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COVID-19 Legal Update as of April 3, 2020

On April 1, the Families First Coronavirus Response Act (FFCRA) went into effect. Later that day, the Department of Labor (DOL) issued temporary regulations which provide additional guidance on the new law. It begins with an executive summary; the actual regulations begin on page 83. Below are some of the key provisions, cut, pasted, and summarized. To read the actual text (all 124 pages), download it here: <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>.¹

Please also note that last weekend, the DOL updated its FAQs on the FFCRA, so if you haven't visited this site recently and you have under 500 employees, it's worth checking again:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

FFCRA Regulations

This section of the newsletter is lengthy because we want to provide a (semi) quick reference guide. You should be able to search in this document to quickly find an answer, or at least a reference to the correct section of the regulations where you can read more. Where there does not appear to be much "newsworthy" in a section, only the section and title number is included.

A couple regulations conflict with the actual language of the FFCRA. We are using bold to help guide you to these important sections, and include commentary with explanations where needed. For brevity, some regulations are paraphrased; check with the actual regulations and/or legal counsel if you have questions about the specific application of these rules.

§ 826.10 General.

(a) *Definitions.* For the FFCRA:

Child Care Provider... a provider who receives compensation for providing child care services regularly. ... The child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee's child.

¹ Consistent with our goal of helping prevent problems and litigation, we are providing this legal update. Please note this document contains only summaries of various laws and should not be considered a substitute for legal advice. Also, the legal landscape is rapidly evolving. Consult with an attorney if you have questions about any of the topics discussed.

EFMLEA ... the Emergency Family and Medical Leave Expansion Act, Division C of the FFCRA.

Employer:

- (1) A private entity or individual that employs fewer than 500 Employees; and
- (2) A Public Agency or any other entity that is not a private entity or individual, that employs one or more Employees;

(B) Includes:

- (1) Any person acting directly or indirectly in the interest of an employer in relation to an Employee;
- (2) Any successor in interest of an employer;
- (3) Joint employers as defined under the FLSA; and
- (4) Integrated employers as defined under the Family and Medical Leave Act.

EPSLA ... the Emergency Paid Sick Leave Act, Division E of the FFCRA.

Expanded Family and Medical Leave (EFML)... paid leave under the EFMLEA.

Paid Sick Leave ... paid leave under the EPSLA.

Place of Care ... a physical location in which care is provided for the Employee's child while the Employee works for the Employer. The physical location need not 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.

Public Agency ... the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State; or any interstate governmental agency.

Public Health Emergency ... an emergency regarding COVID-19 declared by a Federal, State, or local authority.

School ... an "elementary school" or "secondary school."

Secretary ... the Secretary of Labor or his or her designee.

Son or Daughter... a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.

- [*Commentary: the FFCRA said "son or daughter under age 18." The DOL took liberty at expanding this definition in their Regulations.*](#)

Subject to a quarantine or isolation order ... includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (*e.g.*, of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.

Telework ... work the Employer allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace. Telework may be performed during normal hours or at other times agreed by the Employer and Employee. Telework is work for which wages must be paid and is not compensated as paid leave under the EPSLA or the EFMLEA. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the Employer knew or should have known were worked by the Employee.

- *Commentary: Nonexempt employees who are Teleworking must always record and be paid for all hours worked. However, an employer does not have to compensate employees for unreported hours worked while Teleworking for COVID-19 related reasons, unless the employer knew or should have known about such telework.*

§ 826.20 Paid Leave Entitlements.

(a) Qualifying reasons for Paid Sick Leave

(2)² **Subject to a Quarantine or Isolation Order.** Any Employee Subject to a Quarantine or Isolation Order (qualifying reason number 1) may take Paid Sick Leave only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework. **An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer does not have work for the Employee because of the order or other circumstances.**

- *Commentary: If an employer closes and has no work for its employees, an employee's right to receive Paid Sick Leave terminates on the date of the closure, because there is no work available and the employee would be off work regardless of the quarantine order. The employee may be eligible for unemployment compensation.*

² Numbering and margins may appear off throughout because most of this section is cut and pasted from the Regulations. Numbering in the original is maintained for purposes of cross-referencing the original text.

