely savings. This is true particularly in counties with substantial employee contributions toward insurance premiums, where those who can drop coverage may have already done so. The county could find itself paying a bonus to people who have already dropped coverage without encouraging many more to do so. Counties should note that these payments are taxable income to the employees (unlike the value of the health insurance benefit).

66.024 COUNTY EMPLOYEE BENEFITS CONSORTIUM OF OHIO (CEBCO)

CCAO offers a self-insured consortium of counties called the County Employee Benefits Consortium of Ohio, or "CEBCO." CEBCO has 44 participating counties as of January 2023. CEBCO offers a self-funded group health insurance plan along with dental coverage, vision coverage, prescription drug coverage, group life insurance, and an employee assistance program, all available on an à la carte basis. While the program is self-funded, each county's yearly insurance cost is quoted on a fixed basis, and is paid as a premium; thus, the county can fund the liability as it would a fully insured plan. A county joining or renewing with CEBCO must commit to participate for a three-year term to ensure the plan's stability. For more information about the CEBCO option, see Chapter 67 of this *Handbook* or contact the CEBCO staff at CCAO's offices.

66.025 GROUP LIFE INSURANCE (ORC SECTION 305.171 and 3917.01)

Group life insurance may be provided by the county commissioners subject to the conditions set down in ORC Section 305.171. In addition, under ORC Section 3917.01, group life insurance:

1. Must be issued to the employer.

2. Premiums may be paid by the employer or the employees.

3. Must be offered to all employees of the subdivision who otherwise qualify. Insurance may be limited based on criteria applied in a non-discriminatory way; e.g., to full-time employees only.

4. May provide employee options for additional insurance at employee expense.

5. May be extended in the form of term insurance to insure the spouse or children of an insured employee provided that all eligible employees are enrolled, unless the contributions come exclusively from the employee or family member. (ORC Section 3917.03(A)).

Group life insurance may also be provided by a union trust fund. In this case, premiums may be paid by the trust from funds contributed by employers, employees, or both (ORC Section 3917.01 (C) and (D)).

Refer to Chapter 67 of this *Handbook* for details on health insurance.

66.03 PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF OHIO (OPERS)

(See Chapter 68 of this *Handbook*).

66.04 DEFERRED COMPENSATION

Counties are permitted to offer their employees up to two additional deferred compensation plans in addition to the program offered by the Ohio Public Employees Deferred Compensation Board. Additional plans can only be selected and established by the county commissioners.

Under these plans, income is deferred, and the resultant earnings are not subject to state or federal income tax at the time of withholding. Taxes are paid only when the money is withdrawn from the plan upon retirement or upon death, disability, or termination of employment, or if the employee experiences an unforeseeable emergency which qualifies for withdrawal of funds under the IRS regulations. In some cases, loans also are available from funds saved under a deferred compensation program.

The total amount of compensation that can be set aside in any calendar year is limited by an amount indexed to the rate of inflation, as determined by the IRS. See the Ohio County Employees Retirement Plan (OCERP) highlights for current limits. Employees who are age 50 and older or who have not made maximum contributions in prior years may be able to make additional, "catch-up" contributions. Amounts deferred may not be included on W-2 forms for state and federal income tax purposes; however, OPERS contributions are computed on the actual gross salary. Participation in deferred compensation programs has no effect on OPERS benefits.

CCAO is dedicated to offering cost-saving programs to our membership. The Association employed the competitive-bid process in developing the Ohio County Employees Retirement Plan (OCERP), a 457(b) savings plan. This allows the Association to offer a competitive rate of return on investments at a lower cost than other plans available to Ohio county employees. CCAO has contracted with Empower to manage the plan.

OCERP also offers other value-added services that are beneficial to county employees while they are actively employed, as well as after retirement. Participating employees can:

- Contribute pre-tax dollars or make Roth (after-tax) contributions – which have separate contribution limits from 401(k) or 403(b) limits.

- Choose from multiple investment options offered, plus utilize a self-directed brokerage option which includes six different risk-based profile funds and institutionally priced funds.

- Meet with Empower's local, dedicated Retirement Plan Advisors for guidance to help reach individual savings goals.

- Have easy account access via the web to manage individual accounts, including savings planning tools and a mobile web app.

For more information refer to Chapter 69 of this *Handbook* or contact:

Ohio County Employees Retirement Plan (OCERP)
Empower
Phone: 800-284-0444
Online: ocerp457.com

For more information regarding the state-sponsored deferred compensation plan contact:

Ohio Public Employees Deferred Compensation Program
270 East Town Street
Columbus, OH 43266-0571
614-466-1980
www.ohio457.org

66.05 STAFF DEVELOPMENT (ORC SECTION 325.191)

County commissioners may authorize the establishment of staff development and continuing education programs to assist employees to perform more effectively and prepare for promotional advancement. Other elected officials may establish programs for staff development and continuing education only with the authorization of the county commissioners. If the program is adopted, each full-time employee is entitled to participate in the program under the rules adopted by that office, department, or agency. An elected official is not eligible to participate in such programs; however elected officials are required to receive certain training, such as sunshine law, as well as receive training due to the nature of their job. This is training outside the scope of ORC Section 325.191.

Any expenditure must only be made to further interests of the participating county office. The types of programs permissible include: employee orientation, on-the-job training, tuition reimbursement, educational materials reimbursement, and educational leaves of absence. Special teachers, consultants, and educational facilities necessary to implement the program are legitimate program expenses.

66.06 VOLUNTARY WITHHOLDING FOR EMPLOYEE TRANSPORTATION FRINGE BENEFIT (ORC SECTION 9.361)

Under ORC Section 9.361, the board of county commissioners may, by resolution, authorize a payroll deduction plan for parking and transit passes. The program is voluntary for county employees, and contributions to such a program are excluded from federal income taxation under Section 132(f) of the Internal Revenue Code. If the parking benefit covers a facility not owned by the county, there must be a third-party administrator. As part of the resolution, the county must adopt a procedure for employees to join and withdraw from the program.

66.07 OTHER VOLUNTARY BENEFITS THROUGH PAYROLL DEDUCTION (ORC SECTIONS 3917.04, 124.841)

ORC Section 3917.04 broadly allows a political subdivision, such as a county, to allow employees to voluntarily withhold money to pay for the premiums for group life, accident, health, or hospitalization insurance, as well as annuities and salary savings plans. If the county chooses to offer this benefit, at least 10% of the employees of the particular subdivision or at least a department, office, or agency must voluntarily participate. Counties should review with legal counsel whether there is any option to offer payroll deduction for such benefits even if participation falls below that level.

In addition, ORC Section 124.841 allows a county to negotiate a contract for long-term care insurance covering county employees and officials, and such a contract is excluded from the requirements of competitive bidding. Any employee or official may participate, and the county may choose to pay all or any portion of the premium, including no portion, leaving it to the participating employee or official to pay the full amount.

66.08 VACATION LEAVE (ORC SECTIONS 9.44 and 325.19)

Vacation leave is an accrued benefit available to all full-time employees of a county. For purposes of vacation leave, full-time and part-time employees are defined as follows:

1. FULL-TIME EMPLOYEE - Means an employee whose regular hours of service for a county total 40 hours per week, or who renders any other standard of service accepted as full-time by an office, department, or agency of county service. As an example, some counties set the full-time standard at 35 or 37.5 hours per week.

