

DYSINGER
& PATRY, LLC

ATTORNEYS AT LAW

Families First Coronavirus Response Act

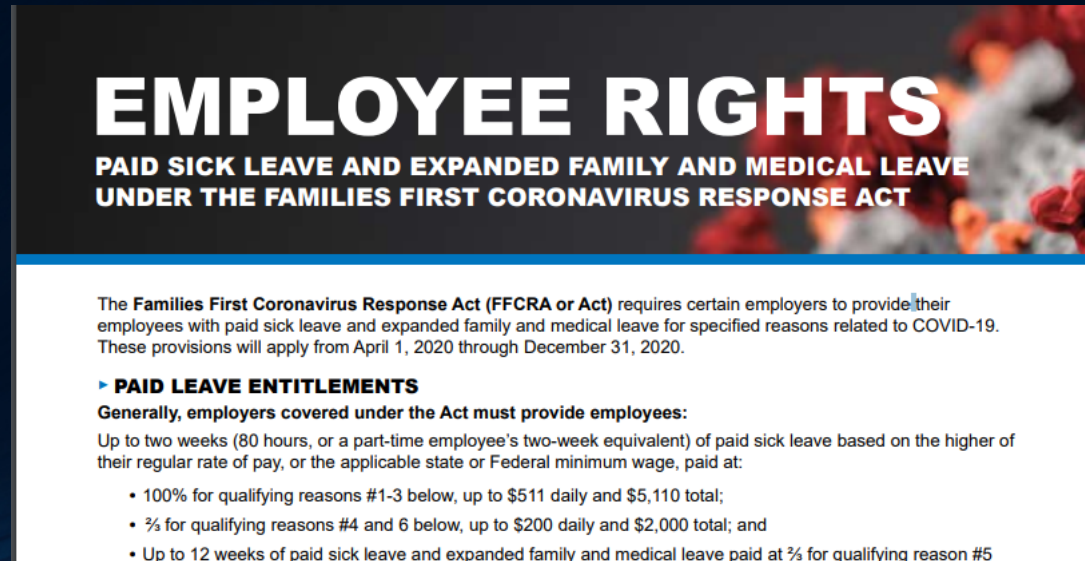
NAVIGATING THE FFCRA
BY: SIMON J. PATRY, 4/8/2020

What we will cover

- FFCRA
- Other Considerations
- Limitations
- Other Resources

Step 1 Provide Notice

- You need to post this notice like you would post any other DOL notice.
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

The image shows a poster titled "EMPLOYEE RIGHTS" in large, bold, white letters. Below the title, it reads "PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT". The background of the poster features a blurred image of red and white virus particles. The text is white on a dark background.

EMPLOYEE RIGHTS
**PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**
Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5

