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Cincinnati • Cleveland • Columbus

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Ennis Britton Webinar:

# Deep Dive into Employee Leaves and Accommodation Requests in the COVID-19 Era

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*Scholars in Education Law*



# Preliminary Reminders

- Zoom basics:
  - We have removed the video feature for attendees for this presentation and have automatically muted you upon entry. Please do not unmute.
  - The chat tool is enabled and should be used for your questions during the presentation. If you have a question, do not wait until the end of the presentation. Ask it in context of the conversation.
    - Use individual chats to report technical problems or other concerns to any of our attorneys.
    - If you have questions after, please contact one of our attorneys.
- Please don't record the sessions, and make sure to protect confidential information such as student information, attorney-client privileged communications, etc.
- Remember! This presentation is given on July 21, 2020. Things can and will change as we move forward into this school year and through COVID-19.

***Disclaimer: the information in this handout and presentation was prepared by Ennis Britton Co., L.P.A. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.***

## Agenda

- Quick reminders on leave still applicable and available:
  - Ohio laws
  - FMLA
- Families First Coronavirus Response Act (FFCRA)
- Expected Scenarios
  - ADA conversation with Scenarios
- Documentation under FFCRA

# Leaves Under Ohio Laws

## Ohio Revised Code Leaves Still Exist

- All the leaves that have previously existed, continue to exist
  - Sick leave
  - Personal leave
  - Vacation leave
  - Unpaid leave of absence:
    - Employee needs to make written request for this unpaid leave for a period up to 2 consecutive school years
    - Must grant:
      - If requested for employee's illness or other disability (Not illness or disability of family member)
    - May grant:
      - For educational, professional or other purposes
    - Consider a notice requirement of wanting to return to work (14 days? 30 days?)
    - No requirement that the Board pay its share of health insurance
      - If employee wishes to maintain health insurance, must pay entire cost
- Don't forget to review your applicable CBAs as well.

# **FMLA: 10,000 ft view** **(in simpler times)**

## FMLA – Eligible Employees

- An employee must have worked for a district:
  - For at least twelve (12) months; and
    - no need to be consecutive as long as worked for employer in past 7 years
  - For at least 1,250 hours during the twelve (12) months prior to the start of the FMLA leave; and
    - An employee's eligibility is determined as of the date leave commences
    - Generally, both unpaid and paid leave are not included in this total
    - The employer has the burden of proof to demonstrate that the employee has not met these requirements
  - At a site where at least 50 employees are employed within 75 miles of the location
    - Employees laid off either permanently or temporarily do not count in this total

## FMLA – How much?

- Twelve (12) weeks of unpaid leave for certain family and medical reasons during a twelve (12) month period
  - Maintain health benefits during period of leave
    - If employee does not return, employer is entitled to reimbursement for any benefits paid during the period of the leave - Employee need only return for 30 days
  - 12-month period is employer calculated in either rolling calendars, calendar years, 12-month set periods, etc.
- Leave does not have to be taken in a consecutive twelve (12) week period
  - An eligible employee may take FMLA leave to receive continuing treatment by a health care provider
    - Example: Absences for therapy treatments such as those ordered by a physician for physical therapy after a hospital stay or for treatment of severe arthritis



## FMLA – Permissible Reasons for Leave

- 1) For the birth and care of the newborn child of the employee;
- 2) Placement with the employee of a son or daughter for adoption or foster care;
- 3) Serious health condition that makes an employee unable to perform the functions of his or her job
- 4) To care for the employee's spouse, son, daughter, or parent who has a serious health condition
- 5) Military caregiver leave or military qualifying exigency leave

## FMLA – Definitions : Serious Health Condition

- **Serious health condition** means an illness, injury, impairment or physical/mental condition that involves inpatient care or continuing treatment by a health care provider
  - The term “continuing treatment” includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition
    - Treatment does not include routine physical, eye or dental exams
    - Test for this can be met through:
      - Period of incapacity of more than 3 consecutive full calendar days plus treatment by a health care provider twice or once with a continuing regimen of treatment
        - A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition
      - Any period of incapacity related to pregnancy or for prenatal care
      - Any period of incapacity or treatment for a chronic serious health condition
      - A period of incapacity for permanent or long-term conditions for which treatment may not be effective; or
      - Any period of incapacity to receive multiple treatments for restorative surgery or for a condition that would likely result in an incapacity of more than 3 consecutive, full calendar days absent medical treatment

## FMLA – Definitions: Serious Health Condition

- NOT intended to cover:
  - short-term conditions for which treatment and recovery are very brief
  - minor illnesses which last only a few days
  - Surgical procedures that typically do not involve hospitalization and require only a brief recovery period.
  - \*\*Complications arising out of such procedures that develop into serious health conditions will be covered.
- Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not “serious health conditions” unless inpatient hospital care is required or unless complications develop
- Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition
- Inpatient Care - an overnight stay in a hospital, hospice or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care.

