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HOW NEW JERSEY EMPLOYERS CAN BALANCE SCHOOL RE-OPENINGS AND STATE LEAVE LAWS: FAQs FOR EMPLOYERS

Insights
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As New Jersey schools announce their re-opening plans, employers in the state are trying to understand their obligations under different federal and state leave laws. As we have seen, 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, we have [previously published a list of answers to frequently asked questions](#) regarding the [Families First Coronavirus Response Act](#) (FFCRA) and its effects on employee leave rights for different types of school schedules. But in addition to the FFCRA, covered employers in New Jersey must also consider their obligations under state leave laws. The below serves as a list of answers to frequently asked questions related to state leave law issues you could face as schools begin to reopen.

FREQUENTLY ASKED QUESTIONS

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1. What type of leave is available for New Jersey employees who need to care for a child whose school or place of care is closed due to COVID-19?
Recent amendments to the New Jersey Family Leave Act (NJFLA) and the New Jersey Earned Sick Leave Law (NJESL) permit employees to take leave to care for their children whose school or place of care is closed by order of a public official due to an epidemic or other public health emergency.

2. What type of benefits do the NJFLA and NJESL generally provide?
The NJFLA permits eligible employees to take up to 12 weeks of unpaid leave in any 24-month period for certain delineated reasons, including to care for a child whose school or place of care is closed due to an epidemic or public health emergency.

The NJESL permits eligible employees to accrue and use up to 40 hours of paid sick leave during a benefit year for certain delineated reasons, including to care for a child whose school or place of care is closed due to an epidemic or public health emergency. If an employer provides NJESL leave as part of an all-inclusive paid time off (PTO) policy, all of the PTO leave would amount to job-protected leave.

An employer cannot require employees to use their NJESL under any circumstance. However, if employees elect to use NJESL, employers can then require employees to concurrently use their allotted leave under the NJFLA or the Family Medical Leave Act (FMLA).

3. Can leave be taken intermittently under the NJFLA and NJESL?
Yes. The newly amended NJFLA provides that unpaid leave "due to an epidemic of a communicable disease, a known or suspected exposure to the communicable disease, or efforts to prevent the spread of the communicable disease" may be taken

intermittently so long as (1) prior notice is provided to the employer as soon as practicable and (2) a reasonable effort is made to schedule leave so as not to unduly disrupt the operations of the employer and, if possible, before leave is taken provide the employer with a regular schedule of the day(s) when intermittent leave will be taken. This includes leave to care for a child whose school or place of care is closed due to an epidemic or public health emergency.

Leave under NJESL may be take in increments determined by the employer, but such increment cannot be larger than an employee's scheduled shift.

4. Is a child's school or place of care deemed "closed" for purposes of the NJFLA or the NJESL if it has moved to online instruction or to another model in which children are required to complete assignments at home?

This is not clear under the NJFLA or the NJESL. There has been no guidance in this regard from the state. For FFCRA purposes, the U.S. Department of Labor has stated that if the physical location where an employee's child received instruction or care is closed, the school or place of care is deemed "closed" even if some or all instruction is being provided online. The same analysis could arguably apply to NJFLA and NJESL since New Jersey courts look to federal FMLA guidance in construing the NJFLA. It would be unlikely for New Jersey courts to interpret the NJFLA in a more restrictive manner than the FMLA.

5. Is an employee entitled to leave under the NJFLA or NJESL if they choose to keep the child at home or have the child homeschooled out of an abundance of caution even though the child's school is open?

Likely not. Although there is no express guidance on this, it is clear from the statutory language that leave is only available if the school is closed.

6. Would an employee qualify for leave under the NJFLA or NJESL 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?

The employee would likely qualify for NJESL because they would be caring for a family member during preventive medical care, a permitted reason under the NJSEL. It is unlikely that the employee would qualify for NJFLA leave under these circumstances, however. NJFLA may be available if the child was recommended by a health care provider to quarantine due to suspected exposure to a communicable disease because the child's presence in the community would jeopardize the health of others (a permitted reason under the NJFLA). Leave may also be available if an employee could establish that they are providing care to a child with a serious health condition (another permitted reason under the NJFLA).

7. Will employees qualify for NJFLA and NJESL leave if a child's school is operating on a hybrid model due to COVID-19 (whereby children are to alternate between physical attendance and remote learning)?

Likely yes. While this scenario is not specifically addressed in the statutes, one would argue that the child's school is technically "closed" to that child on the days when the child is required to participate via remote learning.

8. Would an employee qualify for NJFLA and NJESL leave if the child's school is open but the child's before or after school program is closed?

Likely yes. While "place of care" is not defined in the statutes, there is no good reason why the phrase should be narrowly construed. By definition, a child's before or after school program is a "place of care." The USDOL, for example, has construed the term broadly for purposes of the FFCRA, defining it as a physical location in which care is provided for the

child, including day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

9. Would an employee qualify for NJFLA and NJESL leave if the child's care provider (a person) is unavailable?

No. Unlike the FFCRA, the NJFLA and NJESL does not provide employees with leave to care for a child whose human care provider is unavailable. The statutes makes clear that leave is available when a "**place**" of care is closed due an epidemic or public health emergency.

10. Can an employee qualify for NJFLA and NJESL to care for an adult child whose school/college is closed due to COVID-19?

Strangely, yes. The statutes were recently amended to remove the age restriction to the definition of a child. A "child" can be an adult.

11. Can an employee use NJFLA and NJESL for child care purposes if the employee previously used up their allotted time under each for other permitted reasons?

No. The amendments to the statutes did not provide for additional time off. The amendments merely included additional permitted reasons for the leave. But if employees have already exhausted their NJFLA and NJESL allotment, they would not be entitled to additional time off.

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, [any attorney in our New Jersey office](#), or any member of the FP Post-Pandemic Strategy Group. 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](#).

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.