FFCRA Child Care Leave During Summer Vacation – What's The Rule?

In March, Congress enacted the Families First Coronavirus Response Act ("FFCRA") to provide employees with paid sick leave (collectively, "FFCRA leave") if they are unable to work (or telework) because they need to care for their son or daughter if (a) such son or daughter's school or place of care is closed, or (b) the child care provider of such son or daughter is unavailable due to COVID-19 related reasons. At the time the law was passed, many—if not all—schools and child care facilities were closed due to COVID-19 related reasons. As a result, many employees initially qualified for leave under the FFCRA to care for children.

FFCRA leave for child care purposes may extend up to twelve weeks depending on the circumstances and is paid at two-thirds of the employee's regular rate of pay with a maximum payment of $200 per day. For details on the FFCRA eligibility, pay and reinstatement requirements, click here.

Now, however, as we move into summer and businesses are reopening, many employers are being confronted with a new, challenging question — whether employees are eligible for leave under the FFCRA based upon a lack of summer child care options despite some child care facilities re-opening and despite school being out for the summer. Accordingly, employers must be cognizant of the following as they consider requests for leave under the FFCRA.

Who is a "son or daughter"? An employee's biological, adopted, or foster child, stepchild, legal ward, or a child the employee is standing in loco parentis, who is also under 18 years of age. Children 18 years or older may also be considered a "son or daughter" for the purposes of FFCRA leave, if such child is also incapable of self-care because of a mental or physical disability. Employees, thus, cannot take FFCRA leave to care for children other than those of the employee (i.e. grandchildren, nieces, nephews, or friend's children) or to care for a family member, like a parent or spouse.

Who is a "child care provider"? Those who receive compensation for providing child care services to an employee's child on a regular basis. This includes center-based child care providers, group home child care providers, family child care providers, and other providers or child care services for compensation that are licensed, regulated, or registered under state law. The DOL regulations further clarify that a provider need not be compensated or licensed if they are a family member or friend of the employee, *who regularly cares for the employee's child* (i.e. grandparents, aunts, uncles, and neighbors).

It is worth noting that DOL guidance also provides that an employee may only take leave to care for their child only when the employee needs to, and actually is, caring for the child. As such, if the child does not need care (i.e. a teenager who does not need or require care during summer vacation) or another suitable individual, like a co-parent, co-guardian, or the usual child care provider, is available to provide care to the child, then the employee will not qualify for the leave. Employees who do not want to send a child to their usual and available child care provider out of fear of the virus (or any other non-COVID-19 related reason), will not qualify for FFCRA leave.

What is a "place of care"? Any physical location in which care is provided to the employee's child. This, thus, includes, among others, day care facilitates, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

It is important to note that to be eligible for FFCRA leave, the child's place of care must be closed. Closure, for the purposes of the FFCRA, means that the physical location is closed due to COVID-19 related reasons. This is true even if some or all of the services are being provided virtually or through another format due to COVID-19 related reasons. Therefore, if, a child's daycare or camp is closed due to COVID-19, an employee may be

permitted to take leave. If the reason for closure, however, is for non-COVID-19 related reasons, like summer vacation, then such closure does not qualify for leave under the FFCRA.

Can employees telework? An employee's ability to telework depends on the employee's circumstances and whether the employer permits or allows the employee to telework. If the employer allows telework, but the employee is unable to telework due to care for their child (as qualified under the FFCRA), the employee may take FFCRA leave.

Of course, an employer and employee may agree for the employee to work their normal number of hours outside their normal scheduled hours (i.e. late at night or early in the morning). If the employee agrees to do so, then the employee will no longer qualify for leave.

Can FFCRA leave be taken intermittently? Employers do not need to provide intermittent leave. FFCRA leave may only be used on an intermittent basis if the employer agrees. Intermittent leave arrangements may apply to both teleworking and working onsite, so long as the employer agrees to such arrangement. The terms of the arrangement (i.e. hours and days) are the employer's choice.

Has the leave been otherwise exhausted? Keep in mind that the FFCRA has two components, emergency sick leave and emergency family and medical leave. All employees are entitled to two weeks of partially paid FFCRA child care leave under the emergency sick leave portion. Employees who have been with the employer for 30 days are entitled to an additional 10 weeks of partially paid FFCRA child care leave under the emergency family and medical leave component of the FFCRA if they have not exhausted their normal FMLA leave. For example, if an employee seeking FFCRA child care leave, took six weeks of FMLA leave earlier in the year for some other FMLA reason, that leave counts towards the leave under the emergency family and medical leave entitlement and the employee is only entitled to six weeks of FFCRA child care leave. In addition, if the employee already took the two weeks of emergency sick leave, the first two weeks of the child care leave would be unpaid.

Going forward, employers should:

1. Collect proper documentation. Under the FFCRA, employees must provide documentation to request leave under the FFCRA with the following information:
a. the employee's name;
b. the dates for which FFCRA leave is requested;
c. the qualifying reason for the leave;
d. an oral or written statement that the employee is unable to work due to the qualified reason for leave;
e. the name of the son or daughter being cared for;
f. the name of the school, place of care, or child care provider that has closed or become unavailable due to COVID-19 related reasons; and
g. a representation that no other suitable person will be caring for the son or daughter during the period which the employee requests to take leave.

An employer should ensure the above information is obtained relating to each request so it can properly take the tax credit for the wages paid during the leave. Unfortunately, the FFCRA does not allow employers to collect additional information or documentation to verify the need for leave.**2. Inform employees of eligibility requirements.** Employers should be ready to inform employees regarding eligibility for FFCRA child care leave, as some employees may not realize that the leave is only provided for closures or unavailability due to COVID-19 related reasons, not for any other reasons.

Granting or denying leave under the FFCRA can be complicated and may carry significant financial risks upon denying leave to an eligible employee (i.e. back pay and attorney's fees). Please do not hesitate to contact the Partridge Snow & Hahn Employment Law Group, as we are fully updated on these and other related issues and are available to answer to your questions.

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