



# EMPLOYER BACK TO SCHOOL GUIDE

## Frequently Asked Questions

**David L. Barron**  
Member  
(713) 750-3132  
dbarron@cozen.com

**David Hackett**  
Member  
(215) 665-7235  
dhackett@cozen.com

**Nandini Sane**  
Associate  
(832) 214-3962  
nsane@cozen.com

**Bethany Vasquez**  
Member  
(415) 593-9621  
bavasquez@cozen.com

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## EMPLOYER BACK TO SCHOOL GUIDE: FREQUENTLY ASKED QUESTIONS

Employees with school-aged children are quickly learning that back to school will not be a return to normalcy. Most schools are implementing modified education plans to provide for student and teacher safety in light of COVID-19 concerns. Plans include mandatory and optional remote learning and hybrid models of in-person and remote learning. This practical summary is intended to help employers understand their obligations under the law and provide strategies for meeting business needs during the Fall semester.

### Emergency Paid FMLA

#### **What leave is available under the Families First Coronavirus Response Act (“FFCRA”) to assist parents whose kids are out of school for COVID-19 related reasons?**

- Employers with less than 500 employees must allow employees up to 12 weeks of Paid Family Leave if they are unable to work (or telework) because their child’s school has been closed or the child care provider is unavailable due to the coronavirus and they must provide care for a child. To be eligible, employees must have worked for at least 30 days and the child must generally be under 18 years old. Although the first 10 days of leave may be unpaid, the remainder of this leave (up to 10 weeks) must be paid at a rate of at least two-thirds (2/3) the employee’s regular rate of pay (not to exceed \$200 per day and \$10,000 in the aggregate). During the initial 10 days, an employee may elect to use emergency paid sick leave under the FFCRA or substitute any accrued vacation leave, personal leave, medical or sick leave for unpaid leave. Additionally, certain employers with fewer than 50 employees may be exempt from these FFCRA requirements if providing employees such leave would jeopardize the viability of the business as a going concern.

#### **Is leave available if a child’s school is not “closed,” but has simply moved online?**

- Yes. So long as the physical location where the child received instruction or care is now closed, the school or place of care is “closed” for purposes of leave under the FFCRA. This is true even if some or all instruction is being provided online, or through another format such as “distance learning,” where the child is still expected or required to complete assignments.

#### **If a child’s school has a hybrid model, with parents doing some home-based learning, can the parent employee take intermittent leave?**

- Under the FFCRA, intermittent leave may only be taken if the employer allows it. In such cases, the employee and employer should agree upon an intermittent leave schedule in advance. Importantly, if the employer has a history of allowing intermittent leave in other situations, denying intermittent leave for parents without a good business reason may be construed as interference with protected leave under the FFCRA. Employers should also review state and local law on this topic. Recently, a New York federal judge brought into question whether an employer can deny intermittent leave for this purpose.

#### **What leave is available to an employee who decides to home-school their child, even though the child’s school is open?**

- If the child’s school is otherwise open, an employee would not be eligible for leave under the FFCRA to home-school their child. In fact, the Department of Labor has stated that FFCRA leave is not available if a co-parent, co-guardian, or the usual child care provider is available to provide the care for the child needs.

#### **Some schools are allowing parents to decide whether their child does home-based learning or in person learning. In such a circumstance, where the employee elects home-based learning, rather than in person learning, is FFCRA leave available?**

- The Department of Labor has not yet provided clear guidance on whether a school would be considered “closed” under these circumstances. Accordingly, employers should be cautious about denying FFCRA leave under this scenario. Although there may be a technical statutory argument that the school is not “closed,” the broad intent of the FFCRA appears to allow leave for parents who are needing time off while schools are dealing with COVID-19.

