



RETURN TO WORK: CONSIDERATIONS AS THE SCHOOL YEAR COMMENCES – FOR REMOTE AND IN-PERSON WORKERS

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AGENDA AND SPEAKERS

- Background on the FFCRA
- State law requirements for employers outside of FFCRA
- Effect of recent DOL guidance on the FFCRA
- Legal issues and practical considerations for granting employee leave / telework requests for childcare

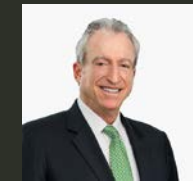
Note regarding Q&A: please use the Q&A feature in the Zoom window to submit your questions. All attendees will be muted and will be unable to verbally ask questions. Questions answered during the call will not be attributed to the participant who submitted the question. In the event we are unable to address all questions due to the time constraints, we will follow-up with you after the webinar.



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FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Took effect April 1, 2020; remains in effect through December 31, 2020
- Employers with up to 500 employees are covered by FFCRA
 - Exemption from some provisions for employers with less than 50 employees
 - Reimbursable to employer through payroll tax credit
- There are two “buckets” of leave available under the FFCRA:
 - Emergency Paid Sick Leave (EPSL)
 - Provides up to 80 hours of paid leave
 - New leave entitlement that is provided in addition to any leave available under federal, state, or local law
 - Expanded Family and Medical Leave (EFMLA)
 - Provides up to 12 weeks of leave (first 2 weeks are unpaid, but an employee can use EPSL during this time)
 - Available EFMLA depends on how much FMLA leave the employee has already used during the employer’s 12-month measurement period

THERE ARE SIX QUALIFYING REASONS FOR LEAVE UNDER THE FFCRA

1. Employee subject to a quarantine or isolation order
2. Employee advised by health care provider to self-quarantine
3. Employee is experiencing COVID-19 symptoms and seeking medical diagnosis
4. Employee is caring for an individual described in 1 or 2 above
5. Employee is experiencing a substantially similar medical condition
6. Employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19

TODAY'S FOCUS: LEAVE FOR CHILDCARE OBLIGATIONS

- Back to school season brings an array of challenges for employers and employees
 - Many employees have already used up their COVID related leave
 - School reopenings (and sudden closures for COVID-19 outbreaks) create volatile scheduling issues for employers
 - Employees requesting to work remotely brings logistical, privacy, and compliance challenges for employers
- Employers need to understand and navigate the current leave requirements regarding childcare obligations
- Employers need practical solutions to guide them through these uncharted waters

STATE AND LOCAL COVID-19 LEAVE

- Several states enacted laws providing paid sick leave to employees not covered by the FFCRA
- Terms vary depending on state / county / city
- Generally applies to employers with 500+ employees
- Many are identical or very similar to FFCRA obligations
 - Some have expansions to COVID-19 reasons (e.g. Sonoma – senior care)
- Other state-required paid FMLA or sick leave may also be available
 - FFCRA leave is in addition to any leave otherwise available under federal, state, or local law but may run concurrently with other state or local COVID-19 emergency paid sick and family leave
 - Check your state and local regulations

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE (AB 1867)

- Effective September 19, 2020 for employers with 500+ employees
- Provides 2 weeks / 80 hours for fulltime (and less for part-time) employees who:
 - Are subject to a federal, state, or local quarantine or isolation order related to COVID-19
 - Advised by a health care provider to self-quarantine or self-isolate due COVID-19
 - Prohibited from working by employer due to potential transmission of COVID-19
- Offset: If an employer has already put in place some type of COVID-19 supplemental leave, it can be credited toward California COVID-19 Supplemental Paid Sick Leave
- IMMEDIATE POSTING and NOTICE REQUIREMENTS for CA employers:
 - Must post workplace posters (California Labor Commissioner has provided a model poster)
 - Must specify the amount of available COVID-19 supplemental leave balances on employees' wage statements (by the next pay period following September 9, 2020)

RECENT EXPANSION TO CALIFORNIA'S FAMILY RIGHTS ACT (S.B. 1383), EFFECTIVE JANUARY 1, 2021

- Expands family member definition to include a broader set of relatives, including siblings, grandparents and grandchildren
 - Historically was limited to employee's "child," "parent", or "spouse"
- The bill also extends protections to workers who need time off when qualifying relatives (spouse, domestic partner, child, or parent) are called to active military duty
 - This was previously available under FMLA, but not CFRA
- Expressly requires employers who employ both parents of a child to grant leave to each employee
- NOTE: the bill does not require employers to pay workers while they are on leave, but rather to hold their jobs until they return, for up to 12 weeks—now for more qualifying reasons

NEW YORK PAID QUARANTINE LAW (EFFECTIVE MARCH 18, 2020)

