DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 826

RIN 1235–AA35

Paid Leave Under the Families First Coronavirus Response Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Temporary rule.

SUMMARY: The Secretary of Labor (''Secretary'') is promulgating temporary regulations to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave to assist working families facing public health emergencies arising out of Coronavirus Disease 2019 (COVID–19) global pandemic. The leave is created by a time-limited statutory authority established under the Families First Coronavirus Response Act, Public Law 116–127 (FFCRA), and is set to expire on December 31, 2020. The FFCRA and this temporary rule do not affect the FMLA after December 31, 2020.

DATES: This rule is effective from April 2, 2020, through December 31, 2020. This rule became operational on April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number).

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I. Executive Summary

On March 18, 2020, President Trump signed into law the FFCRA, which creates two new emergency paid leave requirements in response to the COVID–19 global pandemic. Division E of the FFCRA, ''The Emergency Paid Sick Leave Act'' (EPSLA), entitles certain employees to take up to two weeks of paid sick leave. Division C of the FFCRA, ''The Emergency Family and Medical Leave Expansion Act'' (EFMLEA), which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* (FMLA), permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID–19. On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (CARES Act), which amends certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

In general, the FFCRA requires covered employers to provide eligible employees up to two weeks of paid sick leave at full pay, up to a specified cap, when the employee is unable to work because the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19, has been advised by a health care provider to self-quarantine due to concerns related to COVID–19, or is experiencing COVID–19 symptoms and seeking a medical diagnosis. The FFCRA also provides up to two weeks of paid sick leave at partial pay, up to a specified cap, when an employee is unable to work because of a need to care for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID–19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons; or because the employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services. The FFCRA also requires covered employers to provide up to twelve weeks of expanded family and medical leave, up to ten weeks of which must be paid at partial pay, up to a specified cap, when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons.

The FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allocable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA. For information on the tax credits, *see https://www.irs.gov/forms-pubs/about-form-7200 see also https://www.irs.gov/pub/irs-drop/n-20-21.pdf.* For more information on the COVID–19 related small business loans, *see https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources.*

The CARES Act amended the FFCRA by providing certain technical corrections, as well as clarifying the caps for payment of leave; expanded family and medical leave to certain employees who were laid off or terminated after March 1, 2020, but are reemployed by the same employer prior to December 31, 2020; and provided authority to the Director of the Office of Management and Budget (OMB) to exclude certain Federal employees from paid sick leave and expanded family and medical leave.

The FFCRA grants authority to the Secretary to issue regulations for certain purposes. In particular, sections 3102(b), as amended by section 3611(7) of the CARES Act, and 5111(3) of the FFCRA grant the Secretary authority to issue regulations ''as necessary, to carry

out the purposes of this Act, including to ensure consistency'' between the EPSLA and the EFMLEA. The Department is issuing this temporary rule to carry out the purposes of the FFCRA. These new paid sick leave and expanded family and medical leave requirements became operational on April 1, 2020, effective on April 2, 2020, and will expire on December 31, 2020.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs (OIRA) designated this rule as a ''major rule'', as defined by 5 U.S.C. 804(2).

II. Background

A. Emergency Paid Sick Leave Act (EPSLA)

The EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons having to do with COVID–19 where 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 due to concerns related to COVID–19; (3) is experiencing symptoms of COVID–19 and is seeking a medical diagnosis; (4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2); (5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID–19 related reasons; or (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Private employers with fewer than 500 employees, as well as public agencies with one or more employees, must comply with the EPSLA, although the Secretary has authority to exempt by rulemaking certain employers with fewer than 50 employees from providing paid sick leave to an employee who is unable to work because the employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID–19 related reasons when compliance with this requirement would ''jeopardize the viability of the business as a going concern.'' FFCRA sections 5100(2)(B)(i)–(ii), 5111(2). The EPSLA applies to employees of covered employers regardless of how long an employee has worked for an employer, except that employers may exclude employees who are health care providers or emergency responders from taking paid sick leave; similarly, the Secretary has the authority to exclude by rulemaking ''certain health care providers and emergency responders'' from the requirements of the EPSLA. FFCRA sections 5102(a), 5102(e)(1), 5111(1). The CARES Act also added certain exemptions that may apply to Federal employers and employees, which are discussed below.