2. PART-TIME EMPLOYEE - Means an employee whose regular hours of service for a county total less than 40 hours per week, or who works less than the alternative amount determined as full-time by that office, department, or agency of county service, and whose hours of county service total at least 520 hours annually.

Each full-time employee is entitled to vacation leave with full pay after one year of public service with a county, a council of governments, the State of Ohio, or any political subdivision of the state, as provided in ORC Section 9.44. Under ORC Section 325.19(8), county commissioners, by resolution, may establish vacation leave with full pay for part-time county employees in all county departments. The ratio between hours worked and vacation earned must be the same for both full- and part-time employees.

In other words, part-time employees receive vacation credit on a pro-rated basis, so that a 20-hour per week employee entitled to two weeks would receive 40 hours of vacation.

Table 66-1 at the end of this Chapter shows the yearly entitlement to vacation leave for county employees based on years of service. After completion of one year of service, vacation leave accrues to county employees for each biweekly pay period according to the schedule shown on Table 66-2.

A person employed with a county, other than as an elective officer, is entitled to have their prior service with the state or any political subdivision of the state counted as years of service for the purpose of computing the amount of the employee's vacation. Counties should require

verification of service with other political subdivisions.

The number of years of service includes part-time as well as full-time employment with a county, a council of governments, the state or by any political subdivision of the state. Even part-time service for one year counts as one year of service. Such service need not be continuous. Completion of a total of one year of service (with any qualifying employer) is required before eligibility for any vacation leave is established, however. At that time, the employee is credited for two weeks of vacation, and thereafter begins to accrue vacation in each pay period.

An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the county on or after June 24, 1987, shall not have prior service time with the county or any political subdivision, the state, or a council of governments count for the purpose of computing vacation leave rates.

Vacation leave should be taken in the year it is earned. The statute provides that, "In special and meritorious circumstances, an employee may be allowed to accumulate and carry over vacation leave to the following year, upon written authorization of the appointing authority." Practically speaking, this can be and commonly is done through a broad policy if desired. Note that vacation leave cannot be carried over for more than three years under any circumstances, even if "authorized" by the county appointing authority. Payment must be made for earned but unused vacation upon separation from employment or transfer to a new appointing authority, even within the same county. Transfer to another appointing authority is considered a "separation" requiring payout. Payment for unused accrued vacation must not exceed more than the equivalent of three years plus the current year's accrual, or two years if the county set a lower limit. Note that counties are required to account for the cost of accrued but unused vacation as a liability to the county in reports under generally accepted accounting principles (GAAP).

No authority exists for an employee to continue to work, rather than take vacation leave, and to be paid for hours worked plus vacation pay. Nor do counties have the authority generally to cash out accrued vacation leave while someone remains employed, unless so provided in a collective bargaining agreement.

Care should be taken in vacation records, particularly during years 8, 15, and 25 of service. Upon completion of an employee's 8th, 15th or 25th year, the employee is given a credit of one week of vacation, which means that 40 hours (or the other full-time standard set by the county, such as 35 hours) are added to his or her balance. (If the county adopts an accelerated vacation schedule, the applicable years will be different, but the same approach should apply.) This is effective the first day of the pay period after that year of service has been completed.

For example, an employee is entitled to three weeks of vacation per year after eight years of service. The employee only earns 3.1 hours per pay period during his eighth year of service. When the employee completes the eighth year of service, an additional week of vacation is added to the balance of unused vacation leave, and the employee immediately begins to accumulate vacation leave for the ninth year at the rate of 4.6 hours per pay period. Employees who accrue more than three years' vacation face a "use or lose" situation at the next anniversary date of employment. The three-year limit (or lower limit, if three years are not authorized) applies to carry-over vacation, not the current year's credit, but when the

employee reaches another anniversary date, then any vacation in excess of three years (or two years, if the county has not set the higher limit) is forfeited.

A county appointing authority may establish an alternative schedule of vacation for non-bargaining unit employees provided that the alternative schedule is not inconsistent with the provisions of at least one collective bargaining unit covering employees of that appointing authority. This means that if an appointing authority has negotiated a collective bargaining agreement with a more generous vacation allowance, the appointing authority may match this for its non-bargaining-unit employees. ORC Section 325.19(F) also provides than an appointing authority with no bargaining units among its employees may adopt an alternative vacation schedule, provided that benefits set forth in ORC Section 325.19 are not reduced. Practically speaking, this means that county appointing authorities may grant more - but not less - vacation than provided under state civil services law.

In the case of a death of a county employee, the unused vacation leave and unpaid overtime due to the deceased employee must be paid, in this order, to:

1. The surviving spouse.

2. One or more of the children 18 years or older.

3. Father or mother of the deceased employee.

4. The estate of the deceased.

This provision only applies if the total amount of the payment does not exceed $5,000 (ORC Section 2113.04). If the amount exceeds $5,000, the payment must be made to the estate and is subject to the normal probate process.

The provisions of ORC Section 325.19 (vacation and holiday leave) do not apply to superintendents and management employees of county boards of developmental disabilities.

66.09 HOLIDAY LEAVE (ORC SECTIONS 325.19 and 1.14)

County employees are entitled to pay for eleven legal holidays as shown below:

HOLIDAY	DATE
New Year's Day	January 1

Martin Luther King Day	3rd Monday of January
President's Day	3rd Monday of February
Memorial Day	Last Monday of May
Juneteenth	June 19
Independence Day	July 4
Labor Day	1st Monday of September
Columbus Day	2nd Monday of October
Veterans' Day	November 11
Thanksgiving	4th Thursday of November
Christmas	December 25

In the event that any of these holidays fall on Saturday, the Friday immediately preceding is observed as the holiday. If any of the holidays fall on Sunday, the Monday immediately succeeding is to be observed as the holiday. If an employee's work schedule is other than Monday through Friday, he or she is entitled to holiday pay for holidays observed on the scheduled day off regardless of the day of the week on which they are observed. Employees who observe religious or ethnic holidays other than those specified above must use vacation time, compensatory time off (if eligible), or leave without pay, or if a county has granted personal leave through a collective bargaining agreement or otherwise, that leave may be used.

Appointing authorities should be liberal in granting vacation time or unpaid leave for employee religious observances, as a form of reasonable accommodation under Title VII of the Civil Rights Act of 1964. If granting the requested leave would disrupt operations or impose significant costs, the appointing authority should consult the prosecuting attorney or other appropriate legal counsel for guidance on legal obligations in this area, because missteps in this area can give rise to claims of religious discrimination.

66.091 ALTERNATE HOLIDAY SCHEDULES (ORC SECTION 325.19(F))

Notwithstanding any other section of the Revised Code (including ORC Section 1.14), any county appointing authority may, upon notification of the commissioners, establish alternative schedules for holidays for non-bargaining-unit employees (those not covered by a union contract), provided that the alternative schedules are not inconsistent with the provisions of at least one collective bargaining agreement covering other employees of that appointing authority.

If there is not a bargaining unit within an appointing authority, that appointing authority may, upon notification to the county commissioners, establish an alternative schedule of holidays as long as the new schedule does not diminish overall holiday leave granted by the statute. So, for example, a county office could choose to observe Columbus Day or Presidents' Day on the day after Thanksgiving.

