With kids going back to school, new questions regarding eligibility for paid leave under the Families First Coronavirus Response Act (FFCRA) are cropping up. Thankfully, the Department of Labor (DOL) recently supplemented its Frequently Asked Questions (FAQs) to answer some of the questions that have arisen thus far.

**FFCRA recap**

The FFCRA, which remains in effect until December 31, 2020, requires employers to provide all employees with two weeks (up to 80 hours) of paid sick leave for one of the specified reasons related to COVID-19. Relevant here is that the employee is entitled to two weeks of paid sick leave at two-thirds the regular rate of pay when the employee is unable to work due to a bona fide need to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19. However, employees may take up to two weeks of paid sick leave for any combination of qualifying reasons, so tracking leave and the reason(s) for same is key.

If the employee has been employed for at least 30 days, the employer must provide up to an additional 10 weeks of paid expanded family and medical leave for the same
reason. Time taken under the expanded leave provision counts against the employee’s entitlement to 12 weeks of Family and Medical Leave Act (FMLA) leave in a 12-month period, so if the employee has already exhausted FMLA leave in that period, the employee is not entitled to additional leave under the expanded family and medical leave of the FFCRA.

Landscape has changed since spring semester

In the spring, questions regarding the need to stay home with kids whose schools were closed were clearer because for the most part, schools were either closed or operating remotely. Things this fall are a bit more complicated with staggered school schedules, options for students to attend in person or to participate remotely, and continuing uncertainty about reopening or staying open for in-person attendance.

DOL issues new FAQs to address new questions

Let’s take a look at the guidance offered regarding return to school and the interplay with paid leave under the FFCRA:

1. **Is an employee eligible to take paid leave under the FFCRA when a child’s school is operating on a hybrid-attendance basis, such as having students alternate between days attending school in person and days participating in remote learning?** Yes, the employee is eligible to take paid leave under the FFCRA on the days when the child is not permitted to attend school in person and, instead, must engage in remote learning. There is a key limitation here, though: The employee must actually need the leave to care for the child during that time and there must be no other suitable person available to do so.

2. **Is an employee eligible to take paid leave under the FFCRA when a child’s school gives the option of the child attending in person or participating in remote learning and the child is signed up for the remote learning option?** No. The child's school is not “closed” for COVID-19-related reasons. Because the school is open for in-person attendance, FFCRA paid leave is not available to care for the child — regardless of whether the employee is given the remote learning option.

3. **Is an employee eligible to take paid leave under the FFCRA when a child’s school is starting the school year remotely but continuing to evaluate reopening for in-person attendance later?** Yes — at least, while the child’s school remains closed. If the school reopens and the child can return in person, the availability of paid leave will depend on how the school reopens (e.g., whether there is staggered in-person attendance or the option to continue remote learning).

What now for employers?

Employers should continue to address requests for leave as they arise and ensure management of all levels understands who is evaluating these requests and that
such evaluators are doing so properly. Improper denial of paid leave under the FFCRA can create potential liability for not only the pay to which the employee was entitled but also liquidated damages in the same amount and the attorney’s fees incurred in any associated lawsuit. It is important to make sure the procedures for requesting paid leave are clear, managers and supervisors know not to discourage taking paid leave, requests for paid leave are being addressed by someone who is up to speed on the reasons for eligibility, and there are tracking processes in place so employees are not double-dipping — or having their leave improperly denied. Best practice is to consult with employment counsel to ensure compliance with the FFCRA.

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