(3) **Advised by a health care provider to self-quarantine** ... An Employee may take Paid Sick Leave [because they were advised by a health care provider to self-quarantine (reason 2)] only if:

- (i) A health care provider advises the Employee to self-quarantine based on a belief that—
 - (A) The Employee has COVID-19;
 - (B) The Employee may have COVID-19; or
 - (C) The Employee is particularly vulnerable to COVID-19; **and**
- (ii) Following the advice of a health care provider to self-quarantine prevents the Employee from being able to work or Telework.

(4) **Seeking medical diagnosis for COVID-19.** An Employee may take Paid Sick Leave when experiencing symptoms of COVID-19 and seeking medical diagnosis (reason 3) if the Employee is experiencing any of the following:

- (i) Fever;
- (ii) Dry cough;
- (iii) Shortness of breath; or
- (iv) Any other COVID-19 symptoms identified by the CDC.

Any Paid Sick Leave taken for this reason is limited to time the Employee cannot work because the Employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

- *Commentary: An employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.*

(5) **Caring for an individual.** For leave to care for an individual under quarantine (reason 4), “**individual**” means an Employee’s immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. “Individual” does not include persons with whom the Employee has no personal relationship.

An Employee may not take Paid Sick Leave unless, but for a need to care for an individual, the Employee would be able to work or Telework. **An Employee caring for an individual may not take Paid Sick Leave where the Employer does not have work for the Employee.**

An Employee may take Paid Sick Leave if the Employee cannot perform work for his or her Employer and if the individual depends on the Employee to care of him or her and is:

- (i) Subject to a Quarantine or Isolation Order as described in (Reason 2); or
- (ii) Has been advised to self-quarantine by a health care provider because of a belief that—

- (A) The individual has COVID-19;
- (B) The individual may have COVID-19 due to known exposure or symptoms; or
- (C) The individual is particularly vulnerable to COVID-19.

(6) ***Caring for a Son or Daughter.*** An Employee has a need to take Paid Sick Leave to care for a child whose school or daycare is closed (reason 5) only if no other suitable person is available to care for the Son or Daughter during the period of such leave.

An Employee may not take Paid Sick Leave for this reason unless, but for a need to care for the child, the Employee would be able to perform work for his or her Employer, either at the Employee's normal workplace or by Telework. **An Employee caring for his or her Son or Daughter may not take Paid Sick Leave where the Employer does not have work for the Employee.**

(b) ***Qualifying reason for EFML.*** An Employee may take EMFL because he or she cannot work due to a need to care for his or her child whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID-19. An Employee has need to take EFML for this purpose **only if no suitable person is available to care for his or her Son or Daughter during the period of such leave.**

An Employee may not take EFML to care for his or her Son or Daughter unless, but for a need to care for an individual, the Employee could perform work or Telework. **An Employee caring for his or her Son or Daughter may not take EFML where the Employer does not have work for the Employee.**

- *Commentary: If an employer closes and has no work for its employees, an employee's right to EFML terminates on the date of the closure, because there is no work available and the employee would be off work regardless of the school or daycare closure. The employee may be eligible for unemployment compensation.*

§ 826.21 Amount of Paid Sick Leave.

This section defines full time employees (normally scheduled to work at least 40 hours per week) and part-time employees (normally scheduled to work under 40 hours per week).

Subsection (b)(2) explains how to calculate the number of hours of Paid Sick Leave to which part-time employees receive, and it is similar to the calculation for EFML (See § 826.24, below).

- *Commentary: Although the FFCRA refers to averaging hours over a two-week period, the Regulations require the use of averaging daily work hours. The rationale for this is found on page 20-24 of the Regulations.*

§ 826.22 Amount of Pay for Paid Sick Leave.

§ 826.23 Amount of EFML.

(b) Any period of **EFML** that an Employee takes **counts towards the 12 workweeks of traditional FMLA leave** to which the Employee is entitled.

