

# Employer Guidance for School & Place of Care Closures

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# Topics for Today


- Legal Requirements
  - FFCRA
  - Sick Time and Leave
- Foreseeable Challenges
- Remote Worker Issues
- Practical and Creative Solutions for Employers to Consider
- Q&A



**FFCRA**

# Families First Coronavirus Response Act (FFCRA)

- Coverage: April 1, 2020 – December 31, 2020...*for now*.
- Employers: 500 or less employees
- Employee Eligibility:
  - Paid sick leave of up to 80 hours (2 weeks) regardless of length of employment
  - Expanded FMLA of 12 weeks after 30 days of employment
- Hardship Exemption:
  - Small businesses with fewer than 50 employees *may* qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would “jeopardize the viability of the business as a going concern.”



**EMPLOYEE RIGHTS**  
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE  
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**  
Generally, employers covered under the Act must provide employees:  
Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and

# FFCRA Leave for School Closures

An employee is **unable to work or telework** due to the need to care for a child because of **school or childcare facility closure** (including mandatory remote learning); or, the child's usual childcare provider is unavailable.

- **80 hours** of paid EPLSA leave, available immediately
- **12 weeks** of EFMLEA leave (2 weeks unpaid, 10 weeks paid), available after 30 days of employment
- Applies to employers with **fewer than 500 employees**, with the following exclusions:
  - Healthcare provider employees
  - First responders
  - Businesses with fewer than 50 employees for whom extension of this benefit would “jeopardize the viability of the business as a going concern”

# FFCRA Leave for School Closures, cont'd.

- Employees receive the **lesser** of \$200 per day or two-thirds of the employee's regular rate of pay (capped at \$12,000 (12 weeks of \$200/day) when combining EPSLA and EFMLEA)
- Reinstatement rights (limited exception for small employers)
- Supporting documentation must be kept for **4 years**




# Documentation Required

- Employees must provide:
  - Name of child(ren) being cared for;
  - Age(s) of child(ren) being cared for; and
  - Name of school/place of care/caregiver that is not currently available for in person care.
- Employees must attest:
  - There is no other suitable person to care for the child(ren);
  - If care is exclusively for child(ren) over 14, “special circumstances” exist which require care; and
  - If care is exclusively for child(ren) over 17, a physical or mental disability of the child(ren) prevents self-care.
- ***AND THAT’S IT!***
- <https://www.dwt.com/blogs/employment-labor-and-benefits/2020/04/ffcra-leave-documentation>

# FAQs for EFMLEA



- 
- **How are part time staff impacted?**
    - Part-time employees are eligible for leave for the number hours normally scheduled to work over that period
  - **How does EFMLEA overlap with other FMLA leave?**
    - Same 12-week FMLA leave bucket, but paid and for different reasons
  - **Is intermittent leave allowed?**
    - Yes, at the employer's election
  - **Can you require employees to top off with PTO/other paid leave?**
    - Yes

# Sick Time and Leave Overview

# Sick Time and Leave Overview



- Many cities and states have paid sick time and leave laws
- **Cover various uses:**
  - *School/place of care closures*
  - Medical issues for employee or a family member
  - Workplace closures
- Laws vary on covered uses, amounts, notice, verification, etc.
- Laws amended and/or temporary rules in place
- Limited guidance on “remote learning” and school closures

# Sick Time and Leave Overview

## Considerations:

- Leave and sick time may be protected
- No retaliation
- May be broader than “children”
- Verification may be limited for sick time (and leave)
- Notice may be limited for sick time (and leave)
- PTO - entire bucket may be available for sick time
- May be paid/unpaid
- Emergency Rules (stay current)
- Be flexible



# Sick Time and Leave Overview

## ■ Washington

- ***Washington Paid Sick Time:*** School/care closures by public order for health-related reasons for children
- ***Seattle Paid Sick Time:*** School/care closures for “*family members*”
- ***Tacoma Paid Sick Time:*** School/care closures by public order for children

## ■ Oregon

- ***Oregon Sick Leave:*** School/care closures by public order due to a public health emergency (in some instances may be unpaid)
- ***Oregon Family Leave Act:*** Temporarily expanded to cover school closures as “sick child” leave. 12 weeks of unpaid leave.

# Sick Time and Leave Overview

- **California**

- **Local COVID-19 Emergency Paid Sick Leave:** City of Los Angeles, unincorporated Los Angeles County, City/County of San Francisco, San Jose, San Mateo County, and Oakland (*this list is not exhaustive*). See <https://www.dwt.com/blogs/employment-labor-and-benefits/2020/04/california-local-paid-sick-leave-covid-19>
- **California Paid Sick Leave**
- **City of Los Angeles Paid Sick Leave:** Care for a *family member* whose school/ child care provider ceases operations in response to public health issue or at public official's recommendation/mandate
- **California School Activities Leave:** To address a child care provider or school emergency. (Cal. Lab. Code § 230.8(a).)

