

## FFCRA and Paid Leave to Care for a Child

Across the country, schools and child care providers remain closed because of the COVID-19 pandemic. Parents are struggling to work, maintain their families' economic security, and care for children who would normally be in child care or attending school.<sup>i</sup> This burden is acutely felt by **women, single parents, women of color, families of color**—particularly **Black, Latinx, and American Indian and Alaska Native** families—**families with low incomes**, and workers with unpredictable schedules.<sup>ii</sup>

Recognizing the pandemic's effect on children and their families, Congress created a temporary right in the Families First Coronavirus Response Act (FFCRA) to paid leave to care for a child whose school is closed or child care provider is unavailable because of COVID-19.<sup>iii</sup> This was the first time Congress required federal paid leave for private sector workers—an important initial step in ensuring workers paid low wages have access to these benefits during the COVID-19 pandemic. Along with other **guidance** and **FAQs**, the U.S. Department of Labor (DOL) recently issued a **Revised Rule**, interpreting the FFCRA.<sup>iv</sup>

This fact sheet provides information from DOL's Revised Rule and sub-regulatory guidance on working parents' rights to COVID-related paid sick days and paid family leave to care for a child whose school is closed or child care provider is unavailable.<sup>v</sup> As recognized by a federal district judge, many of DOL's interpretations of the FFCRA continue to significantly undermine the law's purpose of providing crucial paid sick days and paid family leave to employees who need to care for themselves and others. Congress must remedy this in its next relief package.

### FFCRA Leave Rights to Care for a Child

- **Eligible employees** and self-employed individuals can take up to 12 weeks' paid leave by the end of 2020 to care for a **child**<sup>vi</sup> whose school or place of care is closed, or whose child care provider is unavailable because of COVID-19.
  - **Child** includes:
    - a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or
    - an adult child (18 years of age or older) who is incapable of self-care because of a mental or physical disability.
  - A **place of care** is a physical location in which care is provided for a child, such as child care programs (including but not limited to center- or home-based care programs), preschools, before- and after-school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
  - A school or place of care is **closed** if the physical location where the child received instruction or care is closed, even if the school is providing online instruction or distance learning.

- A **child care provider** is someone who cares for the child such as a nanny; au pair; babysitter; and family, friend, and neighbor caregiver. These providers are included, even if they do not charge for care.
- Wages and reimbursement: Employees will receive 2/3 of their wages, up to \$10,000 total in 2020. Some self-employed individuals are eligible for a tax credit covering days they are unable to perform services in any trade or business because of caring for a child.
- Leave can usually be taken intermittently
  - DOL has allowed **intermittent leave only with the employer's consent** (DOL allows some exceptions for what is considered "intermittent," which is addressed further below).
  - Intermittent leave may mean taking off whole-day increments (every Tuesday, for example), or may mean that while teleworking an employee takes leave for **shorter periods of time**, such as 90 minutes.
- Emergency family leave provides a new reason for leave under the FMLA, but not an additional amount of leave.
  - DOL has specified that the 12 weeks of emergency family leave for employees who need to care for a child will be **limited** by any FMLA leave an employee has already taken during the year.
  - Employees who have already exhausted their FMLA leave, such as new parents, may not be able to access this new benefit Congress created to respond to the pandemic. Additionally, employees who take 12 weeks to care for a child whose school is closed will not have access to any FMLA leave for the rest of the year.
- Broad exemptions limit access to these critical provisions.
  - The FFCRA allowed DOL to **exempt certain small businesses** with fewer than 50 employees from providing this leave when doing so would jeopardize the viability of the business.
  - DOL has also allowed employers of **health care providers** and emergency responders to opt out of providing leave.

## Leave Rights and Hybrid In-Person/Virtual School

- **Hybrid School:** When a child's school is operating on a **hybrid basis**, in which students alternate between in-person and remote learning, employees can take paid leave for the days their child is engaged in remote learning. School is "closed" for the child on those days.
- **Choosing to stay home:** According to DOL, parents who select an option of remote learning when in-person attendance is available are **not allowed** to take paid leave for days their child's school is open for optional in-person learning. If the child is eligible for paid sick days for another FFCRA reason, an employee may be able to take paid leave to care for the child for that reason, but that will be limited to 80 hours of emergency paid sick leave (or whatever balance remains for those employees who have previously used any of that leave).
- **Intermittent Leave:** According to DOL, parents taking leave to care for a child whose school is operating on an alternating in-person/virtual schedule are **not taking intermittent leave**. Such working parents, therefore, should not require employer consent for leave.