(c) An **employee can request or an employer require substitution of paid leave** for EFML, but only leave that would be available to the Employee for EMFL under the Employer's existing policies, such as personal leave or paid time off. Any substituted leave would run concurrently with EFML.

§ 826.24 Amount of pay for EFML.

During weeks 3 through 12 of EFML, the employee is entitled to 2/3 their average regular rate, times the scheduled number of hours for each day leave is taken, up to a maximum of \$200/day and \$10,000 in the aggregate.

- *Commentary: Although the FFCRA says the first 10 days of EFML are unpaid, the Regulations state that the first two weeks are unpaid. The rationale for this is found on page 29-30 of the Regulations, and was based on the need to ensure the end of Paid Sick Leave and the start of paid EFML coincided for employees with unusual work hours.*

(b) "scheduled number of hours" is:

(1) The number of hours the Employee is normally scheduled to work on that workday;
or

(2) and (3) If the work schedule varies and an Employer cannot determine the number of hours the Employee would have worked on the day for which leave is taken, average the number of hours the Employee was scheduled to work each workday, over the 6 month period (or entire period of employment if under 6 months) ending on the date on which the Employee first takes EFML, including hours for leave of any type.

(c) The pay for EFML may be computed in hourly increments instead of a full day.

(d) If an Employee uses vacation, personal leave, or paid time off concurrently with EFML, the Employer must pay the Employee a full day's pay for that day.

§ 826.25 Calculating the Regular Rate under the FFCRA.

Generally, the regular rate for a work week is all non-overtime remuneration for employment, divided by the number of hours worked in that workweek. The wages to be averaged are those over the shorter of the 6-month period ending on the date on which the Employee takes Paid Sick Leave or EFML; or the entire period of employment.

- *Commentary: There are exceptions, so refer to the Regulations or legal counsel if needed. Additional explanation is provided on page 31-32 of the Regulations.*

§ 826.30 Employee eligibility for leave.

(1) An Employee is considered to have been employed for at least 30 calendar days if:

- (i) The Employer had the Employee on its payroll for the 30 calendar days immediately before the day that the Employee's leave would begin; or
- (ii) The Employee was laid off or otherwise terminated by the Employer on or after March 1, 2020, and rehired by December 31, 2020, provided that the Employee had been on the Employer's payroll for 30 or more of the 60 calendar days before the Employee was laid off or otherwise terminated.

(2) If an Employee employed by a temporary placement agency is hired by the Employer, the Employer will count the days worked as a temporary Employee at the Employer toward the 30-day eligibility period.

(c) *Exclusion of Employees who are **health care providers and emergency responders**.* An Employer whose Employee is a health care provider or an emergency responder may exclude such Employee from Paid Sick Leave and/or EFML requirements.

(1) Under this rule, a **health care provider** is

- (i) anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
- (ii) This includes any individual employed by an entity that contracts with the institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

(2) **Emergency responders**

- (i) anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911

operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, and individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

§ 826.40 Employer coverage.

(1) To determine the number of Employees employed for purposes of the FFRC, count all full-time and part-time Employees employed within the United States **when the Employee would take leave**. Every part-time Employee is counted as a full-time Employee.

(ii) The number of Employees includes:

- (A) All Employees currently employed;
- (B) Any Employees on leave of any kind;
- (C) Employees of temporary placement agencies jointly employed under the FLSA; and
- (D) Day laborers supplied by a temporary placement agency.

(iii) The number of Employees **does not include independent contractors or workers on layoff or furlough who have not been reemployed**.

(b) *Exemption from requirement to provide paid leave for Employers with under 50 Employees.*

(1) **An Employer with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave and EFML when the imposition of such requirements would jeopardize the viability of the business as a going concern.** A small business may have this exemption if an authorized officer of the business has determined that:

- (i) The leave requested would cause the small business's expenses and financial obligations to exceed business revenues and cause the small business to cease operating at a minimal capacity;
- (ii) The absence of the Employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; **or**
- (iii) There are not 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 requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

(2) To elect this exemption, the Employer must **document that a determination has been made** under the criteria set forth above. The Employer should not send documentation to the DOL, but **retain the records in its files**.

