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### ***FFCRA Overview***

- The Families First Coronavirus Response Act (FFCRA) provides employees with certain amounts of paid leave based on six qualifying circumstances.
- This law went into effect on April 1, 2020 and is set to expire on December 31, 2020, unless extended.



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### FFCRA Emergency Paid Sick Leave

Employees qualify for emergency paid sick leave (up to 80 hours) if the employee is unable to work (or telework) because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee self-isolates at the advice of a health care provider due to diagnosis of or other concerns related to COVID-19;
- The employee is obtaining a medical diagnosis *because the employee is experiencing the symptoms* of COVID-19.



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### FFCRA Emergency Paid Sick Leave, con't.

- The employee is caring for an individual a) who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or b) who is self-isolating at the advice of a health care provider due to diagnosis of or other concerns related to COVID-19;\*
- The employee is *caring for* the employee's son or daughter if the "school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions."\*
- The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services. [No such condition has been specified yet].\*



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### FFCRA Expanded FMLA Leave

Employees may take Expanded FMLA leave (up to 12 weeks, of which only the last 10 weeks are paid\*) if the employee is unable to work (or telework) because the employee is *caring for* the employee's son or daughter if the "school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions."

\* indicates leave is paid at 2/3rds regular rate of pay up to \$200 per day, rather than 100% of pay up to \$511 per day.



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### Definition of "Son or Daughter"

- "Son or daughter" means the employee's own child, including a biological, adopted, foster, stepchild, legal ward, or a child for whom the employee is standing in loco parentis (someone who has day-to-day responsibilities to care for or support a child).
- For example, a grandparent who is raising a grandchild as his/her own child on a day-to-day basis would likely qualify for FFCRA leave if the grandparent is unable to work or telework because of the need to care for the grandchild due to school closure and child care unavailability.
- Additionally, the DOL interprets "son or daughter" to mean an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability.



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### Definition of Child Care Provider

- The DOL has defined "Place of Care" broadly to include a physical location in which care is provided for the child, but does not have to be a location that is solely dedicated to such care.
  - This could include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
- Similarly, the DOL has defined "Child Care Provider" broadly to mean anyone who receives compensation for providing child care services on a regular basis and provides as examples a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under state law.
  - However, the DOL stressed that a "Child Care Provider" can also include someone who is not compensated or licensed, including grandparents, aunts, uncles, neighbors, and friends who regularly care for the child.



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### Integration with "Regular" FMLA Leave

- Expanded FMLA leave under the FFCRA counts towards an employee's total of 12 weeks of "regular" FMLA leave.
- If any employee has already used some FMLA leave for other qualifying reasons, the amount of expanded FMLA is reduced by the amount of FMLA the employee has already taken.
- As with any form of FMLA leave, school districts cannot interfere with the right of an employee to take expanded FMLA leave if they qualify, nor can a district retaliate against an employee for taking this leave.



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### Health Insurance Continuation

- Employees are generally entitled to continue their health insurance coverage while on FFCRA leave on the same terms (including contribution rates) as if they continued to work.
- If the employee does not return to work at the end of their FFCRA leave, the district's health insurance plan will determine whether they are still eligible to be on the plan and at what contribution rate.
- If an employee is no longer eligible for health insurance, the employee likely has continuation rights under COBRA.
- Districts are strongly advised to consult with their health insurance carriers to confirm employee eligibility while on FFCRA leave, including contribution obligations and rates and employee eligibility if an employee does not return from FFCRA leave.



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### Intermittent Leave

- **Teleworking**
  - If an employee is working from home ("teleworking"), the district *may allow the employee, but is not required to allow the employee, to use either emergency paid sick leave or expanded FMLA leave intermittently.*
  - If the district does allow the employee to use FFCRA leave intermittently, the leave may be taken in any time increment to which the school district agrees. School districts have broad flexibility to agree on a teleworking arrangement that works for the district and for each employee.
  - School districts should ensure they are tracking FFCRA hours closely and monitor when the employee has used up the FFCRA leave. Any intermittent use arrangement should be documented in writing to ensure that both the district and employee have a clear understanding of the employee's schedule and use of intermittent leave.



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### Intermittent Leave, con't.

