

School Closings Shaping Up As Next Headache For Employers

By **Vin Gurrieri**

Law360 (July 17, 2020, 8:49 PM EDT) -- With the country embroiled in a contentious debate over the proper way to reopen schools amid the rising tide of coronavirus infections, employers are bracing for the possibility that working parents will regularly be absent because they have nowhere to safely send their kids.

The school-closure issue is one that has quickly moved to the center of the national discourse as infection rates spike in much of the country just weeks before the new school year is set to begin, with President Donald Trump forcefully expressing his belief that schools nationwide should open fully next academic year. School districts have so far announced varying approaches, with some saying they will stick with virtual classrooms, others saying they will open in full and more still opting for a "blended" learning model that would require students to come in only on certain days or weeks.

California Gov. Gavin Newsom laid out his own comprehensive plan Friday for reopening schools in the country's most populous state for in-person classes, which includes masks for staff and kids above the third grade, physical distancing and regular COVID-19 testing. It also calls for localities to use public health data to guide reopening as well as metrics to determine if a school needs to close back down.

Given that school, child care and job responsibilities are intertwined for many working parents, employers will soon be in a position of having to factor schools' reopening plans into their own business decisions, lawyers say.

"This is actually a thing that is on the forefront of a lot of employers' minds that we've been talking to," said Katie Erno, counsel at Crowell & Moring LLP. "I think the most important thing when anticipating the upcoming school year is the type of closures or alternate schedules that schools are doing — some days on, some days off. Employers need to look at and make sure they understand what leave laws might apply to them and their employees."

David Barron of Cozen O'Connor noted that while many employers dealt with issues surrounding remote learning in the spring, the new academic year may bring a range of problems that businesses and workers haven't yet confronted.

"They basically closed in March and we really haven't had situations where what do you do when a kid in your classroom tests positive, or a teacher, or the bus driver," Barron said. "We just haven't hit that issue and I think we're about to hit that pretty hard once school starts."

"So, we're going to have parents who start the semester thinking their kids are in school and then 30 days into the semester their kids are back at home because there's been a positive case in their class," he said. "That to me is going to wreak more havoc than people realize at this point."

Here, Law360 looks at four things employers need to know about containing the fallout caused by shuttered schools.

It's an 'Impossible Situation'

ParentsTogether — a nonprofit with over 2 million members that tracks issues affecting kids and families — released a survey in mid-July of about 1,500 parents that found the economic hardships of the past few months are placing them under great financial strain.

Nearly three out of four parents who responded to the survey said their "family was struggling," with 60% of those parents saying they haven't seen unemployment benefits that they should be eligible for, and 45% of families fearing eviction once moratoriums subside. Additionally, 44% of respondents reported having to cut back on essentials like food and medicine to make their rent or mortgage payments.

For parents with kids under 5 years old, child care was the dominant reason why they've lost income, with 44% of those surveyed saying that is the reason they lost out on pay, according to the poll.

"What we do know is that parents are facing an impossible and crushing choice when it comes to school for the fall," Bethany Robertson, co-director at ParentsTogether, told Law360.

"They are not getting very consistent or timely messages from their schools, we're just starting to hear what the options are," Robertson added. "And it's really a Catch-22 — people are faced with risking their families' health [by] sending their kids to school so they can get paid or they're thinking about, 'I have to keep my kids home and I risk losing my job, house or more.' It's really a completely impossible situation."

For employers, that means being ready to give working parents as much of a helping hand as possible, according to Randi Kochman, chair of the employment law department at Cole Schotz PC.

"It's a little bit up in the air right now because we don't know for certain what the schools will look like [or] what the schedules will be," Kochman said. "I think employers are trying to develop flexibility — that's the key word here."

Grasp Scope of Problem

But to be able to plan for the sort of flexibility that helps parents juggle their job and family responsibilities, whether it be telework or nontraditional schedules, employers have to know exactly what they're dealing with, according to Erno.

One way they can do that is by sending a survey to all employees, which can give employers a sense of how many workers will be impacted by child care issues.

