CalChamber
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Employer Guide to Distance Learning Leaves of Absence

By CalChamber Employment Law Counsel

When the COVID-19 pandemic hit in March, many school districts elected to shut down campuses and move to distance learning, with the assumption and hope that it would be temporary. There was a sense that, while it was difficult, we could figure out how to manage with distance learning to the end of the school year, and then prepare for the return of normalcy in the fall. But, as the new school year begins, most schools remain shuttered due to resurgent pandemic numbers. It's unclear how long students will be learning from home, but it will likely be several weeks, if not months, for some counties, based on state requirements.

As schools reopen this year, they will be rolling out a variety of programs to address learning needs during the pandemic while complying with government health and safety guidelines. Some schools may stay with distance learning for a while, and others will be offering traditional in-person classes or a "hybrid" schedule in which students attend in-person learning certain days of the week and distance learning on other days. Others may offer half day schedules in which half the students attend classes in the morning while the other half attend classes in the afternoon. In some cases, schools are giving parents the option to choose from a variety of programs. If that's not complicated enough, some parents will have multiple children in *different* schools following *different* schedules.

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The patchwork of programs and schedules will be challenging for both employers and employees, who have numerous legal and practical considerations to keep in mind: availability of various COVID-19-specific leaves under federal, state and local laws; vacation/paid time off (PTO); school activities leave; remote working arrangements; and alternative schedules.

Employer, Employee COVID-Related Legalities

To help employers through this school year, here are answers to the most frequently asked legal questions about leaves of absence, employee eligibility, documentation, pay, the tax credit, job protection and notices as they pertain to COVID-related school closures.

Leaves of Absence

Q1: My employee has requested time off to help with their child's distance learning. What are we required to provide to them?

A: The requirements vary depending on how many employees you have and where you're located, but the following leaves may apply:

- **Federal Families First Coronavirus Response Act** (FFCRA): The FFCRA applies to employers with fewer than 500 employees within the United States. It provides Emergency Paid Sick Leave (EPSL) and Expanded Family and Medical Leave (E-FMLA) to employees who can't work or telework due to a need to care for their child if the child's school or place of care has been closed, or the childcare provider is unavailable due to COVID-19.

Employees may be eligible for California's school activities/ emergency leave if their child's school closed due to COVID-19.

- **Local Ordinances**: Numerous cities and counties have passed their own emergency ordinances that require paid leave when the employee is unable to work or telework due to the need to care for a child whose school or place of care has been closed, or the child-care provider is unavailable due to COVID-19. Most of the local ordinances were designed to cover employers not already covered by the FFCRA and each local ordinance has some similarities with the FFCRA requirements, However, each ordinance is unique from the others. Employers should check to see if the cities or counties their employees work within have enacted emergency ordinances covering school/daycare closures and should consult with legal counsel regarding their obligations.
- **School Activities/Emergency Leave**: According to the California Division of Labor Standards Enforcement, employees may be eligible for California's school activities/emergency leave if their child's school closed due to COVID-19. Employers with 25 or more employees working at the same location must permit employees to take up to 40 hours off, unpaid, for certain child-related activities, including to address a child-care provider or school emergency, such as a closure or unexpected unavailability of the school or child-care provider.

Q2: How much EPSL or E-FMLA time off is an employee entitled to for childcare or distance learning issues?

A: Eligible employees may take up to two weeks of EPSL and up to 12 weeks of E-FMLA. For distance learning purposes, employees may be eligible for both EPSL and E-FMLA, in which case the benefits may run concurrently (see Question 15 below). Employers can calculate the hours of leave as follows:

EPSL Hours: Under EPSL, full-time employees (works or averages at least 40 hours per week) can take up to 80 hours of leave. A part-time employee with a regular schedule is entitled to the number of hours they are normally scheduled to work. If the part-time employee has a varying schedule, they are entitled to the

number of hours equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period prior to taking leave; or if they haven't worked six months, then the number of hours equal to 14 times the number of hours the employee and employer agreed the employee would work, on average, each calendar day. If there is no agreement, the employee is entitled to the number of hours equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including any hours in which the employee took leave of any type.

