How To Balance School Re-Openings And COVID-19 Workplace Leave: FAQs For Employers

Insights
8.21.20

As the summer draws to a close, schools are announcing their re-opening plans, which vary widely across states and localities. Some schools plan to remain open several days a week and direct students to attend remotely the other days. Others will split classes into morning and afternoon sessions, allowing students attending in the morning to participate remotely at home for the rest of day and vice versa. Still others will require physical attendance at all times, while some will choose to operate entirely under a remote learning model.

In light of these different reopening plans, employers need to understand how the Families First Coronavirus Response Act (FFCRA) affects the leave rights of employees for each of these different types of school schedules. The below serves as a list of answers to frequently asked questions related to the issues you could face as schools begin to reopen.

The Basics: FFCRA Leave Benefits For Working Parents
Under the FFCRA, eligible employees are entitled to Emergency Paid Sick Leave (EPSL) and/or expanded family and medical leave (EFML) if they are unable to work or telework because they need to care for their son or daughter if (a) the child's school or place of care is closed, or (b) the child care provider is unavailable, due to COVID-19-related reasons. The FFCRA regulations provide that an employee may take leave to care for their child only when the employee needs to, and actually is, caring for the child. The Department of Labor (DOL) has advised that "generally, an employee does not need to take such leave if another suitable individual — such as a co-parent, co-guardian, or the usual child care provider — is available to provide the care the employee's child needs."

Frequently Asked Questions
1. Is a child's school or place of care deemed "closed" for purposes of the FFCRA if it has moved to online instruction or to another model in which children are required to complete assignments at home?
Yes. If the physical location where an employee's child received instruction or care is closed, the school or place of care is deemed "closed" for purposes of the EPSL and EFML. The DOL has instructed that this is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," the child is still expected or required to complete assignments. But this seemingly does not contemplate a hybrid model (discussed below) and likely pertains only to those circumstances where the child is not reporting to a physical

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

location. Also note that in order to be eligible for FFCRA leave, employees must still certify that there is no other suitable person that can care for the child.

2. Is an employee entitled to FFCRA leave if they choose to keep the child at home or have the child homeschooled even though the child's school is open?
No. The DOL has stated that employees do not need to take leave if their usual child care provider is available to provide care. But if the school is operating on a reduced capacity due to COVID-19, which then necessitates remote learning for the child, FFCRA leave could be available. See DOL guidance on summer camps.

3. Would an employee qualify for FFCRA leave if their child's school is open but the employee chooses remote learning based on a doctor's recommendation due to the child's vulnerability to COVID-19?
EFMLA is likely not available to the employee because the child's school is not closed. The employee might be eligible for EPSL if they can demonstrate that they are taking leave to care for a person who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (permitted reason #4 under EPSL). It is unclear however, whether a recommendation for remote learning is the same as a recommended self-quarantine for purposes of the FFCRA.

4. Will employees be eligible for FFCRA leave if a child's school is operating on a hybrid model (whereby children are to alternate between physical attendance and remote learning)?
Yes. The child's school is effectively "closed" to that child on the days or sessions when the child is required to participate via remote learning. Thus, if the employee cannot work or telework during those days or sessions, they should qualify for FFCRA leave.

If the child's school requires them to physically attend school only on certain days of the week, leave is likely to be taken intermittently. It is uncertain, however, whether a parent may take FFCRA leave in less than full day increments when the child's school requires them to attend school daily (e.g., child attends school half of the day and spends the other half remote learning). Note that while the DOL regulations mandate employer consent for intermittent leave, a New York federal court recently struck out this requirement as unreasonable.

5. Would an employee qualify for FFCRA leave if the child's school is open but the child's before or after school program is closed?
Yes. The DOL defines a "place of care" as a physical location in which care is provided for the child. The physical location does not need to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

6. Can an employer deny FFCRA leave to an employee who previously teleworked while the child's school was closed but intends to request leave if the child's school remains closed for the fall?
No. The DOL has made clear that simply because an employee has been teleworking despite having

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

No. The DOL has made clear that simply because an employee has been teleworking despite having their children at home does not mean the employee is prevented from now taking leave to care for the child whose school is closed for a COVID-19-related reason.

