

CLOSED SCHOOLS & OPEN QUESTIONS: GUIDE TO NAVIGATING THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

Back-to-school season felt a bit different this year as the COVID-19 pandemic is still a huge concern in our local communities and across the country.

As school districts continue to deal with health challenges associated with the pandemic, parents face an uncertainty as they attempt to balance work, family and children who are adjusting to a new, often virtual, learning environment.

As parents continue to navigate the school year, employers should remain mindful of their obligations to provide paid leave under the Families First Coronavirus Response Act (FFCRA).

Savoy has created the following guide to be used to help employers understand their obligations and responsibilities as employees request these types of leaves.

Overview:

As a refresher, the FFCRA requires employers to provide up to 80 hours of paid leave to employees for certain COVID-19-related reasons under the Emergency Paid Sick Leave Act (PSLA) and expands the Family and Medical Leave Act (FMLA) to provide employees with up to 12 weeks of emergency job-protected leave to care for a child as a result of school or childcare closings due to a public health emergency.

The table provides a high-level overview of the key differences between the federal Emergency Paid Sick Leave Act (EPSL) and the Emergency Family and Medical Leave Expansion Act (EFMLA).

Reminder:

Under the FFCRA, the requirement to provide paid leave expired on December 31, 2020. However, a COVID-19 stimulus bill was signed into law. The newly enacted stimulus bill does not extend the requirement that employers provide paid leave beyond that date. Rather, employers subject to the FFCRA may voluntarily extend the paid leave option until March 31, 2021. If a FFCRA-eligible employer chooses to extend the leave period, the time period during which its employees may take FFCRA leave is extended, as is the period during which the employer may claim the FFCRA tax credit.

The voluntary extension of the FFCRA does not increase the amount of leave available to employees nor does it increase the maximum payroll tax credit available to the employer. The new measure extends the date for leave from December 31, 2020 to March 31, 2021. Employees that were eligible for leave in 2020, but did not use leave in 2020, may only take the leave in 2021 if their employer has elected to apply the FFCRA extension.

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	Federal Emergency Paid Sick Leave Act (EPSL)	Emergency Family and Medical Leave Expansion Act (EFMLA)	Relevant DOL FAQs
	FFCRA provisions remain in effect through December 31, 2020. Any unused amounts will not carry over to the next year or be paid out to employees.		#1
Overview	Two weeks (up to 80 hours) of job-protected paid sick leave.	Temporary expansion of 12 weeks of FMLA job-protected leave. When applicable leave exceeds ten days, the leave may be paid.	EPSL #6 EFMLA #43
Leave is available if the employee is unable to work or telework due to:	1. The employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider). 2. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis. 3. The employee is caring for an individual who is subject to #1. 4. The employee is caring for their child if the school or childcare provider is closed or unavailable for reasons related to COVID-19.	The employee is caring for their child if the school or childcare provider is closed or unavailable for reasons related to COVID-19.	EPSL #23 EFMLA #7
Amount of Paid Leave	Reasons #s 1 & 2: The employee's regular rate of pay up to a maximum of \$511 per day cap (\$5,110 in the aggregate). Reasons #s 3 & 4: At 2/3 the employee's regular rate of pay up to a maximum of \$200/day (\$2,000/aggregate).	The employee is provided up to 10 weeks paid leave at 2/3 the employee's regular rate of pay capped at \$200/day (\$10,000/aggregate).	EPSL #6 EFMLA #43
Enforcement	Employers who violate EFMLA provisions will be subject to the same penalties as FLSA violations, including back pay, lost wages, attorneys' fees, etc. There is a temporary relief period to implement FFCRA provisions before penalties may be assessed from March 18 through April 17, 2020. Penalties will apply for noncompliance beginning April 18, 2020. In addition, employers who violate EFMLA provisions will be subject to the same penalties as FMLA violations, including back pay, lost wages, reinstatement, etc.		#78
Employer Facts			
Eligible Employees	All employees of the covered employer.	Any employee who has worked for the employer for at least 30 days.	#14