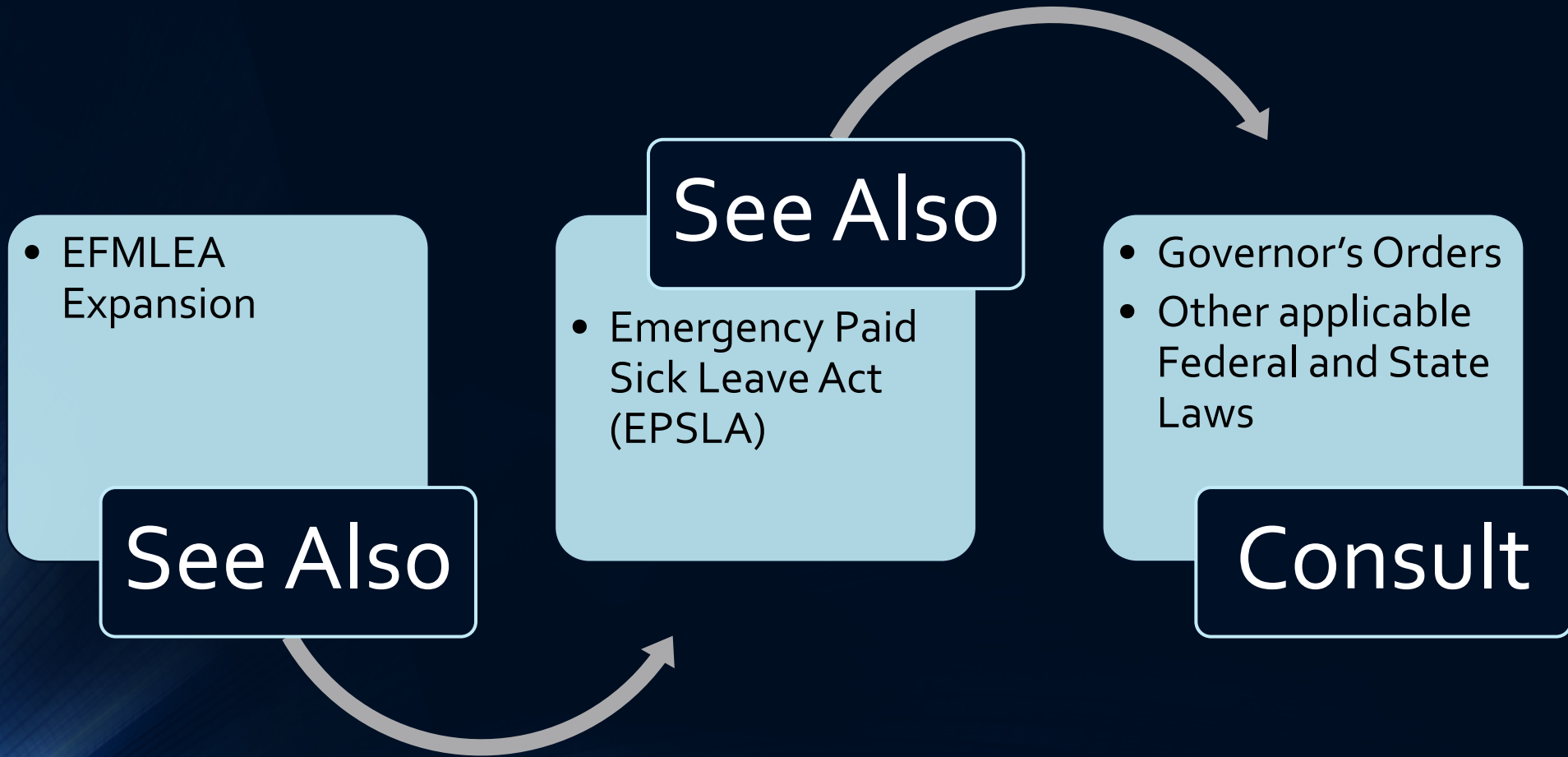
FFCRA, When does it apply to us?

- Some exceptions for:
 - less than 50 employees
 - What qualifies for employment

*employers that employ health care providers and emergency responders may elect to exclude those employees from the public health emergency leave requirements

Who's Covered?	EFMLEA Expansion	Emergency Paid Sick Leave Act
Employers	<u>Less</u> than 500 Employees	<u>Less</u> than 500 Employees
Employees	Employed at least 30 Calendar days*	Employed
If Yes	Follow Flow Chart/Other Considerations	Follow Flow Chart/ Other Considerations