- **Working on Site**
  - By contrast, there are more restrictions on the use of intermittent leave when the employee is physically reporting to work at the worksite. This is because employees who are reporting to the worksite present a greater risk of contracting and spreading COVID-19.
  - School districts are *not required* to allow the use of intermittent leave for worksite employees. If the district does not want to (or is unable to) let worksite employees use FFCRA leave intermittently, the district can deny intermittent leave requests.
  - If the district decides to allow the use of intermittent leave, the employees may only use leave intermittently if they are using FFCRA leave to care for their son or daughter whose school or place of care is closed because of reasons related to COVID-19.



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### Hybrid School Schedules and FFCRA Leave

- Revised regulations from the DOL clarify how school districts must administer FFCRA leave for employees who need to care for a child due to school closures if the child’s school is utilizing a hybrid school schedule due to COVID-19.
- The DOL does not consider a request from an employee to take leave for part of a workweek due to their child’s hybrid school schedule to be a request for intermittent leave. Instead, the DOL considers each day the school is closed to the employee’s child for in-person instruction to be a separate event that qualifies for leave.
- Therefore, school districts must permit employees to take partial weeks of leave when employees need leave due to their children’s school being closed because the children’s school is using a hybrid school schedule.



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### Substitution of Leave

- If both the school district and employee agree, paid leave provided by the district may supplement the employee’s pay while he/she is on FFCRA leave so that the employee may receive the full amount of the employee’s normal compensation.
- School districts should request legal advice before requiring an employee to “top off” their paid FFCRA leave with other district-provided paid leave.



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### Documentation for Leave

- **Documentation shouldn’t be a pre-requisite to leave. Documentation must be provided by the employee “as soon as practicable,” under the circumstances.**
- **Leave Requests Based on Quarantine Orders or Medical Self-Isolation Advice**
  - The name of the governmental entity ordering quarantine or the name of the health care professional advising self-isolation; and
  - If the employee is taking leave to care for someone subject to a quarantine order or self-isolation advice, the name of the person the employee is caring for and their relation to the employee.
    - The DOL has stated that this person must be:
      - someone in the employee’s immediate family member;
      - a person who regularly resides in the employee’s home; or
      - a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantine



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### Documentation for Leave, con't.

- **Leave Requests Based on Child Care Unavailability**
  - 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;
  - 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 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.
- Documentation shouldn't be a pre-requisite to leave. Documentation must be provided by the employee "as soon as practicable," under the circumstances.



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### Documentation for Leave, con't.

- **Leave to obtain a medical diagnosis for COVID-19**
  - Identify his or her symptoms and
  - A date for a test or a doctor's appointment.
- *A school district may not require the employee to provide further documentation of the need to take leave for this reason.* The DOL stressed that this minimal documentation is intentional to allow employees to take leave and slow the spread of COVID-19.
- Documentation shouldn't be a pre-requisite to leave. Documentation must be provided by the employee "as soon as practicable," under the circumstances.



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### Running Out of Leave

- Employees might only have enough FFCRA leave for a single incident of self-isolation due to a potential exposure to COVID-19. As the pandemic continues, some employees might need to isolate more than once.
- What should employers do if an employee needs to self-isolate again?
  - Does the employee qualify for and have available employer-provided paid leave (such as PTO or sick leave)? Does the employer want to consider amending such leave policies? How might increasing this amount have unintended consequences (such as to payouts to employees upon separation from employment or creation of more protected leave)?
  - Does the employer want to create a special type of paid leave for this situation?
  - Employers should be cautious not to create leave for employees that "are exposed to COVID-19 at work," as it might be deemed an admission that COVID-19 was contracted at work. Consider language such as "possible exposure" or disclaimer language that qualifying for such leave is not an admission of exposure to or contraction of COVID-19.
  - Unpaid leave?
  - Balancing leave policies with adequate staffing.
  - Balancing the need to incentivize employees not to work if exposed (to avoid spread) versus potentially providing leave to an employee for an employee's own, perhaps unwise, choices.



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### ***Will the FFCRA Get Renewed/Extended?***

- Unknown right now.
- Politics.
- Would a renewal mean employees get another 80 hours?
- What about EFMLA? Would employees get another 12 weeks, even if not entitled to more “regular” FMLA leave yet? Would employees get more “regular” FMLA too?
- Would tax credits be available to public employers this time?



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### ***Other Leave Issues***



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### ***Flowchart of Leave Eligibility***

- Is the employee qualified for FFCRA leave?
- Is the employee qualified for “regular” FMLA leave?
- Is the employee qualified for district-provided leave? Does the district have applicable non-FMLA long term leave?
- Is the employee requesting a leave of absence as a reasonable accommodation due to a disability?
  - For how long? Indefinite leave?
- If an employee qualifies for multiple leaves, will those leaves run concurrently?