## FMLA – Definitions : Incapacity and Treatment

- Incapacity and treatment: A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - Treatment two or more times within 30 days of the first day of incapacity (unless extenuating circumstances exist) by a health care provider; or
  - Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider
    - These requirements for treatment by a health care provider mean an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity
    - Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider
    - The term “extenuating circumstances” means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider.

## FMLA – Definitions: Chronic Condition

- Three requirements:
  - Requires periodic visits (defined as at least twice a year) for treatment by a health care provider;
  - Continues over an extended period of time (including recurring episodes of a single underlying condition); and
  - May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.)
- Examples provided by the US Department of Labor Wage and Hour Division: asthma, diabetes, etc.

# FMLA - Definitions

- Permanent or long-term conditions: The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (e.g. Alzheimer's, a severe stroke, or terminal stages of a disease)
- Conditions requiring multiple treatments:
  - Restorative surgery after an accident or other injury; or
  - A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention of treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis)

## FMLA – Substitution of Paid Leave for Unpaid Leave

- FMLA leave is unpaid. However, employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by the employer.
  - If this occurs, the unpaid FMLA leave and the paid leave run concurrently – employer should properly notify an employee if this is what is happening
- May not discriminate – apply same policy to all employees or groups of employees
- If an employee uses paid leave for a circumstance that does not qualify as FMLA leave, that leave may not be counted against FMLA leave.
  - i.e. the use of paid sick leave for something that is not a serious health condition would not count against FMLA leave.

## FMLA – Employer Notice Requirements

- Eligibility Notices: employer must notify the employee of his/her eligibility to take FMLA within 5 days of learning the employee may want to take FMLA leave, absent extenuating circumstances
- Notice must provide:
  - Whether the employee is eligible for FMLA leave
  - If not, at least one reason why, including the number of months the employee has worked for the employer and the number of hours worked during the 12-month period
- Notification may be oral or in writing
  - If denying request, it is a good idea to always put the denial in writing
- Department of Labor has produced a sample eligibility notice form.



# FMLA – Employer Notice Requirements

- Rights and Responsibilities Notice
  - Employers must provide written notice detailing specific expectations and obligations of the employee and explaining the consequences for failing to meet these obligations.
  - Employers must provide this notice with the eligibility notice described above
  - Notice must include:
    - Whether employer will require periodic reports of the employee's status and intent to return to work

# FMLA – Employer Notice Requirements

- Designation Notice
  - Employer must designate leave as FMLA leave and give notice of this designation to the employee within 5 business days of a decision
  - If employer requires the substitution of paid leave, the employer must inform the employee at the time of designating the FMLA leave
  - If employer requires a fitness for duty certification to permit the return to work, must notify the employee at the time of the designation – include list of essential functions
  - Must notify employee of the amount of leave counted against the employee's FMLA entitlement.
    - If not possible, employer should provide this notice to the employee upon request, but no more than once in a 30 day period
  - Failure to provide this notice may constitute an interference with, restraint, or denial of exercise of FMLA rights.
    - The employer may be liable for compensation and benefits lost, as well as other monetary damages sustained as a direct result of the violation

# FMLA – Employee Notice Requirements

- If foreseeable, must provide at least 30 days advanced notice
  - If 30 days is not practical, must give notice as soon as practical
    - as soon as practical means the same business day or next business day
  - Employer can require employee to follow normal procedure requirements for requesting leave
    - i.e. fill out form describing leave, anticipated start and duration
  - For scheduling planned medical treatment, employee has duty to consult with employer to make a reasonable effort to schedule the treatment so as to not unreasonably disrupt the employer's operations
- If need for leave is foreseeable at least 30 days in advance, and an employee fails to give timely advanced notice, the employer may delay FMLA coverage until 30 days after notice was provided
  - Delay of FMLA coverage depends on the facts of each case
  - Same rule if leave is unforeseeable

