

# Back-to-School Employment Issues (in the time of COVID-19)

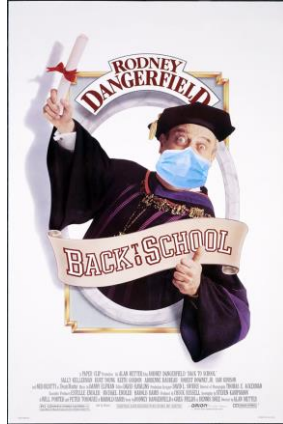
August 11, 2020



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## When Times Were "Normal"

Old photograph of people at a shopping mall (circa: 2019)



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## When Times Were "Normal"

- There is **was** no legal obligation to accommodate parents who cannot perform their job because of childcare issues.
- HOWEVER, even still... parents of minor children make up nearly 33% of the workforce.
- An employer's inflexible approach to childcare issues may lead to a loss of key employees and negatively impact the ability to attract future talent.
- In addition, the nature of an employer's response to these issues may implicate concerns relating to a disparate impact against female employees, who are, more often than not, the primary caregivers in their families.

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## Enter: The Families First Coronavirus Response Act ("FFCRA")

- The FFCRA remains in effect through December 31, 2020 and requires employers (with fewer than 500 employees) to provide their employees with: (1) Emergency Paid Sick Leave ("EPSL"); and (2) Emergency Family and Medical Leave ("EFML") for certain COVID-19-related reasons.
- Generally, the FFCRA provides that employees are entitled to:
  - 2 weeks of **EPSL** at the employee's regular rate of pay (capped at \$511/day) where the employee is unable to work because he/she is: (1) quarantined (pursuant to Federal, State, or local government order or advice of a health care provider); and/or (2) experiencing COVID-19 symptoms and seeking a medical diagnosis; **or**
  - 2 weeks of **EPSL** at 2/3 the employee's regular rate of pay (capped at \$200/day) where he/she is unable to work because of a *bona fide* need: (1) to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider); or (2) to care for a minor child whose school or child care provider is closed or unavailable for reasons related to COVID-19; **and**
  - Up to an additional 10 weeks of paid **EFML** at 2/3 the employee's regular rate of pay (capped at \$200/day) where an employee, who has been employed for at least 30 calendar days, is unable to work due to a *bona fide* need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.



4

## People Responsible for Managing Leave under the FFCRA...



5

## FFCRA: Quick & Dirty Reference Slide

**QUALIFYING REASONS FOR LEAVE:** An employee qualifies for expanded family and medical leave if he/she is unable to work (or telework) because he/she:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to (1) or (2);
5. **is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19;** or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

**DURATION OF LEAVE:**

**For reasons (1)-(4), (6):** Full-time EEs are eligible for 80 hours of EPSL, and part-time EEs are eligible for the number of hours of leave that they work, on average, over a two-week period.

**For reason (5):** Full-time EEs are eligible for up to 12 weeks of leave (2 weeks of EPSL followed by 10 weeks of EFML) at 40 hours a week, and part-time EEs are eligible for leave for the number of hours that they are normally scheduled to work over that period.

**CALCULATION OF PAY:**

**For reasons (1)-(3):** EEs are entitled to pay at their regular rate up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

**For reasons (4) or (6):** EEs are entitled to pay at 2/3 their regular rate up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

**For reason (5):** EEs are entitled to pay at 2/3 their regular rate up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).



6

## FFCRA: Popular (and Frequently Asked) Questions

### U.S. DOL FFCRA FAQs:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

(START HERE FIRST!)

- Weeks or hours?
- Intermittent leave?
- Employer-mandated quarantine?
- Use of other paid leave?
- Documentation?



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## Back to School



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## Back to School: When Can an Employee Take Leave?

- The employee is eligible for EPSL/EFML under the FFCRA relating to a school closure if he/she:
  - has worked for an employer for at least 30 calendar days;
  - has not previously exhausted his/her 12 weeks of FMLA leave;
  - has a “son or daughter” whose school or place of care is closed for reasons related to COVID-19; **and**
  - represents that no other suitable person will be caring for the son or daughter during the leave period.
- If all four requirements are met, the employee is entitled to take EPSL/EFML under the FFCRA **EVEN IF** he/she did not take this type of leave in the spring...



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91. **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?**

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 increase 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 made the decision 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.

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### When Is a School "Closed"?

- 1. If a school is open for in-person instruction, but a child is opting for online instruction by choice, it is not "closed."
- 2. If a school is requiring full-time online instruction or distance learning, it is "closed."
- 3. If a school provides a mixture of in-person and online instruction (e.g., A/B or "hybrid" approach), intermittent leave should be considered where necessary.

Current plans for reopening school next year:



Every parent right now



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### Back to School: When ***Can't*** an Employee Take Leave?

- If he/she cannot satisfy one or more of the necessary requirements, e.g.,
  - Not on payroll for at least 30 calendar days;
  - Has exhausted FMLA leave allotment;
  - School is not actually "closed"; and/or
  - Another person will care for son or daughter.

**-- OR --**

- The employer can successfully establish the "***small business exemption***," which applies only to school-closure-related leaves of absence...

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58. **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- ➔ 1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- ➔ 2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- ➔ 3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

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### Other Potential Options to Consider...

- **DOL FAQ No. 20:** "The Department encourages employers and employees to collaborate to **achieve flexibility** and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave."
- **DOL FAQ No. 21:** "The Department encourages employers and employees to collaborate to **achieve maximum flexibility**. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements."
- **DOL FAQ No. 22:** "The Department encourages employers and employees to collaborate to **achieve flexibility**. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements."
- **DOL FAQ No. 59:** "The Department encourages employers and employees to collaborate to reach the **best solution for maintaining the business and ensuring employee safety**."




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### Other Potential Options to Consider...

- **Create or Expand Permanent Remote Work Roles:** Reimagine roles and duties to facilitate long-term remote work opportunities.
- **Enhance Flexible Scheduling:** Allow employees to work around school hours or around their spouse's schedule so they can share the childcare.
- **Modify FTE Status:** Consider allowing employees who are struggling to manage work and childcare responsibilities to switch temporarily to part-time or reduced hours, with corresponding reductions in pay.
- **Create Temporary Unpaid Leave Programs:** Develop temporary unpaid leave programs for employees who have no statutory or employer-provided sources of paid or unpaid leave available to them.




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# QUESTIONS?



  
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