

# SCHOOL'S OUT FOR SUMMER: UNAVAILABILITY OF CHILD CARE AND THE FFCRA

Insights  
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As more and more businesses plan their re-openings heading into the summer months, many employers are trying to determine how to handle employee requests for leave under the Families First Coronavirus Response Act (FFCRA) based on the unavailability of child care. Specifically, once schools are closed for summer vacation, do employees continue to qualify for paid leave benefits under FFCRA?

Under normal circumstances, accommodating employees with child care issues can present challenges for employers. However, the COVID-19 pandemic has presented unique challenges, as many employees have taken on a new role as teacher. As the school year ends and summer break begins, new challenges await. Typical summer care plans, like camps and daycare, may not be an option this summer due to the pandemic.

Employers may be faced with many questions from employees based on the lack of summer child care options. This means you will need to determine whether employees qualify for FFCRA benefits. Determining who is eligible for paid leave benefits under the FFCRA will depend on a variety of factors. The USDOL has provided some guidance on these issues, but there are several questions left unanswered.

## PAID LEAVE BENEFITS UNDER THE FFCRA

Under the FFCRA, employees are entitled to paid sick leave (PSL) 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

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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 paid sick leave to care for their child only when the employee needs to, and actually is, caring for their child. The USDOL 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.”

## Service Focus

### Counseling and Advice

### Employee Leaves and Accommodations

## SCHOOL CLOSURES AND SUMMER PLANS

Many employers have already granted employees leave based on school closures as public and private educational institutions have been closed around the country for several weeks — if not months. However, now that the academic school year is ending, the question arises as to whether employees remain eligible for paid leave during summer vacation.

In response to Question 93 in its [FFCRA Questions and Answers](#), the USDOL recently clarified that employees may not take paid leave to care for children because school is closed for the summer. However, the USDOL further advised that employees may be eligible to take leave if their child’s care provider during the summer — including a camp or other program in which the employee’s child is enrolled — is closed or unavailable due to a COVID-19 related reason. The question many employers are asking is whether employees qualify for paid leave if their preferred child care provider is not available but other daycare options are available.

## WHO IS A SUITABLE INDIVIDUAL TO PROVIDE CHILD CARE?

The answer to this question is not entirely clear from the current USDOL guidance. However, as noted above, the FFCRA regulations suggest that an employee is not eligible for paid sick 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. The USDOL also repeated this verbiage in its [FFCRA Questions and Answers](#) in response to Question 69 (“Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?”).

While the USDOL has not addressed this issue squarely, forcing an employee to place their child in a day care or other child care setting, if the child's "usual" child care provider is closed due to COVID-19-related reasons, risks an interference claim under the FFCRA.

## HOW SHOULD EMPLOYERS HANDLE REQUESTS FOR FFCRA LEAVE THIS SUMMER?

Employers faced with a request for paid leave on this basis should have a discussion with their employees about what their typical summer child care plans were pre-COVID-19. If the employee worked for the employer during the prior summer vacation, what were the child care arrangements at that time? If the employee's typical child care provider is closed due to COVID-19, then the employee likely is eligible for FFCRA leave. If the employee's usual child care provider is available, but the employee is just generally uncomfortable sending their children, they may not be eligible.

Failing to provide paid leave if an employee is qualified can subject employers to significant liability, including back pay, liquidated damages, attorneys' fees, and reinstatement in the event of a termination. Accordingly, you should carefully consider all leave requests and seek the advice of employment counsel before denying a leave request.

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-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

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further

information, contact your Fisher Phillips attorney or any member of [our Post-Pandemic Strategy Group Roster](#).

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