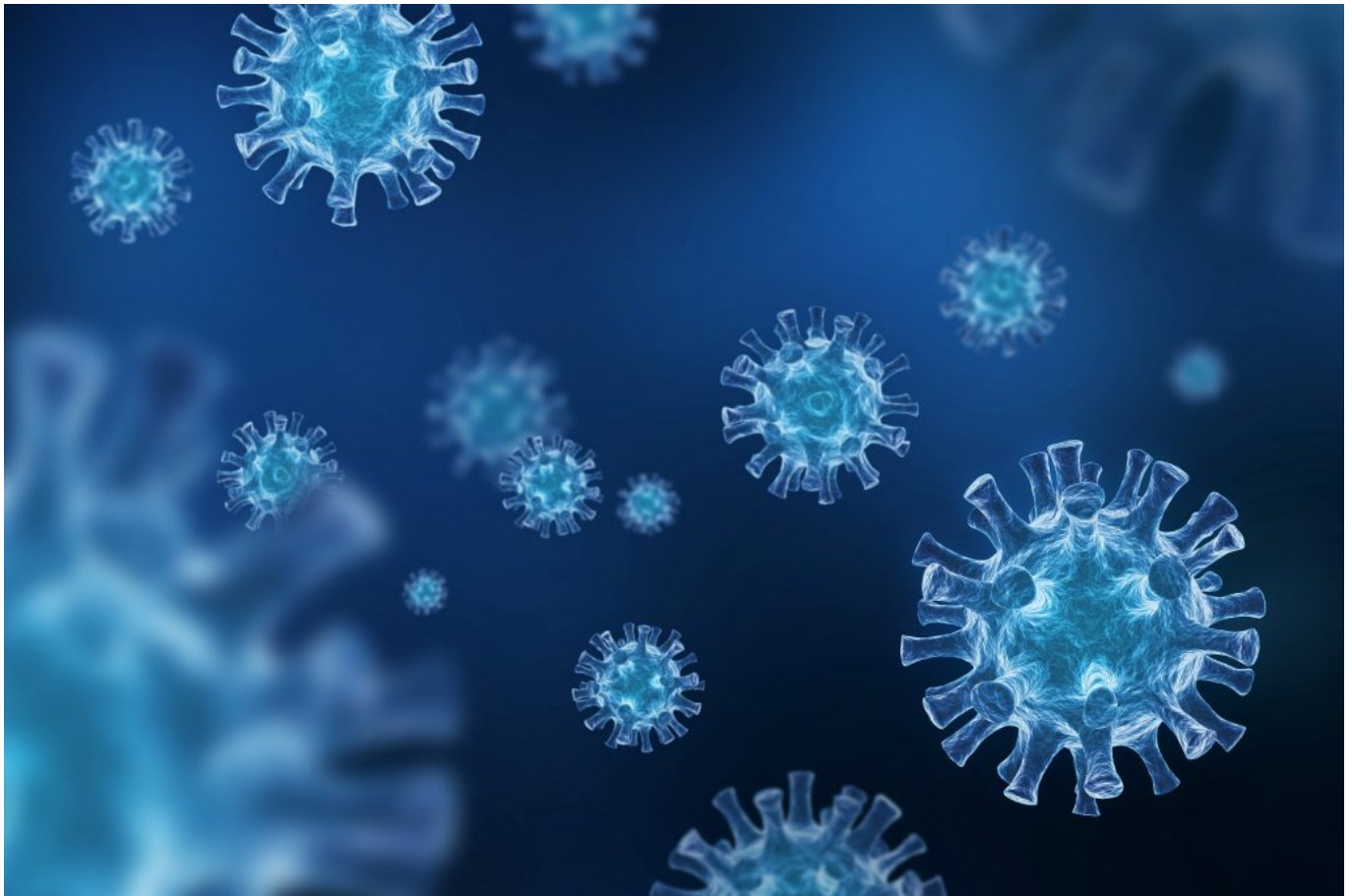


DOL Issues Guidance on FFCRA School Leave

By: John Vering and Mark Opara



On August 28, 2020, the U.S. Department of Labor (DOL) issued new guidance on an employer's obligations under the Families First Corona Virus Response Act (FFCRA) regarding when covered employees are entitled to paid leave as schools reopen for the fall. With some schools opening only for remote learning or offering alternative remote and in person learning options or requirements, employers and employees have been confused regarding entitlement to paid leave, and this new guidance is very helpful in clarifying employer's legal obligations in this area. The guidance is quoted below. Please note that the complete guidance on a variety of FFCRA issues can be found at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

96. I have an employee who used four weeks of expanded family and medical leave before she was furloughed. Now I am re-opening my business. When my employee comes back to work, if she still needs to care for her child because her child care provider is unavailable for COVID-related reasons, how much expanded family and medical leave does she have available? (added 07/20/2020)

Under the FFCRA, your employee is entitled to up to 12 weeks of expanded family and medical leave. She used four weeks of that leave before she was furloughed, and the weeks that she was furloughed do not count as time on leave. When she returns from furlough, she will be eligible for eight additional weeks of leave if she has a qualifying reason to take it.

Because the reason your employee needs leave may have changed during the furlough, you should treat a post-furlough request for expanded family and medical leave as a new leave request and have her give you the appropriate documentation related to the reason she currently needs leave. For example, before the furlough, she may have needed leave because her child's school was closed, but she might need it now because her child's summer camp is closed due to COVID-19-related reasons.

97. My business was closed due to my state's COVID-19 quarantine order. I furloughed all my employees. The quarantine order was lifted and I am returning employees to work. Can I extend my former employee's furlough because he would need to take FFCRA leave to care for his child if he is called back to work? (added 07/20/2020)

No. Employers may not discriminate or retaliate against employees (or prospective employees) for exercising or attempting to exercise their right to take leave under the FFCRA. If your employee's need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it. You may not use his request for leave (or your assumption that he would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough.

98. My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days.

99. My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID-19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See [FAQ 63](#).

Also, as explained more fully in [FAQ 98](#), if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your

child's remote-learning days because the school is effectively "closed" to your child on those days.

My child's school is beginning the school year under a remote learning program out of concern for COVID-19, but has announced it will continue to evaluate local circumstances and make a decision about reopening for in-person attendance later in the school year. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020)

Yes, you are eligible to take paid leave under the FFCRA while your child's school remains closed. If your child's school reopens, the availability of paid leave under the FFCRA will depend on the particulars of the school's operations. See [FAQ 98](#) and [99](#).

Additional Reminder

Please note that none of these Answers prohibit an employer from allowing an employee to take paid or unpaid leave when it is not required by the FFCRA. However, if an employer does so, it should not deduct non-required leave from the employee's leave entitlement under the FFCRA or take the tax deduction allowed by the FFCRA for that additional leave.

We urge our clients and friends to review the regulations and seek legal advice if you have questions about interpreting the FFCRA or if you need assistance in wading through the extensive regulations and related guidance.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's [COVID-19 Resource Center](#). Readers with legal questions should consult the authors, John Vering (jvering@sb-kc.com), Mark Opara (mopara@sb-kc.com), Shannon Cohorst Johnson (sjohnson@sb-kc.com) or other shareholders in Seigfreid Bingham's Employment Law Group, including: John Neyens, Brenda Hamilton, Julie Parisi, Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460.