

School's Out for ... Fall? Managing Employees' Need to Care for Children When School Is Virtual

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In March 2020, everyone thought we just need to occupy our children at home for a few weeks, maybe through spring break, and we would be fine. Then it was “just make it to summer.” Now summer is winding down and many kids are not going back to school full-time (at least not in person) any time soon. This creates tremendous challenges for families as well as employers.



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Employer Obligations Under the FFCRA

While many employers are not governed by laws that provide leave to employees who need to care for their children because schools are providing only virtual learning, the [Families First Coronavirus Response Act](#) (FFCRA) requires most employers with fewer than 500 employees to provide 12 weeks of leave to eligible employees in the event of school closures. The FFCRA only applies if an employee cannot work from home. Many employees may have exhausted the available 12 weeks of FFCRA leave to care for a child before the 2020/2021 school year starts. However, if employees have any remaining leave under the FFCRA, they may use it if their child’s school remains closed (or partially closed) to in-person learning in the fall.

The U.S. Department of Labor (DOL) has indicated that an employee’s ability to use FFCRA leave last spring will not necessarily affect whether the employee can use FFCRA leave this fall. For example, an

employee may be able to use leave under the FFCRA in the coming months, even if the employee was able to work (in person or remotely) when schools were closed last spring. An employer should not assume that the same schedule/arrangement would work for an employee moving forward. The DOL has acknowledged that circumstances may change, including employees realizing they are not able to effectively provide childcare and work remotely at the same time. Parents may also conclude that because remote learning may be here to stay indefinitely, they need to devote more time and attention to it this fall. Similarly, some employees may need to use leave because a co-parent, who may have used FFCRA leave in the spring to care for the child, has now exhausted the maximum 12 weeks of leave.

The DOL also clarified that if a childcare provider or school is open to some students, but not to the employee's student (due to capacity or other COVID-related limitations), the school or childcare provider is still considered "closed" to that student who is unable to attend. This means that employees may be eligible to use FFCRA leave when needed to care for children at home due to a "hybrid" model under which students physically go to school a few days each week and attend virtual school the other days.

The DOL has not expressly addressed an employee's eligibility for FFCRA leave where the employee has selected a virtual option as opposed to physically returning his or her child to school, but based on the statute's language, it appears that this employee would not be eligible for leave under the FFCRA because they had the option for their child to return to school in person. In that case, the school would not be closed to the child due to a COVID-19-related reason. Note, however, that if an employer knows that an employee elected a virtual option due to the child's underlying health condition, the employer may want to follow its typical process to determine if the circumstances may be covered by the traditional Family and Medical Leave Act (or the Emergency Paid Sick Leave Act if the child is subject to a quarantine order from the government or health care provider).

State and Local Laws

While employers with 500 or more employees are not governed by a federal law that would require them to provide leave to employees to care for children out of school, [some states and municipalities have passed paid sick leave laws](#) that are triggered by a COVID-19-related event or absence and do not have a maximum employee threshold. For example, several cities in California, as well as Colorado, New Jersey, Oregon (currently expiring on September 13, 2020), and the District of Columbia have extended some or all of the benefits of the FFCRA to employers with 500 or more employees. Other states and municipalities have more limited leave laws that apply to school closures and/or public health emergencies. As with the FFCRA, if employees have not already exhausted these leave benefits, they may be entitled to job-protected leave to care for a child whose school is closed.

Flexibility and Communication

When there are no laws that require employers to provide leave for employees who need to care for children whose school is closed, employers may want to explore other options to provide flexibility to employees to retain talent and maintain positive employee relations.

Some larger employers, even if not required by law, may choose to use the FFCRA as a guideline and provide equivalent benefits to their employees (albeit not benefiting from the tax credit available to employers that are covered by the FFCRA). Other employers may offer a lesser amount of leave to parents to care for children whose schools are closed. Employers may want to apply these leave programs consistently to avoid any claims of discrimination in how they offer the benefit.

Some employers are simply not able to allow employees to miss work. These employers may explore other options to support employees with childcare obligations. One option for employers may be to continue or expand remote work options. This may be coupled with flexible scheduling so that employees can tend to some childcare tasks during what would normally be work time and perhaps work outside of regular hours when necessary. It may be helpful for employers and employees to communicate at the start of such a remote work arrangement (or when children return to virtual school) about expectations, availability, and how the employee will accurately record work time while working remotely. Employers might also consider allowing employees to job share or trade shifts with another employee. Some employers are considering alternative scheduling, such as four 10-hour days or three 12-hour days, to allow employees to be home during school hours on some days.

Instead of adjusting work hours or responsibilities, other employers are providing childcare support for employees. Some employers are exploring on-site childcare options (perhaps with a community partner that already runs childcare programs or camps, so the provider is well-versed in any applicable licensing or other regulatory requirements). Some employers also provide back-up childcare support for last minute needs, which certainly may arise if schools need to quickly switch to a virtual model in response to COVID-19.

Employers also may want to allow employees to use company message boards to connect with coworkers who may be able to assist with childcare, through sharing babysitters, forming remote school “pods” (a whole new industry created in response to COVID-19), or even connecting employees who have older kids available for babysitting with employees who have younger kids in need of care.

With the uncertainty surrounding the upcoming school year, employers and employees who have caregiving responsibilities may find it beneficial to remain as flexible as possible and communicate openly and clearly to balance the pressing needs of home and work.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm’s [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. **Stay tuned for our upcoming podcast on strategies for employers**

as schools open virtually in the fall. Important information for employers is also available via the firm's webinar programs.

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