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FFCRA Leave Eligibility Related to Reopening of Schools

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Practice Area: Labor and Employment & School Law

The Families First Coronavirus Response Act ("FFCRA") allows eligible employees to take paid leave because of a need to care for an employee's child whose school or place of care is closed due to COVID-19 related reasons. As schools reopen under a variety of plans, such as hybrid-attendance and remote learning, questions have arisen regarding FFCRA leave eligibility under these circumstances. On August 27, 2020, the United States Department of Labor ("DOL") updated its Question and Answer guidance to address these issues. This *Legal Update* summarizes the DOL guidance, and provides practical direction for employers.

The FAQ identifies the following three return to school scenarios:

1. Schools Operating on Alternate Day or Hybrid-Attendance Basis

- Many schools are operating on an alternate-day or hybrid-attendance basis.
- Under these reopening plans, the school is open each day. Students follow an assigned schedule where some days are in-person, and other days are remote learning days.
- Parents do not have the option to send their child to school on remote learning days.
- The school is considered "closed" to the child on remote learning days because parents are unable to send their child to school for in-person learning.
- Parents are eligible to take FFCRA leave to care for the child on remote learning days (assuming that the leave is actually needed for childcare and no other suitable person is available).

2. Schools Provide Option for Either Remote Learning or In-Person Learning

- Some schools are allowing parents to choose between two alternatives—their child will attend school in person in the fall or participate in a remote learning program.
- Based on COVID-19 concerns, the parent chooses to sign up their child for the remote learning program.
- FFCRA leave is not available in this situation. The school is not considered "closed" due to COVID-19 related reasons, because the school is open for in-person attendance and the parent has chosen to keep his or her child home.

3. School Begins Year Under Remote Learning—In-Person Attendance May Follow Later in School Year

- The school is reopening under a remote learning model based on COVID-19 concerns.
- The school has announced that it will monitor local circumstances and decide about reopening for in-person attendance later in the school year.
- Parents are eligible to take FFCRA. The child's school is considered closed due to COVID-19.

Recommended Steps for Employers
Employers should take the following steps:

- Carefully review the updated DOL guidance;
- Update FFCRA leave policies to reflect updated DOL guidance;
- Update FFCRA leave request forms to reflect updated DOL guidance;
- Obtain appropriate documentation from employees to establish the need for FFCRA leave, including:
    - The name of the child being cared for;
    - The name of the school;
    - A statement from the employee that no other suitable person is available to care for the child; and
    - A statement from the employee describing the school's reopening plan, including whether the employee had the option to send the child to school for in-person learning.
- Carefully analyze FFCRA leave requests in light of the applicable circumstances related to whether a school or place of care is "closed" to ensure compliance with the FFCRA.

A complete overview of the complexities of all the FFCRA's leave provisions is outside the scope of this brief update. Employers may also wish to consult the DOL's complete Question and Answer guidance.

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