

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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Back to Virtual School: FFCRA Guidance for Employers

As the number of COVID-19 cases continues to increase in areas throughout the United States, school districts across the country are taking a variety of approaches to the upcoming school year. Several Wisconsin school districts have already announced an all-virtual or hybrid approach (some days per week in-person, while other days virtual) to starting the school year. This will require many working parents to stay home with their children or find alternative childcare arrangements.

The Department of Labor (DOL) updated its [Q&A guidance](#) on the Families First Coronavirus Response Act (FFCRA) to clarify what paid leave employees may be entitled to under the FFCRA when they are unable to work or telework due to school closures or childcare unavailability due to the COVID-19 pandemic. The following information will help employers and employees navigate through the current issues as COVID-19 continues to affect in-person student instruction.

When can employees take leave under the FFCRA due to a childcare or school closure?

Employees are entitled to FFCRA leave if their employer has work for them to do, but they are unable to report to work or telework due to one of the COVID-19 qualifying reasons outlined in the FFCRA. The FFCRA provides that an employee can take FFCRA leave if the employee is unable to work or telework because they are “caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.”

If a school attended by an employee’s child is closed to in-person instruction due to COVID-19, the employee is entitled to take paid leave under the FFCRA. If the closure is due to a reason unrelated to COVID-19 (such as normal school closures due to summer vacation or holidays), that does not qualify for leave under the FFCRA.

If the child’s school remains open for in-person instruction on a daily basis, employees are not entitled to FFCRA leave on days that in-person school is available. This means that if the school an employee’s child attends is open for in-person instruction, but the employee voluntarily keeps their child home (by either homeschooling their child or taking advantage of a virtual education option provided by the school), the employee will generally not be entitled to FFCRA leave.

If the employee’s school or place of childcare is open but a medical provider determines the employee’s child is unable to safely attend in person because the child has a medical condition or disability that puts them at

higher risk due to COVID-19, the employee may be entitled to FFCRA leave if they are needed to stay home to care for their child. However, it is not entirely clear whether the child's school or childcare is effectively "closed" for the student (which would qualify the employee for FFCRA leave), or whether the employee is voluntarily electing what the employee believes to be the best school or childcare choice for the employee's child (which would generally not qualify for FFCRA leave). Given the complexity this situation creates, the employer should contact legal counsel to ensure all legal obligations and documentation requirements are followed with respect to the employee.

Additionally, an employee may also not be entitled to FFCRA if they are able to work in person or remotely while their child is at home (as the case may be for employees with older teenagers). However, if an employee certifies that they need to be home to care for their child, regardless of the child's age, employers should not overly scrutinize such a request, absent a factual basis to believe that the employee is not providing care for the child during the day. The employee could have many valid reasons for needing to care for an older child.

If a school provides virtual-only instruction to students due to COVID-19, does that count as a school closure?

Yes. If the physical location where the employee's child receives instruction or care is closed due to COVID-19, the school or place of care is "closed" for purposes of paid FFCRA leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," the employee's child is still expected or required to complete assignments.

How much paid leave are parents entitled to for childcare or school closures?

Full-time employees are generally entitled to up to 12 weeks of paid leave for this reason, provided the employee chooses to use available emergency paid sick leave (up to 80 hours at 2/3rds pay up to \$200 per day) to substitute for the first two weeks of expanded family medical leave, which would otherwise be unpaid. Provided an employee has not used any "regular" FMLA during the employer's applicable federal FMLA year, the employee would then be eligible for an additional 10 weeks of paid expanded family medical leave at 2/3rds of their regular rate of pay (up to \$200 a day). Part-time employees are eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

For more information on calculating the amount of employee leave under the FFCRA, see our [previous article](#).

What documentation must employees provide to take FFCRA leave due to childcare or school closures?

An employee requesting paid sick leave or expanded family and medical leave due to childcare or school closure must provide the following information:

- The employee's name;
- The date(s) of requested leave;
- The reason for leave;
- A statement the employee is unable to work, including telework, because of the reason for leave;
- The name(s) of their child(ren) and their ages;

- The name of the school, place of care, or childcare provider that has closed or become unavailable;
- A statement that no other suitable person is available to care their child; and
- If the employee is claiming an inability to work because of a need to provide care for child(ren) older than the age of fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

In order for the employer to receive a tax credit for the FFCRA payment, the employee may need to provide additional documentation and information. More information on the required IRS documentation may be found [here](#).

What if an employee has already used some or all of their FFCRA leave in 2020?