E-FMLA Hours: Calculating hours under E-FMLA is similar to EPSL. Employees who work regular schedules are entitled to the number of hours normally scheduled to work on the day leave is taken. For employees with varying hours, they are entitled to the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date on which the employee takes leave, including any hours in which the employee took leave of any type. If the employee hasn't worked for six months, the employee is entitled to the average number of hours the employer and employee agreed the employee would work, on average, each calendar day. If there is no agreement, the employee is entitled to the to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including any hours in which the employee took leave of any type.

Employees may use EPSL and E-FMLA intermittently to care for a child whose school or place of care is closed due to COVID-19.

Q3. My employee lost their daycare provider. Are they entitled to EPSL and/or E-FMLA leave if they request it?

A: Yes, assuming the other FFCRA eligibility requirements are met, EPSL and/or E-FMLA apply if the child's daycare provider is unavailable due to COVID-19.

Q4. My employee's school district has reopened schools but given parents the option to continue distance learning. Is my employee eligible for EPSL or E-FMLA?

A: No, the employee is not eligible for EPSL or E-FMLA because the school is no longer "closed" due to a COVID-19-related reason.

Q5. My employee's school district has reopened school but put students on a "hybrid" schedule where the students come to school some days and are required to distance learn on others. Is my employee eligible for EPSL or E-FMLA?

A: Yes, in part. The employee will be eligible for EPSL or E-FMLA on the days that the employee's child is required to distance learn. On the days that the child may attend school in person, the employee is not eligible for EPSL or E-FMLA. See question 6 below for further discussion on intermittent EPSL or E-FMLA leave.

Q6. My employee wants to take EPSL and E-FMLA intermittently for their child's distance learning, such as taking off a few hours each day or working some days and not others. Do we have to accommodate intermittent use?

A: FFCRA regulations state that employees may use EPSL and E-FMLA intermittently to take care of a child whose school or place of care is closed, or childcare provider is unavailable due to COVID-19, whether the

employee is teleworking or reporting to their worksite, provided that the employer and employee agree to the arrangement.

A recent federal district court decision invalidated the portion of the regulation requiring employer consent to intermittent use of EPSL/E-FMLA leave. In response, the DOL revised its regulations, effective September 16, 2020, reaffirming that intermittent FFCRA leave is only available upon an employer's consent, and it analogizes its FFCRA intermittent leave rule to longstanding FMLA principles that require employer consent for intermittent leave when FMLA isn't taken for a medical reason. The DOL considers FFCRA intermittent leave to fall outside of leave taken for a medical reason. Thus, employer authorization for intermittent leave is appropriate.

The DOL also updated its FFCRA guidance on the topic, clarifying that when a school is engaging in distance learning only (i.e., it's closed all week), and the employee needs to take Monday, Wednesday and Friday off, for example, to help their child with distance learning, the employer and employee can agree on intermittent use for those days. But, if the school is using a hybrid schedule and is closed on Monday, Wednesday, Friday, and open for in-person attendance on Tuesday and Thursday, then "each day of closure or unavailability is a separate reason for leave, and thus [the employee] would not need to take leave for a single reason intermittently. As such, [the employee] would not need employer permission to take leave on just the days of closure or unavailability"

Employers should continue to be flexible, collaborate with employees in their schedule needs, and consult with legal counsel before denying use of intermittent leave.

Employers may not require employees to use existing vacation/PTO and/or sick leave before they can use EPSL or E-FMLA.

Q7. We already provide our employee with paid sick leave and vacation/PTO. Do we still have to provide this leave?

A: Yes, the FFCRA provides leave *in addition* to any other paid sick leave and vacation/PTO provided by state law and the employer.

Q8. Can we require employees to use their existing sick leave or vacation/PTO balances before using EPSL or E-FMLA?

A: No, employers may not require employees to use existing vacation/PTO and/or sick leave before they can use EPSL or E-FMLA. Employers may require that existing paid employer leave run concurrently with E-FMLA, but not EPSL.

Employee Eligibility

Q9. We just recently hired an employee who now needs time off for distance learning under EPSL and E-FMLA. Must the employee have worked with us for a certain length of time before being eligible?

A: All employees are eligible for EPSL, regardless of how long they have worked. In other words, they don't need to work for the employer for any period of time or otherwise accrue the leave before they can take it. Employees are eligible for E-FMLA if they have worked for the employer for at least 30 calendar days.

Q10. Our employee previously used EPSL and E-FMLA when schools closed starting in March 2020. Is the employee eligible for EPSL and E-FMLA again for this new school year?