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Topics & Questions	Understanding FFCRA, EPSL & EFMLA Employee Leave Rights ¹		Relevant DOL FAQs
<p>It is likely that some employees may have utilized their full leave amounts earlier this year, whether for leave covered by PSLA, EFMLA or for other FMLA-qualifying reasons, and other employees may still have leave available. The remainder of the guide addresses questions regarding these different scenarios.</p>			
Available Leave	Once exhausted, you may not take any further leave under FFCRA even if you change employment. FMLA and FFCRA run concurrently.		#31
What if the employee used some or all of their FMLA leave in the last 12 months?	Eligible employees are entitled to paid sick leave under EPSL regardless of how much leave was taken under FMLA.	If you have taken some, but not all 12 workweeks of your leave under FMLA during the current 12-month period as determined by your employer, you may take the remaining portion of leave available.	EPSL #44 EFMLA #21w
Intermittent Scheduling	May be provided, but only in certain situations where the use of intermittent leave would not create a risk of exposure in the workplace. Employer consent required.		#20
Health Benefits	Employers will continue health benefits during the leave period at the same level and under the same conditions as if the employee had continued to work.		#30
ACA Measurement Period	Hours in which an employee takes leave under FFCRA are included for ACA eligibility calculations.		N/A
Documentation	Employees should provide documents stating the name of the employee requesting leave, the dates requested, the reason, and a statement from the employee that they are unable to work. If the leave is for childcare purposes, employees must also provide the name of the childcare provider or school, the name of the child, and a statement that you cannot find another suitable childcare option.		#15

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Topics & Questions	Understanding FFCRA, EPSL & EFMLA Employee Leave Rights		Relevant DOL FAQs
If you are unable to work due to quarantine under Government Order or on the advice of a healthcare provider, or are experiencing symptoms and seeking a diagnosis	You have a total of up to two weeks (80 hours) of paid sick leave at your regular rate of pay up to \$511/day (\$5,110 aggregate).	N/A	#7
If you are unable to work due to having to care for an individual who is quarantined under Government Order or on the advice of a healthcare provider	You have a total of up to two weeks (80 hours) of paid sick leave at your 2/3 regular rate of pay up to \$200/day (\$2,000 aggregate).	N/A	#7
If you are unable to work due to having to care for a child whose regular care provider is closed due to COVID-19		The employee is provided up to 10 weeks paid leave at 2/3 the employee's regular rate of pay capped at \$200/day (\$10,000/ aggregate).	
If you become ill with COVID-19 symptoms and quarantine yourself for two weeks and then return to work without seeking a medical diagnosis	EPSL is unavailable. Eligible employees may not unilaterally decide to self-quarantine for an illness without medical advice, even with COVID-19 symptoms.	EFMLA is unavailable. EFMLA is only available if the employee is caring for their child, such as if the school or childcare provider is closed or unavailable for reasons related to COVID-19.	#62
Would an employee qualify for FFCRA leave if the child's school is open but the child's before or after school program is closed?	Yes. The DOL defines a "place of care" as a physical location in which care is provided for the child. The physical location does not need to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.		#67
What is the age of the child of a parent who may take leave to care for because the school or child provider is closed or unavailable due to COVID-19?	Under 18 years old, or 18 years old and incapable of self-care because of a mental or physical disability.		#66
Is the child's school or place of care deemed "closed" for purposes of the FFCRA if it has moved to online instruction or to another model in which children are required to complete assignments at home?	Yes. If the physical location where an employee's child received instruction or care is closed, the school or place of care is deemed "closed" for purposes of the EPSL and EFML. Also, note that in order to be eligible for FFCRA leave, employees must still certify that there is no other suitable person that can care for the child.		#70

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Topics & Questions	Understanding FFCRA, EPSL & EFMLA Employee Leave Rights		Relevant DOL FAQs
<p>Would an employee qualify for FFCRA leave if their child's school is open but the employee chooses remote learning based on a doctor's recommendation due to the child's vulnerability to COVID-19?</p>	<p>The employee might be eligible for EPSL if they can demonstrate that they are taking leave to care for a person who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. It is unclear, however, whether a recommendation for remote learning is the same as a recommended self-quarantine for purposes of the FFCRA.</p>	<p>EFMLA is likely not available to the employee because the child's school is not closed.</p>	<p>#99</p>
<p>Is an employee entitled to FFCRA leave if they choose to keep the child at home or have the child homeschooled even though the child's school is open, including when given the choice between remote and in-person learning?</p>	<p>No. The DOL has stated that employees do not need to take leave if their usual childcare provider is available to provide care. But if the school is operating on a reduced capacity due to COVID-19, which then necessitates remote learning for the child, FFCRA leave could be available.</p>		<p>#99</p>
<p>Can more than one guardian take EPSL or EFMLA simultaneously to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons?</p>	<p>You may take EPSL or EFMLA to care for your child only when you need to, and actually are, caring for a child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual childcare provider is available to provide the care your child needs.</p>		<p>#69</p>
Employer Facts			
<p>Applicable To</p>	<p>Employers with fewer than 500 employees. Employers with fewer than 50 employees may be eligible for an exemption.</p>		<p>#39</p>
<p>Exemption</p>	<p>There is a small business exemption for those with fewer than 50 employees where it would jeopardize the viability of the business to provide this leave. To apply, you should document why your business must be exempt and why you fit the criteria for exemption listed in the regulations.</p>		<p>#39</p>
<p>If the employee has a choice between remote and in-person learning</p>	<p>If the employee has the option of in-person schooling for their child, but chooses virtual schooling, they are not entitled to FFCRA leave.</p>		<p>#99</p>
<p>Documenting</p>	<p>Employers should document the name of the employee requesting leave, the dates requested, the reason, and a statement from the employee that they are unable to work. If the leave is for childcare purposes specifically, you must also document the name of the childcare provider or school, the name of the child, and a statement that the employee cannot find another suitable childcare option.</p>		<p>#15</p>

