



## Risk Control

# School During the Covid-19 Pandemic: A Challenge for Parents and Their Employers

The 2020-21 school year will be unlike any other because of the COVID-19 pandemic. From in-person classes to virtual classes to a hybrid of both, schools throughout the country are using a variety of formats to safeguard the health of faculty and students as best as possible. Yet even if a school is physically open today, there is no guarantee that it will be open tomorrow. The complexity and uncertainty of the situation is an enormous challenge for working parents and, in turn, their employers.

## January 2021 Update

The Family First Coronavirus Response Act (FFCRA) expired on December 31, 2020. However, the Consolidated Appropriations Act, 2021, which includes COVID-19 relief, has extended to March 31, 2021, the tax credits available to employers for providing FFCRA leave.<sup>1</sup> Thus, although it no longer is mandatory to offer such leave, an employer may choose to continue to provide FFCRA leave and take advantage of the tax credit through March 31, 2021.<sup>2</sup>

Even if an employer does not voluntarily extend FFCRA leave under the 2021 Consolidated Appropriations Act, an employee may be eligible for mandatory paid leave under state or local laws which may still be in effect. Also, an employee who contracts COVID-19, or who is caring for a family member who contracts COVID-19, may also be eligible for mandatory unpaid leave under the Family Medical Leave Act (FMLA) if they have not otherwise exhausted their FMLA leave allotment. Finally, employers should also be mindful that even if an employee exhausts their leave provided under the FFCRA, FMLA, or other leave laws, additional unpaid leave may be required as a reasonable accommodation under federal and state disability laws.

Employers should work with an employment attorney to determine whether they will extend FFCRA for employees currently on FFCRA leave as well as for employees who may seek leave in the future because of COVID-19, and to ensure that their policies are compliant with federal, state and local law. Employers should also continue to monitor the situation, as new federal, state and/or local leave laws may be enacted as the pandemic progresses.

<sup>1</sup> Consolidated Appropriations Act, 2021 at <https://www.govtrack.us/congress/bills/116/hr133/text>.

<sup>2</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#104>

## The FFCRA

Many employment laws may be implicated<sup>3</sup> when an employee needs to take time off to care for a child because the child's school or care provider is closed or unavailable for reasons relating to the COVID-19 pandemic. Generally, employers that have fewer than 500 employees are subject to the Family First Coronavirus Response Act (FFCRA).<sup>4</sup> Set to expire on December 31, 2020, unless it is extended, the FFCRA was enacted in response to the COVID-19 pandemic, establishing two new paid leave obligations for qualifying employees through the Emergency Paid Sick Leave Act (EPSLA)<sup>5</sup> and Emergency Family and Medical Leave Expansion Act (EFMLEA)<sup>6</sup>. Under EPSLA, certain employees may take up to two weeks of paid sick leave. EFMLEA amended the Family and Medical Leave Act (FMLA) to provide certain employees with up to 12 weeks of expanded family and medical leave, 10 of which are paid, for reasons related to the COVID-19 pandemic.

Generally, with respect to the EPSLA, a covered employer must provide to all employees:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to federal, state or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to federal, state or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.<sup>7</sup>

For employees who have been employed for at least 30 days, under the EFMLEA, a covered employer must provide up to an additional 12 weeks of expanded family and medical leave, of which the employee may receive 10 weeks of pay at two-thirds the employee's regular rate of pay, where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.<sup>8</sup>

However, the Temporary Rule promulgated by the Department of Labor (DOL) indicates that an employee is eligible for FFCRA leave to care for a child due to the unavailability or closure of a

school or child care provider only if no other suitable person is available to care for the child during the period of such leave.<sup>9</sup> An employee may not take FFCRA leave for this purpose unless there is work available for the employee, either at the workplace or via teleworking.<sup>10</sup> Thus, if the employee has been furloughed or laid off, they are not eligible for FFCRA leave.