## FMLA – Employee Notice Requirements

- If not foreseeable, must provide as soon as practical
  - Must provide enough information to allow the employer to determine if FMLA applies – calling in “sick” is not enough
  - Employee has duty to respond to employer’s inquiries to determine if leave is FMLA qualifying
  - Employer can require employee to follow normal procedure requirements for requesting leave
    - i.e. call a certain phone number or specific individual

## FMLA - Certification

- Employer may require that an employee's leave request be supported by a certification from a health provider (different requirements for military leave requests)
  - Make request for certification in writing
  - Make request within 5 business days of employee's notice of need for leave
    - May request it at a later date if employer has reason to question need for leave or length
    - Employee generally must provide certification within 15 business days
  - Certification must be complete and sufficient
    - Insufficient if vague, ambiguous, incomplete
    - May advise employee in writing that it is insufficient and give employee 7 days to cure
    - May deny FMLA leave if not cured
  - Must be specific information requested in medical certification
  - May request recertification no more often than 30 days unless the medical certification indicates the leave will last more than 30 days

# **Families First Coronavirus Response Act (FFCRA)**

## Families First Coronavirus Response Act (FFCRA)

- The pandemic has resulted in the enactment of emergency federal legislation providing the additional amendments are part of the Families First Coronavirus Response Act (H.R. 6201).
- This law took effect on **April 1st**. This provision is temporary, ending on December 31, 2020.
- Helpful resources:
  - DOL summary: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
  - DOL FAQ: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

## FFCRA

- Among a number of items, FFCRA created two \*new\* leave provisions for employees:
  - Emergency Paid Sick Leave Act (EPSL)
  - Emergency Family and Medical Leave Expansion Act (eFMLA) (e.g. a new reason for FMLA)
- Covered employers:
  - The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers (e.g. not the federal government but state and local governments), and private employers with fewer than 500 employees.



## FFCRA Qualified Employees

- EPSLA - *All employees* of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19.
- eFMLa – *Employees employed for at least 30 days* are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

## FFCRA - Notice

- Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

## FFCRA – Qualifying Reasons for Leave for Emergency Sick Leave

- Under the FFCRA, an employee qualifies for Emergency Sick Leave (paid sick time) if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:
  1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  2. has been advised by a health care provider to self-quarantine related to COVID-19;
  3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
  5. is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
  6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

# FFCRA – Duration per Qualifying Reason - Emergency Paid Sick Leave

Reason for Leave	Duration for the Leave
#1 is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.	Eligible for 80 hours of leave for FT PT is eligible for the number of hours of leave that the employee works on average over a 2-week period
#2 has been advised by a health care provider to self-quarantine related to COVID-19	Eligible for 80 hours of leave for FT PT is eligible for the number of hours of leave that the employee works on average over a 2-week period
#3 is experiencing COVID-19 symptoms and is seeking a medical diagnosis	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)
#4 is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)	Eligible for 80 hours of leave for FT PT is eligible for the number of hours of leave that the employee works on average over a 2-week period
#5 is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19	Eligible for 40 hours per week of leave for FT PT eligible for the number of hours of leave the employee works on average (note this will be 12 weeks see eFMLeA)
#6 is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.	Eligible for 80 hours of leave for FT PT is eligible for the number of hours of leave that the employee works on average over a 2-week period