The EPSLA entitles full-time covered employees to up to 80 hours of paid sick leave, and generally entitles part-time employees to up to the number of hours that they work on average over a two-week period, although special rules may apply to part-time employees with varying schedules. For an employee who takes paid sick leave because he or she is subject to a quarantine or isolation order, has been advised to self-quarantine by a health care provider, or is experiencing symptoms of COVID–19 and is seeking a medical diagnosis, the EPSLA provides for paid sick leave at the greater of the employee's regular rate of pay under section 7(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (FLSA) (29 U.S.C. 207(e)), or the applicable minimum wage (federal, state, or local), up to $511 per day and $5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason under the EPSLA is entitled to be paid two-thirds of that amount, up to $200 per day and $2,000 in the aggregate. An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave, nor may an employer require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using paid sick leave.

The EPSLA also provides that employers who fail to provide paid sick leave as required are considered to have failed to pay minimum wages in violation of section 6 of the FLSA, and that such employers are subject to enforcement proceedings described in sections 16 and 17 of the FLSA. 29 U.S.C. 206, 216, 217. In addition, the EPSLA prohibits employers from discharging, disciplining, or in any other manner discriminating against an employee who takes paid sick leave under the EPSLA, files any complaint under or relating to the EPSLA, institutes any proceeding under or relating to the EPSLA, or testifies in any such proceeding. *See* FFCRA section 5104, as amended by CARES Act section 3611(8). Employers who violate this prohibition are considered to have violated section 15(a)(3) of the FLSA, and are subject to the penalties described in sections 216 and 217 of the FLSA. 29 U.S.C. 215(a)(3), 216, 217. The EPSLA also authorizes the Secretary to investigate and gather data to ensure compliance with the EPSLA in the same manner as authorized by sections 9 and 11 of the FLSA, and the CARES Act section 3611(9) (adding FFCRA section 5105(c)); 29 U.S.C. 209, 211.

The EPSLA requires employers to post a notice of employees' rights under the EPSLA. It permits, but does not require, employers who are signatories to multiemployer collective bargaining agreements to fulfill their obligations under the EPSLA by making contributions to a multiemployer fund, plan, or program, subject to certain requirements. Nothing in the EPSLA diminishes the rights or benefits that an employee is entitled to under any other Federal, State, or local law; collective bargaining agreement; or existing employer policy. Moreover, the EPSLA does not require financial or other reimbursement by an employer to an employee for unused paid sick leave upon the employee's separation from employment.

B. Emergency Family and Medical Leave Expansion Act (EFMLEA)

The EFMLEA requires employers to provide expanded paid family and medical leave to eligible employees who are unable to work because the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, defined as an emergency with respect to COVID–19, declared by a Federal, State, or local authority.

The EFMLEA applies to different sets of employers and employees from the other provisions of the FMLA. Private employers with fewer than 500 employees must comply with the EFMLEA, although the Secretary has the authority to exempt by rulemaking employers with fewer than 50 employees from EFMLEA's requirements when compliance with the EFMLEA would ''jeopardize the viability of the business as a going concern.'' FFCRA section 3102(b) (adding FMLA section 110(a)(1)(B), (3)(B)). Generally, public agencies as defined at § 826.10(a) must comply with the EFMLEA. As it relates to the Federal government, however, only those Federal employees covered by Title I of the FMLA are potentially eligible under the EFMLEA. 29 U.S.C. 2611(2)(B)(i). The EFMLEA applies to employees of covered employers if such employees have been employed by the employer for at least 30 calendar days. This includes employees who were laid off or

otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer. CARES Act section 3605 (amending FMLA section 110(a)(1)(A)). As with the EPSLA, employers may, however, exclude employees who are health care providers or emergency responders from taking expanded family and medical leave, and similarly, the Secretary has the authority to exclude by rulemaking ''certain health care providers and emergency responders'' from the requirements of the EFMLEA.