66.10 SICK LEAVE (ORC SECTION 124.38)

All employees except elected officials may be given time off from work for personal illness, pregnancy, injury, exposure to contagious disease, doctors' appointments, or illness, injury, or death in the employee's immediate family. Sick leave is only paid with the approval of the appointing authority. Administering sick leave and dealing with suspected abuses of sick leave can occupy a great amount of time. lt is important to outline clear and consistent policies that are uniform with the law, including federal requirements under the Family and Medical Leave Act (FMLA), which is covered under Section 66.22 of this *Handbook.*

For purposes of sick leave use, immediate family is defined as the employee's spouse, parents, children, grandparents, siblings, grandchildren, brother-in-law, sister-in-law, daughter-in-law, son-in-law mother-in-law, father-in-law, step-parents, step-children, step-siblings, or a legal guardian or other person who stands in the place of a parent (in loco parentis). Employees may also use up to five days of sick leave for a death in the immediate family.

All county employees, except superintendents and management employees of county boards of developmental disabilities, are to be credited with 4.6 hours of sick leave for each completed 80 hours of service. Please note that this is a ratio. So if the county has a regular work week of less than 40 hours, say 37.5 hours or 35 hours, then the amount of sick leave credited will be adjusted downward on a pro-rated basis (Employees would thus accrue 4.31 hours per pay period for a 37.5-hour work week, and 4.025 hours per pay period for a 35-hour work week.)

Part-time employees will be credited at the same rate, pro-rated to reflect the reduced hours. If overtime is paid for a particular pay period, additional sick leave should be credited using this same ratio; if an employee does not have 80 paid hours in a pay period, then the amount of sick leave earned is reduced proportionately for that pay period. In other words, this ratio of 4.6 hours per 80 hours in active pay status is applied to the actual number of paid hours in a pay period.

Note, however, that an employee who works extra hours in a particular pay period does not earn additional vacation; though if the hours are below the normal standard, vacation accrual can be proportionately reduced. While this seems inconsistent, it is a function of how the different statutes are written.

Sick leave may be accumulated without limit. The Ohio Supreme Court in *Ebert v. Stark County Board of Mental Retardation* (63 Ohio St. 231 (1980)) declared that ORC Section 124.38 provides minimum sick leave benefit to employees. A county appointing authority may grant employees a greater sick leave benefit than provided in ORC Section 124.38 pursuant to the authority to fix compensation under ORC Section 325.17.

Sick leave used by county employees must be charged in minimum units established by the appointing authority, such as one-quarter or one-tenth of an hour. Employees may only be paid sick leave for the days and hours for which they would have otherwise been regularly scheduled for work. Sick leave must not exceed the amount of time an employee would have regularly been scheduled to work. In other words, if an employee would have received overtime in a week he or she is on sick leave, the employee would only receive pay for the

regularly schedule hours, not the overtime.

An employee who transfers from one public agency to another must be credited with the unused sick leave up to the maximum permitted by the new employer. Sick leave must be credited from previous public service if the employee is re-employed within 10 years of separating from public service. An appointing authority will need to obtain verification of the prior sick leave balance the employee is seeking to transfer.

Each appointing authority may require an employee to sign a statement verifying the use of sick leave, and the employer may require a satisfactory physician's statement. The appointing authority also may establish a policy requiring a physician's statement for any absence over a certain period of time, such as three consecutive work days. Falsification of such verification is grounds for disciplinary action up to termination, and may even constitute the criminal offense of falsifying public records. It is helpful to clarify for employees that claiming paid sick leave when not actually ill or otherwise qualified for such leave is fraudulent and may be treated as a criminal matter.

An appointing authority may require an employee to undergo a medical examination, conducted by a licensed physician, to determine the physical or mental capability to perform the duties of his or her position. If found not qualified, the employee may be placed on sick leave or disability separation. The cost of such an examination must be paid by the appointing authority. Generally speaking, an appointing authority also may require an employee to be examined to verify the appropriate use of sick leave. The employer must pay for any employer-ordered examinations.

If sick leave expires before an employee can return to work, then he or she should be charged for any accrued vacation leave or other, available paid leave, such as compensatory time off. Once all paid leave (and FMLA leave) is exhausted, then the appointing authority to should consider whether to approve a leave of absence without pay or a disability separation under civil service law. See Section 66.17 of this *Handbook for* more information on disability separation.

The appointing authority should promulgate rules governing the use of sick leave to limit potential sick leave abuse. These rules should, at a minimum, set forth the call in procedure and remind employees that the appointing authority has the right to investigate suspected abuse of sick leave.

66.101 SICK LEAVE PAYMENTS UPON RETIREMENT OR SEPARATION (ORC SECTION 124.39)

Upon retirement, an employee with ten or more years of service must be paid in cash for one-fourth of the value of the employee's accrued, but unused sick leave credits up to 30 days, or 240 hours. Sick leave may have been accumulated while the employee worked for the county, the state, or any political subdivision covered under ORC Sections 124.38 or 3319.141. The payment is based on the rate of pay at retirement and eliminates all accrued sick leave.

A county may adopt alternative policies permitting more than one-fourth or more than the 30 days of sick leave to be paid to a retiring employee or paying sick leave to a terminating employee who is not retiring or permitting more than one payment to an employee. Pursuant to ORC Section 124.39(C), this policy must be adopted in one of the following ways:

1. By resolution of the county commissioners for any office which receives at least one-half of its funding from the county general fund.
2. By order of any appointing authority of any county office which receives less than one-half of its funding from the county general fund. The office must still notify the county commissioners in writing of such action.
3. As part of a collective bargaining agreement.

County commissioners should note that under ORC Section 5705.13(8), a county may establish a special revenue fund to set aside funds to pay out accumulated but unused sick leave, vacation leave, and compensatory time off upon the employee's termination of employment or retirement. This fund also can be used to cover excess compensation in those occasional years that see 27 biweekly pay periods instead of 26, a kind of "leap year" phenomenon.

Even if employers do not set up such a fund, under the generally accepted accounting principles (GAAP) now applicable to state and local government employers, counties will have to account for this liability in annual financial reports. Particularly for smaller or cash-strapped counties, it may be wise to set up a separate fund to provide for these payouts, which can otherwise precipitate serious budgeting problems, particularly if a layoff or other sudden exodus of employees requires substantial pay outs to many employees at one time.

66.102 ALTERNATIVE SCHEDULES FOR SICK LEAVE (ORC SECTION 124.38)

Notwithstanding any other section of the Revised Code, any county appointing authority may, upon notification to the commissioners, establish alternative schedules or sick leave for non-bargaining-unit employees, provided that the alternative schedules are not inconsistent with at least one collective bargaining agreement covering other employees of that appointing authority.

If there is no bargaining unit for that appointing authority, the appointing authority may still, upon notice to the board of county commissioners, adopt an alternative schedule of sick leave benefits, provided that the alternative schedule does not reduce the sick leave benefits provided by ORC Section 124.38. Practically speaking, this means that an appointing authority can increase sick leave benefits but not decrease them.

