

School Re-Openings and FFCRA Paid Leave

As September approaches school districts throughout Wisconsin are announcing their re-opening plans. The plans, which vary widely across counties and even among school districts within the same county, range from fully virtual to all students physically present to hybrid plans combining in-person and virtual learning. Employers should understand how these different re-opening plans affect the employers' obligations and employees' rights to paid leave under the Families First Coronavirus Response Act.

FFCRA Paid Leave

Two (2) key provisions of the Families First Coronavirus Response Act ("FFRCA") are the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA") both of which provide paid leave to eligible employees who are unable to work (or telework) because the employee is needed to care for a son or daughter whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 related reasons.

On April 1, 2020 Department of Labor finalized an interim Final Rule (the "DOL Final Rule") providing guidance on the paid leave provisions of the EPSLA and EFMLEA. The DOL Final Rule reiterates that under the FFCRA paid leave may only be taken if the employee is needed to care for a son or daughter whose school or place of care is closed due to COVID-19 related reasons. The DOL advised that generally an employee does not need to take paid leave if another suitable individual – such as a co-parent, co-guardian or other care provider – is available. The DOL also clarified that for purposes of paid leave under the FFCRA a school or place of care will be considered "closed" if the physical location is closed.

Below, in the form of Frequently Asked Questions, is the guidance to date to assist employers in determining their obligations under the various school re-opening plans to provide paid sick leave under the FFCRA.

Frequently Asked Questions

1. If a child's school has moved to virtual instruction or "distance learning" is the school "closed" for purposes of the FFCRA?

Yes. The DOL guidance provides that a school is deemed "closed" if the physical location is closed. The DOL guidance further provides that this is true even if some or all instruction is being provided online or through "distance learning" where the child is expected or required to complete assignments at home.

2. Is an employee eligible for paid leave if their child's school is operating on a hybrid model combining physical attendance with virtual learning?

Yes for the days on which only virtual learning is available. Although the hybrid model is not specifically addressed, the DOL guidance does provide that the school is deemed "closed" if the physical location is closed even if instruction is provided online or through "distance learning." Thus, an employee would be eligible for paid leave under FFCRA if, on the virtual learning days, the employee is needed to care for their son or daughter because the child's school is "closed" for purposes of the FFCRA.

Under the DOL guidance an employee is permitted to take extended leave under the EFMLEA intermittently. The guidance as drafted requires the employer's consent to intermittent EFMLEA leave, however a federal district court in New York recently struck down this requirement as unreasonable. Although the ruling does not include a nationwide injunction – meaning it is not binding precedent outside of New York – it creates uncertainty for all employers because it opens the door for similar challenges by other States.

Consequently, employers may wish to consult with counsel before making a determination on an employee's request for intermittent EFMLEA leave.

3. If the school offers a choice between physical attendance and virtual learning is an employee entitled to paid leave if they choose virtual learning?

No. An employee is eligible for paid leave under FFCRA if the employee is needed to care for a son or daughter whose school or place of care is closed. Under the DOL guidance a school or place of care is deemed “closed” only if the physical location is closed. Thus, if children can physically attend the school is not “closed” for purposes of FFCRA.

4. Is an employee eligible for paid leave if the school offers a choice between physical attendance and virtual learning and the employee chooses virtual learning based on a doctor’s recommendation due to the child’s vulnerability to COVID-19?

The employee would not be eligible for paid leave under the EFMLEA because the child’s school is not closed. It is unclear based on the current guidance whether the employee would be eligible for paid leave under the EPSLA.

The EPSLA provides up to 80 hours of paid leave to care for an individual who has been advised by a health care provider to self-quarantine due to COVID-19 related reasons. However, the guidance to date doesn’t address whether a health care provider recommendation for remote learning due to COVID-19 concerns is the same as a recommendation to self-quarantine for purposes of FFCRA. Given the absence of specific guidance, employers should consult legal counsel before denying an employee’s request for paid leave to care for a child who, based on a doctor’s recommendation, is remote learning because of the child’s vulnerability to COVID-19.

5. Is an employee eligible for paid leave if their child’s school is open but the child’s before or after school program is closed due to COVID-19?

Yes, but because the child’s school is open the paid leave may be limited the periods of before and/or after school care.

An employee is eligible for paid leave under FFCRA if the employee is needed to care for a son or daughter whose school or place of care is closed due to COVID-19 related reasons. The DOL guidance defines “place of care” for purposes of paid leave under FFCRA as the physical location where care is provided for the child and includes as a specific example before and after school care programs. However, if the child’s school is open the employee would not be needed (emphasis added) to care for their child during school day and thus, under the current DOL guidance, the employee would not be eligible for paid leave in connection with that period.

6. Is an employee eligible for paid leave to care for a child age 18 or older?

It depends. An employee may take paid leave under the EPSLA and the EFMLEA to care for a non-disabled child if the child is under the age of 18. If the employee’s child is 18 or older with a disability and cannot care for him or herself due to that disability, the employee may take paid leave if the child’s school or place of care is closed child care provider is unavailable, due to COVID-19 related reasons and the employee is unable to work (or telework) because the employee is needed to care for the child.

The EPSLA also provides paid leave to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. So, if an employee is needed to care for a child age 18 or older for these circumstances, the employee may take paid sick leave if the employee is unable to work or telework as a result of providing care.

7. Can an employer deny FFCRA leave because an employee previously teleworked while their child’s school was closed?

No. The DOL guidance makes clear that an employee is not prevented from taking paid leave under FFCRA simply because the employee was working (or teleworking) during a prior period when their child was at home because the child’s school was closed.

8. What documents must employees provide to their employers to support FFCRA paid leave?

To support a request for paid leave under the EPSLA or the EFMLEA, employees must provide employers, either orally or in writing, the following information:

- Employee' name;
- The date(s) for which employee is requesting leave;
- The reason for leave; and
- A statement that the employee is unable to work because of FFCRA qualifying reason.

If the employee is requesting leave to care for a child whose school or place of care is closed, or child care provider is unavailable, the employee must also provide:

- Name of the employee's child(ren);
- Name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for the employee's child(ren).

It should be noted that the New York federal district court (see #2 above) also held that an employer cannot require an employee to provide the supporting documentation as a precondition for paid leave under the FFCRA.

Vizance will continue to monitor the impact of the COVID-19 pandemic on employee benefit plans and employment policies and practices and provide updates as appropriate. If you have questions or would like more information please contact Beth Ward, Compliance Attorney, at bward@vizance.com.