An employee is entitled to take up to twelve weeks of leave for the purpose described in the EFMLEA. 29 U.S.C. 2611(a)(1). The first two weeks (usually ten workdays) of this leave are unpaid, though an employee may substitute paid sick leave under the EPSLA or paid leave under the employer's preexisting policies for these two weeks of unpaid leave. Unlike FMLA leave taken for other reasons, the following period of up to ten weeks of expanded family and medical leave must be paid. Specifically, after the first two weeks of leave, expanded family and medical leave under the FFCRA must be paid at two-thirds the employee's regular rate of pay. For each day of leave, the employee receives compensation based on the number of hours he or she would otherwise be normally scheduled to work, although special rules may apply to employees with varying schedules. An eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off. The total EFMLEA payment per employee for this ten-week period is capped at $200 per day and $10,000 in the aggregate, for a total of no more than $12,000 when combined with two weeks of paid leave taken under the EPSLA.

The EFMLEA provides that if the need for expanded family and medical leave is foreseeable, employees shall provide employers with notice of the leave as soon as practicable. The EFMLEA defines conditions under which employees who take leave are entitled to be restored to their positions, while exempting employers with fewer than twenty-five employees from this requirement under certain circumstances. The FMLA's general prohibitions on interference with rights and discrimination, 29 U.S.C. 2615, as well as the FMLA's enforcement provisions, 29 U.S.C. 2617, apply for purposes of the EFMLEA, except that an employee's right to file a lawsuit directly against an employer does not extend to employers who were not previously covered by the FMLA.

The EFMLEA permits, but does not require, employers who are signatories to multiemployer collective bargaining agreements to fulfill their obligations under the EFMLEA by making contributions to a multiemployer fund, plan, or program, subject to certain requirements.

III. Discussion

The paid leave requirements of the EPSLA and the EFMLEA are described and interpreted by the Secretary in regulations to appear in new Part 826 of Title 29 of the Code of Federal Regulations, and addressed below.

A. General

Section 826.10 contains definitions of terms used in the EPSLA and the EFMLEA as well as in this rule. As a general matter, the FMLA definitions apply to the EFMLEA unless specific definitions were included in the EFMLEA. The majority of the terms found in the EPSLA and the EFMLEA are based on terms that are defined in other statutes and/or their implementing regulations, such as the FLSA. For example, the EPSLA expressly adopts the definition of ''person'' from the FLSA and the definition of ''son or daughter'' from the FMLA.

The EFMLEA defines ''qualifying need related to a public health emergency'' as a need for leave ''to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.'' FFCRA section 3102(b) (adding FMLA section 110(a)(1)(A)). This definition could be read to narrow the FMLA definition of ''son or daughter'' for purposes of expanded family and medical leave, as the FMLA expressly includes children 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). The EFMLEA does not contain a definition of ''son or daughter,'' however, and therefore the FMLA definition of that term applies to expanded family and medical leave. The EPSLA also adopts the FMLA definition of ''son or daughter.'' As addressed more fully below in the discussion of § 826.20, the Department believes it would create needless confusion and complication to have different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for his or her son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons. The Department is therefore treating the definitions as the same (*i.e.,* to include children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability), pursuant to its statutory authority to issue regulations to ensure consistency between the EPSLA and the EFMLEA.

Only one other definition in the FFCRA—''telework''—bears further discussion here. Section 826.10 defines the word broadly to effectuate the statute's underlying purposes and also outlines when an employee is able to telework. The definition also clarifies that telework is no less work than if it were performed at an employer's worksite. As a result, employees who are teleworking for COVID–19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the FLSA. *See* 29 CFR 785.11–13; 785.48; *see also* 29 U.S.C. 206, 207; 29 CFR part 778. However, an employer is not required 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. *See, e.g., Allen* v. *City of Chicago,* 865 F.3d 936 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1302, 200 L. Ed. 2d 474 (2018). While the Department's regulations and interpretations of the FLSA generally apply to employees who are teleworking for COVID–19 related reasons, the Department has concluded that § 790.6 and its continuous workday guidance are inconsistent with the objectives of the FFCRA and CARES Act only with respect to such employees.

The FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID–19 related reasons. But section 790.6 and the Department's continuous workday guidance generally provide that all time between performance of the first and last principal activities is compensable work time. *See* 29 CFR 790.6(a). Applying this guidance to employers with employees who are teleworking for COVID–19 related reasons would disincentivize and undermine the very flexibility in teleworking arrangements that are

critical to the FFCRA framework Congress created within the broader national response to COVID–19. As a result, the Department has determined that an employer allowing such flexibility during the COVID–19 pandemic shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID–19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID–19 related reasons on the following schedule: 7–9 a.m., 12:30–3 p.m., and 7–9 p.m. on weekdays. This allows an employee, for example, to help teach children whose school is closed or assist the employee's parents who are temporarily living with the family, reserving work times when there are fewer distractions. Of course, the employer must compensate the employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between the employee's first principal activity at 7 a.m. and last at 9 p.m. Section 790.6 and the Department's guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID–19 related reasons.

B. Paid Leave Entitlements

Section 826.20 of Title 29 of the Code of Federal Regulations describes the circumstances under which a covered employer must provide paid sick leave and/or expanded family and medical leave to an eligible employee.

Section 826.20(a) explains that an employee may take paid sick leave if the employee is unable to work because of any one of six qualifying reasons related to COVID–19. The first reason for paid sick leave applies where an employee is unable to work because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order. Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is whether the employee would be able to work or telework ''but for'' being required to comply with a quarantine or isolation order.

An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID–19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.[1] That said, he may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.

Additionally, § 826.20(a)(2) explains that an employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work. For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

The second reason for paid sick leave applies where an employee is unable to work because he or she has been advised by a health care provider, as defined in 29 CFR 825.102, to self-quarantine for a COVID–19 reason. Section 826.20(a)(3) explains that the advice to self-quarantine must be based on the health care provider's belief that the employee has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19. And, self-quarantining must prevent the employee from working. An employee who is self-quarantining is able to telework, and therefore may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID–19 symptoms, that prevent the employee from performing that work. For instance, if the lawyer in the above example would be able to work while self-quarantining at home, she may not take paid sick leave due to a need to self-quarantine.

The third reason for paid sick leave applies where an employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis. Section 826.20(a)(4) explains that symptoms that could trigger this are: Fever, dry cough, shortness of breath, or other COVID–19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID–19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID–19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis. An employee who is waiting for the results of a test is able to telework, and therefore may not take paid sick leave, if: (a) His or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is waiting; and (c) there are no extenuating circumstances, such as serious COVID–19 symptoms, that may prevent the employee from performing that work. An employee may continue to take leave while experiencing any of the symptoms specified at § 826.20(a)(4), however; or may continue to take leave after testing positive for COVID–19, regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine. In addition, an employee who is unable to telework may continue to take paid sick leave under this reason while awaiting

[1] This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.

a test result, regardless of the severity of the COVID–19 symptoms that he or she might be experiencing. In the case of an employee who exhibits COVID–19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the second reason, provided he or she meets all the requirements spelled out above.

The fourth reason for paid sick leave applies where an employee is unable to work because he or she needs to care for an individual who is either: (a) Subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID–19. This qualifying reason applies only if but for a need to care for an individual, the employee would be able to perform work for his or her employer. Accordingly, an employee caring for an individual may not take paid sick leave if the employer does not have work for him or her. Furthermore, if the employee must have a genuine need to care for the individual. Accordingly, § 826.20(a)(5) explains that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, 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 self-quarantined or was quarantined. Additionally, the individual being cared for must: (a) Be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19.

The fifth reason for paid sick leave applies when the employee is unable to work because the employee needs to care for his or her son or daughter if: (a) The child's school or place of care has closed; or (b) the child care provider is unavailable, due to COVID–19 related reasons. Again, the employee must be able to perform work for his or her employer but for the need to care for his or her son or daughter, which means an employee may not take paid sick leave if the employer does not have work for him or her. Moreover, an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.

The sixth reason for paid sick leave applies if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Section 826.20(b) explains that an employee may take expanded family and medical leave if the employee is unable to work due to a need for leave to care for his or her son or daughter if the child's school or place of care is closed, or the child care provider of such son or daughter is unavailable, for reasons related to COVID–19. The EFMLEA provides that this reason for leave is for closures or unavailability ''due to a public health emergency,'' which the statute defines as ''an emergency with respect to COVID–19 declared by a Federal, State, or local authority.'' FFCRA section 3102(b) (adding FMLA section 110(a)(2)(A), (B)). In keeping with the Department's statutory authority to issue regulations to ensure consistency between the EPSLA and the EFMLEA, the regulatory text uses ''for reasons related to COVID–19'' to match the regulatory text related to the same reason for taking paid sick leave. In other words, the leave authorized by the EFMLEA is the same as the fifth reason discussed above authorized by the EPSLA, *i.e.,* leave required when an employee is unable to work because of a need to care for his or her son or daughter if the school or place of care of the son or daughter is closed, or the child care provider of the son or daughter is unavailable, due to COVID–19 related reasons.