66.11 LEAVE DONATION PROGRAMS (ORC SECTION 124.391(C))

A county appointing authority, with the approval of the board of county commissioners, may establish a program of donation of sick leave or vacation leave to employees who have a critical need for it, because of either their own condition such a serious illness or that of an immediate family member. The statutory authorization is very broad, and counties should consider several factors when looking at such a program:

1. What will be the eligibility criteria for such donations? Must leave be exhausted? Is donated leave to be available for any employee out of sick leave, or will it be limited to life-threatening illnesses or injuries only? Many employers believe that an overly generous donation policy may remove an incentive for employees to be frugal with their use of leave and to bank it for more catastrophic occurrences, as employees may come to believe that "someone will always bail me out if it is really bad news."
2. Are you going to allow employees to donate only vacation leave, which is a 100% earned

benefit, or sick leave as well, which is more of a form of insurance? Since vacation is a benefit that must be paid out in any event, some counties are more comfortable restricting donations to that bank of leave, knowing that donating vacation leave will not increase net employment costs. Other counties are willing to allow donation of sick leave, perhaps with a maximum donation amount. But allowing employees who would likely never use a large bank of sick leave to donate leave to those with none left to use may increase overall personnel-related expenditures, because such a policy will increase the aggregate amount of paid sick leave actually used by all employees in a county. That may be an acceptable cost, but it is a real cost that should be considered.

3. Does the county want to allow donations for someone working for a different appointing authority (for example, a Commission employee donating to someone working in the Auditor's Office)? Does the county want to restrict donations across department lines? Across funding lines? If the time is donated across lines of this kind, does some kind of fund transfer need to occur to pay for the actual use of the leave?

4. Does the county want to allow creation of some kind of leave "bank" into which employees can donate, not knowing who the ultimate user will be, or does the county want to restrict donations to specific, known recipients? The advantage of the latter approach is that to some degree employees will self-police their donations and will often not donate to someone they know to be a sick-leave abuser. This approach uses a form of peer pressure. On the other hand, some argue that allowing donations only to named recipients may create "popularity contests."

5. It is important that if donations to specific individuals are allowed, employees must be protected from pressure or coercion. Any communication of the opportunity to donate should come from the appointing authority or human resources only, and employee campaigns to encourage or pressure donations should be discouraged or even prohibited by policy.

6. If a lower-paid employee donates to a higher-paid potential user, are you going to adjust for the difference in pay rates?

7. Consider limits on total donations so that employees don't receive a windfall of far more donated leave than they will actually use. For example, if employees donate vacation time for a co-worker in a time of crisis, only to have the coworker or family member recover and the employee then takes a multi-week vacation to an exotic destination, this may breed resentment from those who gave up hard-earned vacation leave, not expecting the leave to be used for a leisure trip.

It is important that the county commissioners carefully think through these issues before adopting such a policy. When officials are faced with a real tragedy and human need, sometimes policies can be rushed through without due consideration of all the issues. The result can be unintended consequences. Judges sometimes say that "hard facts make bad law." Similarly, sad facts can make for bad policy. The best time to adopt such a policy is in a calm time without an immediate, desperate need pending. If counties wait until a tragedy is upon someone, it is much harder to say "no" or to be thoughtful and careful.

66.12 PERSONAL LEAVE WITH PAY

No statute requires a county to grant personal leave with pay above the holidays, vacation leave, and sick leave provided by statute. Counties may choose to do so by policy or as part of a collective bargaining agreement. The general rule is that, under ORC Section 325.17, an appointing authority may grant benefits in excess of the minimum provided in the Revised Code, unless the Revised Code contains some restriction on that right, as is true in a number of cases. Because ORC Section 124.39(C)(3) provides that a "political subdivision" may adopt policies similar to the state leave policies found in ORC Sections 124.382-.386, and personal leave is among those policies, the best interpretation is that only county commissioners, as the "political subdivision," can authorize personal leave for county employees, even for employees of other county appointing authorities. The other way to adopt personal leave policies is through a collective bargaining agreement, but those, too, must be ratified by the board of county commissioners as the "legislative body" for the county. County commissioners may wish to seek the advice of the prosecuting attorney as to the legal authority of individual county appointing authorities to adopt personal leave without the approval of the board of county commissioners.

Because there is no statutory entitlement to personal leave, counties that choose to grant such leave can restrict the carry-over of personal leave to other years, the increments in which it may be used, the purposes for which it may be used, how approval must be secured, and whether unused leave can be cashed out on separation from employment or at other times.

66.13 COMPENSATORY TIME OFF WITH PAY

Under the Fair Labor Standards Act of 1938 (FLSA), private-sector employees must be compensated for hours worked over 40 hours in a seven-day work period, in cash at the rate of time-and-one-half for every hour over 40. In 1986, the Congress passed legislation to implement the FLSA for state and local governments, and made several accommodations unique to public employers:

1. Public employers are permitted to compensate employees for hours worked over 40 through compensatory time off, at the same rate of one and one-half hours of compensatory time off for each hour worked over 40 in a seven-day work period. There is a partial exemption under Section 7(k) of the FLSA for law enforcement and fire employees, as stated below. Note that the FLSA is only concerned with overtime in excess of 40 hours worked in a seven-day work period. If a county uses a 35-hour work week, overtime need be paid only at an hour-for-hour rate (whether by cash or in compensatory time off) until the employee reaches 40 hours. At that point, the time-and-one-half rate kicks in.

2. In recognition of historically different work schedules for police and fire employees, the FLSA allows an employer to adopt a different work period for law enforcement employees (peace officers and corrections officers, but not dispatchers or clerical employees in a sheriff's office) or for employees involved in fire suppression (firefighters and combined fire/EMS personnel, but not exclusively EMS personnel). The employer is allowed to adopt a work period of up to:

    a. 171 hours in 28 days for law enforcement employees (or the equivalent of 43 hours for a 40-hour work week). The employer can also adopt any other work period between 7 and 28 days, using this same ratio.

b. 212 hours in 28 days for fire-suppression employees, or the equivalent of 53 hours in a 40-hour work week. This reflects the reality of the traditional 24-hours on, 48-hours off schedule that most fire departments use. Again, any work period between 7 and 28 days can be adopted, using the same ratio.

c. In addition to these partial exemptions for police and fire employees, employees who work in a residential health-care facility, such as a county home for indigent or elderly residents, may be paid under what is called an "80-8" work schedule. This alternative calculation method requires the employer to pay overtime at the time-and-one-half rate if the employee works more than 80 hours in a 14-day work period, or works more than eight hours in any one work day. This exception for residential health facilities is thus different from the normal rule that an employee does not earn time-and-one-half for working more than eight hours in any one day, but only if the employee works more than forty hours in seven days. (In theory, an employer could work an employee (not in residential health care) for forty hours straight, with no breaks, and let the employee off for the rest of the week, and no overtime would be incurred. While no employer would do that, it is important to understand what the FLSA does and does not require.)

Please note that other employees may not use a longer work period to calculate overtime, even if the employee or a union agree to it or even ask for it. Employees cannot waive their rights under the FLSA, and unions may not do so on their behalf. While a collective bargaining agreement may supersede most provisions of Ohio civil service law, it cannot supersede the requirements of federal law, including the FLSA although a collective bargaining agreement or county policy may grant benefits greater than required by the FLSA.

1. Compensatory time off, as opposed to cash overtime, can only be used if there is a prior agreement with the employee. This can be done either through a collective bargaining agreement or policy adopted by the appointing authority and distributed to employees before the overtime is worked.

