



Are You Prepared? FFCRA Implications and the Impact of Back to School Plans on Employers

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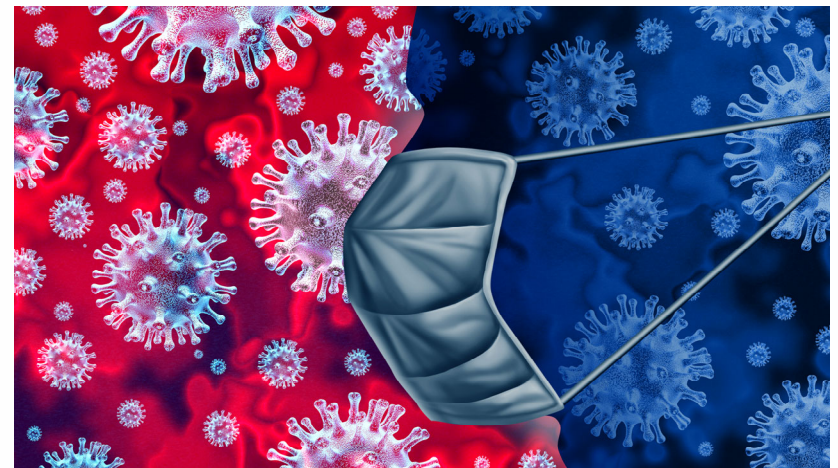
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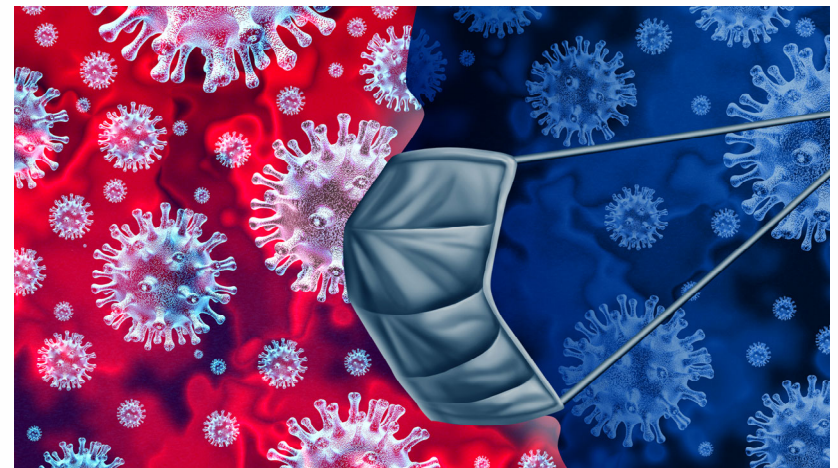
Agenda

- Families First Coronavirus Response Act
- Back to School Options
- FAQs



Disclaimer

This presentation is for educational purposes only. It addresses what we currently know about these recently signed laws and our understanding of how the Department of Labor and courts are interpreting these laws during the evolving Coronavirus pandemic.



FFCRA

Back to School Issues



Paid Sick Leave

- The Emergency Paid Sick Leave Act (the paid leave provision) requires private employers who employ **fewer than 500 employees** to provide paid sick time to employees ***to the extent that the employee is unable to work (or telework)*** because of certain COVID-19 related reasons, including:
 - The employee is caring for a son or daughter because the child's school or place of care has been **closed** or the child's place of care is unavailable due to COVID-19 reasons.
- All employees no matter how long employed.

Paid Sick Leave – Family Related Provisions

- **80 hours** (or PT equivalent)
- If time off is taken to care for someone else or a child who is not in school, employees must be compensated at 2/3rd of their regular rate of pay.
- **Capped** at \$200/day or \$2,000 total per employee for family leave. There is no carryover from year to year.
- **Right to leave currently ends on 12/31/2020**
- Employers cannot require an employee to find a replacement before allowing the employee to take this paid sick time.
- Tax credit available.

Paid Sick Leave

- An employee is entitled to use the paid sick time before other leave
- An employer **may not require** an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- Failure to provide leave is an FLSA violation
 - Fines, imprisonment up to 6 months
 - Amount of leave not paid
 - Liquidated damages for willful violations
 - Attorneys' fees
 - Collective Actions????
- Retaliation prohibited
 - Cannot discharge, discipline or in any other manner discrimination against an employee who takes leave or who files a complaint
 - If an employer willfully retaliates, it is an FLSA violation (see above)

Emergency FMLA

- Employers who have **fewer than 500 employees**
- Employees who have worked 30 days or more prior to the date leave is requested
 - Includes part-timers
- **Only for school and childcare-related COVID-19 absences if employee cannot work or telework**
- First 10 days can be unpaid but employee can use any other available paid time off (including paid sick leave) that they have
- 2/3rd of employee's regular pay (at minimum) * hours worked
- Employees should provide notice *if* reasonably practicable
- Caps: Paid E-FMLA may not exceed \$200 per day and \$10,000 in the aggregate.
- Effective **April 1, 2020 for leave through December 31, 2020.**