(3) Whether or not a small Employer exempts one or more Employees, the Employer is **still required to post the notice of employee rights**.

(c) *Public Employers.*

(1) All public Employers must provide Paid Sick Leave except for exempted healthcare providers and emergency responders.

(2) All public Employers must provide EFML, except for exempted healthcare providers and emergency responders.

§ 826.50 Intermittent leave.

(a) *General Rule.* An Employee may take Paid Sick Leave or EFML intermittently (*i.e.*, in separate periods of time, rather than one continuous period) **only if the Employer and Employee agree, and (unless the employee is Teleworking) only if the leave is to care for a child whose school or child care provider is closed.** The agreement need not be in writing if there is a clear and mutual understanding between the parties.

(2) An Employee may not take Paid Sick Leave intermittently for any other reason.

(c) *Teleworking.* The Employer and Employee may agree that the Employee may take Paid Sick Leave or EFML intermittently, and in any agreed increment of time (but only when the Employee is unavailable to Telework because of a COVID-19 related reason).

(d) *Calculation of Leave.* Only the leave taken may be counted toward the Employee's leave entitlements.

§ 826.60 Leave to care for a Child due to School or Place of Care Closure or Child Care unavailability – intersection between the EPSLA and the EFMLEA.

(1) An Employee may take up to 12 weeks of EFML to care for his or her child whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, due to COVID-19 related reasons.

(2) The first two weeks of leave (up to 80 hours) may be paid under the EPSLA (to the extent available); the subsequent weeks are paid under the EFMLEA.

(3) An Employee's prior use of Paid Sick Leave under EPSLA will affect the Paid Sick Leave that remains available for EFML.

(4) An Employee who has exhausted his or her 12 workweeks of traditional FMLA is still entitled to Paid Sick Leave.

(b) *Supplementing EFML with other accrued Employer provided leave.*

If an employee has exhausted (or partially exhausted) their Paid Sick Leave before taking EFML, all or part of the first 10 days (or first two weeks) of EFML may be unpaid. If that happens, the Employee may choose to substitute available earned or accrued paid leave provided by the Employer during this period.

§ 826.70 Leave to care for a Child due to School or Place of Care closure or Child Care unavailability – intersection of the EFMLEA and the FMLA.

(b) An Employee may take a combined total of 12 weeks for traditional FMLA and EFML during the relevant 12-month period. If an Employee has taken the full 12 workweeks of traditional FMLA leave during the 12-month period, the Employee is not eligible for EFML.

If (and only if) the Employee and Employer agree that during the 3rd through 12th week of EFML, the Employee may substitute accrued paid leave, such leave may supplement the EMFL pay so the Employee receives their normal pay. For example, an Employee and Employer may agree to supplement the EFML by substituting one-third hour of accrued vacation leave for each hour of EFML.

§ 826.80 Employer notice.

(b) The required notice explaining the FFCRA's paid leave is to be posted conspicuously in the workplace; an Employer may also email or direct mail this notice to Employees, or post this notice on an Employee information internal or external website.

(d) This notice does not have to be translated into languages other than English.

- *Commentary: The Regulations do not require employers to respond to requests for EFML with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances.*

§ 826.90 Employee notice of need for leave.

(a) *Requirement to provide notice.*

(1) An Employer may require an Employee to follow reasonable notice procedures after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave other than reason #5 (caring for a child when school or daycare is closed). Employees are encouraged but not required, to notify Employers about their request for Paid Sick Leave or EFML as soon as practicable.

(2) Where an Employee requests leave to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, if that leave was foreseeable, an Employee shall provide the Employer with notice as soon as practicable.

Under either circumstance, if an Employee fails to give proper notice, the Employer should give him or her notice of the failure and an opportunity to provide the required documentation before denying the request for leave.

(b) *Timing and delivery of notice.* Notice may not be required in advance, and may be required only after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave or EFML. After the first workday, it is reasonable to require notice as soon as practicable.