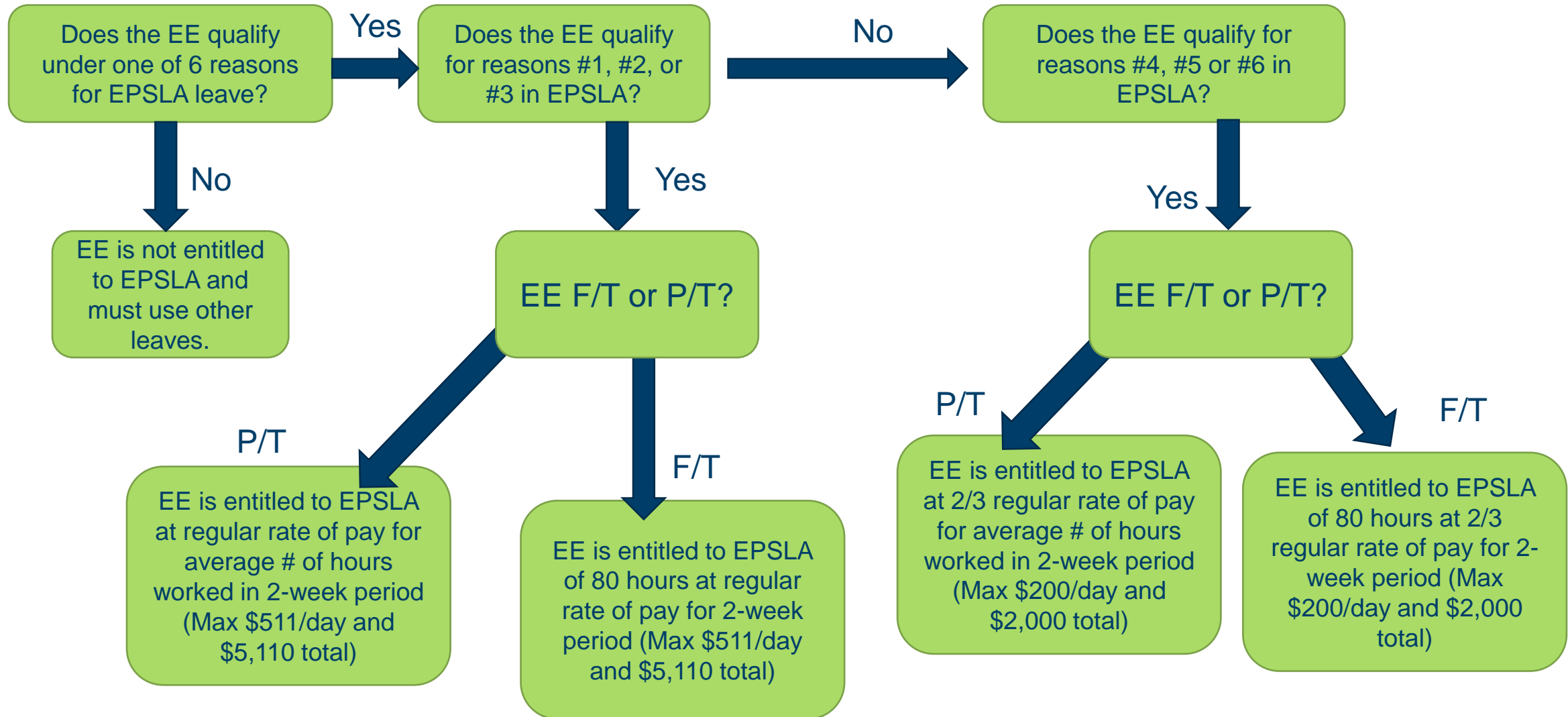
# FFCRA – Pay per Qualifying Reason - Emergency Sick Leave

Reason for Leave	Pay for the Leave
#1 is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)
#2 has been advised by a health care provider to self-quarantine related to COVID-19	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)
#3 is experiencing COVID-19 symptoms and is seeking a medical diagnosis	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)
#4 is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)	Pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)
#5 is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19	Pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)
#6 is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.	Pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)

## Notes for EPSLA

- If employees are paid under FFCRA, it is **not** charged against their sick leave.
- This is in addition to other leaves (vacation, personal, sick) that they already have.
- Employers cannot require employees to use provided or accrued vacation, personal, sick leaves, etc. before the emergency sick leave provided under FFCRA.
  - If the employer AND the employee agree the employee can use preexisting leave entitlements to supplement the amount s/he receives from emergency sick leave under the FFCRA up to the employee's normal earnings.

# Determining an Employee's Pay under EPSLA



## FFCRA – Qualifying Reasons for Leave for eFMLeA

- Under the FFCRA, an employee qualifies for eFMLeA if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19 and the employee is unable to work (or unable to telework) due to that need for leave. (Reason #5 on earlier slide.)





