

Electronic Alert

Volume 23, Issue 36

July 1, 2020

School is Out, but Child Care Issues Remain: Navigating FFCRA & OFLA Child Care Leave Requests During Summer Break

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The Families First Coronavirus Response Act (FFCRA) requires covered employers to provide emergency paid sick leave (EPSL) and expanded paid FMLA leave (EFMLA) to employees who are unable to work because they are caring for their child whose school, place of care, or child care provider is closed or unavailable due to a COVID-19-related reason. With schools now closed for summer vacation rather than COVID-19, many employers are wondering whether they still need to provide EPSL and EFMLA to employees with children at home. The answer is more nuanced than many employers may suspect.

The Department of Labor (DOL) has advised that EPSL and EFMLA are unavailable when schools or places of care are closed for reasons unrelated to COVID-19. However, some employees may rely on summer programs or other care arrangements during summer break. Many of these programs and arrangements have been affected by COVID-19 and are either not open or have substantially curtailed operations.

If an employee's summer child care provider is closed or unavailable due to a COVID-19-related reason, FFCRA leave may be available. Employers faced with FFCRA requests on this basis should ask the requesting employee for the following documentation:

- The name of employee's child;
- The name of the school, place of care, or child care provider that is closed or unavailable due to COVID-19; and
- A statement that no other suitable person is available to care for the employee's child.

Recent DOL guidance has clarified that an employee generally may not take FFCRA leave to care for his or her child based on the closing of a child care center that the child has never attended, unless there is some indication that the child would have attended had the child care center not closed in response to COVID-19. An employee's mere interest in a summer camp or care program for their child is generally not enough.

Employers should keep in mind that child care is often dynamic and changes from year to year. The DOL indicates that there are a "multitude of possible circumstances" under which an employee can establish that summer child care has been interrupted by COVID-19. While proof of current or recent child care enrollment in summer programs is instructive, neither are required to grant leave.

To the extent that an employee can satisfy the above information for a FFCRA leave request, employers should err on the side of granting the request, unless there is a strong reason to suspect the request is fraudulent.

OFLA Sick Child Leave

Temporary OFLA regulations also provide OFLA protected time off to care for children whose school or place of care is closed by order of a public official during COVID-19. Unlike FFCRA leave, OFLA leave is unpaid. While most child care providers are currently not required to be closed under Oregon's phased reopening, many have chosen to stay closed or curtail operations due to the virus. Employers should be wary of narrowly construing the language of the rule. BOLI has signaled it plans to interpret the rule broadly to align with FFCRA guidance. For example, "place of care" extends to an individual "care provider" (for example, nanny, grandparent, familial care, etc.) and a "closure" includes a curtailment of operation that limits attendance and hours due to COVID-19-related reasons.

Unlike FFCRA, OFLA "sick child leave" does not provide a mechanism under which the employer may request the name of the unavailable child care center or provider. An employee's statement alone will suffice to support the reason for OFLA "sick child leave."

Employers should also remember that an employee who has exhausted twelve weeks of OFLA parental leave is still entitled to an additional twelve weeks of OFLA "sick child leave" in the same leave year.

Outside of some factual discrepancy, an employer should approve an OFLA "sick child leave" request if the employee represents they are required to care for their child due to a COVID-19-related loss of child care.

If you have questions regarding FFCRA, OFLA, or the DOL's expanded guidance on COVID-19-related child care leave, contact Amy Angel or Daniel Walker at 503-228-0500, or at aangel@barran.com or dwalker@barran.com. For additional content, including other Electronic Alerts, articles, and employer resources, visit www.barran.com.