



BACK-TO-SCHOOL

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

If children and their parents can choose between in-person schooling or online schooling, can we deny leave to employees who choose online schooling?

We don't know yet. EFMLA can be used when a child's school or place of care is "closed," such that the child cannot be there in person. This might suggest that if the option is available to attend in-person, that those choosing online school would not be eligible for leave. However, we expect that many school districts will *need* a certain percentage of students to take classes online to make in-person school possible at a sufficiently reduced capacity. In effect, these schools will be "closed" to a certain portion of the student body and it may or may not matter whether the parents chose the online option. We expect guidance from the Department of Labor soon that will answer this question definitively.

If kids are going to school in-person two days a week and doing school from home three days a week, do we have to give a parent three days a week off or can we refuse intermittent leave?

If you're in the Southern District of New York, you must grant intermittent EFMLA if that is what an employee needs and asks for. That district includes the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester.

In the rest of the country, the answer is not clear, but we certainly recommend providing intermittent leave (as does the Department of Labor). Employees with children are in desperate need of flexibility and understanding right now and refusing a request for intermittent leave may lead to low morale, low productivity, or the employee quitting.

Keep in mind that not all employees will want a full day off just because a child is doing school from home—many may request an hour or two in the morning and an hour or two in the afternoon. Being open to these kinds of requests should help you maximize productivity (as much as possible under tough circumstances) and reduce turnover.

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 or children are 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?

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 or children are 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 infringe on 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 that 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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