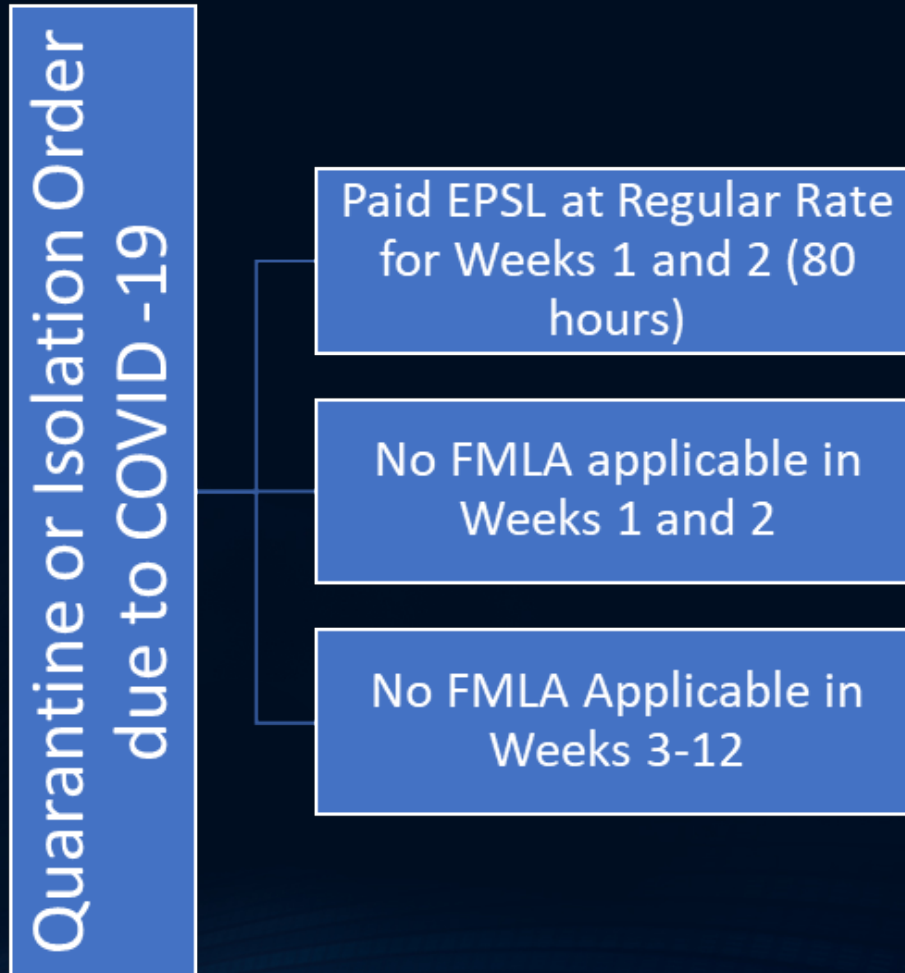
As in all Labor Laws, these “dove tail” other existing laws and other COVID-19 Orders



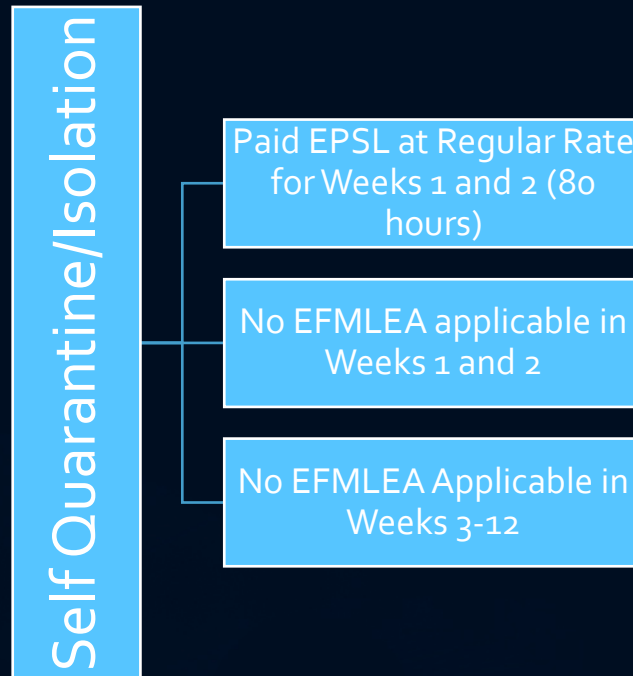
Flow Charts

NAVIGATING THE FFCRA

Subject to Federal, State, or Local Quarantine or Isolation due to COVID-19

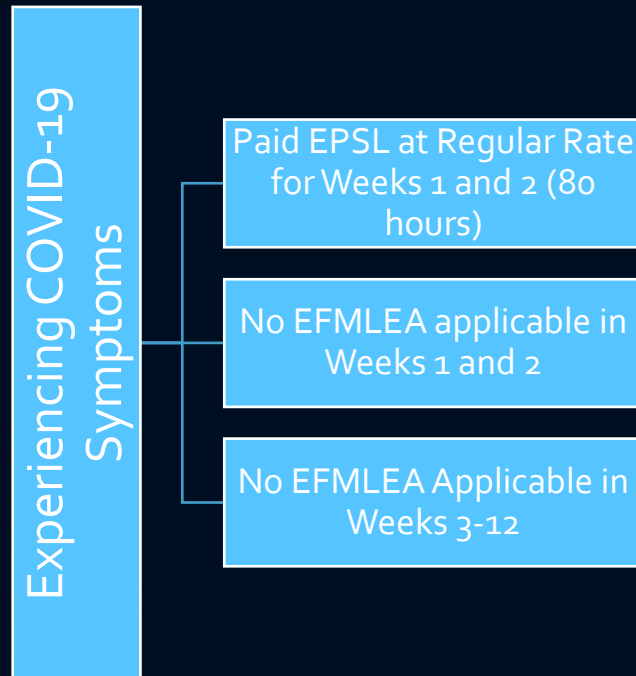


Has been advised by a Health Care Provider to Self Quarantine related to COVID-19