## The Urgent Need for Permanent and Comprehensive Paid Leave

CLASP continues to advocate for Congress to fill the gaps in FFCRA and the Coronavirus Aid, Relief, and Economic Security (CARES) Act that left millions of working people without the supports they need to balance work and caregiving responsibilities. Congress must expand and extend the emergency paid sick

days and emergency leave provisions in FFCRA, as well as provide at least \$50 billion in relief for child care to safely sustain the sector during the pandemic.<sup>vii</sup>

Congress must also pass permanent, national, comprehensive paid sick days and paid family and medical leave. Paid leave is essential to protect the health of workers, their families, and our communities. As jurisdictions around the country consider how to re-open schools and child care providers, they can only do so safely by maintaining low levels of community transmission. The FCCRA and CARES Act continue to play a critical role here—ensuring that workers who are sick or exposed can stay home to care for themselves and to reduce transmission, while also ensuring parents can take necessary leave to care for children who are unable to be in school or child care full time. Now more than ever, our country needs permanent, inclusive, and comprehensive paid leave to survive this pandemic and guard against the next crisis we might face.

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<sup>i</sup> UOregon CTN in RAPID-EC Project, “Something’s Gotta Give,” Medium, 2020, <https://medium.com/rapid-ec-project/somethings-gotta-give-6766c5a88d18>.

<sup>ii</sup> Misty L. Heggeness & Jason M. Fields, “Working Moms Bear Brunt of Home Schooling While Working During COVID-19,” U.S. Census Bureau, 2020, <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html>; Sapna Maheshwari and Michael Corkery, “As School Begins, Mothers Working Retail Jobs Feel Extra Burden,” New York Times, Sept. 2020, <https://www.nytimes.com/2020/09/21/business/coronavirus-retail-workers-mothers.html?action=click&module=Top%20Stories&pgtype=Homepage>; Jocelyn Frye, “On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color,” Center for American Progress, 2020, <https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/>; Dorn et al., “COVID-19 and student learning in the United States: The hurt could last a lifetime,” McKinsey & Company, 2020, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>; Natalie Spievack and Megan Gallagher, “For Students of Color, Remote Learning Environments Pose Multiple Challenges,” Urban Institute, 2020, <https://www.urban.org/urban-wire/students-color-remote-learning-environments-pose-multiple-challenges>; Stephen Roll and Yung Chun, “Safe, affordable child care is a right, not a privilege,” Social Policy Institute, 2020, <https://socialpolicyinstitute.wustl.edu/safe-affordable-child-care-is-a-right-not-a-privilege/>.

<sup>iii</sup> On March 18, 2020, Congress passed the *Families First Coronavirus Response Act (FFCRA)*, providing some employees up to 10 paid sick days and up to 12 weeks of family leave (with 10 of the weeks paid), in addition to other critical measures. On March 27, 2020, Congress passed and the president signed the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, H.R. 748, amending portions of the FFCRA.

<sup>iv</sup> The U.S. Department of Labor (DOL) had issued a **Temporary Rule** interpreting the FFCRA. In response to a lawsuit by the New York Attorney General challenging provisions of the Temporary Rule that restricted workers’ access to leave, a federal district Judge **vacated** portions of the Temporary Rule. DOL then issued a **Revised Rule**, effective September 16 – December 31, 2020

<sup>v</sup> CLASP has also published a fact sheet on “Paid Sick Days and Paid Leave Provisions in FFCRA and CARES Act,” CLASP, March 20, 2020, <https://www.clasp.org/publications/fact-sheet/paid-sick-days-and-paid-leave-provisions-ffcra-and-cares-act>.

<sup>vi</sup> FFCRA specifically refers to “son or daughter,” but CLASP is using “child” to be inclusive of nonbinary children.

<sup>vii</sup> Stephanie Schmit, “Why We Need \$50 billion in Pandemic Child Care Relief,” CLASP, May 5, 2020, <https://www.clasp.org/publications/fact-sheet/why-we-need-50-billion-pandemic-child-care-relief-state-state-estimate>.