

Employees on FMLA Leave Before School Closure

On March 13, 2020, Governor Evers ordered the Secretary of the Department of Health Services to close all public and private schools in the State of Wisconsin, starting on Wednesday, March 18, 2020, for purposes of pupil instruction and extracurricular activities. Based on this and other orders, schools have had to close for at least some time because of the COVID-19 pandemic. Such shutdowns raise many questions, including employment-related questions. One question that many schools have faced is how this shutdown impacts employees who were on an authorized leave of absence pursuant to the state and/or federal Family and Medical Leave Act (FMLA) prior to the closure of schools.

The answer to this question depends on the circumstances for each employee on an approved FMLA leave. There are various reasons for employees being approved for such leaves, including to address their own serious health condition or the birth of a child. As a result, each situation must be analyzed separately to determine the impact of the closure on the leave.

Although each situation must be analyzed based on its own circumstances, there are some general rules to keep in mind. Under the federal FMLA, there is a specific provision (29 C.F.R. s. 825.200(h)) that addresses closures during holidays and shutdowns. This provision states that “[i]f for some reason the employer’s business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas / New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer’s activities have ceased do not count against the employee’s FMLA leave entitlement.” As a result, in instances where a school is shut down for a week or more, the school cannot count this time against the employee’s FMLA allotment.

For example, a teacher may have been approved for state / federal FMLA leave beginning on Monday January 20, 2020, for the birth of a child. If the leave was approved for twelve weeks, the leave would have continued through Friday, April 10, 2020. However, if the school temporarily ceased operations and employees were not expected to report to work for the week of March 16 to March 20, that week would not be counted against the employee’s FMLA entitlement. Therefore, in such circumstances, an employee’s FMLA is not terminated; instead, the employer is simply not permitted to count such time against the employee’s allotment of FMLA leave. As a result, the FMLA leave could then be continued through Friday, April 17, 2020.

Of course, this question becomes a little more complicated if the school is only shut down for part of a week, or if the employee was approved for FMLA leave on an intermittent basis. As a result, schools will want to analyze each situation independently to determine whether the general rule above applies, or whether the unique circumstances warrant a different result. In general, however, employees who were taking FMLA prior to the school closure still must be afforded any such leave pursuant to the law, but the issue will likely be whether a school should count any days where the school is shut down toward the employee’s FMLA allotment.

One question you will need to determine is whether you have actually shut down for the class of employees the person is in. For example, teachers may still be working to provide online instruction material, but your educational assistants may not be working. So the answer could be different for different employees.

Another issue to also consider in these circumstances is whether any approved leave under the state or federal FMLA should be paid. Normally, any leave under state and federal FMLA is unpaid. However, there are provisions under both state and federal law identifying when, during the FMLA leave, paid benefits (e.g., sick days) may be used. Both state and federal FMLA have different substitution requirements, and board policy must also be considered. If a district is extending certain paid leave during the closure, such paid leave may also impact whether an employee should be able to substitute such paid leave during the employee's FMLA leave.

Employees currently on FMLA leave may also be impacted by the Families First Coronavirus Response Act, which was just recently enacted. This Act provides certain employees affected by the coronavirus with paid sick leave and paid FMLA benefits. Our firm will be issuing a newsletter on this topic shortly. The federal government has also issued guidance documents on issues related to leave, so schools should also review such guidance to determine if it applies to individuals currently on FMLA leave.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

<https://www.dol.gov/agencies/whd/fmla/pandemic>

Finally, there are some employees who were on non-FMLA leave prior to the closure of schools. Schools will need to again analyze the circumstances surrounding such leave carefully to determine how to address those individual employees. It is likely that such leaves should not be terminated, and districts should be cautious in their approach to such existing leaves.

For advice on specific matters or on how to apply a policy to particular facts, please consult one of our School Group Practice attorneys.

PRIMARY AUTHORS



Doug E. Witte

(608) 283-7529
DWITTE@BOARDMANCLARK.COM



Richard F. Verstegen

(608) 283-7233
RVERSTEGEN@BOARDMANCLARK.COM

- | | | | | | |
|----------------------|----------------|---------------------------|----------------|--------------------------|----------------|
| ■ Michael J. Julka | (608) 286-7238 | ■ Steven C. Zach | (608) 283-1736 | ■ Matthew W. Bell | (608) 286-7239 |
| ■ James K. Ruhly | (608) 283-1738 | ■ Richard F. Verstegen | (608) 283-7233 | ■ Christopher T. Schmidt | (608) 286-7157 |
| ■ William L. Fahey | (608) 286-7234 | ■ David P. Weller | (608) 286-7235 | ■ Brian P. Goodman | (608) 283-1722 |
| ■ JoAnn M. Hart | (608) 286-7162 | ■ Jennifer S. Mirus | (608) 283-1799 | ■ Daniel T. Fahey | (608) 286-7216 |
| ■ Eileen A. Brownlee | (608) 822-3251 | ■ Rhonda R. Hazen | (608) 283-1724 | ■ Eric B. Hagen | (608) 286-7225 |
| ■ Doug E. Witte | (608) 283-7529 | ■ M. Tess O'Brien-Heinzen | (608) 283-1798 | | |

Disclaimer: Boardman & Clark LLP provides this material as information about legal issues. It does not offer legal advice with respect to particular situations and does not purport that this newsletter is a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.