A: Maybe. If the employee did not use all of their EPSL (two weeks) and E-FMLA (up to 12 weeks) earlier in the year, then they may be eligible to take leave again and continue to draw down those amounts. If the employee already exhausted their EPSL and E-FMLA earlier in the year, then they're not able to take leave under the FFCRA.

However, there are circumstances in which an employee has become eligible for another 12 weeks of E-FMLA leave since March 2020 when the employer is covered by traditional FMLA (50 or more employees). Employers covered by traditional FMLA must set a 12-month leave entitlement period that may be calculated in one of four ways:

- The calendar year.
- Any fixed 12-month leave year, such as fiscal year or employment anniversary.
- A 12-month rolling forward period measured from the date the employee first takes leave.
- A 12-month lookback measured from the date an employee uses leave.

If an employee used all 12 weeks on traditional FMLA, they cannot take E-FMLA unless the 12-month FMLA leave entitlement period has reset.

If, for example, an employer uses the fiscal year, July 1 through June 30, as their 12-month FMLA leave entitlement period, then an employee may receive additional FMLA/E-FMLA leave time July 1. If that's the case, then the employee may be eligible for up to 12 weeks of E-FMLA even though they used E-FMLA back in March 2020. FMLA-covered employers should review their leave calculation method to determine employees' current FMLA/E-FMLA eligibility. This scenario likely doesn't apply to smaller employers not previously covered by traditional FMLA.

Q11. Our employee previously used 12 weeks of FMLA for a serious medical condition earlier in the year and now wants to take time under E-FMLA due to distance learning. Do we have to provide 12 more weeks under E-FMLA?

A: No, FMLA and E-FMLA both draw on the same 12 weeks of leave available to an employee under traditional FMLA. If an employee used all 12 weeks on traditional FMLA, they cannot take E-FMLA unless the 12-month FMLA leave entitlement period has reset. See Question 10 for further discussion on this point.

Q12. We furloughed an employee over the summer while keeping them on the payroll. They're still furloughed but are now requesting EPSL and/or E-FMLA because their child's school is in session. Do we have to provide leave to furloughed employees?

A: The FFCRA regulations state that employees aren't eligible for EPSL or E-FMLA to take care of a child whose school or place of care has been closed when the employer doesn't have work for the employee (29 C.F.R § 826.20(b)). The U.S. Department of Labor's (DOL) position is that leave is provided to employees for time when the employee would otherwise be required to work, so if the employee isn't scheduled to work, whether that's due to furlough, business closure, etc., there's no work from which to take leave.

A recent federal district court decision invalidated this portion of DOL's regulations, referring to it as the "work-availability requirement," because the DOL applied the work requirement unequally in its regulations and, in general, the DOL failed to properly explain why work availability was a requirement for leave. In response, the DOL revised its regulations, reaffirming the work availability requirement and adding further explanation for the requirement based on the statute's language.

The DOL's revised regulations reaffirming the work-availability requirement took effect September 16, 2020.

Documentation

Q13. What documentation may we require from the employee before we grant EPSL and/or E-FMLA leave?

A: FFCRA regulations require employees to provide notice to their employers of their need to take either EPSL or E-FMLA, and the notice must include the following information:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work because of the qualified reason.

Employees must provide documentation supporting their need for EPSL and/or E-FMLA leave as soon as practicable under the circumstances.

Employees also must provide additional information specific to the qualifying reason. If the employee is taking care of a child whose school is closed or childcare is unavailable due to COVID-19, then the employee must provide the name of the child being cared for; the name of the school, place of care or childcare provider that's closed; and a representation that no other suitable person will be caring for the child during the leave.

The regulation specifies that employers may also request additional materials as needed to support their requests for FFCRA tax credits and tells employers to consult the Internal Revenue Service (IRS) tax credit guidance for more details.

CalChamber's *COVID-19-Related Paid Sick Leave or Family and Medical Leave (FFCRA) — Employee Notice* includes all the above required information.

Q14: Is there a deadline for employees to provide documentation supporting their need for the leave?

A: The FFCRA regulations state that employees must provide notice as soon as practicable under the circumstances. Documentation may not be required in advance. If an employee fails to give proper notice, the employer should give the employee notice of any deficiency and an opportunity to provide the required documentation prior to denying the request for leave.

Pay

Q15. Is EPSL/E-FMLA leave paid or unpaid? If paid, who pays it?

