

# Given Remote and Hybrid Re-Opening of Schools, When Is a School “Closed” and When Can Employees Take Expanded FMLA?

## Department of Labor Issues Updated Guidance

Article

April 28, 2020

Employers may be expecting an increase in requests for Families First Coronavirus Response Act (FFCRA) leave as the new school year is upon us. But many employers may have questions about when and under what circumstances an employee can qualify for FFCRA leave, given the varying ways that schools “reopen.” Some schools are beginning the year with fully remote learning, and others are attempting fully in-person instruction. Still, others are implementing a “hybrid” approach, whereby students are divided into groups or “cohorts” and attend school in-person on certain days of the week and attend school remotely for the balance of the week. Finally, some schools are giving families the option of choosing between in-person learning or remote instruction.

A quick recap: Most employers with fewer than 500 employees understand that employees who have been on the payroll for at least 30 days and who are unable to work or telework due to the need to care for a child whose school or childcare is unavailable due to the COVID-19 pandemic may be eligible for up to 12 weeks of leave under the expanded FMLA (EFMLA) provisions of the FFCRA. To be eligible for this leave, the employee must be primarily responsible for the child’s care and another “suitable individual,” such as a co-parent, co-guardian, or the “usual child care provider,” must not be available to provide the care the child needs.

Because, as noted above, schools are reopening under several different configurations, what does it mean for a school to be “closed?” Can an employee take EFMLA leave in the case of a “hybrid” school arrangement, taking leave on days when their child must attend school remotely? May an employee take EFMLA leave if their child’s school is fully open for in-person learning, but the employee has *opted* to have their student attend school only via remote

### PROFESSIONALS

Laurie E. Meyer  
Partner

### RELATED SERVICES

Employment Advice &  
Counsel

School & Higher Education

learning?

In recent days, the Department of Labor (DOL) has addressed these questions in updated responses to **Frequently Asked Questions** (FAQs).

- **School Is Fully Remote:** The most clear-cut scenario is when the student's school is completely closed for in-person learning—either indefinitely or temporarily due to a positive case and the need to deep clean. In those cases, the eligible employee may take leave to care for the child, so long as the employee attests that no other suitable individual is available to do so. (Remember that an employer is permitted to ask the employee to explain any special circumstances that would necessitate such care for children between the ages of 15 and 17.)
- **FFCRA Leave Due to Hybrid In-Person and Remote Instruction:** When a school provides hybrid learning as the only option (i.e., in-person school is unavailable to the employee's child on particular days of the week), then an eligible employee may take intermittent FFCRA leave on those days.
- **Parent "Opts Out" of Available In-Person Instruction and Chooses Remote Instruction:** If in-person learning is available at the child's school but the parent-employee chooses to keep his or her child home for remote learning due to generalized concerns about COVID-19, the DOL has stated that the employee cannot take FFCRA leave because the child's school is not in fact "closed" due to COVID-19 reasons. However, if the parent has kept the child out of school because he or she is under a quarantine order or because his or her health care provider has advised that the child self-isolate or self-quarantine, then the employee may be eligible to take paid FFCRA leave to care for him or her.
- **Before or After School Childcare Unavailable:** If a child's place of care (which includes before or after school programs or a previous caregiver, such as a grandparent) is closed or unavailable due to COVID-19 reasons.

Some employers may wonder if they can deny leave or inquire further when an employee, who has seemingly been able to work or telework productively since school closed in March and throughout the summer, now requests FFCRA leave as the school year begins. In earlier guidance, the DOL opined that employers should exercise caution in these situations to avoid an FMLA interference claim. While employers may inquire as to the existence of changed circumstances which might necessitate leave now—or ask the employee whether he or she would be interested in intermittent leave or flexible scheduling to enable the employee to balance his or her workload with childcare responsibilities—employers should recognize that there do exist legitimate reasons for the requests for leave after all this time. FAQ #91 and the DOL's response are as follows:

Given  
Remote and  
Hybrid Re-  
Opening of  
Schools,  
When Is a  
School  
"Closed"  
and When  
Can  
Employees  
Take  
Expanded  
FMLA?  
Department  
of Labor  
Issues  
Updated  
Guidance

**Q:** My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?

**A:** You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's rule applying the FFCRA. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increases the likelihood that any decision denying leave based on that information is a prohibited act. 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 decided 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. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

Given  
Remote and  
Hybrid Re-  
Opening of  
Schools,  
When Is a  
School  
"Closed"  
and When  
Can  
Employees  
Take  
Expanded  
FMLA?  
Department  
of Labor  
Issues  
Updated  
Guidance