- **New York**

- **New York City's Safe and Sick Leave Act:** School/care closures due to a public health emergency for children

***THIS LIST IS NOT EXHAUSTIVE, ONLY PROVIDES EXAMPLES***



# Foreseeable Challenges

# Discrimination and Other Risks

- Leave law violations
- Wage and hour issues
- Discrimination



# New Leave Laws

1. Employees denied benefits under new leave laws
2. Employees on PFML who were not provided notice or benefits upon layoff  
(Employees can bring a cause of action under PFML starting June 12)
3. Employees disciplined or terminated for taking leave they are entitled to  
under the new (and old) leave laws (FFCRA, FMLA, etc.)

***Jones v. Eastern Airlines LLC*** (Pennsylvania). Executive alleges she was fired for trying to take time off under the Families First Coronavirus Response Act to care for her school-aged child

# Avoiding Claims About the New Leave Laws



1. Stay up-to-date on leave laws (consult legal counsel!)
2. Ensure you are providing notice about PFML to employees on leave or intending to take leave
3. Avoid disciplinary/termination decisions after employees apply for leave unless you have a well-documented reason
4. Reminder that laid off/terminated employees are not entitled to FFCRA benefits
5. Check in with employees on intermittent leave to see how they are doing

# Wage and Hour Litigation Risks

1. How do you monitor overtime and breaks of employees on a flexible schedule?
2. How are you sure employees with flexible work schedules are tracking all of their time and being paid for all hours worked?
3. Are employees entitled to additional pay for time spent doing temperature checks?
4. Are employees misclassified due to reduced hours?



# Proactive Steps To Prevent Wage and Hour Claims

1. Implement or update remote worker/telecommuting policies or agreements
2. Implement or update flexible work schedule policies or agreements
3. Set schedules and expectations – especially with employees with flexible schedules. And regularly check in with employees to make sure the schedule and expectations are working!
4. Train managers to be observant and vigilant with non-exempt employees
5. Reiterate timekeeping policies (in writing)
6. Require employees to certify their time and attest to daily meal/rest breaks
7. Exempt employees salary basis issues – watch out for employees on leave or those on reduced schedules

# Discrimination Claims

## EEOC Guidance from June 2020:

- If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? (6/11/20)
  - Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

# Discrimination Claims

1. Who gets a flexible work schedule? Who does not?
2. Disciplining/terminating employees who raise concerns that other employees are being treated more favorably with regard to flexible or reduced work schedules?
3. Who gets to keep working from home? Who must return to work?
4. Disciplining/terminating employees who voice concerns about safety?

***Kristopher King v. Trader Joe's East, Inc.*** (Kentucky). Employee alleges he was fired for voicing concerns on a private Facebook page about his employer not doing enough to protect him from the COVID-19 exposure.

# Proactive Steps to Avoid Discrimination Claims

1. Draft flexible work policies applicable to everyone
2. Allow those who might need a flexible schedule to identify themselves – don't self select them
3. DON'T make assumptions
  - Woman with school-aged children needs a flexible work schedule but male colleague with children does not
  - Employee who complained about working conditions would prefer to stay home
4. Carefully consider all circumstances when making performance-based personnel decisions...but still make those decisions if they are merited
5. Anticipate that you will have to explain/defend every personnel decision, including who gets to have a flexible or reduced work schedule

# Remote Worker Issues

# Remote Work Arrangements

- Remote work will be the answer for many employees/employers
- Apply remote work standards and expectations consistently, regardless of whether the need results from school or place of care closure
  - *[Remote work from out of state may be different]*
- Put in writing the key terms of the remote work arrangement:
  - Policy and/or Agreement
  - Review old policies and agreements with a fresh perspective



# Remote Work Policies and Agreements

- Consistent criteria for eligibility for remote work
  - Consider requirements of local and state stay-at-home orders, not just employees managing school and place of care closures;
  - Full- and part-time employees;
  - Exempt (salaried) and non-exempt (hourly) employees;
  - Objective factors such as job position/duties; and
  - Legitimate/non-discriminatory subjective factors such as length of employment or performance.
- Consistent application of benefits, rules, responsibilities (availability, timekeeping, equipment, security, monitoring, expense reimbursement, etc.)

# Remote Work Policies and Agreements

- Temporary or an ongoing arrangement?
- 100 percent remote or partial in-office work?
- Workspace safety, workers compensation coverage
- Security/privacy
- Equipment and expense reimbursement
- Performance and schedule expectations in remote environment (flexible hours, required hours of availability)
- Wage-and-hour compliance, including timekeeping, and break compliance
- Integration with existing employee policies

# Challenges of Remote Work Arrangements

- Burden on managers and supervisors
- Timekeeping
- Internet connection limitations
- Availability
- Distractions
- Compensable time/mileage/workers compensation risks for a quick trip to the office
- **Bottom Line: Train Managers and Supervisors, with an emphasis on consistency, communication, and flexibility**





**Practical and Creative  
Solutions for Employers to  
Consider**

# How Do We Support Employees? Creative Solutions and Ideas

- **Start of Pandemic: What was the advice?** “Use your natural supports and work with your employer for a flexible schedule, use of paid leave, extended leave, and the possibility of teleworking with children.”
- **How old does my child have to be to stay at home alone?**
- **The Current Reality:** Working parents need support, understanding, and creative solutions.