A: All of EPSL is paid leave. The first two weeks of E-FMLA are unpaid; the remaining time, up to 10 weeks, is paid. Employees may use EPSL to cover the first two weeks of unpaid E-FMLA leave, providing a total of up to 12 weeks of paid leave for COVID-19-related school closures. The employer pays for the leaves under the FFCRA but may claim a tax credit for full reimbursement (more information on tax credits in questions 17 and 18).

Q16. How do we calculate how much to pay the employee who takes EPSL and/or E-FMLA for school- or childcare-related reasons?

A: Under both EPSL and E-FMLA, employees are entitled to two-thirds of their "average regular rate" for the hours of leave taken for school- or childcare-related reasons, up to a maximum amount of $200 per day.

According to the DOL's FFCRA regulations, to determine the "average regular rate," employers must compute the "regular rate for each full workweek" in which the employee has been employed over the six months preceding leave, or for those employed less than six months, the entire period of employment. Employers must then compute the average of the weekly rates weighted by the number of hours worked for each workweek.

The FFCRA provides full reimbursement to employers for paying employees for EPSL/E-FMLA through payroll tax credits.

If, over the six-month period, an employee is paid exclusively through fixed hourly wage or salary, the average regular rate would equal the hourly wage or hourly equivalent of their salary.

But if an employee is paid through different arrangements, such as piece rate, commissions or tips, the regular rate may fluctuate from week to week. In that case, for each full workweek in the six-month period, employers will calculate the regular rate in accordance with the Fair Labor Standards Act.

Once you determine the average regular rate, multiply it by the appropriate number of hours of leave taken as described in Question 2.

Q17. Can we get reimbursed for paying employees for EPSL/E-FMLA?

A: Yes, the FFCRA provides full reimbursement to employers through payroll tax credits. According to IRS guidance, employers can withhold federal employment taxes equal to the amount of leave paid, rather than depositing them with the IRS. Employers will report this on their *Form 941, Employer's Quarterly Federal Tax Return*.

If an employer does not have sufficient employment taxes set aside, employers may file a request for an accelerated payment from the IRS with *Form 7200, Advance Payment of Employer Credits Due to COVID-19*. Employers should review the IRS guidance for more details.

Tax Credit

Q18. What documentation do we need to claim the tax credits? Do we submit this to the IRS?

A: The IRS requires employers to retain the basic FFCRA leave documentation that employers collect from employees requesting leave such as the employee information, dates of leave, qualifying reason for leave, etc. (described in Question 13). The IRS also requires, with respect to the employee's inability to work or telework because of a need to provide care for "a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care."

In addition to that information, the IRS requires that employers maintain:

- Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees who are eligible for the credit, including records of work, telework, and qualified sick and family leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- Copies of any completed *Forms 7200, Advance of Employer Credits Due To COVID-19*, that the employer submitted to the IRS.
- Copies of the completed *Forms 941, Employer's Quarterly Federal Tax Return*, that the employer submitted to the IRS (or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on Form 941).

The FFCRA contains a small business exemption that may be applicable to small employers under some circumstances.

Employers should keep these records for four years. They should be available for IRS review. The *COVID-19-Related Paid Sick Leave or Family and Medical Leave (FFCRA) Documentation Checklist — For Employer Use Only* will help guide employers through the required documentation.

Q19: Our organization has fewer than 50 employees and we don't normally provide FMLA leave. Are we exempt from E-FMLA?

A: The FFCRA applies to all employers with fewer than 500 employees, even small employers to whom FMLA normally doesn't apply. The act does, however, contain a small business exemption that may be applicable to small employers under some circumstances.

The act's small business exemption applies to employers with fewer than 50 employees, but it's important to note that this is not a blanket exemption applicable to all small employers. To qualify for the exemption, small employers must show that paying for the requested leave would "jeopardize the viability of the small business as a going concern." An employer may satisfy this requirement if an authorized officer of the business determined that:

1. The provision of paid sick leave or E-FMLA leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or E-FMLA would entail a substantial risk to the small business' financial health or operational capabilities because of their specialized skills, knowledge of the business or responsibilities; or

3. There aren't sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or E-FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

To elect the small business exemption, an employer must document that a determination has been made as to the criteria listed above. The employer shouldn't send the documentation to the DOL, rather it should retain the records in its files. Employers should consult with legal counsel before denying EPSL/E-FMLA under the small business exemption.