(c) *Content of notice.* Generally, an Employer can require oral notice and sufficient information to determine whether the requested leave is covered by the EPSLA or the EFMLEA. An Employer **may not require the notice to include documentation beyond what is allowed** by § 826.100 [see below].

(d) *Complying with Employer policy.* Generally, it will be reasonable to require the Employee to comply with the Employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

§ 826.100 Documentation of need for leave.

(a) An **Employee must provide** the Employer documentation containing the following information before taking Paid Sick Leave or EFML:

- (1) Employee's name;
- (2) Date(s) for which leave is requested;
- (3) Qualifying reason for the leave; and
- (4) Oral or written statement that the Employee cannot work because of the qualified reason for leave.

To take Paid Sick Leave, an Employee may have to provide **additional information** depending on the reason for the leave:

- (b) For Reason 1 (quarantine), the name of the government entity that issued the Quarantine or Isolation Order.
- (c) For Reason 2 (self-quarantine), the name of the health care provider who advised the Employee to self-quarantine.
- (d) For Reason 3 (caring for someone with Reason 1 or 2) either:
 - (1) The name of the government entity that issued the Quarantine or Isolation Order to which the individual being cared for is subject; or
 - (2) The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.
- (e) For Reason 5 (caring for child):
 - (1) The name of the Son or Daughter being cared for;
 - (2) The name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; **and**
 - (3) A representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or EFML.

- *Commentary: In FAQ 44 from the IRS guidance (link below under Tax Credits), the IRS states: an employer may request "with respect to the employee's*

inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.” Although not in the DOL regulations, it would seem prudent to request this certification when appropriate to protect your right to the tax credit if leave is granted.

(f) The Employer may also request such additional material for the Employer to support a request for tax credits under the FFCRA. **The Employer does not have to provide leave if materials sufficient to support the tax credit have not been provided.** For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

§ 826.110 Health care coverage.

(a) While an Employee is taking Paid Sick Leave or EFML, an Employer **must maintain the Employee’s coverage under any group health plan on the same conditions as coverage would have been provided if the Employee had been continuously employed** during the entire leave period. Maintenance of individual health insurance policies purchased by an Employee from an insurance provider is the responsibility of the Employee.

(b) The same group health plan benefits provided to an Employee before taking Paid Sick Leave or EFML must be maintained while an Employee is taking Paid Sick Leave or EFML. This includes coverage for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc.

(c) If an Employer provides a new health plan or benefits or changes health benefits or plans while an Employee is taking Paid Sick Leave or EFML, the Employee is entitled to the new or changed plan/benefits to the same extent as if the Employee was not on leave. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, etc.) which apply to all Employees of the workforce would also apply to Employees taking Paid Sick Leave or EFML.

(d) Notice of any opportunity to change plans or benefits must also be given to an Employee taking Paid Sick Leave or EFML. If the Employee requests the changed coverage, the Employer must provide it.

(e) An Employee remains responsible for paying his or her portion of group health plan premiums. The Employee’s share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. If leave is unpaid, or the Employee’s pay during leave is insufficient to cover the Employee’s share of the premiums, the Employer may obtain payment from the Employee under 29 CFR § 825.210(c).³

³ 29 CFR § 825.210(c) states:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(f) An Employee may choose not to retain group health plan coverage while an Employee is taking Paid Sick Leave or EFML. However, when an Employee returns from leave, the Employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, with no additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

(g) Except as required under COBRA, an Employer's obligation to maintain health benefits while an Employee is taking Paid Sick Leave or EFML ceases under this section if and when the employment relationship would have terminated if the Employee had not taken Paid Sick Leave or EFML (e.g., if the Employee fails to return from leave, or if the entitlement to leave ceases because an Employer closes its business).

§ 826.120 Multiemployer plans.

§ 826.130 Return to work.

(a) *General rule.* An Employee has a right to be restored to the same or an equivalent position.

(b) *Restoration limitations.* Notwithstanding the general rule:

(1) An Employee is not protected from employment actions, such as layoffs, that would have affected the Employee whether or not he or she took leave.

(2) For EFML, an Employer **may deny job restoration to key Employees**, as defined under the FMLA, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the Employer.

