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# BACK-TO-SCHOOL

Frequently Asked Questions about Leave under the Families First Coronavirus Response Act (FFCRA)

**My employee's 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. Can the employee take paid leave under the FFCRA in these circumstances?**

Yes, employees are eligible to take paid leave under the FFCRA on days when their child is not permitted to attend school in person and must instead engage in remote learning, as long as the employee needs the leave to actually care for their child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA, the child's school is effectively "closed" on days they cannot attend in person, so employees may take leave as needed on those days.

**Some schools are letting parents choose between having their child attend in person or participate in a remote learning program for the fall. Some of my employees want to take the remote-only option because they are worried that children will catch COVID-19 and bring it home to the family. Can they take paid leave under the FFCRA in these circumstances?**

No, the employee is not eligible to take paid leave under the FFCRA because their child's school is not "closed" due to COVID-19 related reasons; it is open for their child to attend. If the child's school is physically open, but an employee has chosen for the child to remain home, they are not entitled to FFCRA leave.

If, however, the choice was between a hybrid schedule and a remote-only option, the employee would still be eligible to take paid leave on the days when the child would be doing remote-learning regardless (because the school is effectively "closed" to the child on those days). For instance, if an employee had a choice between three days in school and two days at home *or* a fully remote program, and chose the fully remote program, they'd still be entitled to use FFCRA leave for the two days the child would have been schooling from home.

Also, if child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the employee may be eligible to take Emergency Paid Sick Leave under the FFCRA to care for them.

**Can we set up childcare or tutoring in the workplace?**

While it may be possible (and we applaud the creativity), you'd want to consult with an attorney or someone else in your state that is familiar with the kind of licensing and insurance that would be required to do this. Even if you were only allowing children in the workplace occasionally and they remained under the control of their parent, you'd want to check with your general liability carrier to make sure that it would cover incidents that involved a visiting child.

**Can I deny leave to an employee who has high schoolers who should be able to take care of themselves during the day?**

No. However, if the child is 15 or older, you should require that the employee provide a statement or affirmation that there are special circumstances that cause the older child to need their care. They do not need to provide any further information beyond that statement (such as what the special circumstances are). If you feel it necessary, you can remind all employees that it is fraudulent to take FFCRA leave if they are not *unable* to work as a result of the care they will be providing.

## Can we require proof that the school or place of care is closed?

No. You can and should (for IRS documentation) require the names and ages of the child (or children) being cared for and the name of the school, place of care, or caregiver that is closed or unavailable due to COVID-19. You should also require a signed statement that the employee is *unable to work* because they need to provide care for the child or children. Finally, if the child is 15 or older, the employee needs to indicate that there are special circumstances (but doesn't need to explain them).

We don't encourage independent sleuthing to verify what an employee tells you, but if you feel that's necessary, be very careful of doing anything that could violate an employee's right to privacy. Also be consistent in verifying this kind of information—if you are only fact-checking certain employees, you'll open yourself up to complaints of unfair treatment.

## Can I ask an employee to look for different childcare if their usual provider is unavailable?

No. An employee is entitled to leave if the child's usual care provider is unavailable because of COVID-19. They are under no obligation to look for alternatives, and any attempt on your part to require them to do so would be illegal interference with their right to leave.

## Can I deny leave if I think or know an employee is lying about the need to care for a child?

There is significant risk in denying a request for FFCRA leave if an employee has provided the appropriate documentation. That said, if you believe the request is fraudulent, you should have a discussion with the employee before granting or denying leave. If it turns out that they were submitting a fraudulent request—and you have sufficient evidence to support that—you can take disciplinary action if it seems appropriate. If, after discussion, you think their request is more likely than not legitimate, you should grant it.

Be careful of disciplining an employee who requests leave but doesn't meet the necessary criteria. These leave entitlements can be confusing, and it would be unlawful retaliation to discipline an employee who was attempting to use their right to leave in good faith.

## If an employee's stay-at-home spouse is sick with COVID-19 and unable to care for their children, can they take FFCRA leave to do so?

Yes, the children's regular care provider (the stay-at-home spouse) is unavailable because of COVID-19, so the employee would be able to use either EPSL or EFMLA to provide care while their spouse is not able to do so.

## What if an employee won't fill out the required FFCRA documentation?

The earliest an employer can require notice is *after* the first workday of FFCRA leave. (The regulations require employees to provide notice of their need for school closure leave as soon as practicable, but there are no consequences if the employee doesn't do so.) If, after the first workday, the employee does not provide sufficient documentation to support their request for leave, they must be notified of the problem and given an opportunity to provide what is needed. If the employee still does not provide completed documentation after being given a reasonable opportunity to do so, then the employer is not required to provide FFCRA leave.



## **Can we terminate an employee who is unable to work because they need to care for a child but have used up their leave under the FFCRA?**

Assuming that no other leave laws apply, termination is an option. But you may want to instead consider offering the employee an unpaid personal leave of absence or revisiting whether a flexible or part-time work schedule would be better than losing the employee entirely. Recruiting, hiring, and training are all expensive undertakings, so if there's a way to keep an employee around—even if they need some time off—that is likely better for your bottom line.

If you do decide to terminate an employee who is out of leave, make sure you can be consistent in that response going forward. If you are flexible with some employees while firing others, you will open yourself up to claims of discrimination.

## **What if we find out after we've granted and paid for an employee's leave that it was fraudulent? Do we make them pay us back or report them to the IRS?**

There is not yet clear guidance about how to handle this situation, so we recommend calling your local Wage and Hour Division of the Department of Labor. They are generally very responsive and may be able to provide some guidance based on your situation.

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