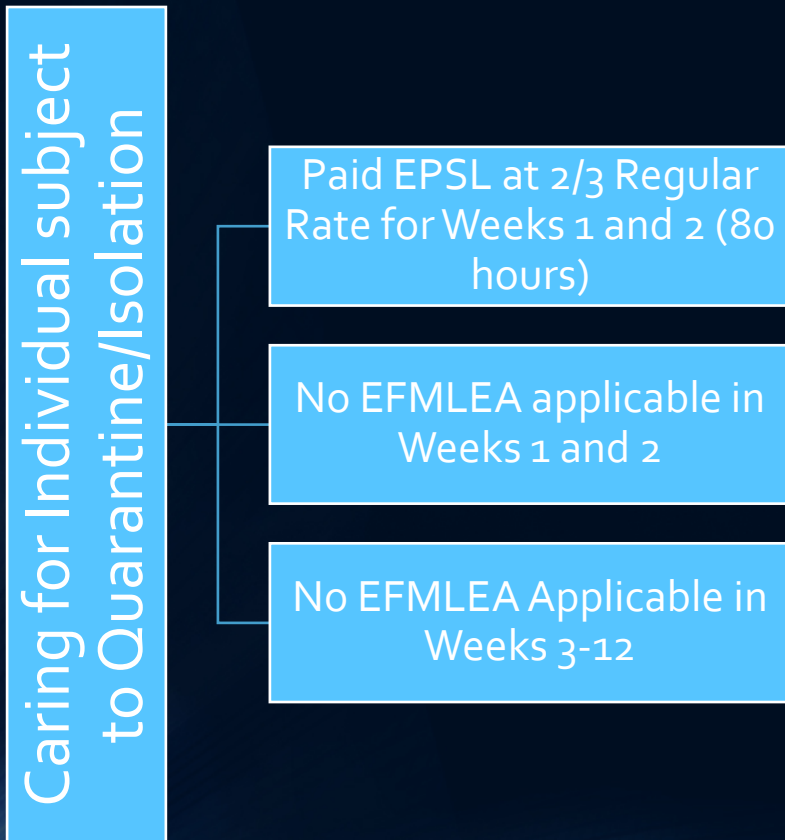
Review Executive Orders of Ohio for what can be requested documenting the request.

Experiencing COVID-19 Symptoms

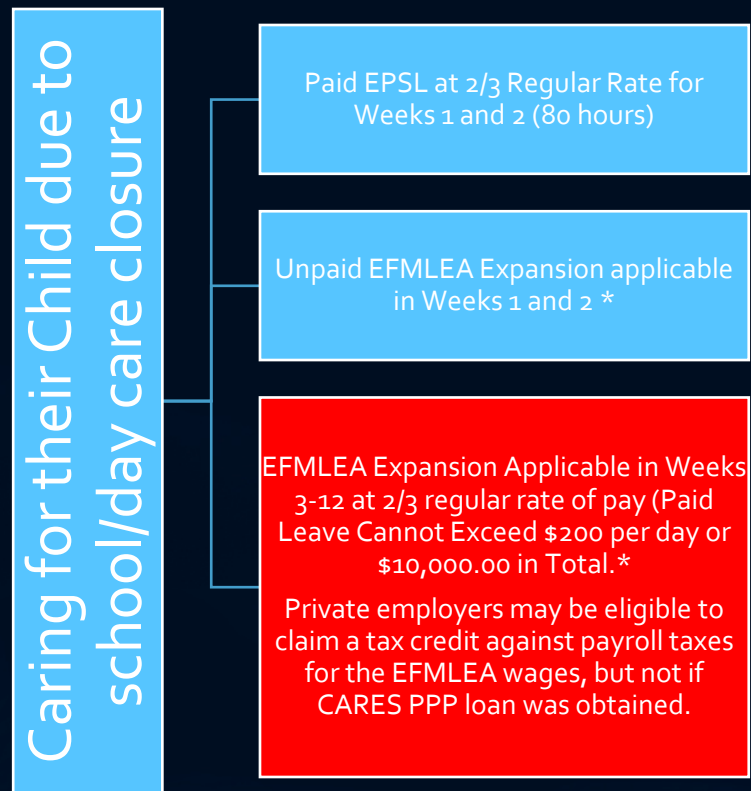


Review Executive Orders of Ohio for what can be requested documenting the request. Error on allowing for any symptoms for liability reasons.