# What Are Working Parents Saying? Concerns.

- Increased Expenses - Caregivers are paying others to do the things they can't do because they're working (i.e. paying for childcare). But, these caregivers don't end up producing more.
- Availability - There's still an expectation that you're available at all hours even with the acknowledgement that availability is more difficult.
- Career Progression –Caregivers are also concerned they will be the first laid off due to a perception of being less productive. Employees want employers to help mitigate this fear.
- Layoffs – Companies that have gone through significant layoffs due to the pandemic now have many employees covering 2 or 3 employees' jobs. It's incredibly stressful for employees and makes balancing parenting duties even harder.
- Management – How management can lead by example (both men and women).

# What Are Working Parents Saying? Suggestions.

- Reduced Work Hours - Reduced work hours for everyone. Reprioritize the work in a real and meaningful way.
- Unlimited/Flexible PTO - Employers don't have to pay employees out for unused PTO but there's also a real culture around empowering people to take time off when they need/want it.
- Access to Support - Make access to therapy, counseling, coaching, or whatever other support parents need something that's easy and affordable (or free) to access. Employees are working through a global crisis and employers should acknowledge and support people struggling.
- HR Reporting - Promote an open door policy on reporting any concerns about peers or superiors slighting or shaming caregivers.
- Equal Access - Recognize that these are changes that would benefit all workers, not just people who are caregivers. Justice for the most impacted ends up being good for everyone.
- Acknowledge Individual Circumstances – Employers should acknowledge the bind that parents are in and ask employees what would help them. There are so many different circumstances that blanket policies are hard. Acknowledge how hard it is for working parents right now and for employers to tell them that their work is appreciated and that it's understandable and ok that they will not be the same employee they were in an office versus an at home parent/employee during a pandemic.
- Office Access – Implement the option to reserve office space in an empty office for quiet time.
- Childcare – Offer some sort of subsidy that can be used for childcare.

# What Are Working Parents Saying? Suggestions.

- Flexible working time
- Adjustment to policies that prohibit working from home while serving as a caregiver
- Don't book the days full of meetings/calls, especially video calls
- Make sure it's clear when a meeting is required versus optional
- Don't make a meeting required unless absolutely necessary
- Make it clear that video is optional (or dress code is modified)
- Implement "no meeting days" so caregivers can focus on work and parenting without the interruption of meetings
- Stack meetings so they aren't all throughout the day
- Work with employees to see what days/times work the best for meeting blocks and leave the rest of the time for actual work or parenting

# What Are Employers Doing?

- Control Over Schedule – Employers have offered employees flexibility to schedule times to assist/feed their kids daily.
- Adjusted Work Schedules – One employer told employees that they don't expect them to put in 100% of what they usually do right now, they said 80-90% is good enough. They also end the workweek early on Fridays for everyone (or have moved to a 4-day workweek).
- Onsite Employee Schedules – Consider switching to non-standard shift hours to allow parents to juggle schedules and be home with kids. Consider adding an early crew and a late crew to also allow for more physical distancing of employees.
- Additional PTO - Employer gave all employees a bank of 40 COVID hours to use at the beginning of the pandemic. Employees have the option to use a few hours here and there knowing that it doesn't count against PTO.
- COVID-Related Leave - An employer is offering full pay for any COVID-related reason.
- Childcare Support - Employer offers a reimbursement for any cost incurred above pre-COVID childcare costs. Another employer contracts with a daycare provider for back up care and offers 20 days of subsidized care per year.
- Increased Communication – An employer has implemented more staff meetings with executive leadership. Employer also created a COVID page on the intranet that has information on frequently asked questions. Finally, there are various committees planning virtual coffee breaks, happy hours, etc. to try to keep morale up.
- Counseling Services – An employer offers counseling services available through work (for individuals, couples, families) and there are frequent lunchtime presentations on pandemic related mental health stresses. Another employer offers reimbursement for subscribing to Calm or Headspace apps/mindfulness sessions.

# What Do Your Employees Need? Ask Them...

- Stipend for enhanced Internet or WiFi based or other home office needs
- Assistance with occasional care expenses for personally-sourced child care
- Flexible work schedule arrangements during the regular workweek
- Flexible work schedule arrangements including regular work on weekends
- Online tutoring or supplemental education services for school-age children
- Counseling services: family, couple, or individual counseling
- Reduced hour work arrangements or unpaid leave of absence



# Q&A

# Thank you



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