- Requires employers to provide job protected sick leave to employees under a mandatory or precautionary quarantine or isolation order due to COVID-19
- Amount and type of leave (paid v. unpaid) depends on employer's size and annual income:
 - Less than 10 employees/\$1M annual income = unpaid leave for duration of quarantine/isolation order
 - Less than 10 employees but more than \$1M annual income = 5 days paid sick leave
 - Between 11 and 99 employees = 5 days paid sick leave
 - 100 or more employees = 14 days paid sick leave
 - All public employers = 14 days paid sick leave
- New York employers with less than 500 employees are subject to state and FFCRA obligations
- NOTE: New York Paid Quarantine Law does not provide leave for childcare obligations, unless the child is subject to a quarantine/isolation order

NEW, NEW YORK PAID SICK LEAVE LAW

- Goes into effect September 30, 2020 (but employers are not obligated to allow use of sick leave until January 1, 2021)
- Applies to all employers within the state but the amount of PSL varies by employer size:
 - Less than 100 employees = 40 hours of PSL per calendar year
 - More than 100 employees = 56 hours of PSL per calendar year
- Sick leave will accrue at a rate of 1 hour for every 30 hours worked, unless an employer frontload sick leave at the beginning of the calendar year
- Sick leave may be used for any of the following reasons:
 - For illness, injury, or health condition of the employee or an employee's covered family member
 - For diagnosis, care, or treatment of employee or family member; or
 - For various reasons when the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking
- NOTE: does not provide leave for childcare obligations, unless the child is a victim as specified above

AGENDA FOR CHILDCARE LEAVE ISSUES UNDER THE FFCRA

- Recent S.D.N.Y. decision and DOL guidance in response thereto
- Who is eligible for childcare leave under FFCRA?
- When is a school “closed” for purposes of the FFCRA?
- What is “intermittent leave” for purposes of the FFCRA?
- Legal considerations for granting leave for childcare obligations
- Practical considerations for addressing employees’ childcare obligations

RECENT COURT DECISION CHALLENGING THE FFCRA – QUICK BACKGROUND

- *State of New York v. United States Department of Labor*
 - On April 14, 2020, the State of New York challenged certain provisions of the FFCRA, including the:
 - “Work-availability” requirement
 - Definition of “health care provider”
 - Employer approval requirement for intermittent leave
- On August 3, 2020, the S.D.N.Y. determined that:
 - Employees who are furloughed or out of work due to an employer closure *are* covered by the FFCRA
 - Employer approval is *not* required for intermitted leave
 - The “health care provider” exemption was too narrow, thus excluding too many workers from the FFCRA

ON SEPTEMBER 11, 2020, THE DEPARTMENT OF LABOR CLARIFIED THAT:

- The FFCRA provides relief for employees who cannot work because of the six enumerated reasons, which does not include unavailability of work from the employer
 - DOL reaffirmed FFCRA leave may only be taken if the employee has work from which to take leave and are unable to telework
- Employer approval *is* required for “intermittent leave”
 - But what is intermittent leave? We’ll cover that shortly...
- The definition of “health care provider” was intended broadly
 - Includes those “employed to provide diagnostic services, preventive services, treatment services, or *other services that are integrated with and necessary to the provision of patient care*”
 - Important to review any prior and current exemptions taken under this exception to ensure continued compliance with FFCRA

WHO IS ELIGIBLE FOR CHILDCARE LEAVE UNDER FFCRA?

- To be eligible, the employee must be:
 - (1) Primarily responsible for the child's care, and,
 - (2) 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
- An employee can use either bucket (EPSL or EFMLA) if unable to work or telework due to the need to care for a child

CARING FOR A CHILD WHOSE SCHOOL IS “CLOSED”

- FFCRA is available if the employee is caring for a child whose school or place of care is “closed” for reasons related to COVID-19
- What does it mean for a school to be “closed”?
 - In-person learning – not closed
 - Virtual learning only – closed
 - Hybrid learning (in person and virtual) – sometimes closed
- What about districts that provided for full-time in-person learning but parents opted for virtual? Is the school considered “closed” under FFCRA?
 - No. See DOL FAQ 99
 - If virtual option was selected because of child’s underlying medical conditions, then traditional FMLA leave or EPSL may apply

INTERMITTENT LEAVE UNDER FFCRA

- Employer approval is required for intermittent leave
- What if employees take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis?
 - Such leave is not “intermittent” under FFCRA - Why?
 - For purposes of the FFCRA, the school is effectively “closed” on days the employee’s child cannot attend in person, even if this occurs on alternate days (see DOL FAQ 98)
 - Takeaway: employer approval is not required in this situation
- *Cf.* the employee’s child attends in-person classes for half of each school day, or in-person classes every other week
 - If the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person, this is considered intermittent leave that requires employer approval

LEGAL ISSUES WHEN GRANTING EMPLOYEE LEAVE / TELEWORK REQUESTS FOR CHILDCARE

- Privacy considerations
 - Employees working with children nearby
 - Employees may only have one computer at home and now need to share it with their children
- Meal break compliance
 - Many states have laws requiring meal breaks to be taken by specific times
 - May want to consider a telework meal break agreement
 - Carefully track hours worked and monitor meal break compliance
- Possible tax implications related to employees teleworking out of state/moving
 - Complex tax issue that often varies by state law
 - *E.g.*, employees relocating to states with no income taxes and trying to change their residency for tax withholdings

LEGAL ISSUES CONTINUED...