**What if the employee has already exhausted some or all of their Emergency Paid FMLA leave earlier in the year?**

- If the employee has only used some of their Emergency Paid FMLA leave earlier in the year, they can use the remainder of their paid leave through December 31, 2020. If, on the other hand, the employee has used all of their Emergency Paid FMLA earlier in the year, they are not entitled to any additional time under the FFCRA. Those employees may be entitled to other leave under state and local laws or company policies.

**What documentation are companies allowed to request from the parent/employee taking leave under the FFCRA?**

- If an employee requests leave to care for a child, the employer may request the following information: (1) the name and age of the child or children needing care; (2) the name of the school or place of care; (3) a representation that no other suitable person is available to care for the employee’s child/children; and, (4) if the child is older than 14, a statement describing any special circumstances which make it necessary for the employee to be absent to care for the child.

**Alternative Options**

**What options are available for companies looking to support working parents, who might not otherwise be eligible for leave?**

- The Department of Labor has encouraged employers and employees to collaborate to find solutions that meet mutual needs. In light of this pandemic, more and more employers are being flexible with respect to employees who have exhausted all available leave. Options employers may want to consider include temporary unpaid leave, temporary job reassignment, opportunities to telework, and/or allowing intermittent leave. If the employer has no legal obligation to accommodate an employee’s absence from work due to child care needs related to COVID-19 but decides to accommodate the employee, the employer must ensure that it is providing such options to similarly situated employees and consider its compliance with the Americans with Disabilities Act in a non-COVID-19 scenario.

**What should employers be doing right now to get prepared for the school year?**

- Employers should proactively communicate with employees and determine what adjustments might need to be made. Additionally, we recommend employers revisit their leave policies and forms for requesting and approving leave to ensure they are up to date.

**Working from Home**

**How can employers ensure that non-exempt employees who are working from home for child care reasons are adequately tracking and reporting their time?**

- Because of the increased number of employees working from home, the Department of Labor has reminded employers of the need to accurately record and pay non-exempt employees for all hours worked. We recommend employers clearly communicate with non-exempt employees about their work hours and schedule, including any lunch or rest breaks, and taking into account any alternative schedules which may be necessary for child care. Employers should continue to follow their regular policies with respect to time-reporting and overtime.

**Is an employer required to pay employees who are working from home or working reduced hours the same hourly rate or salary?**

- No. Generally, employers have the ability to reduce an employee’s hourly rate or salary, provided the rate paid is at least the minimum wage or meets the minimum salary threshold. Before doing so, however, employers should also review state and local laws, as many jurisdictions require employers to give advance notice of any pay reduction in writing.

**Are businesses required to cover the additional costs that an employee may incur if they work from home (internet access, computer, additional phone line, etc.)?**

- Although federal law only requires reimbursement of business-related expenses if doing so would cause the employee’s rate of pay to fall below minimum wage, many state and local laws require reimbursement of an employees’ necessary business expenses. For example, employees in California, Illinois, Iowa, New Hampshire, and Pennsylvania may be entitled to such a reimbursement. We recommend all employers carefully review applicable local and state laws to determine what expenses, if any, must be reimbursed.

## Other State and Federal Leave Rights

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### **If an employee's child is a high-risk individual for COVID-19, is the employee entitled to any additional protections?**

- The FMLA allows for up to 12 weeks of job protected leave to care for a child with a serious health condition. The Department of Labor has made clear, however, that caring for a child being held out of school because of a fear of COVID-19 infection does not ordinarily trigger coverage under the FMLA. Individual circumstances should be considered and there may be cases where FMLA leave may be applicable for children with serious health conditions who require extra care because of pandemic related reasons. In addition, an employee may otherwise qualify for FFCRA leave because the child has been directed to self-quarantine by a health care provider for a COVID-19 related reason.

### **Are there any state and local laws that provide school-related parental leave?**

- It is important to consider applicable local and state laws, as many jurisdictions provide broader entitlements than those available under federal law. For example, both New York and California have laws mandating that employers provide time off to employees in the event of a school closure or emergency.