FMLA Amendments – Paid FMLA

- Job Restoration
 - FMLA's standard job restoration requirements will apply to employers with 25 or more employees.
 - For employers who employ **fewer than 25** employees, job restoration is not required if all the following conditions are met:
 - The employee takes E-FMLA (or, perhaps, Paid Sick Leave)
 - The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position
 - If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

Back to School Options

This Fall, school districts across the country are falling into four learning categories:

- In Person
- Virtual
- Hybrid
- Parents' Choice

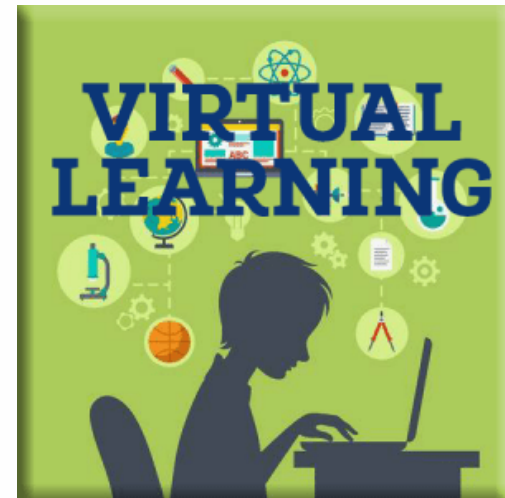
In person

If the employee's child's school is requiring in-person learning, FFCRA leave is generally not owed to employee because the school is not "closed".



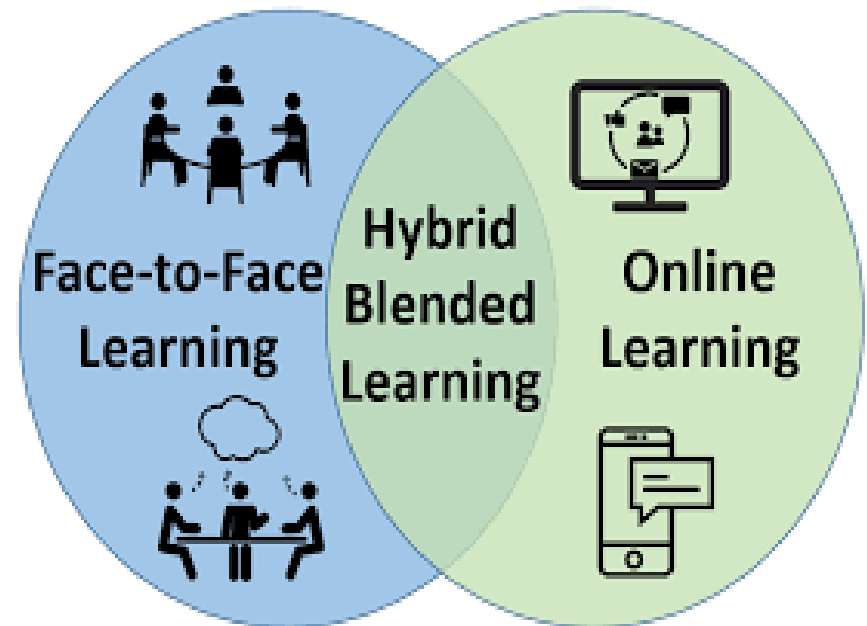
Virtual Learning

If the employee's child's school is requiring virtual learning, the school is "closed" so FFCRA leave is generally available to qualified employees.



Hybrid Model

Some schools have opted for a hybrid model: where some days the kids go to school and some days the kids are working remotely. On the days when the child is in school, the school is “open” and leave is not available.



Parents' Choice

- Some districts are allowing parents to choose the “best” option for their families.
- If the school is “open” FFCRA is not available.
- Other leave may be available to employees who elect online schooling because child or other member of household is “at risk”.

Every parent right now



Intermittent Leave

- FFCRA leave taken for child care reasons may be taken intermittently.
- May be in any increment agreed upon.
- The DOL Final Rule states that there must be a mutual agreement between the employee and employer for leave to be taken intermittently
- The SDNY opinion, however, has called that into question.

Info on the SDNY opinion

- DOL guidance on intermittent leave:
 - Employers and employees shall agree to intermittent leave
 - If the employee is working at the employer's worksite, intermittent leave can only be taken when the employee is caring for a child whose school, place of care or child care provider is closed or unavailable.
- August 3, 2020 – SDNY Decision vacated the DOL's requirement that an employee secure employer consent for intermittent leave.
- FYI - Decision also vacated 3 other provisions of the DOL's final rule: work-availability requirement, the definition of "health care provider," and the timing requirement that documentation be provided to the employer before the employee takes leave.