- Predictive scheduling laws
 - Vary by jurisdiction but generally require employers give employees notice of their schedules somewhere between 1-2 weeks in advance
 - Also requires employer notices of any changes to the employee's original schedule
 - Given the possibility of the changes in school schedules, pay close attention to predictive scheduling laws
 - Fines for noncompliance
 - Currently only Oregon has a statewide predictive scheduling law
 - There are six local laws, including San Francisco, New York City, Chicago, Seattle, Philadelphia

LEGAL CONSIDERATIONS

- Leave / telework decisions should be funneled through one person or department to ensure consistency
 - Important all decisions are made in a fair, nondiscriminatory manner
- Should leave decisions also be tracked?
 - A tracking chart helps ensure leave decisions are fair, justified, and defensible
 - A tracking chart may be discoverable in litigation
- Ways to maintain privilege / confidentiality
 - Companies that have legal departments should consider having Legal track the decisions or work with Legal
 - The self-critical analysis privilege
 - Protect records reflecting confidential internal investigations and self-evaluative analyses
 - Availability of this privilege varies by jurisdictions
 - Qualified privilege, not absolute (protects subjective information but not underlying objective facts)

PRACTICAL CONSIDERATIONS

- Employers may want to prepare a telework agreement to ensure mutual understanding of the employee's duties and hours while working remotely
 - Specify expectations around hours, performance, availability, productivity for both exempt and nonexempt employees
 - Check in with employees regularly to ensure both employer and employee needs and expectations are met
- Document any flex schedule or intermittent leave arrangements, and any performance expectations or issues regarding same
- Understand that some employees working remotely will also be managing their child's Zoom class
 - Create an understanding but professional atmosphere if some employees deal with childcare interruptions while on work virtual meetings or calls

PRACTICAL CONSIDERATIONS CONTINUED

- Can offer flexible work hours
- Can consider an alternative workweek schedule
 - Defined as more than eight hours of work in a 24-hour period without overtime pay—
 - Requirements vary by state law
 - In California, requires the support of at least two-thirds of the affected workers
- Consider having employees work collaboratively on their schedules to adjust for respective childcare responsibilities
 - Some employers have considered informal “pods” of employees, wherein one employee might work in the morning while his or her coworker handles childcare responsibilities for both of their children, and in the afternoon, the other employee works
- Unpaid leave
 - Helps retain quality employees and eliminate employee turn over costs
- Subsidizing childcare costs

PRACTICAL CONSIDERATIONS CONTINUED

- Part-time work options for employees
 - Employee workload is reduced, and pay is reduced accordingly
 - Allows employers to retain good employees through the pandemic with the goal of returning to full-time status in the future
 - Main issues associated with this option include:
 - Determining whether the option will be available for all employees (or only those with children)
 - Ensuring health benefits are still available (many employer-sponsored health benefit plans require a minimum number of hours of work per week for eligibility)
 - Ensuring compliance with wage and hour laws
- Shared work arrangements for working parents
 - The idea is to match two employees to share a job
 - Same issues as the part time option above

PRACTICAL CONSIDERATIONS CONTINUED

- One-room schoolhouse (space for school-age kids on company property)
 - Proctors are provided and the kids are allowed to stay in designated areas during the workday
 - Requires employers to address potential policies on
 - Children who are ill
 - How to screen proctors
 - When to allow “visitors” on the property
 - How to manage kids’ behavioral issues
 - How best to allow children to work out their energy during the day
 - Best to partner with existing, certified daycare or afterschool providers
- Partner with a local daycare or afterschool program and supplement the cost
 - This allows employees to have a viable childcare option that is not on the employer’s premises for the 2020-2021 school year or until schools and daycares return to a more normal schedule

HOW TO DETERMINE WHICH OPTIONS ARE BEST FOR YOU?

- Can assess employee needs through a survey
 - Allows employers to collect feedback on what employees really need to effectively work and care for their family, without spending precious time and resources implementing the wrong benefits
- Considerations around liability, safety, nondiscrimination rules and tax considerations exist and should not be overlooked
- Consult counsel to develop customized, practical solutions for your business

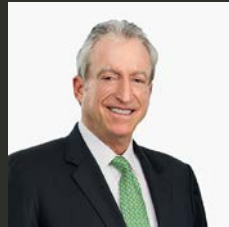
THANK YOU / QUESTIONS?



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