



LEHR MIDDLEBROOKS  
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • BENEFITS

## BACK TO SCHOOL (SORT OF?)

*July 30, 2020*

As local school districts evaluate whether and in what format to open schools this fall, parents and parents' employers ponder how to juggle childcare demands and work. The Families First Coronavirus Response Act (FFCRA) created leave options for employees needed for childcare, but many employees have already used some or all of that leave. Here are issues to consider in planning for the upcoming school year.

### **A refresher**

For employers with fewer than 500 employees, the FFCRA expands FMLA leave to include the leave to care for a child whose school or childcare is closed for COVID-19 related reasons. In conjunction with leave under the Emergency Paid Sick Leave Act, this leave is partially paid (and reimbursable to the employer through payroll tax credits). The leave is capped at 12 weeks – inclusive of all forms of FMLA leave.

### **If schools open on a reduced schedule (such as alternating days or partial days), can an employee take EFMLA intermittently?**

Many schools districts are considering a “hybrid” opening in which students will be allowed to attend physical school on a reduced basis (such as 2-3 days a week) and spend the remainder of the school week in virtual learning from home. Under these circumstances, an employee may request to take EFMLA only during those times when the child is in virtual learning. An employer may agree to this intermittent leave, but intermittent leave is not required.

### **If schools offer parents the option of attending physical school or virtual learning from home, can the employee take EFMLA?**

If parents have an option, the schools would not be closed for purposes of the EFMLA.

### **What if the employee can work from home while schools are physically closed?**

EMFLA leave is only available to employees who cannot work (including telework) because schools are closed. An employee can be required to perform telework while schools are closed. The feasibility of telework, however, may depend on the need for the employee to participate in the child's virtual learning – which may turn on the child's age and other circumstances. An employer and employee may agree on a reduced

schedule in which the employee works part of the day and takes EFMLA while assisting with childcare and learning.

The Department of Labor has stated that an employee only need be paid for the time spent performing actual work. If an employee teleworks in the morning, assists with schoolwork in the afternoon and works again in the evening, they would only be paid for the actual work time (morning and evening).

**If an employee works during hours when school (in-person or virtual) is not in session, must the employer permit the employee time off from that shift when the employee has been at home during the day with the child?**

Although there is no definitive guidance from the Department of Labor, EFMLA is intended to be leave for when school or childcare is closed. Therefore, the parent (at least in theory) could care for the child during the day and still cover their shift. EFMLA would therefore not be applicable. However, if childcare during the shift is closed because of COVID, EFMLA might be available during that time.

**What if the employee's children are capable of self-care?**

Under IRS regulations, if the child is 15 or older, you can require substantiation that the employee's supervision is necessary.

**If a 15 to 18-year-old is home with siblings younger than 15, may the employee still use EFMLA or is the 15 to 18-year-old considered as providing care?**

The employee would still be entitled to use EFMLA to care for the younger child.

**If the schools are open but the child's class is required to quarantine, is EFMLA available?**

Yes. The school would be considered closed for the class even if others can still attend.

**What if the employee has already taken EFMLA when schools closed earlier in the pandemic?**

The employee is only entitled to total of 12 weeks of EFMLA. If they have already used some of their EFMLA leave, that leave reduces the balance which they can use for the upcoming school year. You can, of course, provide additional leave at your option, but the additional leave, if paid, will not be eligible for the tax credit.

**What documentation should you require for EFMLA?**

You should request a statement from the employee which includes the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to

provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

**Can you keep an employee on furlough if they will need EFMLA when school starts?**

No. You cannot discriminate against employees because they will need to use EFMLA.

682127