

Back to School Cheat Sheet for Employers: New York

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Summer is coming to an end, and you know what that means: school is back in session. We've previously provided general [guidance](#) on the challenges facing students, parents and employers this fall as students return to school during the pandemic. This post focuses specifically on what employers doing business in New York should be considering.

The same overarching analysis applies when determining your obligations if an employee is seeking leave to care for children who would be in school if not for COVID-19:

- Does FFCRA apply?
- Does a state or local Emergency COVID-19 leave law apply in our jurisdiction?
- Does a paid sick leave law apply in our jurisdiction?
- Does a company benefit or policy apply?

New York has a number of leave laws that are implicated by school closures. Fortunately, employers need not worry about New York State's Paid Family Leave for purposes of school closures. New York has explicitly stated in its [FAQ](#) that a COVID-related school closure is not a qualifying reason for purposes of Paid Family Leave benefits under the law. An employee may, however, avail himself or herself of such benefits if the employee or the employee's minor dependent child is subject to a mandatory or precautionary order of quarantine or isolation issued by the State, department of health, local board of health, or government entity.

Additionally, both New York City and Westchester County have their own sick leave laws. Both [New York City's Earned Safe and Sick Time Act](#) ("NYC Leave") and [Westchester County's Earned Sick Leave Law](#) ("Westchester Leave") require employers to provide eligible employees with at least one hour of paid sick leave for every 30 hours worked (accrual is capped at 40 hours per year). Both laws allow eligible employees to use paid sick leave not only for illnesses suffered by the employee or his or her family member, but also if the "employer's business closes due to a public health emergency or [the employee] need[s] to care for a child whose school or child care provider closed due to a public health emergency."

Interestingly, these leave laws went into effect before the COVID-19 pandemic and before employers started scratching their heads over the current school reopening debacle. As such, these laws do not spell out what exactly a "closed" school looks like. For instance, the laws do not specifically provide whether they apply when a school's physical location is closed, but the classrooms are technically "open" where all classes are remote, nor do the laws contemplate the even more confusing hybrid or blended learning models, where physical locations are open some days and closed for remote

learning other days. Nevertheless, best practice dictates that employers follow the logic of the Department of Labor's ("DOL") guidance for FFCRA leave, and allow employees to use their earned sick leave in the same situations that FFCRA leave would be available to ensure compliance with the law, as set forth below:

1. In-Person: If a child's school is not closed due to COVID-19 related reasons, it is open for children to attend and FFCRA, NYC Leave, or Westchester Leave is not available.
2. Hybrid/Blended Learning: FFCRA, NYC Leave, or Westchester Leave may be available on days or parts of days when a child is not permitted to attend school in person and must instead engage in remote learning.
3. Only Remote: FFCRA, NYC Leave, or Westchester Leave is available while a child's school remains closed.
4. Families opting out of school or *choosing* to participate in the remote learning program: FFCRA, NYC Leave, or Westchester Leave is not available because a child's school is not closed and paid sick leave is not available to take care of a child whose school is open for in-person attendance.

Other New York Specific Considerations

- Since many schools are adopting hybrid/blended learning models, employers in New York must be careful when considering employee requests for intermittent leave. While the DOL regulations state that FFCRA leave may be taken intermittently only with employer consent, a Southern District of New York court recently struck down the DOL's regulations requiring employer consent where a COVID-related school closure necessitated the intermittent leave. We reported on that decision [here](#).

In light of the decision, the DOL issued [revisions to the FFCRA Temporary Rule](#) to clarify its stance on intermittent leave. The DOL reaffirmed the need for employer approval for intermittent leave, but clarified that employer approval does not apply to leave used in full-day increments to care for children subject to a hybrid school schedule as such leave is not actually considered "intermittent," but is instead considered consecutive requests for leave. Essentially, the DOL is saying that each day a school is closed constitutes a separate reason for FFCRA leave and ends when the school opens again. The DOL explains "[t]he employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that)." However, if an employee's child is subject to a hybrid school schedule at a school operating only in the morning or the afternoon, the employee would need consent to use leave intermittently if being used for partial-day increments. Though DOL guidance attempts to offer clarity on what counts as "intermittent" leave in hybrid learning scenarios, New York employers subject to the FFCRA should still proceed cautiously when denying any intermittent leave requests in light of the recent court decision.

- On September 30, 2020, New York State's new statewide mandatory sick leave law goes into effect, requiring employers to provide unpaid and paid sick leave benefits to their employees. Whether the leave is unpaid or paid, and how many hours of leave must be paid, depends on the size and income of the employer. A more detailed analysis of the law can be found in our previous post [here](#). Notably, employers with 100 or more employees in any calendar year must provide at least 56 hours of paid sick leave, exceeding the current 40-hour accrual under both NYC Leave and Westchester Leave. Note that if an employer already has a sick leave policy that

equals or exceeds the paid sick leave law, there is no need to provide any additional sick leave.

Unlike NYC Leave and Westchester Leave, and based on current guidance, employees are not eligible for leave for school closures under New York State's new sick leave law. Nevertheless, it is important for employers to keep in mind that employees may be eligible for such leave for other reasons, such as diagnosis, care or treatment of an illness of the employee or family member, or may be eligible for NYC Leave or Westchester Leave as such leave is not preempted by the state's law. As such, employers should review their policies and consult with counsel to ensure they are providing enough leave under this new law.

As with anything COVID-related, the legal considerations for employers with respect to managing school reopening is complicated. Please reach out to one of our Labor & Employment attorneys for specific guidance.