The Department recognizes that section 3102 of the EFMLEA defines ''qualifying need related to a public health emergency'' as a need for leave ''to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.'' FFCRA section 3102(b) (adding FMLA section 110(a)(2)(A), (B)). This definition can be read to narrow the FMLA definition of son or daughter, which includes children under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). Section 5110(4) of the EPSLA states that the FMLA definition of son or daughter applies when, among other things, the employee is unable to work because the employee is caring for a son or daughter of the employee if: (a) The school or place of care of the son or daughter has been closed; or (b) the child care provider of such son or daughter is unavailable, due to COVID–19 related reasons.

The Department considered interpreting the leave provision of the EFMLEA to apply only when an employee is unable to work because of a need to care for a child under age 18 years of age, and not to apply when a child is 18 years of age or older and incapable of self-care because of a mental or physical disability. The Department also recognizes there could be other interpretations of the ''under 18 years of age'' phrase within the EFMLEA. However, the Department has decided not to employ these alternative interpretations because it sees significant disadvantages to having different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for his or her son or daughter. Having different rules would introduce unnecessary complexity and incongruity into the leave provisions and could improperly deny leave to employees with a need to care for a child age 18 or older who is incapable of caring for himself or herself because of a mental or physical disability. The Department is therefore treating the definitions as the same pursuant to its authority under section 5111 of the EPSLA and section 110(a) of the FMLA, as amended by the EFMLEA, and the CARES Act, and will issue regulations to ensure consistency between the EPSLA and the EFMLEA.

The Department intends that providing maximum flexibility to employers and employees during the public health emergency should not impact the underlying relationships between an employer and an employee. More specifically, nothing in this Act should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either paid sick leave or expanded family and medical leave should not be construed as undermining the employee's salary basis for purposes of 29 U.S.C. 213 and 29 CFR part 541.

Section 826.21 explains how much paid sick leave an employee is entitled to under the EPSLA. Under section 5102(b)(2) of the EPSLA, a full-time employee is entitled to 80 hours of paid sick leave, and a part-time employee is entitled to the ''number of hours that such employee works, on average, over a 2-week period.'' Section 5110(5)(C)(i) further provides that if the part-time employee's ''schedule varies from week to week . . . the average number of

hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time'' shall be used in place of the ''number of hours that such employee works, on average, over a 2-week period'' under section 5102(b)(2)(B) to determine the number of paid sick leave hours.

The Department does not believe the EPSLA intended to replace the average number of hours worked ''over a 2-week period'' with the average number of hours scheduled ''per day'' as the number of paid sick leave hours because such replacement would create a contradiction within the statute and lead to an absurd outcome. Setting hours of paid sick leave ''equal to the average number of hours that the employee was scheduled per day,'' as section 5110(5)(C)(i) requires, would violate the requirement under section 5102(b)(2)(B) that ''hours of paid sick time to which an employee is entitled shall be . . . equal to the number of hours that such employee works, on average, over a 2-week period'' for the obvious reason that a day is different from a two-week period. And the number of hours an employee typically works in a day is an order of magnitude lower than the number of hours that an employee typically works in a two-week period. Thus, an employee who works a varied schedule would be entitled to an order of magnitude fewer hours of paid sick leave than if the employee had worked a regular schedule. In light of the FFCRA, the Department can think of no reason why Congress would penalize part-time employees who work varied as opposed to regular schedules.

Rather, the Department believes Congress intended to use the daily average to compute the two-week average. Because there are fourteen calendar days over a two-week period, the Department believes Congress intended for the EPSLA to provide part-time employees whose weekly schedule varies with paid sick leave equal to fourteen times the ''number of hours that the employee was scheduled per [calendar] day,'' averaged over the above-mentioned six-month period. An employer may also use twice the number of hours that an employee was scheduled to work per workweek, averaged over the six-month period.

