DAVIS GILBERT

Summer Camp Closures and Cancelled Enrichment Programs Allow Working Parents to Request Paid Leave from Covered Employers

The Bottom Line

- *Employees who managed to both work or telework, and take care of their kids when schools were closed during the months of April, May and June 2020, could be eligible for a paid leave during the summer months to care for kids if their planned camp or other summer program is also closed due to COVID-19.*

The Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees to allow an eligible employee to take paid leave to care for a child whose school or "place of care" is closed due to COVID-19 and no other suitable person is available to care for the child.

Summer Camp and Summer Enrichment Programs Are Akin to Schools

On June 26, 2020, the U.S. Department of Labor (DOL) issued important guidance to its regional and local offices stating that DOL investigators should consider a child's summer camp or summer enrichment program to be a "place of care" under the FFCRA.

The DOL's reasoning is straightforward; an employee who cannot work because a child's planned summer enrollments fell through due to COVID-19 is no different than the employee being unable to work because his or her child's school or daycare center is closed.

The DOL issued the guidance to settle any confusion concerning whether the FFCRA's scope reached summer camps and programs. Unlike schools and daycare centers, many summer camps and programs closed in response to COVID-19 *before* children began to attend and/or enroll. As a result, it was unclear whether covered employers were required to consider closed camps and programs "places of care" when employees ask for leave to take care of their children who are unexpectedly at home for the summer. This issue apparently caused confusion for DOL investigators evaluating FFCRA claims.

The DOL's recent guidance now makes clear that covered employers who deny leave to eligible employees unable to work or telework because, for coronavirus-related reasons, their kids could not go to camp or to another summer program are most likely violating the FFCRA.

Leave for Eligible Employees

If an employer is "covered" by the FFCRA, eligible employees unable to work because they are caring for children whose camp or summer program is closed for reasons related to COVID-19, and there is no other suitable care provider available, must be provided leave in the form of paid sick time and/or paid expanded family medical leave.

Generally, the FFCRA provides a total of 12 weeks of leave to care for a child. How much a covered employer is required to pay an employee during this leave depends on a number of factors, including:

- Whether the employee uses existing vacation, personal or sick days under the employer's policies, and
- How much leave time, if any, the employee has already used under the FFCRA and Family and Medical Leave Act (FMLA).

Providing Proof to Employers

In a Field Assistance Bulletin, the DOL advises what information an employee seeking a leave based on the closure of a summer camp or summer enrichment program needs to provide to his or her employer.

For example:

- The employee must name the camp or program.
- The employee should provide proof that the child was enrolled in, or had applied to, the camp or program.
- If the child was not yet enrolled or applied, the employee should provide documentation that the child had attended in prior summers and was expected to attend again in the summer of 2020.
- If the camp or program is operating at a reduced capacity, or is otherwise partially open, the employee may still establish that the summer camp or program was "closed" for purposes of an FFCRA leave request, if the child could not attend because of the reduced capacity or partial closure.

The DOL's guidance suggests that covered employers should accept a wide variety of documentation when considering FFCRA leave requests based on summer camp and program closures. The DOL recognizes that there are many possible circumstances as to how an employee might establish that his or her child intended to attend a camp, and its guidance plainly states there can be no "one-size-fits-all rule."

On the other hand, a parent-employee's mere interest in sending a child to a camp or summer program that is closed due to COVID-19 is generally not enough to demonstrate entitlement to a leave under the FFCRA.

Employers are prohibited from discriminating or retaliating against an employee who seeks to take paid leave under the FFCRA. Employers who violate the FFCRA are subject to the enforcement provisions of the FMLA. Under the FMLA, an employee is generally guaranteed job reinstatement after a leave and employers who violate the FMLA are subject to penalties such as liquidated damages and attorneys' fees.

Employer Takeaways

Employers should be mindful of whether they are "covered" under the FFCRA. There are exemptions that may apply to employers with fewer than 50 employees.

While covered employers should always carefully evaluate an employee's eligibility for leave under the FFCRA, including the length of the leave, the required rate of pay, any applicable cap to the amount of compensation to be paid during the leave, etc., employers should heed the DOL's guidance that no "one-size-fits-all" and instead be flexible concerning the "proof" that employees must submit as evidence of their plan to send a child to a camp or summer program closed due to the coronavirus pandemic.

Related People

Maureen McLoughlin
Partner
212 468 4910
mmcloughlin@dglaw.com