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### ***“Regular” FMLA***

- Employee’s own serious health condition.
- Caring for a parent, child, or spouse with serious health condition.
- Birth or adoption of a child.
- Federal FMLA (only get 12 weeks total of FFCRA and FMLA).
- State FMLA (could apply in some instances when employee is out of federal FMLA or doesn’t qualify for federal FMLA).
  - Provides different durations of leave than FMLA based on the qualifying reason.
- Make sure employee is eligible for FMLA leave.
  - 1250 hours federal; 1000 hours state.
  - Worked for district for at least 12 months.
  - Employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.
  - Policy or practice of allowing FMLA, even if under 50 employees?
- Certification Form.



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### ***ADA (WFEA) and Returning Employees to Workplace***

- Address requests for reasonable accommodation due to a health condition, such as a request to work remotely or take an unpaid leave of absence.
  - Does health condition constitute disability?
  - Can you provide the requested accommodation without undue hardship to the district?
  - Is there another accommodation that would allow the employee to perform his/her job duties successfully without undue hardship?
- Engage in the interactive process.
- Pose specific questions to employee’s doctor.
- This process is limited to employees with disabilities as provided by law.



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### ***Leave as a Reasonable Accommodation***

- Goal of any accommodation is to enable employee to perform their job.
- Short-term, unpaid, leave of absence may be reasonable in some circumstances.
- Indefinite leave not generally required.
- Clear and specific documentation from a doctor is important in navigating these requests. Work with legal counsel to draft a “Dear Doctor” letter to obtain more specific information regarding an employee’s request for accommodation and the employee’s potential disability.



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## Hypothetical Scenario



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### Leave Scenario 1

A District starts the year in an all-virtual mode. Local COVID-19 numbers have improved, so now the District wants to return to full in-person instruction.

A Teacher says he cannot return to school in-person. The Teacher has worked for the District full time for many years and thus is "regular" FMLA eligible (if the Teacher experiences an FMLA-qualifying event).

The District asks the Teacher why he cannot return and receives the following information (in a long email from the Teacher):

- The Teacher's parents cannot watch the Teacher's child because they are at high risk of contracting COVID-19.
- The Teacher's spouse is at high risk if the spouse contracts COVID-19 because the spouse is recovering from cancer treatment.
- The Teacher has an anxiety disorder that is exacerbated by in-person instruction due to fear of COVID-19.



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### Leave Scenario 1, con't.

- The Teacher likely qualifies for paid FFCRA leave due to childcare unavailability.
- The Teacher might be eligible for "regular" unpaid FMLA if the Teacher has to care for a spouse recovering from cancer, but is not entitled to a reasonable accommodation under ADA/WFEA for spouse recovering from cancer (only employee's own disabilities are covered). The Teacher might also be able to use district-provided leave.
- The Teacher might be eligible for "regular" unpaid FMLA and ADA/WFEA accommodation (including potentially leave) if the Teacher's anxiety disorder qualifies as both a serious health condition and disability (get certification and documentation from doctor). The teacher might also qualify to use district-provided leave.



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### Leave Scenario 1, con't.

- Emergency Paid Sick Leave runs concurrently with Expanded FMLA *at the Teacher's request*. District can decide whether to allow the Teacher to use qualifying district-provided leave to "top off" pay.
- Expanded FMLA use depletes federal FMLA eligibility *but not state FMLA Eligibility* (which could mean 2 additional weeks each for the teacher's own serious health condition and spouse's serious health condition).
- The Teacher can elect to substitute qualifying District-provided leave to receive pay for any state FMLA eligibility or can hold on to District-provided leave and use it after exhausting state FMLA.
- On January 1, 2021, the Teacher gets state FMLA leave again. Federal FMLA is available again based on the FMLA year selected by the District, which need not be the calendar year.
- If the Teacher qualifies for leave of a certain duration (such as the school year) as a reasonable accommodation for the Teacher's anxiety, this can run concurrently with state/federal FMLA leave if the Teacher qualifies for both.



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### Leave Scenario 1, con't.

- In short, when an employee has multiple qualifying events, the key is to provide the employee with applicable leave request forms (FMLA, FFCRA) and follow up with employee's doctor (ADA/WFEA) to get a complete picture of what the employee is requesting. Getting all the information up front can help avoid the situation where an employee is constantly requesting a little bit more leave multiple times throughout the fall.
- Each potential reason for requesting leave should be analyzed under each potential type of leave available.



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### Questions?



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