# What can the eFMLeA look like? (Remember for childcare)



Paid eFMLeA leave

Emergency Paid Leave OR  
Unpaid eFMLeA Leave OR  
run other available paid leave



Paid eFMLeA leave

Emergency  
Paid Leave  
under other  
reason

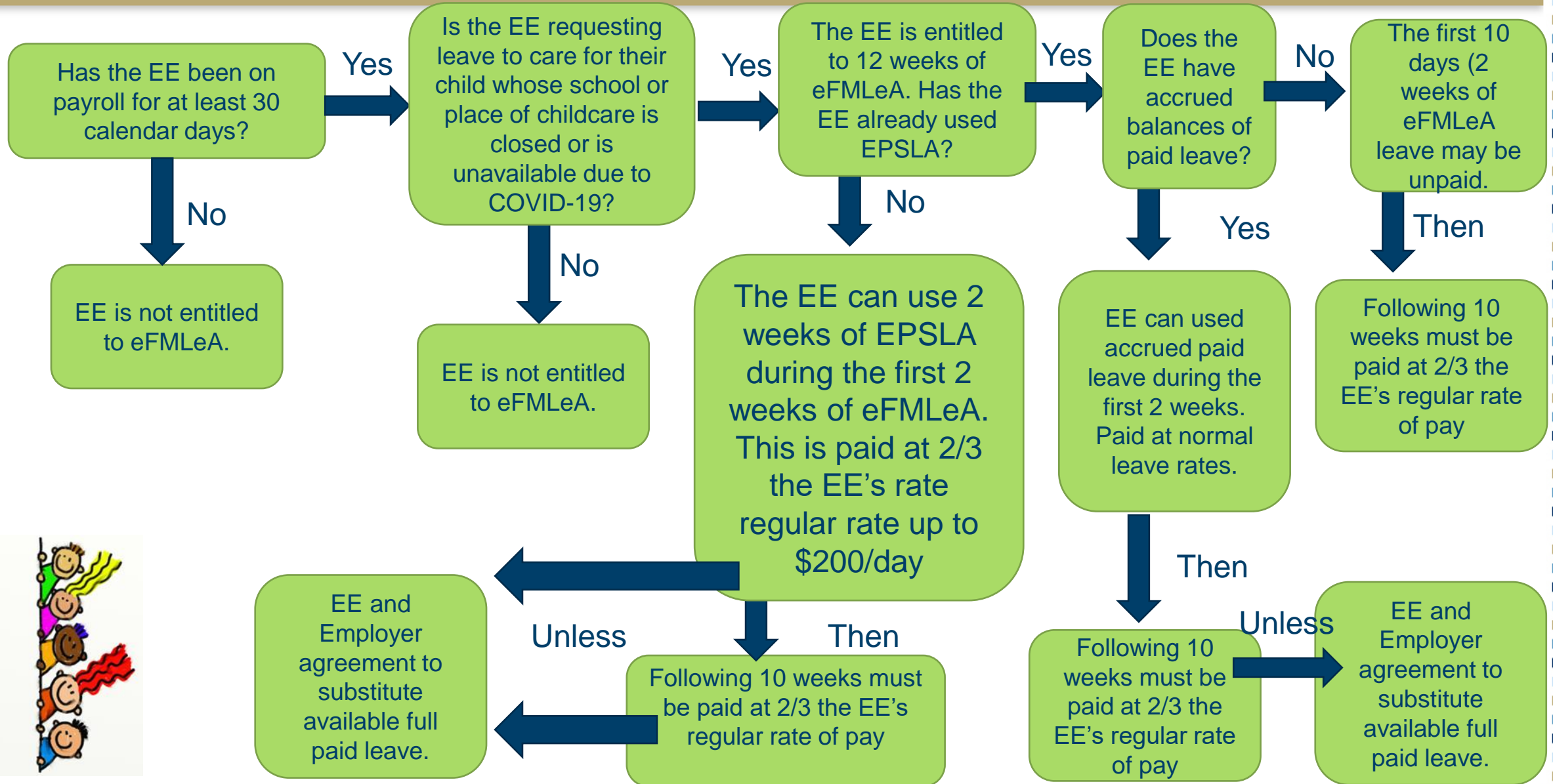
Unpaid eFMLeA Leave OR  
run other available paid  
leave

## Notes for eFMLeA

- Intermittent eFMLeA not required. Only used with employer agreement.
- This counts towards / against an employee's allotment of 12 weeks of FMLA in a 12-month period. Watch how you calculate this with your calendar (rolling, calendar year, fixed 12-month period, etc.)
- Determine whether your district will allow "sick leave" to be taken for this.
- Your district can determine whether it will supplement an employee's pay up to his/her normal compensation during this leave and what that would look like. Employer and Employee must agree.



