

## U.S. COVID-19: DOL ISSUES FFCRA GUIDANCE REGARDING SCHOOL REOPENING PLANS

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Last week, the Department of Labor (“DOL”) published guidance (Q&A #s 98-100) on the impact of various school reopening plans on employees’ entitlement to leave under the Families First Coronavirus Response Act (“FFCRA”). As anticipated, leave rights depend on the specific circumstances, with the key being whether the school is “closed” (not available for the child to attend in person):

- **No In-Person Program:** If the school is not offering any in-person instruction and instead is providing only remote learning (aka virtual learning; e-learning; distance learning) to students, then an employee will have a qualifying reason for leave.
- **Hybrid Program:** If the school is providing a hybrid program pursuant to which students are receiving in-person instruction on some days and doing remote learning on other days (such as alternating days or weeks in the classroom vs. at-home), then an employee will have a qualifying reason for leave but only on the days when in-person instruction is not available to their child.
- **Choice Between In-Person or Remote Program:** If the school provides families with a choice between an in-person program or a remote program, and the employee *chooses* the remote option, the employee will not have a qualifying reason for leave. This is true regardless of the reason for the employee’s choice (e.g., choosing remote learning due to fear of exposure to COVID will not provide a qualifying reason for leave when in-person learning is available).

Importantly, even when the school is closed, an employee will still be entitled to leave only when the employee is needed to care for the child due to the closure. Thus, if another individual (such as the employee’s spouse) is available to care for the child, or if the child is over age 14 and there are no special circumstances requiring the employee to provide care to the child, then the employee will not be entitled to leave even if in-person learning is not available.

The new guidance does not address all potential school reopening plans. For example, the DOL did not discuss whether an employee will have a qualifying reason for leave if the school is open each day, but is open for fewer hours than normal (e.g., a 9 am – 1 pm school schedule rather than a 9

am – 3 pm school schedule). Nor did the Q&A address the currently open question of whether employees may take FFCRA leave for child care purposes on an intermittent basis without employer approval. It would appear, however, based on the new Q&A, that the DOL would likely support an employee's right to take FFCRA leave even for shorter periods than a single, full workday if the child's school is unavailable during times when it would normally be available.

That said, where the school day is shorter than normal, an employer may still wish to inquire into the employee's usual childcare plans during work hours before and/or after school, and whether that childcare option remains available. For example, some schools are offering expanded before and after school programs, such that FFCRA leave is not needed despite the new school hours.

Of course, just as many schools' reopening plans have changed in the weeks (and even days) leading up to the start of school, whether a school is open or closed at any point in the future may also change. In that event, an employee's entitlement to FFCRA leave could very well change too. Accordingly, employers will need to continue to remain flexible and provide clear, ongoing communication with their employees.

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