For those employers who are subject to the Family Medical Leave Act (FMLA), EFMLEA leave is counted towards the 12 weeks of FMLA leave that employees may take for any FMLA qualifying reason during the 12-month period that the employer uses to measure FMLA leave eligibility. Similarly, FMLA leave counts against EFMLEA leave, even when two FMLA annual periods straddle the effective dates for FFCRA.<sup>11</sup>

Some employees may be eligible for both EPSLA and EFMLEA for child care, in which case leave under EPSLA will run concurrently with leave under EFMLEA.<sup>12</sup> If the employee has not already exhausted their EPSLA benefits, EPSLA may require payment for the first two weeks of EFMLEA leave, which otherwise ordinarily are unpaid. But if the employee has exhausted their EPSLA leave, they may substitute, for the two weeks of unpaid leave, accrued leave under their employer's benefit plan, such as vacation or personal leave.

## DOL Issues Resources

Managing leave for employees who need to take time off to care for children will continue to be challenging for employers as schools may open and close throughout the school year as clusters of COVID-19 cases develop. The DOL has provided guidance in the form of "Questions and Answers" (Q&As) to assist employers in understanding eligibility for benefits under the FFCRA.<sup>13</sup> The DOL has also posted an online tool to assist employees in determining if they are eligible for FFCRA leave.<sup>14</sup> Although a similar tool to assist employers has not yet been posted on the DOL's website, the employee tool may assist an employer in determining an employee's eligibility for FFCRA leave.

## When is a School Considered "Closed" Under the FFCRA?

Recently, the DOL added questions 98-100 to the FAQs, which address whether a school or care provider will be considered "closed or unavailable for reasons related to COVID-19" under the FFCRA. The guidance focuses on the physical location where the child receives instruction or care. For example, if a child's school or place of care is operating on a remote basis and the children are not permitted to enter the building, then the school is considered "closed" for purposes of the FFCRA.<sup>15</sup> In that case, an employee may take leave to care for a child, assuming that the employee is otherwise eligible.

<sup>3</sup> Although this article outlines current events regarding certain federal and state laws, it is not intended to be legal advice. Please see the important disclaimer at the close of this article.

<sup>4</sup> Public Law 116-127. <https://www.govinfo.gov/content/pkg/PLAW-116publ127/html/PLAW-116publ127.htm>. "Healthcare providers" are not covered by the FFCRA to avoid disruptions to the health care system, but this exclusion is narrow. The Department of Labor's April 1, 2020, Temporary Rule § 4 clarified that what matters is the individual employee's specific skills, role, duties, and capabilities. Thus, the "healthcare provider" FFCRA exclusion does not encompass employees of health care companies who do not provide direct patient care services, such as "information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers." See FR Doc. 2020-20351, 9/16/2020, at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-20351.pdf>

<sup>5</sup> See Public Law 116-127 § 5101-5111

<sup>6</sup> See Public Law 116-127 § 3101-3106.

<sup>7</sup> Sections 5102(a)(1)-(6) and 5110(5)(b)(ii).

<sup>8</sup> Section 3102(b). Although the first two weeks of leave under EFMLEA is unpaid, an employee may substitute EPSLA leave or any paid leave benefit, such as vacation time, for the first two weeks of EFMLEA leave.

<sup>9</sup> 29 CFR § 826.20 (a) (8), (b).

<sup>10</sup> 29 CFR § 826.20 (a) (9).

<sup>11</sup> 29 CFR § 826.70(a-b).

<sup>12</sup> 29 CFR § 826.60

<sup>13</sup> at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

<sup>14</sup> See <https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool>.