2. Employees can only bank up to 240 hours of compensatory time off (except for law enforcement and firefighters, who can bank up to 480 hours). Any overtime worked after that must be paid in cash at the time-and-one-half rate. Appointing authorities may adopt a policy imposing a lower cap on the accrual of compensatory time.

3. Compensatory time off must be granted within a reasonable time of the employee's request, unless its use would cause an undue hardship to the employer. Under rulings of the US Court of Appeals for the Sixth Circuit, applicable throughout Ohio, the employee must be allowed to use the compensatory time off on the specific day requested unless the employer can show the use will cause undue hardship, and the mere fact that employee's use of compensatory time off will generate still more overtime is not sufficient hardship.

4. If the employee separates from county service, compensatory time off must be paid out at the employee's pay rate at the time of separation, or the average pay rate over the past three years, whichever is higher. If an employee has been demoted or took a pay cut, it is very important to pay careful attention to this provision.

66.14 MILITARY LEAVE WITH PAY (ORC SECTION 5923.05)

County employees who are members of the Ohio National Guard, the Ohio Defense Corps, the Ohio Naval Militia, or members of other reserve components of the United States armed forces, are entitled to a military leave of absence with pay not to exceed 31 calendar days, measured by 22 work days for an 8-hour-per-day employee or up to a maximum of 176 hours, in any calendar year. Firefighters and emergency medical technicians are entitled to 17 twenty-four hour days or 408 hours in a calendar year.

The employee continues to receive full-pay without any offset during the period of such service, irrespective of any contrary provision of policy or collective bargaining agreement. There is no requirement that the service be for a continuous period. Employees are required to submit military orders or statements to the appointing authority before leave with pay will be granted.

If the employee is called up for military service for longer than 31 calendar days in a year, and the employee is not a temporary, intermittent, student, or seasonal employee, then the employee continues to be paid the lesser of the following during the extended leave of absence:

1. The difference between the employee's regular pay and military pay (if the military pay is less); or
2. $500.

No collective bargaining agreement can reduce benefits during a military leave below these levels, though the agreement can increase them. A county could also be more generous by policy.

66.141 EXTENSION OF INSURANCE BENEFITS (ORC SECTIONS 3923.381, 3923.382)

All subdivisions of the state and even all private employers in Ohio are required to extend existing health care policies to an employee who is a reservist called to active duty, or for his spouse or dependent child, for up to 18 months. Eligible persons must pay the employer's portion in addition to any employee's portion required under the plan. The county may elect to pay the employer's portion of the cost of the coverage. The law allows any eligible person to extend coverage for an additional 18 months upon death of the reservist, divorce, or cessation of dependency of a child. The eligible person must pay monthly in advance to retain coverage. Such coverage terminates if the eligible person becomes eligible for another group policy (other than CHAMPUS, the insurance provided by the Armed Forces); the 18- or 36-month period expires; the eligible person fails to make a timely payment; or the group policy is terminated (unless the employer replaces the policy with similar coverage).

These extensions apply to self-insurance programs, HMOs, PPOs, and any other alternatives to traditional medical coverage. Under ORC Section 4117.1 0(A), these benefits supersede any collective bargaining agreement which provides lesser benefits.

66.142 MILITARY LEAVE WITHOUT PAY (ORC 5903.02)

Permanent county employees who have held a position for at least 90 days are entitled to military leave without pay to be inducted or enter military duty. This leave must be considered a leave of absence with reinstatement rights. No single leave of absence or combination of

uniformed service leaves of absence may exceed five years or a single, longer period required to complete an initial period of obligated service.

The employee must apply for reinstatement within 90 days of returning from military leave. If the leave is less than 30 days, the application must be immediate; if less than 180 days, then the employee has 14 days to apply for reinstatement. Upon proper application for reinstatement, the employee must be returned to the same or similar position in the classification series. If the classification no longer exists the employee must be assigned to a similar position. If the employee returns permanently disabled, reasonable accommodation must be made to adjust the job duties or change classifications. If the employee returns temporarily disabled, he or she has up to two years to recover before being required to reapply or report for duty.

A reinstated employee receives:

1. Previously accrued sick leave before the military leave commenced.

2. Service time which would have accrued had the employee been working.

3. Salary adjustments or classification change as if the employee had continued working.

4. Reinstatement to health insurance and related benefits with no waiting period or pre-existing condition exclusions.

The employee does not receive:

1. Sick leave accrual during leave.

2. Vacation leave accrual during leave.

3. Hospitalization and life insurance benefits are suspended during leave. Payment into the programs is optional during leave. As noted above, benefits must be reinstituted upon reinstatement with no loss of coverage.

Employees reinstated after military leave without pay must not be terminated without cause for one year after reinstatement. This period is 180 days for military leaves of between 31 and 180 days. Time spent on military leave without pay is not counted towards determination of retirement benefits if the employee voluntarily leaves or is terminated for cause within one year of reinstatement.

66.15 ADMINISTRATIVE LEAVE WITH PAY (ORC SECTION 124.388)

While it is certainly not a "benefit" in the traditional sense, a county appointing authority may place an employee on administrative leave with pay in certain unusual situations. ORC Section 124.388 limits such leave to "circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected." That said, many appointing authorities interpret this language to include circumstances when an employee must be removed from the workplace to allow for

investigation of serious allegations and where the employer wants to avoid any premature imputation of guilt or needs to avoid the possibility of an investigation being influenced or disrupted by the employee's presence (and possible intimidation of witnesses). This section also was used to allow pay leave during the COVID pandemic.

When an employee is charged with a felony, the county may place the employee on an unpaid administrative leave for up to two months. If the employee is not convicted or does not plead guilty, the employer must then repay the leave, with interest (at a rate not specified).

When an employee is charged with a criminal offense, it is often unwise to hold off on resolving the employee's job status until after the criminal process has run its course. This is particularly true when the employee is charged in connection with work conduct, but not only in that situation. A criminal conviction requires proof beyond a reasonable doubt, while the administrative determination to terminate someone's employment generally requires only a preponderance of the evidence, the far lower threshold of proof applicable in civil cases. Criminal cases often involve plea bargaining, where the offense is frequently reduced to a misdemeanor while the accused essentially admits guilt in the underlying misconduct, which may be very serious, such as a theft from the county. But the statute is very specific that the employee must be convicted of a felony. For that reason, the appointing authority may wish to retain the employee on paid administrative leave and resolve the case administratively based on the evidence at hand, rather than tying the employment issue to the outcome of the criminal case, which can be delayed for many months in any event.

66.16 LEAVE FOR PREGNANCY OR CHILD CARE

Employees and employers alike commonly refer to "maternity leave" when female employees have a child. Within that concept, however, are two very different kinds of leave that should be carefully distinguished.

1. Leave for the physical disability of pregnancy, childbirth, and recovery from childbirth. Under federal and state civil rights laws, leave must be granted to the woman for the period of physical incapacity of pregnancy and its aftermath to the same extent as any other, short-term disability. This means the woman can use available, paid sick leave for this period, and unpaid sick leave for the remainder of the period of incapacity. Depending on the woman's medical condition, this can include a period of inability to work before the delivery, and may involve a longer than usual recovery period in cases of a complicated delivery or other complications, either with the mother or the baby. For most healthy women who give birth without complications, however, it is probably safe to presume a six week period for this kind of leave, but note that more must be granted if medically indicated by the employee's physician. Because this kind of leave is tied to the actual incapacitation of pregnancy and childbirth, by definition this leave is only available to the mother.
2. Leave for care of the child after recovery from the physical period of incapacity. Sometimes called "child-care leave" or "bonding leave," the importance of distinguishing this leave is that it is not for any disabling condition (and therefore paid sick leave may not be used), and it must be granted on a nondiscriminatory basis to the father and mother alike.