"That way employers can get a sense now of what scheduling and staffing issues may be in the fall,"

Erno said, noting that businesses should also be sure that any surveys are sent to all employees and not only those who will likely be impacted by school closures to protect against potential claims of discrimination.

Kochman offered a similar tip, saying she has found surveys to be "useful in terms of information so [businesses] know which of their employees will be affected if the schools don't open" and then try to piece together schedules based on the data.

"I wouldn't wait until the last minute for sure," she added. "It's just a lot of logistics and planning and trying to be flexible."

But beyond their legal obligations, Erno said that such communications by employers can go a long way toward assuaging workers' anxiety and boosting morale.

"Something like a survey or just an open, all-employee communication kind of assuring employees that they're valued [and] that the employer understands that this is an unprecedented, incredibly difficult time for many people for different reasons and that they want to ... be flexible and work together," Erno said. "That's really one way [that goes] both towards ensuring compliance with applicable laws but also towards employee morale."

Maze of Leave Laws

Besides practical issues about staffing and scheduling problems, employers also should be sure they know how to navigate an ever-expanding web of laws that entitle employees to paid leave, including if they have to take care of kids during the pandemic.

Among them is the Families First Coronavirus Response Act, which applies to businesses with 500 or fewer employees and includes two key paid leave components: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

The latter of those amends the traditional FMLA to provide workers with up to 10 weeks off at partial pay, up to \$200 per day, to care for children whose schools or child care centers have closed due to the virus, after two unpaid weeks. Some small businesses with less than 50 people, however, may be exempt from the expanded FMLA portion of the law if they meet certain criteria.

While some workers may have taken all or part of that leave allotment in the spring, there are those that still have leave time left that is available to them, putting the onus on employers to know exactly who is eligible and what they're entitled to receive.

"On top of that you're entitled to state law benefits, company benefits — you have to kind of put all that together to figure out how ... much is paid fully, how much is paid partially. It'll vary," Kochman said.

Daniel Prokott, a partner at Faegre Drinker Biddle & Reath LLP, said that FFCRA leave may also look different in the fall than it did in the spring since there may be more child care options available if schools are closed. But he noted employers nonetheless "have to be thinking about the ability to provide extra leave, even if not mandated by law," including options like unpaid leave as well as reduced schedules or reduced pay, which should all be on the table if a person's leave allotment has been exhausted.

"Policymakers I think at state and local governments and the federal government are going to have to be considering what additional laws may need to be passed to address the fact that there may be employees who need longer leave and whether or not they're going to leave it up to employers to decide under the current framework or create additional protection for employees," Prokott said.

Cozen O'Connor's Barron also pointed out that the FFCRA is due to sunset at the end of the year, which could cause another host of problems if the pandemic continues into 2021 and Congress doesn't renew the law.

"I think there's a likelihood that we end up seeing that extended," Barron said. "Many parents have already burned their 12 weeks in the spring and [they] don't even have anything left in the bank or very little left in the bank. If this thing pushes past the end of the year, there's going to be a lot of people saying they need an additional 12 weeks or some extended benefit."

Periodic Leave Is Allowed

A common question that employers have been asking, according to Barron, is whether the FFCRA allows for employees to split up their 12 weeks of expanded leave time as opposed to them taking it in one continuous block.

"They only used six weeks in the spring, do they still have six weeks left? The answer is yes," he said. "You can use it in blocks; it doesn't have to all be used at once. So that's something to keep in mind. Once that leave is exhausted, then it becomes a little bit trickier."

Barron noted that some states may offer additional protection if a child is actually sick with COVID-19 or enters quarantine because of possible exposure at school, which could also trigger coverage under the FFCRA's paid sick leave provision if working parents haven't tapped into that time yet.

Erno for one also said that the FFCRA allows employers and workers to agree to intermittent leave and flexible scheduling arrangements, which could come into play if kids are in school, for example, only two days per week or if parents need off-duty time during the day to help their kids with remote learning.

"Of course, employers who aren't covered by Families First can also do that," Erno said. "So, opening up that dialogue now can give the employer and the employee an opportunity to talk through when they might be available."

--Editing by Emily Kokoll and Aaron Pelc.