7. Can more than one parent take paid sick leave or expanded family and medical leave simultaneously to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?
No. An employee may take EPSL or EFML leave to care for their child only when they need to, and actually are, caring for the child if they are unable to work or telework as a result of providing care. Generally, employees do not need to take such leave if a co-parent, co-guardian, or the usual child care provider is available to provide the care the child needs.

8. Can an employee take paid FFCRA leave to care for a child who is 18 years old or older?
It depends. EPSL and EFML leave may only be taken to care for an employee's non-disabled child if they are under the age of 18. If the employee's child is 18 years of age or older with a disability and cannot care for themselves due to that disability, the employee may take EPSL and EFML leave to care for the child if their school or place of care is closed or the child care provider is unavailable due to COVID-19-related reasons and the employee is unable to work or telework as a result. Additionally, EPSL is available 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. If an employee has a need to care for a child age 18 or older who needs care for these circumstances, the employee may take EPSL if they are unable to work or telework as a result of providing care. But in no event may the employee's total paid sick leave exceed two weeks.

9. Can an employee use EPSL for child care purposes if the employee already used up their 80 hours of EPSL for other permitted purposes?
No. The DOL regulations state that employees are entitled to only a one-time use of 80 hours of EPSL, regardless of the reason. However, if an employee has not exhausted their full EPSL allotment, they may use the remaining time for other permitted reasons.

10. If a new employee has used up their EPSL leave allotment while employed at their previous employer, are they entitled to another 80 hours of EPSL leave with the new employer?
No. The DOL regulations specify that any person is limited to a total of 80 hours of EPSL. An employee who has taken all such leave and then changes employers is not entitled to additional EPSL from their new employer. However, an employee who has taken some (but fewer than 80 hours of) EPSL and then changes employers is entitled to the remaining portion of such leave from their new employer, but only if the new employer is covered by the FFCRA.

11. Can employees use EFML leave if they have already exhausted all of their FMLA leave allotment for the benefit year?
No. An employee may only take a total of 12 workweeks for FMLA or EFMLA reasons during the employer's designated benefit year.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

12. Does EFML contain the same limitation contained in the FMLA that requires spouses who work for the same employer to share the 12 weeks of leave (instead of each getting 12 weeks)?
No. Under 29 CFR 201(b), spouses who work for the same employer can be required to share a combined 12 weeks of FMLA leave to bond with their new child or care for their own parent with a serious health condition. The EFMLA does not provide for the same carveout. But keep in mind that while both employees who work for the same employer would each be eligible for EFMLA leave, they would likely not be able to both take leave to care for their child since they have to certify that there is not alternative suitable caregiver.

13. What supporting documents must employees provide to their employers for FFCRA purposes?
When requesting EPSL or EFML leave, employees must provide the following information to their employers, either orally or in writing:

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

If the employee requests leave because they are subject to a quarantine or isolation order or to care for an individual subject to such an order, they should additionally provide the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, they should also provide the name of the health care provider who gave the advice.

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

- The name of the child;
- The 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 child.

Notably, a New York federal court recently held that supporting documentation may not be required as a precondition for FFCRA leave. Thus, employers should ensure documentation is not required to commence the leave under the FFCRA. Supporting documentation can be submitted after the leave has commenced.

What Should Employers Do?
As you begin the process of reopening, you should familiarize yourself with our alert: 5 Steps To Reopen Your Workplace, According To CDC's Latest Guidance. You should also keep handy our 4-

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

Conclusion

We will continue to monitor this rapidly developing situation and provide updates as appropriate, including updating FAQs on as-needed basis. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of the FP Post-Pandemic Strategy Group.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Myra K. Creighton
Partner
404.240.4285
Email

Service Focus

Employee Leaves and Accommodations

Workplace Safety and Catastrophe Management

Trending

COVID-19/Vaccine Resource Center

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.