Caring for an individual subject to Quarantine or Isolation (Either Ordered or Health Care Advised)

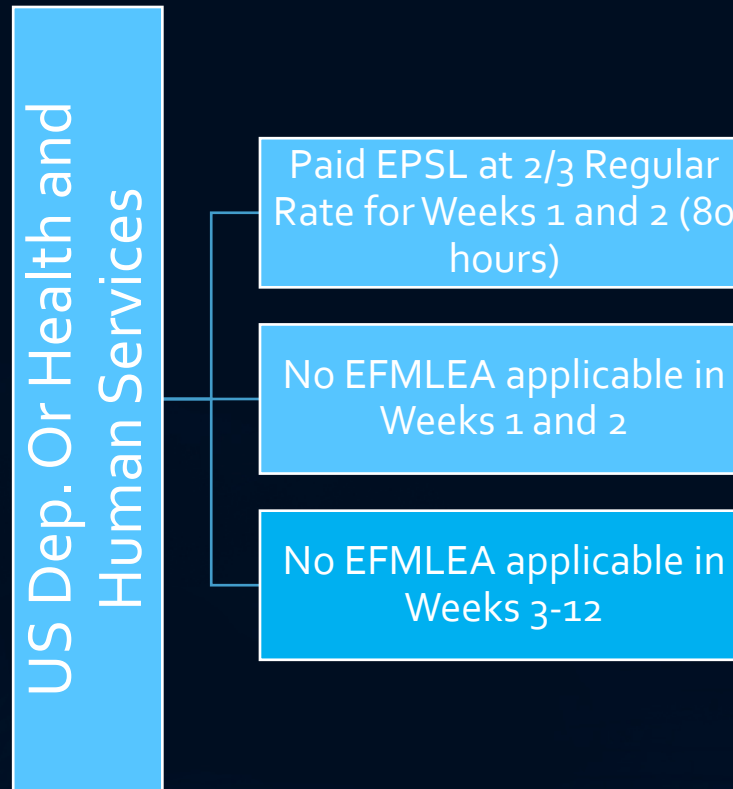


Caring for their child who's school or childcare closed/unavailable due to COVID-19 (Either Ordered or Health Care Advised)



Employee can elect to substitute paid leave for time periods covered under EFMLEA

experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services



Other Questions for Eligibility and Other Considerations

- **Note on applicable rate of pay EPSLA under two-week period, it is the highest applicable wage rate of:**
 - **Employee's regular rate of pay**
 - **FLSA minimum wage, or**
 - **Highest applicable state or municipal minimum wage**
- **Is the employee unable to work or telework?**
 - **If the employee can work or telework, FFCRA does not provide coverage.**
- **Are there other items that I need to consider?**
 - **PPP loans have certain requirements**
 - **Other Labor and Employment Laws**

CARES PPP Specific Considerations (1 of 2)

- PPP covers payroll costs, which include employee benefits such as costs for parental, family, medical, or sick leave.
- Because of this d – NO DOUBLE DIPPING – CARES Act expressly excludes qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (FFCRA) (Public Law 116–127). *Department of Treasury Fact Sheet on Paycheck Protection Program

CARES PPP Specific Considerations (2 of 2)

- **Forgiveness provisions of the PPP have certain requirements related to Number of Staff, Level of Payroll, and Re-Hiring**
 - Number of Staff: Loan forgiveness will be reduced if you decrease your full-time employee headcount.
 - Level of Payroll: **Your loan forgiveness will also be reduced if you decrease salaries and wages by more than 25% for any employee that made less than \$100,000 annualized in 2019.**
 - Re-Hiring: You have until June 30, 2020 to restore your full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020. *Department of Treasury Fact Sheet on Paycheck Protection Program

