

U.S. Dept. of Labor releases paid leave guidance for employees with children returning to school



Janet Hendrick is an experienced employment litigator who tackles each of her client's problems with a tailored, results-oriented approach.

The U.S. Department of Labor issued additional guidance on Thursday, Aug. 28 regarding employees taking paid leave under the FFCRA. This update from the DOL comes soon after the United States District Court for the Southern District of New York issued an opinion invalidating four DOL regulations interpreting the FFCRA: (1) the “work-availability” requirement; (2) the definition of a “health care provider”; (3) the intermittent leave regulation; and (4) the documentation requirements.[\[1\]](#) Thus, the new guidance indicates that the DOL will follow and has adopted the New

York Federal Court's opinion.

For employees who have children returning or who have returned to school, DOL added the following three Families First Coronavirus Response Act Questions and Answers to help employers and employees understand under which circumstances employees may take paid leave of work.

- **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.

- **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.

These changes show that employer compliance with the New York Federal Court opinion is crucial – even for employers outside of that jurisdiction. The DOL could continue to release new guidance based on other Federal Court decisions examining FFCRA regulations.

[1] State of New York v. United States Dep't of Labor, 20-CV-3020 (S.D.N.Y. 2020). A copy of the opinion is located at: <https://www.fmlainsights.com/wp-content/uploads/sites/813/2020/08/State-of-NY-v.-USDOL.pdf>.

For more information on this article and its impact on your business, please call 214.615.6391 or [email Janet A. Hendrick](#).

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