(3) An Employer who **employs fewer than 25 Eligible Employees** may deny job restoration to an Employee who has taken EFML if all four of these conditions exist:

(i) The Employee took leave to care for his or her Son or Daughter whose School or Place of Care was closed, or whose Child Care Provider was unavailable, for COVID-19 related reasons;

(ii) The position held by the Employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the Employer that affect employment and are caused by a Public Health Emergency during the period of leave;

(iii) The Employer makes reasonable efforts to restore the Employee to a position equivalent to the position the Employee held when the leave

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; **and**

(iv) Where the reasonable efforts of the Employer to restore the Employee to an equivalent position fail, the Employer makes reasonable efforts to contact the Employee during a one-year period, if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave concludes or the date 12 weeks after the Employee's leave began.

§ 826.140 Recordkeeping.

(a) An Employer must keep all documentation of need for leave for **4 years**, regardless whether leave was granted or denied. If an Employee provided oral statements to support a request for Paid Sick Leave or EFML, the Employer must document and maintain such information for 4 years.

(b) An Employer that denies an Employee's request for Paid Sick Leave or EFML by claiming a hardship exemption as an employer with under 50 employees must document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for 4 years.

(c) **To claim tax credits from the IRS**, an Employer is advised to maintain the following for 4 years:

- (1) Documentation to show how the Employer determined the amount of paid sick leave and EFML paid to Employees eligible for the credit, including records of work, Telework, Paid Sick Leave, and EFML;
- (2) Documentation to show how the Employer determined the amount of qualified health plan expenses the Employer allocated to wages;
- (3) Copies of completed IRS Forms 7200 the Employer submitted to the IRS;
- (4) Copies of completed IRS Forms 941 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 IRS Form 941; and
- (5) Other documents needed to support its request for tax credits under IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, consult <https://www.irs.gov/newsroom/covid-19-related-taxcredits-for-required-paid-leave-provided-by-small-and-midsize-businesses-fags>.

§ 826.150 Prohibited acts and enforcement under the EPSLA.

(a) *Prohibited acts.* An Employer may not discharge, discipline, or discriminate against any Employee because such Employee took Paid Sick Leave, or filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding, under or related to the EPSLA, or has testified or is about to testify in any such proceeding.

(b) *Enforcement.* Failure to provide Paid Sick Leave under the EPSLA will be considered a failure to pay minimum wage. An employee may sue on behalf of that employee and any similarly-situated employees to recover unpaid sick leave at twice the federal minimum wage for each hour denied, plus attorney fees and costs. The DOL can likewise sue for double damages and an injunction. Penalties are worse for repeat or willful violations.

§ 826.151 Prohibited acts and enforcement under the EFMLEA.

Employers may not interfere with employees' exercise of rights, discriminate, or retaliate against an employee taking, or attempting to take, leave under the EFMLEA.

An employee cannot bring a private action against the employer under the EFMLEA if the employer is not otherwise subject to the FMLA.

§ 826.152 Filing a complaint with the Federal Government.

Employees can file complaints alleging violations of the FFCRA with the wage and hour division of the DOL.

§ 826.153 Investigative authority of the Secretary.

§ 826.160 Effect on other laws, employer practices, and collective bargaining agreements.

(a) No diminishment of other rights or benefits.

(1) An Employee's entitlement to or use of Paid Sick Leave is in addition to—and shall not diminish, reduce, or eliminate—any other right or benefit to which the Employee is entitled under any other law, collective bargaining agreement, or employer policy that existed before April 1, 2020.

(2) That an Employee already used leave (other than FMLA) before April 1, 2020, for reasons related to COVID-19 or otherwise, shall not be grounds for denial of Paid Sick Leave and EFML or for the Employer to delay or postpone the Employee's use of Paid Sick Leave and EFML. The FFCRA is not retroactive and does not apply to leave taken before April 1, 2020, even if for COVID-19-related reasons.

