

# The ABCs of Employee Leave Related to Their Children's Schools Implementing Distance Learning

By Susan Stahlfeld and Amy Robinson, SPHR, SHRM-SCP

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When schools closed or went remote in April 2020, parents and their employers had to suddenly figure out how to handle a situation where both employees and their children were home full-time. Generally, people managed to cobble together some arrangements, even if they were not ideal. However, most people expected (or at least fervently hoped!) it to be a short-term situation, with schools returning to regular activities by this fall.

Instead, for most Washington and Oregon families, the 2020-2021 school year will start with full or partial online/distance learning rather than in-person learning, creating additional challenges for working parents and their employers.

Employers need to be aware that there are federal and state leave laws that provide for paid leave to parents who need to care for children because of school closures. Below is a brief overview of applicable leaves with links to more information, followed by some FAQs to help employers navigate the most common scenarios.

## OVERVIEW OF POSSIBLE LEAVES DUE TO SCHOOL ONLINE OR DISTANCE LEARNING

Both Washington and Oregon require employers to provide paid sick leave to non-exempt employees for use when a child's school or daycare is closed for health-related reasons by government order. These statutes have required accrual rates, usage increments, and carryover rights, and allow employers to meet these obligations through use of generic Paid Time Off (PTO). More details are available at the links above. If an employee has accrued but unused state-mandated paid sick leave (or PTO if that is how the employer meets its paid sick leave obligations), it must be made available for use if the employee needs time off to care for a child due to a school not being open for in-person learning this fall. Oregon has also expanded the Oregon Family Leave Act (OFLA) to cover leave needed for school closures due to COVID-19, at least through September 13, 2020.

Likewise, in March 2020 the federal government passed the Families First Coronavirus Relief Act (FFCRA) which covers employers with fewer than 500 employees. The FFCRA mandates two emergency leaves—Emergency Paid Sick Leave (E-PSL) and Emergency Family Medical Leave (E-FMLA)—through December 31, 2020. E-PSL provides 80 hours of paid leave available for a variety of reasons, including school or daycare closures, while E-FMLA allows 12 weeks of leave for school or daycare closures with the final 10 weeks being paid (E-PSL or other paid leave can be used to cover the first two weeks). These FFCRA leaves can only be used if the employee cannot work or telework due to a need to care for a child whose school has been closed or is operating online/distance learning due to COVID-19. For this reason, FFCRA leave is paid at two-thirds (2/3) of the employee's regular pay up to \$200 a day. Note, employers can claim a 100% tax credit for FFCRA leave. For more details on FFCRA leave, please see our prior articles:

- [FFCRA Requires Paid Child Care Leave Under E-FMLA](#)
- [FFCRA and Emergency Paid Sick Leave \(E-PSL\)](#)
- [Documentation Needed to Claim Tax Credit for FFCRA Leave](#)
- [Chart Comparing E-FMLA and E-PSL Under FFCRA](#)

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## FAQS ON POSSIBLE LEAVES DUE TO SCHOOL ONLINE OR DISTANCE LEARNING

1. *If the school is operating virtually, doesn't that mean it is open and not closed and so the employee does not qualify for leave under the FFCRA?*

According to the current DOL Guidelines (see FAQ 70), the school is considered "closed" for purposes of triggering FFCRA leave entitlements, even in full or partial remote/virtual learning mode, because the student cannot physically attend class and may therefore require care or oversight. That means employees have the right to utilize FFCRA leaves when schools are in remote/virtual learning mode. We believe the same analysis will apply to state paid sick leave laws.

2. *One employee wants to take leave in the morning and work a half-day in the afternoon, and another employee wants to take leave two days a week and work three days a week – do I have to let them do this?*

Employers are not currently required to provide the FFCRA leaves intermittently for school closure-related reasons (either part day, or some days per week), though it is possible that will be a requirement in the near future if the guidance or regulations changes. However, even though not yet required, we recommend that employers consider allowing intermittent FFCRA leave for both onsite work and telework situations, as there are advantages to accommodating the employee with intermittent leave and keeping the employee involved in the workplace.

As to state- (or city-) mandated paid sick leave, the employee has the right to utilize the leave in the increments as the employee needs. That is, if the employee has any available paid sick leave (or PTO if used to comply with paid sick leave laws), the employee has the right to use the leave intermittently until it is exhausted.

For Oregon employers subject to OFLA, if an employee has OFLA leave available, the right to intermittent leave is mandatory, not optional. In that situation, however, if the proposed leave/schedule adjustment presents a particular hardship, the employer may be able to temporarily transfer the employee into another position that can accommodate the employee's leave needs. This is a narrow exception, allowed only when certain specific criteria are met, including that the employee must voluntarily agree to the transfer and be returned to their original position when the leave period ends. See, OAR 839-009-0245.

3. *My employees are still on furlough. Do I have to pay them for any of these leaves if they tell me their child's school is all on-line?*

No. Employees are only entitled to FFCRA or state paid sick leave benefits when they must take leave from work they would otherwise be doing. If they are already on furlough or not otherwise scheduled to work, they are not eligible for any leave. Note, an employer cannot place an employee on furlough just to avoid providing FFCRA leave, as that would give rise to a retaliation claim.