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Additional Considerations		Relevant DOL FAQs
State Provisions	There are various state leave provisions which may impact your FFCRA leave. Please consult with your benefits advisor.	N/A
Dependent Care Flexible Spending Account	Please click here to learn more.	N/A
FFCRA Provisions	Recent NY Federal Court Challenges to FFCRA and Rulings²	
The DOL has signaled they are looking for revisions to FFCRA compliance guidelines. However, until further clarification is issued, employers will be challenged on how to comply.		
Work Availability	The FFCRA statutory language provides that employees are only entitled to leave if they are unable to work because of a COVID-19 qualifying reason. The DOL asserts that employees are not entitled to FFCRA leave if their employer has no work available for them, even if the lack of work is the result of a government directive such as a closure or “stay-at-home” order. The Court later reaffirmed this position.	N/A
Intermittent Leave	In the regulations, the DOL provided for intermittent use of leave, but only: (1) in certain situations where the use of leave intermittently would not create a risk of exposure in the workplace (such as when an employee taking FFCRA Paid Sick Leave due to COVID-19 illness could telework rather than come in to the workplace, or when the employee’s need for leave is based on the need to provide care to a child whose school is closed); and (2) with employer consent. The court upheld the regulation as it relates to the types of leave that may be used intermittently, including the requirement of employer consent.	#20
Documentation	The court held that documentation supporting the need for FFCRA leave must be provided to the employer as soon as possible (see fisherphillips.com/resources/alerts-back-to-square-one-court-ruling-upends).	N/A
Health Care Workers	The FFCRA statutory language permits employers to exclude health care providers from taking FFCRA leave. The DOL definition was later clarified by the Court, stating that “Health Care Provider” includes “only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.”	#38
Note: 1. If you have exhausted FFCRA or FMLA leave, there may be additional state leave options. 2. <i>State of New York v. United States Department of Labor, et. al., 20-CV-3020 (JPO)</i> , NY District Court, Southern District of NJ, August 3, 2020, updated September, 2020.		

DEPENDENT CARE ASSISTANCE PLAN (DCAP)

BASICS

Overview	A DCAP is an employer-sponsored benefit plan that allows employees to pay for certain dependent care expenses on a tax-free basis, up to a specified limit. In most cases, DCAPs are funded by employees with pre-tax dollars through payroll deductions. When employees incur eligible dependent care expenses, such as expenses for babysitting or child care, they can seek reimbursement from their DCAP account.
Qualifying Child	A taxpayer's dependent child under the age of 13 years old (son, daughter, stepson/stepdaughter and a foster child). A taxpayer's spouse or dependent who is mentally or physically incapable of self-care and who has the same principal place of abode as the taxpayer for more than half of the year.
Qualifying Reason	Reimbursement of work-related expenses incurred to enable the employee (or spouse) to work or look for work.
Contributions	Employees make contributions on a pre-tax basis through a Section 125 cafeteria plan.
Annual Limits	\$5,000 for an unmarried employee or married employee who files a joint tax return. \$2,500 for a married employee who files separately.
"Use or Lose" Rule	<p>Employees' unused DCAP balances must be forfeited at the end of the coverage period, unless the DCAP has a grace period. Although, employers have the option to adopt exceptions to the rule.</p> <p>The exceptions can include a change in status event such as the employee's number of dependents, change in employment status. For example, a work schedule that changes from FT to PT may reduce the number of hours needed for childcare.</p> <p>Also, it includes a change in cost or coverage such when an employee switches day care providers or a provider changes its rates. Lastly, employers may adopt a mid-year change for employees who take FMLA leave allowing employees to revoke their election.</p>
COVID-19 Guidance under §125 Cafeteria Plans (employers have the option to adopt this temporary relief)	<p>Employers are provided the option to permit employees to revoke an election, make a new election or decrease or increase an existing election on a prospective basis without having a mid-year change.</p> <p>Due to the nature of the public health emergency posed by COVID-19, employees may be more likely to have unused DCAP amounts as of the end of plan years, or grace periods ending in 2020 and may wish to have an extended period during which to apply their unused DCAP amounts to pay or reimburse dependent care expenses. This relief is temporary and applies to expenses incurred through December 31, 2020. IRS Notice 2020-29.</p>