# Determining an Employee's Pay under eFMLeA



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# Scenarios

## Expected Scenarios

- Staff member tests positive.
  - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
    - Pay is at regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in aggregate (over 2-week period)
  - Could use other available leave if needing longer time out (sick, personal, vacation, etc.) (Need appropriate doctor's note?)
    - Does FMLA kick in here? Look for serious health condition.
  - Discuss with your district's County Board of Health regarding what they will provide to individuals in order for them to return to work.
    - Some have stated they will mail a letter to return to work

## Expected Scenarios

- Quarantine ordered by contact tracing or health care provider recommended due to concerns related to COVID-19 (e.g. positive case in classroom with known proximity)
  - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
    - Pay is at regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in aggregate (over 2-week period)
  - Could use other available leave if needing longer time out (sick, personal, vacation, etc.) (Need appropriate doctor's note?)
    - FMLA probably not applicable here because employee is not yet sick.
  - Maybe? County Board of Health to provide letter to return to work

## Expected Scenarios

- Building secretary is permitted to have up to 40 workdays during the summer with the prior approval of their Building principal. Staff member's spouse tests positive for COVID-19, and staff member now is required to quarantine due to known exposure.
  - Do they receive paid leave under FFCRA?

## Expected Scenario

- Employee is caring for an individual who is subject to a quarantine order or healthcare provider order to self-quarantine
  - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
    - Pay is at 2/3 regular rate or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in aggregate (over 2-week period)
  - Could use other available leave if needing longer time out (sick, personal, vacation, etc.) (Need appropriate doctor's note)
    - Does FMLA kick in here? Look for serious health condition and must be a qualified family member.
  - Discuss with your district's County Board of Health regarding what they will provide, if anything in this situation.



## Expected Scenario

- Staff member's student's school is on split weeks or remote learning.
  - Options: *Local decision on whether to allow use of sick leave.*
    - Employee is on leave under FFCRA for two work weeks (80 hours) paid. Then s/he is on emergency FMLA for the remaining 10 workweeks. (total 12 weeks of FMLA.)
      - Pay is at 2/3 regular rate or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in aggregate (over 2-week period)
      - This is **not** required to have an employee using their sick leave under ORC. It is within the discretion of the District – statute does not require it. Consider CBAs.
        - USDOL has stated that you can use an employee's preexisting leave entitlements to supplement the amounts/he receives from paid sick leave up to the employee's normal earnings – only if the employer and the employee AGREE.
    - Intermittent leave is not required.

## Expected Scenario

- Staff member chooses remote learning for their child for the 2020/2021 school year.
  - US Department of Labor is not clear on this aspect of eFMLeA yet. The law was written with the understanding that schools were closing under state/local orders. The law was not written with the understanding that parents may have the ability to choose virtual learning for their child(ren).
  - Options: *Local decision on whether to allow use of eFMLeA and/or sick time.*
    - If allow: They are on leave under FFCRA for two work weeks (80 hours) paid. Then they are on emergency FMLA for the remaining 10 workweeks. (total 12 weeks of FMLA.)
      - Pay is at 2/3 regular rate or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in aggregate (over 2-week period)
      - This is **not** required to have an employee using their sick leave under ORC. It is within the discretion of the District – statute does not require it. Consider CBAs.
        - USDOL has stated that you can use an employee's preexisting leave entitlements to supplement the amounts/he receives from paid sick leave up to the employee's normal earnings – only if the employer and the employee AGREE.
    - Intermittent leave is not required.

## Expected Scenario

- Employee has not been exposed or tested positive. Instead they allege they have a serious health condition (comorbidity issues / fear for self) and need to be off work
- Appropriate doctor's note with emergency leave under #2 (self-quarantine).
  - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
    - Pay is at regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in aggregate (over 2-week period)
- Once that's exhausted then other available leaves (personal, sick, vacation, etc.)
- ADA Conversations – Can we make an accommodation?
- Consideration of unpaid medical leave of absence to be approved by the Board.



