

## **Despite Planning Underway to “Re-Open America,” Gap in Child Care Anticipated to Continue to Impact Workforce**

Article By:

Kara M. Friedman

Scott M. Gilbert

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Due to the COVID-19 pandemic, schools in the United States have generally suspended brick-and-mortar operations nationwide and are almost exclusively conducting classes through remote learning for the remainder of the academic year. Providing learning support and other care to children staying home due to school closures necessitates a meaningful level of adult supervision by parents who would often otherwise be working. Relatedly, parents of younger children are grappling with a need to work while supervising their toddlers as many child care facilities, including before and after school care programs, are also closed. In light of the ongoing nature of the pandemic, various summer programs for children are following suit. As the pandemic continues without a vaccine or other effective drug therapies, federal, state, and local governments are attempting to develop more advanced infection control plans for re-opening public activities including schools, child care facilities, and summer programs. Whether those programs do, in fact, re-open, many families may opt to keep their children home to minimize the risk of COVID-19 infection. As children idle longer at home and parents struggle with an ongoing gap in child care, U.S. employers and their workforce face significant uncertainty in addressing child care matters during this unprecedented pandemic. Juggling child care and work will likely continue to affect workforce productivity and adversely impact employers of all sizes well into the summer.

The federal government attempted to provide some relief to families through the passage of the Families First Coronavirus Response Act (“FFCRA”), which requires most employers with fewer than 500 employees to provide certain pandemic-related paid leave benefits to employees. Details regarding the benefits provided under the FFCRA can be found [here](#), but they include paid leave benefits for employees who are unable to work due to the need to care for one or more minor children whose school or place of care <sup>[1]</sup> is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.

As it relates to child-care related leave connected to COVID-19, the FFCRA requires employers to foot the bill for up to 12 weeks of paid leave for eligible employees. The first two weeks of leave (up to 80 hours) may be paid under the Emergency Paid Sick Leave Act (“EPSLA”) <sup>[2]</sup>. After the initial two weeks of leave, an eligible employee may take up to an additional 10 weeks of paid leave under the Emergency Family and Medical Leave Expansion Act (“EFMLA”).

The paid leave benefit is capped at \$200 per day and \$10,000 total for each eligible employee, and employers may take a dollar-for-dollar credit against their quarterly payroll tax payments. However, considering the pandemic may continue for many months, the paid leave provisions of the FFCRA are unlikely to be adequate in addressing the challenges employers and employees now face, and will continue to face as they head into summer.

Unfortunately, the fact that the school year will be ending soon will not eliminate the need for child-care based leave if the pandemic persists. The FFCRA recognized this by including summer camps and summer enrichment programs. As a result, maintaining a flexible approach relating to the use of these paid leave benefits may prove crucial to allowing caregivers to effectively continue in the workforce into the summer. Ultimately, however, it appears increasingly likely that employers need to prepare for longer term implications of children staying at home through the summer.

While employees and employers must both agree for these paid leave benefits to be taken intermittently, reaching an agreement that allows for the pacing of a workforce's utilization of EPSLA and EFMLA leaves may extend the benefit longer than it would otherwise be available. For example, an employee may be able to work half days over 20 weeks rather than take a full 10 sequential weeks off, or work two or three days a week, similarly extending the benefit. Where employers and employees can reach agreement on flexible scheduling, such staggering of leave may help struggling parents patch together a schedule that both allows productive time for their job every week as well as allows necessary supervision of their children while they are at home. However, unlike traditional FMLA, the Paid FMLA Leave is just that - a paid benefit, and therefore, employees may be less incented to stagger the use of this benefit. That said, staggering this benefit over the course of the remaining academic year and summer may be exactly what is required for employees to manage through what everyone hopes to be the worst of the pandemic.

If your company has questions about the legal implications of their employees' longer term child care challenges and those employees' rights under the Families First Coronavirus Response Act, contact the authors of this article or the Polsinelli attorney with whom you regularly work.

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[1] "Place of care" is defined for purposes of the benefits described in this post as a physical location where care is provided for the child while the employee works for the employer. Place of care is broadly defined as a physical location that does not have to be solely dedicated to such care and

includes day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs and

respite care programs.

[2] This is provided the eligible employee has not already taken all or part of available EPSLA leave for a COVID-19 another qualifying reason. If the eligible employee has exhausted such entitlement, the employee may utilize accrued but unused paid leave to cover the gap under EFMLA leave

becomes available.

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