Under the Family and Medical Leave Act of 1993 (FMLA), each parent may take up to 12 weeks of unpaid leave for the birth of a child (unless both parents are employed by the county, in which case the county may make them share the 12 weeks between them). Paid sick leave

may only be taken for the period of physical incapacity resulting from the pregnancy, childbirth, and recovery or if the newborn has a serious health condition. The period of disability must, in any event, be certified by the employee's physician, and if the county has reason to question the certification, the county could exercise its right to order an independent medical examination or review.

Leave beyond the period of physical incapacitation must be unpaid leave under the FMLA, unless the employee has vacation or compensatory time off to cover the absence. For the father, all leave taken is unpaid, unless the mother of the child (spouse) or the child have a serious health condition. This period of sick leave will need to be documented by a medical provider.

As noted above, leave for pregnancy and child care is guaranteed by the FMLA, and any extended leave for disability (for example, a very high-risk pregnancy or a delivery that serious injures the mother) is treated like any other, longer-term disability. Under civil-service rules, the employee could have up to a six-month unpaid leave after exhaustion of paid leave, and then be placed on disability separation if she is unable to return. This kind of extended leave is not required for child-care or bonding purposes, however.

The county may choose to grant leave following the birth of a child longer than the 12- week total guaranteed under the FMLA. Any such leave must be granted on a nondiscriminatory basis to female and male employees alike, however, and such requests lie in the county's discretion. It is important that such requests be handled in a consistent way that does not leave the county open to charges of discrimination.

Leaves in this area are confusing because they are based on federal laws (the FMLA) and state civil service laws. The important point is that counties should not allow pyramiding of such leaves. The law does not grant 12 weeks of FMLA leave plus the leave provided under state civil service law. The period of FMLA leave, whether paid or unpaid leave, should be run concurrently with paid and unpaid sick leave or child-care leave under state civil-service law. If the county chooses to grant more than the minimum required, this is a matter of discretion, not of right.

The county must maintain the employee's health insurance during the period of any FMLA leave, including one for pregnancy and the birth of a child, just as during any other FMLA leave. As is true with FMLA leaves generally, the employee must pay any contribution otherwise charged to the employee for the cost of the premium. Once FMLA leave and paid leave are exhausted, it is up to the county and the terms of its insurance coverage if insurance will be continued at the county's cost for any longer than that. If insurance coverage is terminated, the employee still has the right to purchase continuation coverage for up to 18 months under COBRA.

66.17 DISABILITY SEPARATION

An employee who has exhausted all paid sick leave, vacation leave, and other, available paid leave (such as compensatory time off or personal leave, in counties that have chosen to grant that) may be entitled to an additional, six-month unpaid leave if the employee's physician certifies that the employee is likely to recover and be able to perform the essential functions of the job within that six-month period. If not, or if the employee cannot perform the essential functions of the job at the end of that time, then the employer must place the employee on

disability separation, which is a separation from employment, but with a conditional right to reinstatement for up to two years.

Disability separation also may be initiated by the employer when the employer believes that the employee is unable to perform the essential functions of the job because of a physical or mental illness or incapacity. In this scenario, the appointing authority directs the employee to be examined by a physician appointed and paid for by the employer, and the physician should be provided detailed information on the essential functions of the employee's position. Once the medical report is received, assuming that the report indicated that the employee is unable to perform the essential functions of their job, with or without reasonable accommodation, then the appointing authority must offer the employee a pre-separation hearing, where the employee can present evidence and challenge the physician's conclusions. After the hearing, the employer determines whether the employee will be involuntarily separated, and such a disability separation may be appealed to the State Personnel Board of Review (SPBR) within 10 days of the determination (or perhaps to arbitration, if the employee is covered by a labor agreement so providing).

An employee also may take a voluntary disability separation. In this case, the employee does not dispute his or her inability to perform the essential functions of the job, and the employee may even initiate the request. The employer still has the right to require the employee to submit to a medical examination in cases where the employee has requested disability separation. If the employee consents to disability separation, then he or she has waived the pre-separation hearing, and this consent should be confirmed in writing, preferably signed by the employee.

The employer must pay for any examination it requires during this process.

Following disability separation, the employee has separated from employment with the county. The employee may, however, request reinstatement from disability separation. The employee must submit a request for reinstatement, accompanied by substantial, credible medical evidence that the employee is again able to perform the essential functions of the job. The employer can either evaluate this evidence and grant the request or require the employee to submit to a medical examination to verify the ability to perform the essential functions of the job. If the appointing authority does not approve the reinstatement request, the appointing authority must offer a pre-reinstatement hearing to the employee. If the employee is denied reinstatement following the hearing, he or she may appeal to the SPBR within 30 days.

Any request for reinstatement must be made within two years of the beginning of the disability separation, unless the employee has been approved for disability retirement under the Public Employees Retirement System of Ohio (OPERS) or another Ohio public retirement system, in which case the period is extended to five years.

An employee who fails to be reinstated within this two-year period (five years if under an OPERS disability retirement) is permanently separated from the county service.

Note that there is no provision for "disability leave with pay" for county employees once paid sick leave is exhausted, though such a mechanism exists for state employees. Someone on disability separation is no longer a county employee, not on "leave," and should be deleted from payroll accordingly. It is important that this process proceed even if the employee is

receiving disability-income insurance payments through either county-provided or privately procured insurance or is receiving temporary-total disability payments through workers' compensation, which is a type of separate, state-funded insurance. External payments of this kind do not change the civil-service status of an employee.

66.18 VOTING LEAVE (ORC SECTIONS 5.20, 325.19, 3599.06)

The laws relating to voting and election day are somewhat confusing. While ORC Section 5.20 declares between noon and 5:30 p.m. on Election Day as a legal holiday, the Attorney General has ruled that payment for voting leave is not required under ORC Section 325.19 (OAG 65-225). Payment is the option of the county commissioners. Note, though, that ORC Section 3599.06 provides for fines for any employer who discharges or threatens to discharge a voter for taking a reasonable amount of time to vote on Election Day. Given that polls are open for 13 hours, this is unlikely to pose an issue, but county appointing authorities should be aware of this, particularly if an employee is scheduled to work very long hours on Election Day.

66.19 COURT LEAVE

There are no specific provisions addressing court leave. Generally, if an employee must appear in court on a personal matter, they should be required to take vacation leave, comp time, or personal leave. If the employee does not have paid leave, then it the leave should be without pay.

An employee is entitled to full pay when an employee is subpoenaed for any court or jury duty. The employee may either receive full pay or witness pay, but not both, and if the employee accepts full pay from the county, he or she must pay over to the county any witness pay received. The employee is not entitled to court leave if subpoenaed in a case where the employee is party to the action or where it stems from secondary employment outside of county service; in such a case, the employee must use vacation leave, compensatory time off (if available), or unpaid leave. Note that subpoenae are binding on employees as with any citizen, and this includes those for hearings for workers' compensation, unemployment compensation appeals, arbitrations, or before the State Personnel Board of Review or the State Employment Relations Board. In the case of hearings before SERB and the SPBR, employees are entitled to release time with pay to testify during their normal work hours even in their own cases under rules adopted by those agencies.