Effective September 16, 2020, the DOL's regulation focuses the "health care provider" definition on the employee's skills, role, duties or capabilities rather than the employer's identity.

Q20: We are a health care provider. Are we exempt from the EPSL and E-FMLA?

A: The FFCRA allows employers to exclude employees who are health care providers and emergency responders from EPSL and E-FMLA.

The DOL's initial regulation defined "health care provider" broadly and focused on who the employer is. The DOL admitted that based upon this language, an English professor, librarian or cafeteria manager at a university with a medical school would all be "health care providers." A federal District Court invalidated this definition as being overly broad.

In response, the DOL revised the regulation, effective September 16, 2020, to focus the "health care provider" definition on the employee's skills, role, duties or capabilities rather than focusing on the employer's identity. "Health care provider" now means:

- A doctor of medicine or osteopathy who's authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices;
- Any person who's employed to provide diagnostic services, preventative services, treatment services or other services integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care; and
- Any other person determined by the Secretary of Health and Human Services to be capable of providing health care services.

Employers excluding employees from the FFCRA under the DOL's definition of health care provider should consult with legal counsel to determine how the to proceed under the revised regulations.

Job Protection

Q21. Our employee is currently on E-FMLA due to a school closure. The temporary employee we hired is a better worker than the employee on leave. Can we lay off the employee on leave?

A: Generally, no. As with standard FMLA leave, E-FMLA is protected, meaning an employer must return the employee to the same or an equivalent position upon their return.

There are narrow exceptions to the job protection requirement. Small employers with fewer than 25 employees don't have to return the employees to the same or equivalent position if the position doesn't exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency. However, the employer must make reasonable efforts to restore the employee to an equivalent position, and, if those efforts fail, the employer must make reasonable efforts to contact the employee if an equivalent position opens within a year. This is a narrow exception that won't apply in most circumstances. Additionally, an employer doesn't have to bring back a highly compensated "key" employee as defined under the FMLA. It's unlikely that either of these apply in this situation.

Although E-FMLA is job-protected leave, employees aren't protected from employment actions that would have affected them regardless of whether they took leave.

Q22. Our employee is currently on E-FMLA due to a school closure. Unfortunately, due to a loss of revenue, we must close some departments within our organization. The employee on E-FMLA works in one of those departments. Do we have to continue to employ the individual on E-FMLA?

A: Generally, E-FMLA is job-protected leave, meaning employers must return employees to the same or equivalent position. However, employees are not protected from employment actions that would have affected the employee regardless of whether the employee took leave — such as layoffs. In other words, employers can lay off employees taking E-FMLA for legitimate business reasons, such as the closure of a department due to loss in revenue. The employer must be able to demonstrate that the employee would have been laid off even if the employee had not taken leave. Employers should consult with legal counsel on the matter.

Notices

Q23: Do we have to provide any information to employees regarding the availability of EPSL/E-FMLA?

A: Yes, the FFCRA requires employers to post the EPSL/E-FMLA rights notice in conspicuous places on the employer's premises; however, the DOL's guidance states that employers with remote employees can comply with this requirement by emailing or direct mailing this notice to their employees, or even posting the notice on an "employee information internal or external website." The DOL published a model poster for employers to use.

Work Arrangements, Schedules and Other Considerations

In addition to leaves of absence, employers have other options to address employees' need to help their children with distance learning, including various flexible scheduling options and remote working arrangements.

Flexible Schedules

Job duties permitting, employers can be flexible with employees' work schedules. For example, employers can move shift start and end times, move shifts to different days, or offer a split shift option. Employers must be mindful of an employee's exempt/nonexempt status in changing their schedules; while it's fairly easy to create a flexible schedule for exempt employees, for nonexempt employees, employers must ensure compliance with the state's various wage and hour laws, including meal and rest breaks and overtime requirements. Employers should also clearly communicate to the employee the temporary nature of the arrangement and the expectation that when the need to help their child with distance learning ends, the employee is expected to return to their normal schedule.

Offering a flexible schedule to your remote employees is possible; the question from a wage and hour/scheduling perspective boils down to who is exempt and who is nonexempt.

The following Q&As illustrate common scheduling scenarios employers are facing and the issues they should consider.

Q24. Our employees have been working remotely since the state's shelter-in-place orders were issued in March. We were going to bring our employees back, but then the schools closed, and employees began to voice concern about returning to work while kids were home. So, we delayed our return to work plans but now employees are asking for more – different schedules. Do we have to allow remote working and different schedules?