4. *My employee's duties can be performed remotely. Can I require him to telework while his children are doing their distance learning?*

To utilize FFCRA leave the employee must be unable to work or telework. But whether an employee can telework while children are involved in their online / distance learning will likely depend on the particular circumstances involved, such as the age of the children, whether another caregiver is available to be with the children while they distance-learn, the nature of the employee's job, etc. Of course, for any time an employee is performing telework they are paid as usual and not considered to be using paid leave.

Employees who wish to use state-mandated paid sick leave, or Oregon employees whose leave is covered by OFLA, cannot be required to telework.

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5. *My employee used the full two weeks of E-PSL last May when she was diagnosed with COVID-19 and was quarantined. Does that mean she is only entitled to 10 weeks of FFCRA leave because her children's schools are closed?*

No, the employee is entitled to 12 weeks of E-FMLA leave, which is only available for use if a child's school or daycare is closed. (E-PSL is available for a variety of reasons, one of which is school or daycare closures.) With no E-PSL left to use, the first two weeks of the E-FMLA will be unpaid (unless the employee has other leave that can be used, such as state-mandated paid sick leave or PTO), with the final ten weeks being paid.

6. *My employee used four weeks of regular FMLA in January for foot surgery. Is the 12 weeks of E-FMLA in addition to that?*

No, the employee gets 12 weeks of combined FMLA leave in a 12-month period. In this case, the employee can get 8 weeks of E-FMLA leave. The converse is also true: if the employee takes 12 weeks of E-FMLA leave this fall, they will not be entitled to more FMLA leave for the remainder of the applicable 12-month leave period.

7. *My employee wants to take FFCRA leave but would have a hard time getting by on only two-thirds (2/3) pay for 12 weeks. Can I let her use her accrued PTO to make up the difference? Can I advance PTO for this purpose?*

Yes to both, though advancing PTO before it is accrued can be risky because it might not be possible to recoup the pay if the employee does not return to work with the employer. This scenario should not be done selectively and if an exception is made, it must be made uniformly available to ensure that it is being applied in a nondiscriminatory manner. Employers are not required to allow employees to supplement FFCRA leave with employer provided PTO or other paid leave, but may do so if they want. If an employer allows one employee to supplement FFCRA benefits with PTO, it should also allow other employees to do the same. We recommend employers create a policy and procedure for requesting and/or using supplemental benefits, including whether they want to advance PTO before it is accrued.

As you can see, many different issues might arise when an employee seeks time off to be with children whose schools are not meeting in-person this fall. To the extent that an employer is able to accommodate an employee, it is advisable to work with the employee to arrange leave, adjust schedules, work tasks, or responsibilities, or utilize a combination of these accommodations. For additional tips related to flexible work arrangements, see [this article](#) by our colleague, Matt Tripp.

We would be pleased to help you with any questions you might have around providing any of these leaves this fall. In the meantime, we hope you and all your employees are keeping well and healthy!

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<sup>1</sup> Seattle and Tacoma also require that exempt employees receive paid sick leave. Seattle has different accrual and carryover requirements depending on employer size, and also provides that it can be used when an employee's family member's school is closed due to COVID-19 (not just an employee's child).

<sup>2</sup> Or for certain military caregiver-related reasons, up to 26 weeks.

<sup>3</sup> As a reminder, Washington State Paid Family Medical Leave ("PFML"), with benefits provided by the state, does not apply to school closures. As a result, it is possible that a Washington employee in this example could claim 8 weeks of E-FMLA and still have eligibility for 8 weeks of PFML for their own or a family member's medical condition or for baby-bonding purposes.

<sup>4</sup> Recall, FMLA covered employers may define the applicable leave year as any 12 month period, so long as that option is uniformly applied to all FMLA leaves, corresponding to: (1) the calendar year, (2) a different fixed 12 month period (e.g., the employer's fiscal year) or (3) a 12-month rolling forward or backward period based on the date that FMLA leave begins. See, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28h.pdf>.

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**Susan Stahlfeld** is a partner and represents employers in cases involving employment and labor law, such as discrimination, wrongful discharge, wage-and-hour rules, and employment torts litigation. She also regularly counsels employers on the various personnel issues they face day to day, and provides clients with training for supervisors and managers, and for all employees.

**Direct:** 206.777.7510 | **Email:** [susan.stahlfeld@millernash.com](mailto:susan.stahlfeld@millernash.com)



**Amy Robinson, SPHR, SHRM-SCP**, represents public and private employers throughout Washington and Oregon in a broad range of workplace-related issues. She skillfully handles matters for clients regarding wage-and-hour, leave laws, disability and accommodation, and complaints related to discrimination, retaliation, and harassment. Amy is adept at guiding employers through policy and handbook creation, crafting employment contracts, and various other agreements.

**Direct:** 360.619.7024 or 503.205.2512 | **Email:** [amy.robinson@millernash.com](mailto:amy.robinson@millernash.com)