<sup>15</sup> DOL FFCRA Questions and Answers, Question 98, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Some schools may operate on alternate days, alternate weeks or some other form of hybrid schedule, where children attend in person on some days and participate in remote learning on others, and are not permitted to attend in person on days in which they are designated to participate remotely. In those situations, an eligible employee may take FFCRA leave on each of the days the child is not permitted to attend in person, because the school is considered “closed” on the days that the child is not permitted to attend in person. There is, however, an important distinction between a school choosing to operate in a remote or hybrid format and a parent choosing a remote or hybrid format. If a parent has a choice between in-person instruction, remote learning or a hybrid format, and chooses remote learning or a hybrid format, the employee will not be eligible for FFCRA leave because the school will not be considered “closed.”<sup>16</sup>

### The DOL Temporary Rule Revisions

The DOL recently revised the FFCRA Temporary Rule (Temporary Rule), effective September 16, 2020, to clarify some aspects of the FFCRA.<sup>17</sup> Ordinarily, an employer’s consent is required before an employee may take intermittent leave under the FFCRA (“intermittent leave” is defined as “leave taken in separate blocks of time due to a single qualifying reason, with the employee reporting to work intermittently during an otherwise continuous period of leave taken for a single qualifying reason”).<sup>18</sup> According to the DOL, though, when a child’s school mandates hybrid attendance on alternate days, each time the school opens and closes with respect to that student is a separate event. Because there is no single cause for the employee’s need for child care leave, it is not “intermittent” within the meaning of FMLA and hence the employee does not have to secure the employer’s prior agreement to take discontinuous leave periods under FFCRA.

Even an employee who has been teleworking may request FFCRA to care for a child whose school is currently closed because of COVID-19. An employer may ask the employee to provide a qualifying reason for the leave, and submit supporting documentation. However, an eligible employee is entitled to take the leave regardless of whether or not they were working remotely while caring for their child/children previously, as circumstances may have changed.<sup>19</sup> An employer should not make any employment decisions based upon whether an employee takes, or may take, FFCRA leave, as that would violate the anti-retaliation provisions of the FFCRA.<sup>20</sup>

### Obligations Under State Leave Laws May Be Triggered

An employer must be mindful of the many other laws which may be implicated by school closures during the pandemic. Some laws were recently passed as a result of the pandemic and others have been on the books for years. For example, many states have passed laws similar to the FFCRA, which may also provide leave for employees to care for a child whose school or place of care is closed because of COVID-19. However, unlike the FFCRA, some of those laws may apply to employers with 500 or more employees. Some states and localities have family leave laws which may also be triggered by school closures. Paid sick and safe time laws, kin care laws, and some school activities leave laws may apply if they cover the closure or unexpected unavailability of a school or childcare provider, or school or child emergencies.<sup>21</sup>

### Conclusion

Employers should train managers and human resources personnel to handle these requests appropriately and track leave properly. Employment counsel should be consulted to ensure that all applicable laws are taken into account when handling leave requests. Employers should also review their handbook and policies with employment counsel to ensure that they are compliant with the FFCRA, state and local laws.

## Beyond HR

Eligible policyholders who purchase Employment Practices Liability (EPL) insurance from CNA have access to the H.R. Help Line and Beyond HR®, the CNA management liability risk control platform. Beyond HR provides a dedicated COVID-19 resource page which contains materials such as articles, podcasts and model policies and forms, and which may be accessed on the home page, after logging in, by clicking on the red “COVID-19 Resources” button on the right side. Beyond HR also provides online, trackable training modules, including training modules on the topics of discrimination and harassment prevention, as well as civility in the workplace, which can assist an employer in maintaining a work environment free from discrimination and harassment. For more information about the H.R. Help Line and Beyond HR, click [here](#).

<sup>16</sup> Id., Question 99.

<sup>17</sup> Temporary Rule § III (Sep. 11, 2020), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-20351.pdf>

<sup>18</sup> Id.

<sup>19</sup> DOL FFCRA Questions and Answers, Question 91, at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

<sup>20</sup> Public Law 116-127 §5104(2)

<sup>21</sup> For a more detailed discussion of laws which may apply to school and child care provider closures, see Littler, August 26, 2020, How Do We Manage Time Off, Scheduling & Accommodation Requests from Employees with Children Whose Education is Affected by COVID-19?, at <https://www.littler.com/publication-press/publication/dear-littler-how-do-we-manage-time-scheduling-accommodation-requests>

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