

DOL Clarifies FFCRA Child Care Leave – More FFCRA Guidance Expected

Labor & Employment Law Update

on September 10, 2020

The Families First Coronavirus Relief Act or “FFCRA” requires employers with less than 500 employees to provide paid leave to employees unable to work (or telework) for various COVID-related reasons. Particularly relevant as many schools open either virtually or with combination of in person and virtual instruction is FFCRA’s mandate for paid leave to care for children not in school or daycare due to COVID-19.

On August 27, 2020 the DOL added FFCRA FAQs 98-100 clarifying that:

- FFCRA is not triggered if the child’s school is open for in-person instruction but the family chooses an e-learning option *unless* the e-learning option was chosen *because* the child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine. See FAQ #99
- A hybrid in-person / e-learning schedule triggers FFCRA for the child’s assigned e-learning days (those days when the school is effectively closed to that child although open to others) if the employee is needed to *care for* the child and no other suitable person available to do so. FAQ #98
- The fact that the district is monitoring the local situation and may reopen to in-person instruction does not impact FFCRA coverage. FFCRA is triggered when the employee is needed to provide care because the school is not open to the child for in-person learning. FAQ #100

While helpful, the FAQs leave some questions unanswered. What if school is open only half days? What if school is open but the child must quarantine due to possible exposure? If the child is not experiencing symptoms and therefore has not sought a diagnosis does the parent’s absence trigger FFCRA? Absent further guidance to the contrary, consider these absences as FFCRA-covered anytime the school is effectively closed to that child.

In other FFCRA news, back on August 5, 2020 we reported that a U.S. District Court for the Southern District of New York struck down portions of the DOL’s final rule implementing the FFCRA. The court invalidated the work availability requirement, much of the health care provider exception, the employer consent rule for intermittent leave, and employers’ right to require documentation in advance of leave. No word yet on whether the DOL will appeal the ruling

(because a U.S. government agency is a litigant, the parties have 60 days to appeal rather than the normal 30 days). However, on September 3, 2020, the DOL sent a revised final rule on the FFCRA to the White House for review. Presumably revisions were made in response to this ruling. Absent further guidance to the contrary, consider absences as FFCRA-covered anytime employees must care for their child because the school is effectively closed to that child.

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