66.20 OLYMPIC COMPETITION LEAVE (ORC SECTION 9.46)

A county employee must be granted leave from employment without loss of pay to participate in Olympic competition sanctioned by the United States Olympic Committee. Events covered by this law are the Winter Olympic Games, the Summer Olympic Games, and the Pan-American Games. Participation in Olympic competition includes duties as coach, judge, official, or athlete.

66.21 LEAVE OF ABSENCE

Leave of absence without pay may be granted to classified employees. Employers have a lot of discretion in this area. Appointing authorities should be consistent in how they administer requests for such leave, however, to avoid possible claims of discrimination. All requests must be in writing.

66.22 FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act (FMLA) requires counties to grant up to 12 weeks of unpaid leave each year for a new child, or for the employee's or qualified family member's serious health conditions. Amendments in 2009 created a new category of leave for military families facing deployment or care following service-related injuries. Employers often face difficulties in administering the requirements of the law and the regulations issued by the US Department of Labor, particularly how the requirements of the FMLA interface with the requirements of state civil service law, union contracts, and other federal and state laws, such as the Americans with Disabilities Act (ADA) and workers' compensation law. Compliance with the sometimes conflicting requirements of these laws requires careful consultation with legal counsel.

The act requires that employers provide employees up to 12 weeks leave for specified family or medical reasons, and up to 26 weeks for qualified, military-related emergencies, such as preparing for call-ups, and for caregivers of those suffering from service-related injuries. The employer must also continue health insurance benefits

throughout the leave and reinstate employees to the same or an equivalent position at the termination of the leave. To be eligible for family or medical leave, an employee must have worked for at least 12 months and must have worked a minimum of 1,250 hours during the 12 months immediately preceding the leave request. The 12 months of total employment need not be just before the leave or in a single block of time but must have occurred in the preceding seven years. Time spent on paid leave does not count towards the 1,250 hours worked requirement. For purposes of the FMLA, the County is one employer. This means time worked with various county appointing authorities will count towards the 12 month and 1,250 hour requirements.

The FMLA applies to public employers and private-sector employers who have 50 or more employees within a 75-mile radius. For the purposes of the act, the term public agency includes any political subdivision of a state, such as a county or city. Therefore, the number of employees will be calculated based on the total employees of a county, not the employees of an individual office or appointing authority. Most legal authorities believe that the FMLA covers public employers regardless of size.

66.221 REQUIREMENTS OF THE FMLA

1. LEAVE

An employee is entitled to 12 weeks of leave during any 12-month period for any one or more of the following reasons:

a. The employee's own serious health condition;

b. the birth of a child;

c. the placement of an adopted or foster care child; or

d. to take care of a child, spouse or parent who has a serious health condition.

Leave for a serious health condition, whether the employee's own or that of a covered relative, may be taken in a single block of time or on an intermittent basis when medically necessary.

Unless the employer and employee agree, however, leave for the birth or placement of a child may not be taken intermittently and can be limited to a single block of time. In any case, the employer and employee may agree to implement the leave through a reduced work schedule such as reducing the number of days worked per week or reducing the number of hours worked each day. In addition, if the father and mother of the child both work for the county, they are entitled to a total of twelve weeks of leave, not 12 weeks apiece. The FMLA leave taken for the birth, adoption, or foster placement of a child must be taken within 12 months of the event.

In addition to the reasons stated above, amendments in 2009 and 2010 granted employees up to 26 weeks of FMLA leave for military caregiver leave, which covers both deployment-related needs and the care for an injured member of the Armed Services where the employee is the spouse, son, daughter, parent, or next of kin. Note that the definition of family here is broader, including next of kin. In some cases, that means that aunts, uncles, nephews and nieces, and cousins could take military caregiver leave, when they are covered neither by the FMLA generally nor by the even more expansive definition of "immediate family" under civil service regulations for sick leave and funeral leave.

The FMLA places the burden on the employer to determine whether requested leave is FMLA eligible and covered. Accordingly, the employee need not formally request "FMLA leave" or even invoke the FMLA at all. Rather, it is sufficient that the employee has given the employer (meaning the frontline supervisor if that is the person who took the call) enough information to determine that the FMLA is implicated. An example could include, "I'm sick from a diabetic episode, and my doctor is continuing to monitor it. I may be out a few days." Accordingly, it is important that supervisors be trained enough in this area to recognize possible FMLA issues, and that the determination of actual FMLA coverage and the issuance or required notices and forms be centralized in a human resources office or other, central administrative office where a responsible manager has been trained in the requirements of this complicated law. Under the FMLA, the employer is required to investigate any situations when it has reason to believe the employee’s need for leave involves an FMLA qualifying condition. Usually, this investigation will start with requiring the employee and their medical provider to complete the appropriate FMLA certification form.

2. CALCULATION OF THE 12-MONTH PERIOD

The employer is permitted to select among four options on how the 12-month period in which an employee can receive 12 weeks of leave will be calculated:

a. A calendar year.

b. Another fixed, 12-month period, such as fiscal year.

c. A rolling, 12-month period measured forwards from the date of the leave request.

d. A rolling, 12-month period measured backwards from the first date of the requested leave. This method looks backwards at how much leave the employee has already used in the preceding 12 months, and then deducts that amount from the amount of leave remaining to be used prospectively.

The rolling backwards method is the most complicated to administer and to explain to employees (and managers as well) but is the only method that prevents an employee from stacking together two, 12-week leaves for a total of 24 weeks off and is thus favored by many employers.

The period can be set by policy adopted by the appointing authority, or in a collective bargaining agreement, where applicable.

3. PAID OR UNPAID

FMLA leave is unpaid, and nothing in the federal law requires an employer to provide paid leave under any circumstances. Where an employer does provide paid leave, however (and all counties do under civil service law), then the employee may elect or the employer may require substitution of accrued paid sick leave, vacation leave, compensatory time off, or paid personal leave for part or all of the 12 weeks. If the employer requires substitution of paid leave, then any paid sick or other leave taken for an FMLA qualifying purpose runs concurrent with the FMLA leave.

Each county appointing authority should adopt a policy specifying whether substitution of available, paid leave is required before the employee can take unpaid leave under the FMLA. This can be done by policy or through a collective bargaining agreement, where applicable. Most employers require substitution of paid leave because this is the only method that does not allow an employee to take perhaps months off on paid leave plus an additional 12-weeks of federally guaranteed leave after the paid leave is exhausted.

If the need for leave due to medical treatment is foreseeable, the employee is required to make a reasonable effort to schedule the treatment so that it does not unduly interrupt the employer's operations. An employee who takes leave for such treatment, or for the birth or adoption of a child, must provide 30 days' notice or, if that is not possible, as much notice as is practicable.

Employers may enforce their normal call-in and notification procedures when an employee is using paid sick leave or other paid leave, even if that leave is also being counted against the employer's 12 weeks of FMLA leave.

