

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **DOL issues back-to-school guidance on paid leave and unemployment benefits**

On August 27, the DOL clarified the circumstances under which working parents may be eligible for FFCRA leave when their children start the new school year. Separately, it addressed the availability of unemployment benefits for students' caregivers as schools reopen.

#### **Background**

The Families First Coronavirus Response Act (FFCRA) requires covered employers to provide paid leave to employees who are unable to work due to the closure of their child's school or place of care for COVID-19 related reasons. (See our [March 18, 2020 FYI](#).) The Pandemic Unemployment Assistance (PUA) program — created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act — provides benefits for certain individuals who are not ordinarily eligible for unemployment benefits, including those who are unable or unavailable to work because a child for whom they have primary caregiving responsibility is unable to attend school or another care facility that is closed as a direct result of the current public health emergency.

As schools announce reopening plans, employers face new questions from parents with school age children about the availability of virus-related paid leave and their eligibility for jobless benefits if they opt for virtual schooling when in-person instruction is available for their child.

#### **DOL guidance**

Since March, the DOL's Wage & Hour Division (WHD) has issued a series of questions and answers (Q&As) explaining FFCRA leave provisions. (See our [March 26, 2020 FYI](#).) Initial guidance provided that, with limited exception, an employee who is unable to work — in person or remotely — because their child's school or "place of care" is closed or unavailable due to COVID-19 related reasons would be eligible for paid sick leave and expanded family and medical leave under the FFCRA. Subsequent guidance clarified that a school or place of care that has moved entirely to online instruction or

Volume 43

Issue 57

September 9, 2020

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“distance learning” — where children are expected or required to complete assignments at home — is considered “closed” for purposes of FFCRA leave. Most recently, the WHD confirmed that FFCRA leave also extended to summer camp or enrichment program closures or cancellations. (See our [July 15, 2020 FYI](#).)

### Common back-to-school scenarios

On August 27, 2020, the DOL’s Wage and Hour Division (WHD) updated its FFCRA [Q&As](#) to address three back-to-school scenarios that parents with school age children are likely to face.

- A child attends a school operating on an alternate-day basis
- A parent opts for remote learning when in-person instruction is available for their child
- A school year begins with remote learning, but may shift to in-person instruction if conditions warrant

An August 27 [advisory](#) by the DOL’s Employment and Training Administration (ETA) focused on the PUA eligibility of caregivers affected by school reopening, as well as the intersection of PUA with paid leave available under the FFCRA in these common scenarios.

### Alternate-day (or other hybrid) basis

Where the school district requires students to receive in-person learning on some days and virtual sessions on other days (such as alternating days or weeks) for COVID-related reasons, the school is effectively “closed” on remote-learning days. Thus, FFCRA leave may be available to an employee who is not able to work or telework on designated remote-learning days if they need to actually care for their child and no other suitable person is available to do so.

Like the FFCRA, the CARES Act considers a school closed when it provides only online instruction due to the public health emergency. Thus, when the school system requires alternate-day (or alternate-week) in-person instruction, it is “closed” under the CARES Act on the days distance learning is required. Individuals not receiving paid leave or other jobless benefits may be eligible for PUA if unable or unavailable to work due to their primary caregiving responsibilities even if permitted to work from home.

### Remote learning option

A parent who opts for remote learning when in-person instruction is available generally would not qualify for extended family and medical leave under the FFCRA — even if based on a general COVID-19 concern. If, on the other hand, a healthcare provider has advised that the child quarantine or self-isolate, the parent may be entitled to up to two weeks of FFCRA emergency paid sick leave to care for them.

**Buck comment.** Even if FFCRA leave is not available, regular FMLA leave may be available to care for a child who is unable to attend school. Other protections for caregiver responsibilities under federal, state, or local law may also be available.

When the school system provides the individual with a choice between full-time in-person instruction and remote learning, it also is not “closed” for purposes of the CARES Act. Thus, a primary caregiver who chooses the remote learning option would not be eligible for PUA unless they qualify for another COVID-19 related reason.

### **Shifting approach**

Both the FFCRA and CARES Act permit paid leave or jobless benefits as described above while the school system provides only online instruction. If, as conditions warrant, the school resumes in-person instruction, the continued availability of leave or PUA benefits will depend on the particulars of the school’s operations.

**Buck comment.** FFCRA leave for childcare-related reasons may also be available if a school that has reopened temporarily requires remote instruction due to a possible COVID-19 exposure.

### **Intersection of PUA with FFCRA leave**

Workers who are unable to perform their jobs at home when their child’s school is closed due to the virus may be eligible for paid leave under the FFCRA or for PUA benefits under the CARES Act. However, they cannot receive both entitlements at once.

Like FFCRA leave, PUA benefits are available only when the school is conducting all classes via distance learning or requires students to alternate between in-person learning and virtual sessions. However, individuals who have the ability to telework with pay or are receiving paid sick leave or other paid leave benefits are not eligible for PUA.

A parent is ineligible to receive either benefit when they have the option to send their children to school but choose at-home online schooling instead, even if out of concern for contracting COVID-19. Unless the school is closed, neither type of benefit is available.

### **In closing**

The DOL has provided welcome guidance as working parents who are navigating childcare arrangements for the new school year look to their employers for increased flexibility or other accommodations for their particular circumstances. It addresses both the availability of paid family leave under the FFCRA and the eligibility for unemployment benefits under the CARES Act in three common back-to-school scenarios.

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