BCLP. Client Intelligent

BCLPatWork.com

US COVID-19: MANAGING FFCRA "CHILD CARE" LEAVE DURING THE SUMMER

Jun 30, 2020

The advent of summer has brought the reality of "child care" leave under the Families First Coronavirus Response Act (FFCRA) to the forefront of employers' minds: Are employees really entitled to up to 12 weeks of leave to care for their children during "summer vacation" from school? And, if yes, how do we manage this leave?

The answer to the first question is, "possibly." Eligible employees of employers covered by the FFCRA are entitled to up to 12 weeks of leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19: (a) two weeks of Paid Sick Leave; and (b) up to ten additional weeks of Emergency FMLA Leave.

While this entitlement creates the potential for employees to be on leave all summer (and mostly paid leave, at that: employers must play employees 2/3rds pay at employee's normal rate, subject to caps) there are a number of steps employers can take to effectively manage this leave.

Step 1: Ensure the Employee has a Qualifying Reason for Leave, and Document the Reason

The Department of Labor has made it clear that "summer vacation" does not, in itself, create a qualifying reason for FFCRA leave, because school being closed for the summer is not a "reason related to COVID-19." See DOL FFCRA Q&A #93. It is only when the employee's *plans* for summer care for the child have fallen through *because of a COVID-19 related reason* that FFCRA leave could be available. See DOL FFCRA Q&A #s 67, 68, 93.

Importantly, employers may require employees to submit information and documentation in support of the request for leave. At minimum, the employer should require the employee to provide, in writing:

- The name(s) and age(s) of the child(ren) to be cared for;
- The name(s) of the school(s), place(s) of care, or other camp(s)/program(s) that are unavailable due to COVID-19;

- A copy of an applicable notice(s) of closure or unavailability from the school/place of care / child care provider / camp / program (such as a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from the provider); and
- A statement that:
  - The employee is unable to work because the employee is caring for his son or daughter because his/her school or child care provider is closed or unavailable due to a reason related to COVID-19;
  - No other person will be providing care for the child during the period for which the employee is requesting leave; and
  - (if applicable) For leave to care for a child older than 14 during daylight hours, that there are special circumstances requiring the employee to provide the care (and the circumstances should be described).

Beyond the foregoing, the employer may, in appropriate circumstances, require more information than set forth above, in order to ensure that the employee actually had a *plan* to send the child to a *specific* place of care, or at least that it was *likely* that the child would have attended. With respect to camps and similar programs – which may have been canceled in the spring before formal enrollment began, or which may be open but with reduced capacity – the DOL recently provided guidance to its investigators regarding the types of information that may be sufficient to support the existence of this specific plan or likelihood:

Potentially sufficient information:

- Evidence of actual enrollment in the camp before it was closed;
- Evidence of affirmative steps to enroll the child, such as submission of an application before closure occurred;
- Evidence of an intent to enroll, such as submission of a deposit;
- Evidence of being placed on a waitlist in the event of reopening;
- Evidence that the child attended the camp or program in recent, prior summers and was eligible to attend again (e.g., the child is in the age range of the campers).

Potentially insufficient information:

- A statement that the child was going to attend a particular place of care that the child had never attended previously, without some additional indication that this place was the plan for

this summer;

- A parent's "mere interest" in a camp or program;
- A child's attendance at the camp several years ago, but not recently.

While employers may delve into these issues with employees, employers should exercise caution when determining whether to grant or deny requested leave, and take all the facts into account. For example, an employee who recently moved to the area may not be able to point to prior attendance at a camp as evidence of the plan.

Step 2: Evaluate Whether Flexible Working Arrangements May Reduce the Need for Leave

Assuming that the employee does need to provide care for the child, employers may still discuss with the employee whether the employee is nonetheless able to work, perhaps through flexible arrangements. For example, maybe the employee is able to telework even though the child is home. And/or, maybe the employee can work an adjusted schedule or flexible hours (early mornings, or in the evenings, when another person such as the other parent is available to provide care) instead of taking leave. Employers are also permitted to decide whether employees may take child care leave on an intermittent basis, or will be required to take leave in full-day increments.

Any discussions on these issues should be handled in a manner designed to find a solution that will work for both the employer and the employee, and not in a manner that suggests a hostility towards leave. In addition, employer decisions on such issues as whether to permit telework or intermittent leave should be based on legitimate, non-discriminatory, non-retaliatory considerations.

Step 3: Determine Amount of Available Leave and Track Leave Usage

Employers should carefully track employees' use of FFCRA leave, given the specific (and different) amounts of leave available under the Paid Sick Leave provisions and the Emergency FMLA Leave provisions. Further, because Emergency FMLA Leave is a (new) type of FMLA leave, an employee's prior use of traditional FMLA leave during the applicable 12-month period can reduce the amount of Emergency FMLA Leave available to that employee. For example, if an employee already took 4 weeks of FMLA leave during the applicable 12 month period, the employee will only be entitled to up to 8 weeks of Emergency FMLA Leave.

Step 4: Consider Whether to Require Concurrent Use of Accrued Paid Leave

After the first two weeks of Emergency FMLA Leave (which are unpaid, unless an employee uses available Paid Sick Leave or other accrued paid leave during that period), employers may require employees to concurrently use any accrued paid leave under the company's leave policies, to the extent such leave may be used for a child care purpose (e.g., vacation, PTO, or personal leave). If accrued paid leave is used concurrently with FFCRA leave, the employee should be paid in

accordance with the applicable leave policy, and the employer may claim the tax credit only for the FFCRA-required portion of the pay.

Step 5: Consider Whether an Employee's FFCRA Leave Jeopardizes the Viability of the Business (Employers with fewer than 50 Employees)

For those employers with fewer than 50 employees, a "small business exemption" relating to FFCRA child care leave may apply. This exemption is available *on an employee-by-employee basis*, and permits the employer to deny leave if the employer can show that the particular employee's use of Paid Sick Leave or Emergency FMLA Leave for a child care purpose would jeopardize the viability of the business as a going concern.

A small business may claim this exemption if an authorized officer of the business determines that:

1. The provision of leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Christy E. Phanthavong

Chicago
christy.phanthavong@bclplaw.com
+1 312 602 5185