Limitations and Other Issues

- FFCRA is only applicable from April 1, 2020 through December 31, 2020
- Amount paid is limited:
 - EFMLEA Expansion (Emergency EFMLEA): First 10 days unpaid, after first ten days limited to 2/3rds regular rate of pay subject to limits of \$200 per day and \$10,000 total.
 - EPSLA the amount an employer is required to pay is capped at \$511 per day of paid sick leave taken and \$5,110 in total per covered employee for all paid sick leave pay. Furthermore, where an employee is taking paid sick leave at two-thirds pay, the amount of pay is subject to a lower cap of \$200 per day of leave and \$2,000 in total per covered employee for all paid sick leave that is paid at two-thirds pay.

Limitations and Other Issues

- Amount of Time taken is limited:
 - Section 826.23(b) further clarifies that any time taken by an eligible employee as expanded family and medical leave counts towards the twelve workweeks of FMLA leave to which the employee is entitled under section 102 of the FMLA and 29 CFR 825.200.
- JOB PROTECTION EFMLEA and EPSLA
 - Generally, EFMLEA gives employees right to return to same or equivalent position
 - EFMLEA not required with less than 25 employees when all are met:
 - Position no longer exists due to economic or other operating condition affecting employment caused by public health emergency
 - Employer makes reasonable effort to return employee to equivalent position
 - If unable to return to equivalent – contact employee about equivalent (which ever happens first):
 - One year from the end of the qualifying need
 - 12 weeks after leave began

Limitations and Other Issues

- **Record Keeping**

- **Section 826.140 explains that an employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless of whether leave was granted or denied.**
- **If an Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.**
- **If an employer denies an employee's request for leave pursuant to the small business exemption under § 826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.**
- **Section 826.140 also explains what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.**

Limitations and Other Issues

- **Prohibited Acts and Enforcement**
 - Sections 826.150 and 826.151 describe certain acts that are prohibited under the EPSLA and the EFMLEA, as well as enforcement mechanisms.
 - Section 826.150(a) explains that, under the EPSLA, employers are prohibited from:
 - discharging,
 - disciplining, or
 - discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding.

Limitations and Other Issues

- **Documentation of Need for Leave**
- **(a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA:**
 - **(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 is unable to work because of the qualified reason for leave.**

Limitations and Other Issues

- **Documentation of Need for Leave**
- **(b) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(i), an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.**
- **(c) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(ii) an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.**

Limitations and Other Issues

- **Documentation of Need for Leave**
- **(d) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(iii) an Employee must additionally provide the Employer with either:**
 - **(1) The name of the government entity that issued the Quarantine or Isolation Order to which the individual being care 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.**

Limitations and Other Issues

- **Documentation of Need for Leave**
- (e) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(v) or Expanded Family and Medical Leave, an Employee must additionally provide:
 - (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 Expanded Family and Medical Leave.

Limitations and Other Issues

- **Documentation of Need for Leave**
- **(f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable 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>

Limitations and Other Issues

- **Small Business Exemption for less than 50 Employees:**
 - Small businesses with fewer than 50 employees, AND
 - Employee's leave is to care for his or her child whose school or place of care is closed (or child care provider is unavailable), but only if
- Requirements of the FFCRA jeopardize business viability

Limitations and Other Issues

- **Small Business Exemption for less than 50 Employees (Continued):**
- **No application process - exemption applies if employer determines:**
 - **Leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity**
 - **Employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; OR**
 - **Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.**

What does this Mean in Relation to Cost Saving Measures and Reductions in Force

- The new statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken, IF
 - Business is open and conduct lawful lay offs etc.
 - Business is closed after April 1, but before employee takes leave
 - Does not apply to anything prior to April 1st.
- BUT, the employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave.
- This provision tracks the existing provision under the FMLA in 29 CFR 825.216. The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

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Other Resources

* Final Rule Effective April 2, 2020 and Published on April 6, 2020 for Paid Leave Under the Families First Coronavirus Response Act put out by Wage and Hour Division of Department of Labor

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

* Webinar put out by the Department of Labor Wage and Hour and Division

<https://dolwhd.cosocloud.com/pm4jvdnb4sch/?proto=true>

* Webinar's Slides in PDF by the Department of Labor Wage and Hour

https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA_webinar.pdf