DEPENDENT CARE ASSISTANCE PLAN (DCAP)

Dependent Care Reimbursable Expenses	
In General	Day camp, before/after-school care, nursery school, preschool or a similar programs below the kindergarten level and babysitters (in some cases).
Babysitting	Babysitting unless the babysitter is the employee's child, stepchild or foster child who is under the age of 19; a tax dependent of the employee or employee's spouse; the employee's spouse or the parent of the employee's qualifying child.
Day Camp	Reimbursement of work-related expenses incurred to enable the employee (or spouse) to work or look for work. The cost of day camp may be for the care of a qualifying individual and a work-related eligible expense, even if the camp specializes in a particular activity, such as computers or soccer. The cost of sending a child to an overnight camp is not considered a work-related expense.
Childcare Centers/Day Care	A facility (including a nonprofit facility) that provides care for more than six individuals and receives a fee, payment or grant for providing these services.
Home Care	The cost of care by a nanny or au pair, for example is an eligible expense if it is attributable to the care of a qualifying individual.
School	Expenses for a child in nursery school, preschool or a similar program for children below the level of kindergarten are expenses for care. Expenses to attend kindergarten or a higher grade are not eligible expenses. Expenses for summer school or tutoring programs are also ineligible. However, expenses for before- or after-school care of a child may be eligible expenses for care.
Fees and Deposits	Fees and deposits that an employee has to pay for care are eligible expenses even though they are not directly for care. Examples include fees paid to an agency to obtain the services of a care provider, deposits paid to an agency or preschool, application fees.

DEPENDENT CARE ASSISTANCE PLAN (DCAP)

Current Relatable DCAP Questions

<p>General Care Center/Children Program Questions</p>	<p>Care centers / programs only qualify if they are not primarily for educational purposes and the main reason a child attends is so that parents may work. That doesn't mean if children between the ages of 5-12 attend a program and learn a new skill while there, it's not an eligible expense. If the purpose is primarily educational, the school program is not a qualified DCAP expense.</p>
<p>Can an employee be reimbursed for childcare expenses if he/she is working from home?</p>	<p>Yes, if the expenses are childcare expenses that are necessary to enable the participant (and spouse) to work or look for work.</p>
<p>Can you use DCAP to reimburse for educational "pandemic" pods?</p>	<p>Yes, if you hire a sitter to supervise your children while you work even if they are logged in and talking to their teachers and classmates virtually. However, if you hire someone to teach your children while you are at work, rather than merely assist with webcams and assignment submissions the expenses is an impermissible expense.</p>
<p>Can you use DCAP funds to pay for care to help a child aged 13 and older with special needs navigate virtual school and life at home while you are working?</p>	<p>Probably not. To claim an eligible care expense for a child older than 12, the IRS says your child must be a person who "can't dress, clean, or feed themselves because of physical or mental problems. If your child meets this level of disability, then your care expenses may qualify.</p>
<p>Could an employee elect to participate for the first time in a DCAP, or increase their election for a DCAP, due to the COVID-19 pandemic for child care expenses related to in-person care or supervision of a child that is concurrent with virtual learning?</p>	<p>As noted above under the "Use or Lose" Rule, DCAP elections made during the annual open enrollment period are generally irrevocable for the year unless the employer adopts IRS' exceptions. Aside from the exceptions, the IRS also issued COVID-19 specific DCAP enrollment relief (see above COVID-19 Guidance). Employers can temporarily allow employees to revoke an election, make a new election, or decrease/increase an existing election on a prospective basis.</p>
<p>For details, visit: (2) IRS Notice 2020-29: www.irs.gov/pub/irs-drop/n-20-29.pdf (1) Internal Revenue Service, Child and Dependent Care Expenses, Publication 503: https://www.irs.gov/pub/irs-pdf/p503.pdf</p>	
<p><i>This document and its links are informational only and are not intended to constitute legal, tax or business advice. For further information, please refer to your lawyer, business or tax advisor. The accuracy, currency or completeness of the information contained herein is not guaranteed.</i></p>	