A. The year of 2020 is proving to be the year of patience, grit and flexibility. Many employers are grappling with the ever-evolving work-from-home arrangements. Distance learning added to the evolution. Offering a flexible schedule to your remote employees is possible. The question from a wage and hour/scheduling perspective boils down to who is exempt and who is nonexempt. The exempt employees are paid to perform the job and are not required to clock in and out, track hours or take required breaks. Because there is more flexibility with when an exempt employee works, providing a flexible/fluctuating schedule to these employees requires less oversight, planning and compliance than for our nonexempt employees. Exempt employees can help with their kids from 9 a.m. – 2 p.m. and work in-between helping or even work until 10 p.m. at night if that's what it takes to get the job done. No overtime, meal and rest breaks, split shifts or the like are required. As the employer, you don't have to worry about the actual time spent or when the hours were worked, so long as the work is getting done.

Nonexempt employees are a bit tricky because state and federal law require that they are paid for every hour worked and overtime if they work over 8 hours in a day or 40 hours in a week. Additionally, meal and rest break rules must be followed. Similarly, if an employee works a few hours in the morning, clocks out

for two hours to help with school, and then clocks in, that employee may also be entitled to split shift pay. The key to providing nonexempt employees flexibility is to work out a schedule and clearly communicate your policy as it relates to clocking in and out and taking the required meal and rest breaks. So long as your employees can still perform their job while also complying with the rules, flexibility is possible.

Q25. My employee would like to adjust their schedule so that they can be home to help their child with distance learning. The employee normally works a 9-to-5 schedule with a 30-minute lunch break, Monday-Friday. My employee would like to change their schedule and work from 2 p.m. to 8 p.m. Is it okay if I allow my employee to change their schedule?

A. Generally, yes. If your employee is exempt, then tracking the number of hours the employee works while ensuring the required meal and rest breaks are taken is not an issue. Remember, we pay exempt employees for doing their job not punching a clock. However, if this employee is nonexempt, then we do need to make sure all hours worked are tracked and that the employee takes their required rest and meal breaks. Because this employee is scheduled for an 8-hour shift, that employee will need to still take two rest breaks and one 30-minute meal break, which must begin no later than 4:59 minutes into the shift. Finally, if you are offering this alternative schedule for the purposes of accommodating distance learning, it is important that you clearly communicate to your employee that they will need to resume their normal schedule once their child is back at school in the traditional sense and document this discussion in the employee's file.

Employers considering schedule changes also have the option of setting up an "alternative workweek," which allows nonexempt employees to work more than eight hours per day without requiring daily overtime payment. For example, an employer could set up an alternative workweek schedule consisting of four ten-hour shifts per week without incurring overtime costs.

Employers must follow strict requirements to establish the alternative workweek, and failing to comply with one can lead to overtime backpay liability.

Although adopting an alternative workweek schedule can reduce overtime costs, it also greatly limits an employer's scheduling flexibility and therefore is best suited for employers who typically have regular working hours that rarely need to change. Additionally, employers must follow strict requirements to establish the alternative workweek and the failure to comply with one can lead to overtime backpay liability. Employers should consult with legal counsel before adopting an alternative workweek.

Q26. My business is considered "essential" under California state and local guidelines, and my employees must be at the worksite to perform their essential job functions. I have a full-time employee who would like to adjust their schedule to accommodate their child's distance learning schedule, but the nature of my business and my employee's job require that work is performed during our normal business hours of 8 a.m. to 5 p.m. There's no work my employee can do before or after business hours. What are my options?

A. California's guidelines state that as an essential business, you may require your employees to work at the worksite rather than remotely. Similarly, the guidelines don't require an employer to grant an employee's request for an adjusted schedule due to distance learning.

Keep in mind that under the FFCRA, employees are entitled to up to 12 weeks of paid leave (the first 10 days may be unpaid), but many employees would like to continue working while also assisting children. In

such cases, when remote or an alternative 8-hour schedule isn't feasible, you may consider offering a part-time schedule or a reduction in hours during the schools closures. Note that if the employee is exempt, this reduction in hours could possibly jeopardize the employee's exempt status and you may wish to reclassify the employee as nonexempt during this temporary time.

