

# Ask the Attorney: FMLA and parents in the pandemic

*These questions were submitted by participants of the recent online training and answered by speaker and employment lawyer, Anniken Davenport.*

**Q. “Employee worked at home prior to COVID. Has provided info for daycare which does not provide childcare - gymnastics center. Can we deny both options for leave? Spouse is not able to share in the childcare due to exposure to COVID in his work.”**

A. The second question first - the employee has been teleworking and you have telework available. She cannot perform that work because of no childcare. Is she eligible for leave?

The regulations seem to contemplate that if the employee cannot telework because of a covered COVID reason, she may have leave UNLESS the employer arranges a deviation from the usual schedule to allow telework. You could perhaps try to offer different hours, but it sounds as if the spouse is unavailable because he's exposed. You may have to offer leave. Thus, employers could deny leave if someone else can care for the kids or you offer an alternative telework schedule that presumably would be a reasonable one. I don't think DOL thought this through all the way. Is it reasonable, for example, to offer a night-time telework schedule to justify turning down leave?

The second question on childcare - DOL provides this definition of childcare:

*What is a “place of care”?*

A “place of care” is a physical location in which care is provided for your child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

Finally, a related question is what happens in summer when schools are not closed, but out for summer? DOL did include in the definition of place of care summer camps and summer enrichment programs. Employers may want to request proof that these are unavailable should parents still request leave after school ends.

**Q. “If a daycare is still open, but the parents remove the child from the daycare for safety reasons to basically keep a family member with underlying health conditions safe, is this acceptable?”**

A. The daycare closure provision would not apply. But has the family member with health conditions been told by a medical provider to self-isolate? And does the employee need to care for that self-isolated individual? That might be an independent reason for leave unrelated to the daycare situation.

**Q. “Can employee remove their child from open daycare to make room for essential employees' children, is this acceptable to get the leave?”**

A. That is unclear. Assuming the child care center is making the decision, the question would be whether that

meets the definition of closure.

**Q. “How much can we require in regards to childcare options? Hours in care? Seems like the DOL left this very vague with an opportunity for fraud by the employee.”**

A. The DOL says:

*What documents do I need to give my employer to get paid sick leave or expanded family and medical leave?*

When requesting paid sick leave or expanded family and medical leave, you must provide your employer either orally or in writing the following information:

Your name;

- The date(s) for which you request leave;
- The reason for leave; and
- A statement that you are unable to work because of the above reason.

If you request leave because you are subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally provide the name of the government entity that issued the order. If you request leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally provide the name of the health care provider who gave advice.

If you request leave to care for your child whose school or place of care is closed, or child care provider is unavailable, you must also provide:

- The name of your child;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for your child.

In addition to the above information, you must also provide to your employer written documentation in support of your paid sick leave as specified in applicable IRS forms, instructions, and information.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to provide medical certifications under the FMLA if required by your employer.

**Q. “I have an employee Teleworking. However, wants to work only until a certain hour because after that she has no one to watch the children. How do I handle that?”**

A. The regulations contemplate the possibility of intermittent leave for that circumstance. The regulations specify that:

General Rule. Subject to the conditions and applicable limits, an Employee may take Paid Sick Leave or Expanded Family and Medical Leave intermittently (i.e., in separate periods of time, rather than one continuous period) only if the Employer and Employee agree. The Employer and Employee may memorialize in writing any agreement under this section, but a clear and mutual understanding between the parties is sufficient.