Employees are only entitled to a maximum of two weeks of emergency paid sick leave and twelve weeks of paid expanded family medical leave (of which only the last 10 weeks are paid). Once an employee has exhausted all of their leave, they are no longer entitled to leave under the FFCRA. If a parent used some or all of their available leave under the FFCRA in April or May of 2020, they will have fewer (or potentially no) FFCRA paid leave days available during later months of 2020 (i.e., the start of the new school year). Currently, the FFCRA is set to expire on December 31, 2020, and it is yet to be determined whether Congress will renew the FFCRA or what the details of such a renewal might be.

Employers may voluntarily provide additional paid or unpaid leave to employees under existing or new company leave policies, but employers will not receive additional IRS tax credits for such voluntary benefits.

Can parents take unpaid leave under the “regular” FMLA due to childcare or school closures to care for a healthy child with no medical condition?

No. The “regular” FMLA generally does not allow employees to take unpaid leave for general childcare purposes. Employees may be able to take protected, unpaid leave under the “regular” FMLA to care for a child who has a serious health condition.

However, any leave taken under the paid expanded family medical leave counts against the employee’s qualified use of “regular,” unpaid FMLA leave and vice versa. If an employee took leave under the “regular” FMLA earlier in 2020, they may have less expanded family and medical leave available. More information on the interaction between the FFCRA paid expanded family medical leave and the “regular” FMLA can be found [here](#).

If the employee is able to work from home, are they still entitled to FFCRA leave?

It depends. Generally, if an employee is able to telework while their children are at home, they are not entitled to FFCRA leave. FFCRA leave is only available when the employee is unable to work or telework due to childcare obligations related to COVID-19.

The DOL warns employers that just because the employer provides teleworking as an option or the employee has been able to telework in the past, that does not necessarily mean the employee is able to telework and care for their child now or in the future. “The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the

employee's spouse, who is not eligible for any type of paid leave, could work or telework.”

Employers may require employees to provide the qualifying reason they are taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation as described above. Employers may discipline an employee who unlawfully takes emergency paid sick leave or expanded family medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, not taking care of a child.

What if both parents or more than one caregiver are working from home? Can multiple individuals take FFCRA leave to care for the same child(ren)?

DOL guidance makes clear that parents and other caregivers may not “double dip.” Employees may take paid sick leave or expanded family medical leave to care for their child(ren) only when they need to, and actually are, the only individual caring for their child and are unable to work or telework as a result of providing care.

If an employee's co-parent, co-guardian, or the employee's usual childcare provider is available to provide childcare, the employee is generally not eligible to take FFCRA leave. If two co-parents or co-guardians work for the same employer, only one employee may take leave to care for the same child(ren) at one time.

My employee was furloughed or terminated for a period of time due to COVID-19 but now I am returning the employee to work. Once the employee comes back from furlough/termination, how much FFCRA leave do they have available?

Employees are entitled to up to 2 weeks of paid sick leave and 10 weeks of paid expanded family medical leave. If an employee previously used some or all of their FFCRA leave (or “regular” FMLA leave) before the furlough or termination, that counts against their use of the corresponding type of FFCRA leave once they return. The employee's “bank” of FFCRA leave does not “restart” once they return from furlough or termination.

For example, if an employee used four weeks of paid expanded family medical leave (substituting their emergency paid sick leave for the first two unpaid weeks of leave) before they were furloughed, when the employee returns from furlough, they will be eligible for eight additional weeks of paid expanded family medical leave if they have a qualifying reason to take it.

Because the reason the employee needs leave may have changed during the furlough, you should treat a post-furlough request for FFCRA leave as a new leave request and have the employee provide you the appropriate documentation related to the reason they currently needs leave.

My business was closed due to my state's COVID-19 quarantine order. I furloughed all my employees. The quarantine order was lifted and I am returning employees to work. Can I extend my former employee's furlough because they would need to take FFCRA leave to care for their child if they are called back to work?

No. Employers may not discriminate or retaliate against employees (or prospective employees) for exercising or attempting to exercise their right to take leave under the FFCRA. If your employee's need to care for their child qualifies for FFCRA leave, whether paid sick leave or expanded family medical leave, they have a right to take that leave until they has used all of it. You may not use their request for leave (or your assumption that they would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough.

Currently, there is ongoing litigation in a New York federal court that may impact certain provisions of the FFCRA, including the rules on use of intermittent leave, documentation requirements, and work availability requirements. What impact, if any, this has for Wisconsin employers is undetermined at this time. Boardman Clark will continue to provide updates on this ongoing legal development.

As school districts across the country decide on their back to school plans and as those plans continue to change in response to COVID-19, Boardman Clark's Labor & Employment team will provide the latest FFCRA updates to employers.

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