4. FMLA LEAVE FOR SPOUSES EMPLOYED BY SAME EMPLOYER

When a husband and wife are employed by the same employer, and both would be entitled to FMLA leave, the total leave taken by both may be limited to combined total of 12 weeks. This provision does not apply if the leave is taken for the employee's own serious health condition. Because a county is likely considered one employer for FMLA purposes, this could even extend to spouses employed in different offices of the same county, though counties are advised to consult with the prosecuting attorney for guidance in this area.

5. SERIOUS HEALTH CONDITION

The threshold question for medical leaves under the FMLA is whether a "serious health condition" exists. A "serious health condition" means an illness or impairment, physical or mental, which involves:

a. Any period of incapacity or treatment in connection with inpatient care in a hospital, residential care facility, or hospice; or

b. Any period of incapacity requiring absence from work, school, or other regular, daily activities of more than three consecutive calendar days, that also involves continuing treatment by a health care provider; or

c. Any period of incapacity due to a chronic serious health condition, such as asthma, diabetes, epilepsy, and similar conditions.

What is "continuing treatment"? The regulations define this as:

a. The employee or family member is treated two or more times within the first 30 days of the incapacity (the first of which must be within 7 days of the first day of incapacity) for the illness or injury; or

b. The employee or family member is treated on at least one occasion with the first visit within 7 days of the first day of incapacity, and is given a regimen of continuing treatment under the supervision of the health care provider (which can be as little as a prescription or the common direction to call back if the condition does not improve); or

c. The employee or family member is under the continuing supervision of a health care provider, which includes at least two visits per year, for a chronic condition or disability which is permanent or long-term.

6. MEDICAL CERTIFICATION

When leave is requested due to a serious health condition, an employer may require medical certification, including the date on which the condition arose, its probable duration, and the category of the Act the leave falls under. This must be done using forms prescribed by the US Department of Labor; see www.dol.gov for the forms. The employer can require the employee to return the completed certification within 15 days, but such a directive must be explicit, must explain the consequences of failing to do so (e.g., disapproval of the leave, disciplinary action, or the like), and the employer must grant a reasonable extension if the employee is unable to return the form within the 15 days. If the form is incomplete or insufficient, the employer must notify the employee of the defects and give an additional, seven day period to cure the defects.

The employer may require re-certifications, but no more often than every 30 days, unless the employee requests an extension of leave, circumstances change, or the validity of an initial certification is questioned.

The human resources office of the county may contact the physician who completed a certification to verify its accuracy or seek clarification.

The employee's direct supervisor may not make this contact.

An employer may further require, at its own expense, a second medical opinion from a health care provider designated or approved by the employer. The provider of the second opinion cannot be employed on a regular basis by the employer. If a dispute arises from a second certification, the employer may at its own expense require a third opinion from a health care provider. The employee and employer must agree on the selection of the third health care provider, whose opinion is binding on both parties.

7. MEDICAL BENEFITS WHILE ON LEAVE

An employee's medical benefits must be maintained throughout the leave under the same conditions which would exist if the employee was not on leave. In other words, if the employer normally pays the premiums for employee insurance, the employer must continue to pay its portion of the premiums while the employee is on family leave, though the employee must pay his or her usual portion of the premiums, even if on unpaid leave. The employer may require periodic reports concerning the employee's intention to return to work. If an employee fails to return from the leave after the leave has expired, and due to circumstances within the employee's control, then the employer may recover from the employee the premium which the employer paid for maintaining medical coverage during the leave.

8. RETURN RIGHTS

Upon the employee's return from leave, he or she must be restored to the same position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." However, the FMLA does not entitle an employee on unpaid FMLA leave to accrue seniority or other benefits during the leave period. The act provides a very narrow (and quite seldom used) exception to this reinstatement requirement for "key employees," where:

a. The employee is among the 10 percent most highly paid persons working for the employer within 75 miles of the place where the employee works.

b. Denying reinstatement is "necessary to prevent substantial and grievous economic injury" to the employer's operations. Note: It must be the employee's reinstatement, and not the granting of the leave in the first place, that has this negative effect. On its face, this seems to be a very hard test to meet.

c. The employer notifies the employee of its intent to deny reinstatement as soon as it determines that such injury will occur.

Because of the very narrow limits of this exception, county appointing authorities should carefully consult with the prosecuting attorney before trying to claim it.

66.222 ENFORCEMENT

The FMLA may be enforced through legal action brought by the employee. The US

Department of Labor also may investigate complaints and bring an action for damages and injunctive relief. An employer who violates the act is liable for:

1. Any lost wages, salary, benefits, and compensation, or - if there was no such loss - actual monetary losses (such as the cost of providing medical care) up to a sum equal to 12 weeks of pay.

2. Prejudgment interest.

3. Double damages can be awarded if the court finds that the employer acted in bad faith.

4. Court costs, expert witness fees, and attorney's fees. The court may also award the employee equitable relief, such as reinstatement, employment or promotion. Suit must be filed within two years after the alleged violation, or three years if the violation is willful.

The Department of Labor has issued extensive regulations implementing the FMLA.. There are also requirements that an employee using FMLA leave must be notified of his or her rights under the law whenever the employer determines that leave will be counted against the employee's FMLA allotment, even if the employee never requested FMLA leave.

66.223 PRACTICAL CONSIDERATIONS

Counties should review their existing leave and absenteeism policies to make sure that any changes which are needed in order to comply with the FMLA Counties should provide training to supervisors and managers who may be required to address FMLA issues. FMLA requirements and the resulting changes in personnel procedures should be added to the county's personnel procedures manual. In addition, employers should ensure that correct Department of Labor forms and procedures for the request and approval of leaves and for certification of medical leaves are being used correctly.

Be careful about addressing the FMLA in a collective bargaining agreement. Such an agreement cannot limit employees' rights under the FMLA. By including FMLA benefits in a collective bargaining agreement, the county is potentially opening this complicated area of benefits to interpretation by an arbitrator.

APPENDIX

TABLE 66-1

COUNTY EMPLOYEE VACATION LEAVE ENTITLEMENTS

YEARS OF SERVICE	YEARLY ENTITLEMENT*
less than 1	-0-
1	80 hours
8	120 hours
15	160 hours
25	200 hours

* These credits are based on a forty hour work week. If the work week is less than forty hours, the hours of vacation leave credit are reduced in a proportion which is the same proportion that the hours worked are to forty hours.

TABLE 66-2

COUNTY EMPLOYEE VACATION LEAVE ENTITLEMENTS PER BIWEEKLY PAV PERIOD*

YEARLY ENTITLEMENT	BIWEEKLY CREDIT*			
	LENGTH	OF	WORK	WEEK
	40 HOURS	37.5 HOURS	35 HOURS	32.5 HOURS
2 WEEKS	3.1	2.9	2.7	2.5
3 WEEKS	4.6	4.3	4.1	3.75
4 WEEKS	6.2	5.8	5.4	5.0
5 WEEKS	7.7	7.2	6.7	6.25

FIGURES ARE ROUNDED

TABLE 66-3

COUNTY LEGAL HOLIDAYS

HOLIDAY	DATE
New Year's Day	January 1
Martin Luther King Day	3rd Monday of January
President's Day	3rd Monday of February
Memorial Day	Last Monday of May
Juneteenth	June 19
Independence Day	July 4
Labor Day	1st Monday of September
Columbus Day	2nd Monday of October
Veterans' Day	November 11
Thanksgiving	4th Thursday of November
Christmas	December 25