# Americans with Disabilities Act (ADA) quickly

# Americans with Disabilities Act – Quick Primer

- **Purposes of Original ADA:**

- Protect qualified persons with a disability from employment discrimination, whether the discrimination occurs in hiring procedures, terminations, or conditions of employment
- Prohibits employers from discriminating against an employee because of his/her association with an individual who has a disability

- **Who is a person with a disability?**

- A person who :
  - Has a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (this is VERY broad – expanded under ADAAA)
- having a record of such impairment; or
- being regarded as having such an impairment.”

# Americans with Disabilities Act – Quick Primer: Qualified Individual

- **Qualified individual with a disability:**
  - Meets legitimate skill, experience, education, or other requirements of an employment position
- **AND**
  - Can perform the essential functions of the position with or without reasonable accommodation
- If a person is qualified to perform the essential functions of a job but cannot perform one or more essential functions because of a disability, the employer must consider whether the person could perform these functions with a reasonable accommodation.

## Americans with Disabilities Act – Quick Primer: Process

- **Interactive Process and Documentation is KEY**
- Employee must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.
  - To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."
  - Doesn't need to be in writing from the employee. Employer should document the receipt of the request.
- Employee and Employer engage in informal process to clarify the employee needs and identify the appropriate reasonable accommodation. Employer should document the meeting (invitation, notes from meeting, decision from meeting)
  - Employer can ask relevant questions to enable an informed decision: e.g. nature of disability, functional limitations, problems posed by the workplace barrier
  - Employer can ask for documentation unless the disability and the need for reasonable accommodation are obvious or it enough information has already been provided to substantiate the request.
- Process should proceed as quickly as possible.

## Americans with Disabilities Act – Quick Primer: Reasonable Accommodations

- You are not required to provide the reasonable accommodation the individual wants. You can choose among reasonable accommodations as long as the chosen accommodation is effective.
- When looking at reasonable accommodations, you need to first identify and review all of the essential job functions (fundamental to performing a specific job).
  - You do not have to remove any essential job duties.
  - Job descriptions are KEY to this conversation. Have them ready and accessible, and hopefully up to date.
- Follow up after the accommodation is given to see how it is working.



## Americans with Disabilities Act – Quick Primer: Reasonable Accommodations Options (non-exhaustive)

- Reasonable accommodation options: (there is no exhaustive list and it is not a one size fits all approach)
  - Job restructuring includes modifications such as:
    - reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
    - altering when and/or how a function, essential or marginal, is performed.
  - An employer never has to reallocate essential functions as a reasonable accommodation but can do so if it wishes.
  - Remote work
  - Flexible schedules
  - Rest areas
  - Etc.
- Resource: Job Accommodation Network (for ideas)  
<https://askjan.org/a-to-z.cfm>

A large, abstract watercolor splash in various shades of green, from light lime to dark forest green, with some yellow and white highlights, centered on the page. The splash has irregular, feathered edges and a textured, painterly appearance.

# Back to the Scenarios

## Expected Scenario (REVISITED)

- Employee has not been exposed or tested positive. Instead they allege they have a serious health condition (comorbidity issues / fear for self) and need to be off work
  - Appropriate doctor's note with emergency leave under #2 (self-quarantine).
    - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
      - Pay is at regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in aggregate (over 2-week period)
  - Once that's exhausted then other available leaves (personal, sick, vacation, etc.)
  - ADA Conversations – Can we make an accommodation?
    - E.g. remote, air purifiers, certain cleaners used in classroom, PPE, etc.
    - Documentation of that discussion and process is key.
  - Consideration of unpaid medical leave of absence to be approved by the Board.



## Expected Scenario

- Employee has not been exposed or tested positive. Instead they allege they have a serious health condition (comorbidity issues / fear for self) and need to work remotely.
  - ADA Conversations – Can we make an accommodation?
    - Discuss what you are doing in your buildings for cleaning, disinfecting, mask wearing, barrier building, etc.
    - What we do for one, do we have to do for all?
      - What if the teacher is a hard to fine licensure area?
    - Discuss the need for working remotely – what is this designed to fulfill? Would working in a different isolated room at the building fulfill this need?
    - Documentation of that discussion and process is key.
  - Consider reviewing the available leaves they may have:
    - FFCRA (EPSLA)
    - FMLA ?
    - Other available leaves (personal, sick, vacation, etc.)
    - Unpaid medical leave of absence to be approved by the Board.

