



Back in Session: Critical Return to School Issues for Employers

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Marylou Fabbo



Marylou is a Partner in the Springfield office and heads the firm's litigation team. Marylou is also the firm's immigration expert. She knows the importance of an understanding and cooperative relationship between an organization and its employees.

For over twenty years, Marylou has encouraged employers to take proactive steps to fostering a work positive environment.

Marylou has successfully represented the firm's clients in state and federal courts, as well as the Equal Employment Opportunity Commission (EEOC), Massachusetts Commission Against Discrimination, Connecticut Commission on Human Rights and Opportunities, and other forums. For years she has been recognized by Boston Magazine as a Super Lawyer and had been designated as one of the Top Women in Law by Massachusetts Lawyers Weekly.



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John S. Gannon has defended employers against claims of discrimination, retaliation, harassment, and wrongful termination, as well as actions arising under the FMLA, and wage and hour law. John also has experience with lawsuits seeking to enforce restrictive covenants and protect trade secrets.

John frequently assists employers in litigation avoidance strategies. He regularly counsels employers on compliance with state and federal laws, including the Americans with Disabilities Act, Fair Labor Standards Act, and Occupational Health and Safety Act. John is a regular contributor to business publications and to the Massachusetts Employment Law Letter.



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Agenda

- Quick FFCRA recap
- Childcare leave issues
- New MA legislation
- Remote work issues
- Unpaid leaves of absence if no FFCRA
- Q & A



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FFCRA: Quick Summary

Paid Sick Leave (EPSL) if employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. **is caring for a child whose school or place of care is closed for reasons related to COVID-19 (can also take EFML); or**
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Quick Summary

- EPSL: Two weeks paid leave (up to 80 hours for full-time; part-time equivalent)
 - Full pay for reasons # 1 – 3
 - 2/3 pay for reasons # 4 – 6
- EFML: Up to an additional 10 weeks of paid expanded family and medical leave
 - 2/3 pay
 - **Only for reason number # 5**

School/Place of Care “Closed”

- DOL Guidance -- Question 70: *My child’s school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it “closed”?*



School/Place of Care “Closed”

- DOL Guidance -- Question 70
 - Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave.
 - This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

School Open; Employee Opts Out

- No clear guidance (yet)
- Best guess: FFCRA not available because the school/place of learning is not closed
- Exception: Employee's child high-risk
 - If child advised to stay home, EPSL may be available
 - *Is this a quarantine advisory, or simply choosing remote over other options?*
 - "Regular" (unpaid) FMLA may be available to care for child "during period of incapacity"
 - EFML not available

Hybrid Model: Is the School Closed?

- No specific guidance on this (yet)
- Best guess: FFCRA only available on days/weeks when remote is only option
- Is intermittent leave an option?
 - DOL Regulations: Intermittent only available when employer/employee agree
 - *State of New York v. U.S. Department of Labor*
 - Court found several FFCRA provisions invalid, including intermittent leave limitations
- My advice: Be flexible

What if Employee Worked From Home in Spring/Summer with No Issues?

- DOL Guidance – Question 91
 - The fact that your employee has been teleworking despite having his or her children at home **does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason.**
 - Ex: Employee's spouse provided care in March;
 - Ex: Employee now feels cannot properly care for child while remote learning
 - May require oral/written statement explaining why unable to work

Legislation on the Horizon

- Mass. S.2869: An Act to protect working parents during the COVID-19 emergency.
- The bill would:
 - forbid employers from terminating “an employee who cannot physically report to work due to a lack of childcare,
 - require employers to provide reasonable accommodations to such employees “to the best of their ability,” including telework and flexible schedule arrangements,
 - extend state unemployment benefits to such employees from the time they exhaust their paid time off until 90 days after Governor Baker lifts the existing state of emergency, and
 - require employers to reinstate these employees at that time.

What if My Employee Does Not Have Any FFCRA Available?

Under some circumstances, an employee may not have any time available:

- Employer has more than 500 employees
- The employer has opted out as a small business or healthcare provider.
- Employer has more than 500 employees
- The employee has been employed less than 30 days.
- The employee has used up all FFCRA time.
- Employee has used 12 weeks of “regular” FMLA.

Employer Options

Is there a way to maintain the employment relationship, or should you separate with the employee?

- Other legally-required, job-protected time
- Different work schedule/duties
- Unpaid Leave/Furlough
- Termination

Do other laws afford the employee with time off?

Employers must keep in mind that other job-protected leave may be available.

- “Regular” FMLA?
- Reasonable accommodation of child’s disability not required.
- Massachusetts Earned Sick Time?
- Eventually...Massachusetts Paid Family and Medical Leave?

Is alternate work available?

Employers who want to retain an employee may consider making changes to the employee’s position.

1. Can the employees’ position be **restructured** to allow for time at home?
2. Can the employee work **alternate hours** outside of “normal” working hours?
3. Can the employee be **transferred** to another position?
4. Can the employee work **part time**?

Can an unpaid leave of absence be provided?

Employers should consider providing an unpaid leave of absence if they wish to retain the employee.

1. Use company-provided accrued time first.
2. Can your organization accommodate continuous or intermittent unpaid leave?
3. Should the employee be furloughed?
3. An employee on unpaid leave/furlough *may* be eligible for unemployment benefits.

Should You Separate with the Employee?

Employers may choose to separate with the employee who cannot work due to remote-learning childcare obligations for one or more reasons:

- It's not able to accommodate need for time off.
- Employee has been a poor performer.
- Other candidates are available to fill the position.

Decision-Making

Decisions must be made on legitimate, non-discriminatory factors.

- Gender: Discriminatory to provide female employees with more generous or flexible options than male employees based on view that “moms” are the real family caregivers.
- Age: Could it be discriminatory to transfer duties to “older” employees who are no longer raising children?

Effectuating the Change in Employment Relationship

The employer and employee should have a clear understanding of the employment relationship during the employee’s time at home.

1. Verbal discussion with the employee.
2. Documentation provided to employee, copy to personnel file should include:
 - Explanation of change
 - Duration
 - Employer may modify/revoke arrangement.
 - Expectations
 - At-will status remains
 - Logistical issues – insurance premiums, etc.
3. Inform relevant personnel of changes
4. Establish check-in/follow ups
5. Identify point person.

Remote Work Issues – Employment Law Compliance

Employment laws still apply when employee working from home when not tending to child's needs.

1. Wage hour laws
2. What about sexual harassment?
3. Reasonable accommodations for disabled employees
4. Employee notices
5. Workers' compensation

Remote Work Issues – Performance Expectations

Remote workers should not be held to different or lower performance standards.

1. MIA/Facebook/Instagram
2. Remote meetings - unprofessional dress, "office" space, and background "noise."
3. Working time/non-work time.

Remote Working Policy

Topics to address in a remote work policy:

- Temporary - only during pandemic?
- Procedures
- Remote working space
- Equipment and expenses
- Compliance with policies

School-Related Exposure

What should an employer do if a student at its employee's school tests positive?

- Can employees be required to report a confirmed or presumptive case?
- Can/should other employees be put on notice?
- Is the employee eligible for time off?
 - FFCRA
 - MA Paid Sick Leave
 - FMLA
 - ADA
 - Unpaid leave

