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Blog Post

Summertime: Child Care and Child Labor News

July 14, 2020

Summer camp closures and extended school sessions present new challenges for both working parents and for companies employing teens. The Department of Labor has offered new guidance on both issues.

COVID-19 has created issues with summer camps, enrichment programs, and other summer activities that usually serve as childcare for employees in the summer months as many are not opening or are opening with reduced capacity. What's a working parent to do? Conversely, some school districts have extended their regular school year into the summer to compensate for instruction time lost due to COVID-19, leaving employers wondering how they can employ minors and remain compliant with the Fair Labor Standards Act (FLSA).

To clarify issues relating to the effect of limited summer childcare options and extended school sessions on the workplace, last month the Department of Labor's Wage and Hour Division (WHD) issued two Field Assistance Bulletins. (Such bulletins are written by the Office of Regulations and Interpretations to enforcement personnel to provide guidance in response to questions that have arisen in field operations). The two new bulletins specifically address: 1) when schools that are physically closed for COVID-19 related reasons are considered "in session" for purposes of federal child

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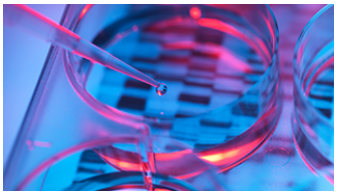


labor requirements; and 2) paid sick or expanded family and medical leave eligibility under the Families First COVID-19 Response Act (FFCRA) based on the closure of summer camps, summer school, or other summer programs.

School Closures and Child Labor Laws

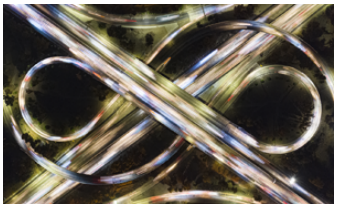
Field Assistance Bulletin No. 2020-3 (FAB-3), clarifies how child labor laws under the FLSA apply to the employment of children when schools are in session while physically closed due to COVID-19.

Typically, "[s]ummer school sessions, held in addition to the regularly scheduled school year, are considered to be outside of school hours." 29 C.F.R. § 570.35(b). However, with some school districts considering mandatory instruction for all students over the summer, the FAB-3 clarifies that if a public school district physically closes schools in response to COVID-19 but requires all students to continue instruction through virtual or distance learning for at least one day or during any part of one day, school is "in session" during that day and that week. Thus, minors age 14 and 15 may not work in nonagricultural employment during these "school hours" and must limit hours of employment to 3 hours in any day in which virtual or distance learning is required, 8 hours in any day in which no virtual or distance learning is scheduled, and 18 hours in the week. In districts where school is not in session, minors age 14 and 15 may work in nonagricultural employment up to 8 hours in any day and 40 hours in any week.

Summer Camp Closures and FFCRA Leave

Eligible employees may qualify for paid and/or extended leave under the FFCRA in certain circumstances where their child's summer camp or program was closed due to COVID-19, according to Field Assistance Bulletin No. 2020-4 (FAB-4).

In March 2020, Congress passed the FFCRA, to address in part the need for leave to care for children



as a result of school and child care center closures due to COVID-19 and stay-at-home orders. Under the regulations, parents may take FFCRA leave if a child's "school" or "place of care" is closed due to COVID. 29 C.F.R. §§ 826.20(a)(v), (b). The FFCRA allows up to 80 hours of paid sick leave and 10 weeks of expanded family and medical leave to cover employees who need to care for a child because the child's school or place of care is closed due to COVID-19.

The regulations implementing the FFCRA did not make clear whether employees could take FFCRA leave where summer camps or programs were canceled as a result of COVID-19. FAB-4 confirms that a summer camp or similar summer activity is a "place of care," permitting eligible employees to take FFCRA leave if their child's summer arrangements are canceled due to COVID-19. However, as the WHD acknowledged, "unlike schools and day care centers, many summer camps and programs closed in response to COVID-19 before any children began to attend and, in some cases, before they began to enroll. Such camps and programs therefore would not have been places of care of any child at the time they closed. Accordingly, determining whether a camp or program is the place of care of an employee's child may be confusing and requires clarification."

To determine whether the summer camp or care facility qualifies as a "place of care"—entitling the employee to FFCRA leave—the employer must evaluate whether the closed facility would have been the child's place of care *but for* the COVID-19 cancellation. The FAB-4 highlights that there are no "one-size-fits-all" assessment criteria. If an employee is able to establish that there was a *plan* for the child to attend the camp or summer program, then the employee is entitled to take FFCRA leave. While current enrollment or recent prior enrollment are sufficient to indicate the child planned to attend a program, other less concrete evidence like an application or deposit with a

program or even evidence of an attempt to register being rejected due to COVID-related group-size limitations may suffice. Critically, FAB-4 emphasizes that the employee's mere interest in a summer camp is insufficient to determine the employee had a plan to send their child to a particular summer care option.

Employers may receive an influx of requests for FFCRA leave for child care reasons over the summer and should be mindful of potential claims based on caregiver discrimination, sometimes also referred to as "family responsibilities discrimination." Employers should carefully document the basis for the requested leave, and track leaves granted, taken and denied leave to comply with recordkeeping requirements. Cases alleging interference with FFCRA leave rights or retaliation for exercising those rights already have been filed, and there undoubtedly will be more as employers attempt to ascertain what documentation is sufficient to demonstrate an employee's plan for childcare during the COVID-19 pandemic.

Akerman can assist with leave and other COVID-19 issues. In addition, Akerman has created multiple documents which employers can adapt for use with their workforces, available in the Akerman Return to Work Resource Guide. For assistance with policies, training, procedures, or issues that relate to COVID-19, contact your Akerman lawyer.