Finally, a reduction in hours may impact the benefits your employee is entitled to receive under your company policy. Therefore, it's a good practice to inform the employee of any benefit loss should a reduced schedule be adopted.

Q27. I have several employees who perform the same job and have children at home distance learning. Two of the employees approached me the other day about whether they could "share" their workload. Is job sharing even a possibility and, if so, how would it work?

A. Job sharing is not a new concept and is certainly something many employers and employees are utilizing during this time. The idea is that two individuals share the workload of one full-time position. The law generally allows this work arrangement so long as your job-sharing employees are properly classified (most likely as nonexempt), their hours are tracked, and the requisite meal and rest breaks are taken. A successful job-sharing arrangement does require a coordination of schedules between each employee and a successful and professional working arrangement.

Remote Work Reminders

A remote work arrangement may provide employees the ability to help with distance learning while they continue working. Remote working has already become the new norm for many employers, but for those who, for example, went back to the office when the state started reopening, it may be worth considering a transition back to remote working. Many employers are also offering a hybrid arrangement with certain days in the office and the remaining time remote.

As a reminder, a good remote work policy contains:

- The criteria for assessing whether an employee can work remotely;
- How to handle home office expenses and other telecommuting expenses and logistics;
- How managers can expect to manage productivity and adherence to company policies;
- How to handle off-the-clock issues if the employee is nonexempt; and
- Confidentiality and privacy policies, including how the employee is monitored.

Employers may also consider using a remote work/telecommuting agreement that describes the expectations your company has for employees who work remotely. Employers should also keep workplace safety in mind when implementing a remote work arrangement. A remote work/telecommuting safety checklist is helpful.

Employers also have the option to reduce employees' hours and enroll in the Employment Development Department's Work Sharing Program — this program allows employers to reduce employee work schedules, while permitting these employees to simultaneously collect partial unemployment benefits for the time reduced. This may allow employers to address employees' needs to help with distance learning while mitigating the impact of lost income through the partial unemployment benefits. The work sharing program has specific eligibility requirements, so it won't work for everyone. Employers should consult with legal counsel to see if the program is a good strategy for their circumstances.

Children at the Office

Q28. My employee has asked to bring their child to work with them. Is that ok?

A. Generally, yes, you can allow employees to bring their children to work. Some employers have made this option available to their employees as a way of keeping the employee working in the office while allowing them to monitor their child's distance learning. Of course, this may not work depending on the circumstances, but it may be an effective temporary strategy that allows employers to keep their business running. Employers considering this option need to keep a couple things in mind.

First, employers must continue to follow and comply with all applicable health and safety protocols. It may be difficult bringing children to certain worksites depending on the site and industry.

Second, employers should keep productivity in mind. It can be challenging monitoring a child's distance learning while working at the same time. Employers should clearly communicate their expectations to employees under this arrangement.

Employers have been addressing childcare issues in other creative ways. Some employers are partnering with existing childcare centers to create a daycare center at their offices. Partnering with existing childcare centers can be helpful with licensing and safety issues. Other employers are providing childcare stipends to employees who need it. This option isn't going to work for everyone since many businesses are struggling economically right now.

With the uncertainty surrounding this school year, employers and employees should continue to be flexible and collaborative ...

The viability of these and other options are highly dependent on the business's specific circumstances. Employers should consider consulting with legal counsel if they want to explore accommodating working parents in these ways.

Final Thoughts for Employers

This is an unprecedented situation that is constantly changing and evolving. As counties move through the state's new tier system, schools will start to reopen to some extent, but it's unclear how exactly that will progress over the coming weeks and months.

With the uncertainty surrounding this school year, employers and employees should continue to be flexible and collaborative in their approach to the issues discussed in this white paper. Employers should consult with legal counsel as needed and continue to monitor federal, state and local orders, and any agency-issued guidance.

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CalChamber Can Help

Did you find this helpful? Sign up for a ***free 15-day trial of HRCalifornia***, which includes the website's HR Library, compliance tools, and forms and checklists that help California employers with HR compliance. Limited access with free trial.

*Required **California and Federal Labor Law Notices** — including poster/pamphlets sets for remote employees.*

Safe Distancing Posters, Floor Decals and Face Mask Posters

To learn more about our CalChamber resources, please call our Customer Service Representatives at (800) 331-8877, Monday through Thursday from 8 a.m. to 5 p.m. PT., and Friday from 8 a.m. to 4 p.m. PT.

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