

## **DOL Issues Major Change to Intermittent FFCRA Leave for Parents of Children Enrolled in Hybrid and Rotating Education Programs.**

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With the start of the new school year and the U.S. Department of Labor's ("DOL") recent updates to regulations and Frequently Asked Questions ("FAQs") about leaves under the Families First Coronavirus Response Act ("FFCRA"), many employers in Pennsylvania have questions about intermittent leave requests from parents whose children attend schools using an alternating day or hybrid online and in-person instructional model.

The original FFCRA regulations clearly stated that intermittent leave due to a school closing is permitted only when the employer and employee both agree. This fact was stated in both the regulations and the FAQs which, while they do not carry the force of law, do provide guidance from the DOL, the agency which enforces the law's provisions. *See* 29 C.F.R. § 826.50(a). In fact, on September 11, 2020, the DOL announced revised regulations reaffirming that an employer must agree to an employee's intermittent use of EPSLA and EFMLA leave, and that absent an employer's agreement, employees are not entitled to take intermittent FFCRA leave.

However, the DOL recently did an about-face on this issue as it relates to an employee's leave to care for children who are enrolled in an alternating day or hybrid in-person and online education program. Effective as of last week, the DOL has concluded that the use of EPSLA and EFMLEA leave on days when students are required to participate in alternating or hybrid instruction are not considered "intermittent" and therefore do not require employer consent. In the revised regulations, the DOL states that FFCRA leave taken in full-day increments (or even a half-day or other increments if that is the model the school has selected) is not considered "intermittent" leave and does not require employer permission.

The DOL reasons that for "the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opens the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes . . . and opens repeatedly."

Note that the DOL distinguishes this schedule "...from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement."

Functionally, DOL's new guidance on FFCRA leave for parents caring for children enrolled in an alternating day or hybrid in-person and online education program means that these leaves are not really "intermittent," under the FFCRA. This means that an employer's agreement is no longer required for an employee to be entitled to take leave on alternating days or when their children are subject to a hybrid learning model. While these changes undoubtedly reduce one of the challenges faced by parents with children enrolled in schools utilizing these types of programs, they will likely also intensify staffing challenges for employers by requiring coverage for employees who take

leave on a non-continuous basis to care for their children whose school is “closed” due to an alternating day or hybrid learning model.