Health Care Provider Exemption – Definition in Flux

- Employers of health care providers or emergency responders may elect not to provide FFCRA leave to employees. **What is a health care provider?**
- A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
- Entity that contracts with the above to maintain the operation of facilities; entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.
- SDNY vacated the above definition, stating that the DOL widely missed the mark by using an employer-based definition rather than an employee-based definition.

I'm a Small Employer. Do I have to provide this leave?

- An employer with fewer than **50** employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern.

What if I have less than 50 employees?

A small business may claim this exemption if an authorized officer of the business has determined:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; **or**
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
- ***You should not send any materials to the DOL when seeking a small business exemption but you should document above.***

Some FAQs

- **How is “son or daughter” defined?*** A “son or daughter” is employee’s own child, which includes biological, adopted, or foster child, stepchild, a legal ward, or a child for whom employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. Also includes adult children if unable to care for themselves due to physical or mental disability.
- **Do I have to give leave if someone else is available to care for their children?** Generally, no, but interactive process is encouraged here.
- **The school is open but they’ve elected to do homeschooling because employee is at-risk. Do I have to provide paid leave?** Not paid family leave. But employee may be entitled to paid sick leave if they’ve been told to self-quarantine by a health care provider and they cannot telework. The employee may also be entitled to additional time off under existing policies or law, including the FMLA.

Some FAQs

- **The school is open but they've elected to do homeschooling because a family member is at-risk. Do I have to provide leave?** Not paid family leave. But employee may be entitled to paid sick leave if they have to care for a member of their household who has been told by a healthcare provider to self-quarantine and employee cannot telework. The employee may be entitled to additional time off under existing policies or law, including the FMLA.
- **The doctor's note says the child needs to continue to self-quarantine for the rest of the year, so the employee has elected the "virtual school" option even though the child's school is open for instruction – are they entitled to EFMLA?** Probably not. Under the statutory language of FFCRA, in order to be eligible for leave, the physical location where the child receives instruction or care must be closed. As such, the employee is not entitled to EFMLA based upon their personal decision to elect the virtual school option. The employee may, however, be entitled to additional time off under existing policies or law, including EPSL and the FMLA.

Some FAQs

- **I received a doctor's note from an employee saying their child is advised to self-quarantine because they are "at-risk" of catching COVID19. Does the employee qualify for EPSL?** Yes but only for the two weeks (this is EPSL) and only if they are unable to telework.
- **My employee's parent used to watch the child after school, but is no longer able to do so due to COVID-19 concerns. Is the employee entitled to FFCRA leave?** Likely yes.
- **Does an employee have an affirmative duty to seek childcare alternatives?** There is no DOL guidance directly on point, but requiring an employee to seek childcare alternatives could give rise to an FFCRA interference claim.

Some FAQs

- **What documentation can we get from employee?** Information about school being closed or child care being unavailable. IRS also allows for you to obtain name and ages of children. You can ask if there is someone else available to watch the children during the day.
- **What if the employee has already exhausted their FMLA or has less than 12 weeks remaining?** The employee only has 12 weeks of FMLA total, including E-FMLA. Any leave time employee used when schools were closed in spring counts towards the 12 weeks available.
- **Employee had their kids alone while they were working during the summer. Do I have to provide them leave?** Yes, if school is closed due to COVID-19.

Some FAQs

- **I have two parents working for me. Can I make them alternate EFMLA days and not allow them to take EFMLA together?** You should work with these employees to come up with a schedule that works best for them and your business. They may have legitimate reasons why they both need to be home at the same time.
- **What about days like weekends, evenings, spring break and summer vacations where kids are not usually in school anyway?** Remember, EFMLA doesn't just apply to school closures. It is also applicable when child care is unavailable due to COVID. Employees may not have childcare available during those times.

Help! School Is About to Start and I Have a Stack of Leave Requests on My Desk

- Can employees work remotely?
- Is school actually closed?
- How much leave do these employees have available?
- Scheduling changes
- Intermittent leave discussions
- Learning pods
- Babysitters

What if child gets COVID when they go back to school?

- Employee may be entitled to EPSL to care for family member who has COVID.
- Whether it's paid may depend on whether employee elected to have EPSL cover the 2 weeks of unpaid EFMLA
- Documentation needed for employee to RTW
 - Can I require a negative COVID test?
 - Latest CDC guidance

What if I have more than 500 employees?

- FFCRA new leave benefits ONLY apply to employers with less than 500 employees.
- You don't have to provide leave under the FFCRA if you don't want to. If you do, you will NOT get a tax credit.
- Qualified employees may still be able to take regular FMLA leave to care for their own serious medical condition or for a family member with a serious medical condition.
- Be mindful of your headcount if you are close to 500 or you are conducting layoffs (or furloughs) that may take you below 500 employees. If you go below the 500 threshold between April 1 and December 31, you will be subject to FFCRA.

Thank you!



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