- *Commentary: For example, if an employee who did not qualify for FMLA was given a 6 week leave of absence to undergo and recover from surgery, the employee could still be eligible for a full 12 weeks of EFML. Likewise, an employee receiving paid time off before April 1 because of a COVID-19 related reason could still be entitled to the full amount of Paid Sick Leave (80 hours for a full time employee) starting on or after April 1.*

(b) Sequencing of Paid Sick Leave.

(1) An Employee **may first use Paid Sick Leave before using any other leave to which he or she is entitled.**

(2) No Employer may require, coerce, or unduly influence any Employee to first use any other paid leave to which the Employee is entitled before the Employee uses Paid Sick Leave. Nor may an Employer require, coerce, or unduly influence an Employee to use any source or type of unpaid leave before taking Paid Sick Leave.

(c) *Sequencing of EFML.*

(1) An Employee may elect to use, or an Employer may require that an Employee use, accrued leave available to the Employee for the purpose set forth in § 826.20(b) (to care for a child) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with EMFL.

(2) If an Employee elects, or an Employer requires, concurrent leave, the Employer must pay the Employee the full amount to which the Employee is entitled under the Employer's preexisting paid leave policy for the period of leave taken.

- *Commentary: When paid leave is taken concurrent with EFML, the employer must pay the employee the full amount to which the employee is entitled under the paid leave policy, even if that exceeds \$200/day. But the employer's tax credit is still capped at \$200/day.*

(d) *No creation of requirements upon end of employment.* An Employer has no obligation to provide—and an Employee has no right or entitlement to receive—financial compensation or other reimbursement for unused Paid Sick Leave or EMFL upon the Employee's termination, resignation, retirement, or any other separation from employment.

(e) *No creation of requirements upon expiration.* An Employer has no obligation to provide—and an Employee has no right or entitlement to receive—financial compensation or other reimbursement for unused Paid Sick Leave or EMFL upon the expiration of the FFCRA on December 31, 2020.

(f) **One time use. Each person is limited to 80 hours Paid Sick Leave. An Employee who has taken all such leave and then changes Employers may not have additional Paid Sick Leave from his or her new Employer.** An Employee who has taken some, but fewer than 80 hours of Paid Sick Leave, and then changes Employers is entitled only to the remaining portion of such leave from his or her new Employer and only if the new Employer is covered by the Emergency Paid Sick Leave Act.

Small Business Loans

We are not experts on these, but federally-backed loans (**including some with forgiveness provisions**) may be available to you. Here is an excellent presentation from Siebert & Reynolds, CPAs:

<https://zoom.us/rec/share/4MBTKoPL3XxIaKPqskTyaP4rWZnDX6a80XVL-KJcy07NyD4sjYhWYSVBqSCDO61m>

Check with your banker and/or accountant for more details.

Tax Credits

The IRS issued a FAQ explaining the process and documentation needed for claiming the tax credit for leave paid under the FFCRA: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Unemployment

The Federal CARES Act that went into law last Friday greatly expanded unemployment benefits. However, those benefits do not kick in unless Ohio agrees with the Federal Government about how the benefits will be distributed. This is in process and we will let you know when we have more information.

To furlough or lay off?

Generally, a furlough is a reduction in hours across the board for many employees. A layoff is a termination of employment. With the expanded unemployment compensation benefits, employees may be eligible in either circumstance. Some considerations when making this decision:

- An employee remaining on payroll to use unused vacation or sick days will not be eligible for unemployment until removed from the payroll.
- Once an employee is removed from payroll, they no longer qualify for health insurance and other benefits. Send COBRA notices when appropriate.

Workers' Compensation

Legislation introduced in the Ohio House of Representatives would establish a rebuttable presumption that anyone who must work outside the home and who contracts COVID-19 contracted the disease at work. This could only be "refuted by affirmative evidence." If this passes, any of your employees working outside their home who contract COVID-19 would be entitled to workers' compensation benefits unless you can prove they contracted the virus elsewhere (such as from contact with someone at home, grocery shopping, getting gas, opening their home mail or packages, contact with a restaurant delivery driver, etc.) http://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb573/IN/00?format=pdf If you disagree, contact your representative.

If there is anything we can do to help your business, please let us know.