## Expected Scenario

- Employee has not been exposed or tested positive. Instead they allege their parent or child has a serious health condition (comorbidity issues / fear for others) and need to be off work
  - May be on leave under FFCRA for two work weeks (80 hours) paid (#4 for #2). This is **not** using their sick leave under ORC. APPROPRIATE DOCTOR'S NOTE NEEDED.
    - Pay is at 2/3 regular rate or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in aggregate (over 2-week period)
  - Could use other available leave if needing longer time out (sick, personal, vacation, etc.) (Need doctor's note?)
    - Cannot take FMLA to avoid getting exposure.
    - Other FMLA applications?
  - District could consider unpaid leave subject to Board approval under R.C. 3319.13.

## Expected Scenario

- Employee is pregnant and concerned about COVID-19.
  - If they have appropriate doctor's note with emergency leave under #2 (self-quarantine).
    - They are on leave under FFCRA for two work weeks (80 hours) paid. This is **not** using their sick leave under ORC.
      - Pay is at regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in aggregate (over 2-week period)
  - Once that's exhausted then other available leaves (personal, sick, vacation, etc.) if applicable
  - Is there an ADA conversation to be had?
  - Is there an FMLA conversation to be had?
  - Consideration of unpaid medical leave of absence to be approved by the Board.

## Be Careful!

- These are anticipated scenarios.
- Each situation will be different and should be looked at on a case-by-case situation.
- **Remember** we have learned one thing through COVID-19:
  - Expect things to change – today, tomorrow or within the week.
- Keep in communication with your legal counsel on situations you are unsure of, want to ensure you are doing correctly, etc.



# Documentation to Require under FFCRA



## Documentation to Require

- If an employee take paid sick leave under the FFCRA you must document the following:
  - The name of your employee requesting leave;
  - The date(s) for which leave is requested;
  - The reasons for the leave;
  - A statement from the employee that s/he is unable to work because of the reason.
  - If the employee is subject to an order or doctor's note – document the name of the government entity that issued the order or the healthcare provider who gave the advice. (Actual documentation is better than just the name if received.)

## Documentation to Require

- If an employee take paid sick leave or expanded FMLA under the FFCRA to care for his/her child because of a closed school or childcare provider being unavailable you must document the following:
  - The name of the child being cared for;
  - The name of the school, place of care, or childcare provider that has closed or become unavailable; and
  - A statement from the employee that no other suitable person is available to care for the child.

# Questions?

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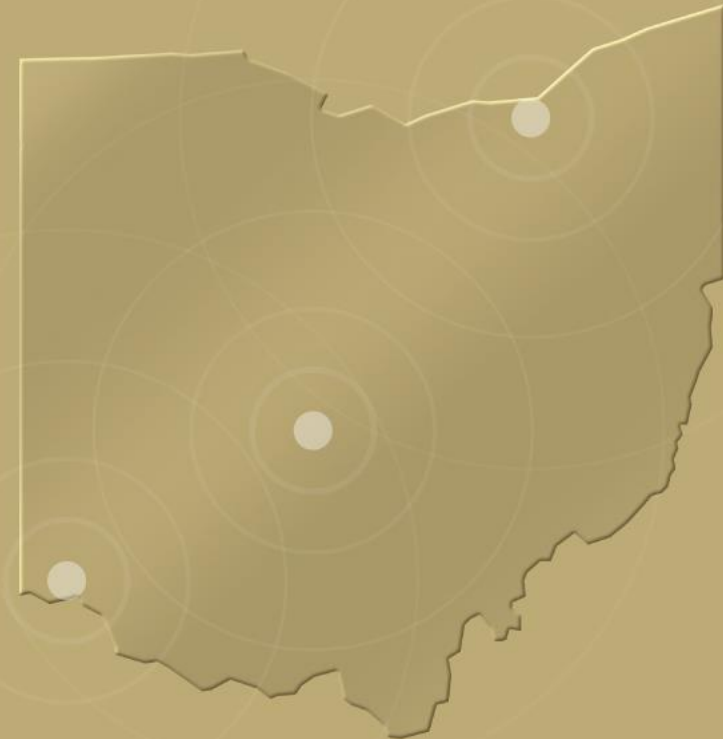
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# *Thank you!*

The information in this handout and presentation was prepared by Ennis Britton Co., L.P.A. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.



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