The EPSLA does not define what it means to be a ''full-time'' or ''part-time'' employee. Because paid sick leave is designed to provide leave ''over a 2-week period,'' and the EPSLA provides up to 80 hours of such leave to full-time employees, the Department believes a full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each workweek. As a result, the Department defines a full-time employee as an employee who is normally scheduled to work at least 40 hours each workweek in § 826.21(a)(2). Further, § 826.21(a)(3) provides that an employee who does not have a normal weekly schedule may also be a full-time employee if he or she is scheduled to work, on average, at least 40 hours each workweek. For consistency purposes, this weekly average should be computed over the same six-month period as the ''Varying Schedule Hours Calculation'' for certain part-time employees under section 5110(5)(C)(i) of the FFCRA. Thus, § 826.21(a)(3) provides that the average hours per workweek for an employee who does not have a normal weekly schedule should be calculated over the six-months prior to the date on which leave is requested to determine if he or she is a full-time employee. If the employee has been employed for less than six months, the average hours per workweek is computed over the entire period of employment.

Under § 826.21(b), a part-time employee is an employee who is normally scheduled to work fewer than 40 hours each workweek or—if the employee lacks a normal weekly schedule—who is scheduled to work, on average, fewer than 40 hours each workweek. Under § 826.21(b)(1), a part-time employee who works a normal schedule is entitled to paid sick leave equal to the number of hours he or she is normally scheduled to work over a two-workweek period. As discussed above, the Department believes that a part-time employee whose weekly work schedule varies should be entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type. This computation is possible only if the employee has been employed for at least six months. Thus, § 826.21(b)(2) provides variable-schedule part-time employees with such an amount of paid sick leave.

Section 5110(5)(C)(ii) of the EPSLA further provides that, if a part-time employee with a varying weekly schedule has been employed for fewer than six months, ''the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work'' should be used ''in place of'' the average number of hours worked ''over a 2-week period'' under section 5102(b)(2)(B) to determine the amount of paid sick leave to which an employee is entitled. Again, the Department does not believe that in the EPSLA Congress intended for ''the reasonable expectation . . . of the average number of hours per day'' to be used ''in place of'' the average number of hours worked ''over a 2-week period.'' Rather, Congress intended to use the expected daily average number of hours to estimate the two-week average. The Department further believes such ''reasonable expectation'' is best evidenced by an agreement between the employer and employee at the time of hiring.

Thus, § 826.21(b)(3) states that a part-time employee with a varying schedule who has been employed for fewer than six months is entitled to fourteen times the expected number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. This is equal to twice the average number of hours that the employee would be expected to work each workweek. The agreement could have used any time period—*e.g.,* each workweek, month, or year—to express the average number of hours the employee was expected to work, so long as that daily average could be extrapolated. In the absence of such an agreement, the Department believes that the actual average number of hours the employee was scheduled to work each workday demonstrates ''the reasonable expectation . . . of the average number of hours per day that the employee would normally be scheduled to work.'' FFCRA section 5110(5)(C)(ii). Accordingly, § 826.21(b)(3) further states that, in the absence of an agreement regarding the expected number of hours worked each day, a part-time employee with a varying schedule who has been employed for fewer than six months ''is entitled to up to the number of hours of paid sick leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.'' An employer may also use twice the number of hours that an employee was scheduled to work per workweek, on average, over the six-month period.

Section 826.22 explains the amount of pay due to employees who take paid sick leave. If the employee takes paid sick leave because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order; has been advised by a health care provider to self-quarantine for COVID-related reasons;

or is experiencing COVID–19 symptoms and seeking a medical diagnosis, the employer must pay the employee his or her regular rate of pay (subject to the qualifications described below) for each hour of paid sick leave taken. If an employee takes paid sick leave because of any other COVID–19 qualifying reason, the employer must pay the employee two-thirds of the employee's regular rate of pay (subject to the qualifications described below).

If the employee's regular rate of pay is lower than the Federal, State, or local minimum wage (if applicable to the employee), the employee should instead be paid the highest of such amounts. That means an employee taking paid sick leave because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order; has been advised by a health care provider to self-quarantine for COVID-related reasons; or is experiencing COVID–19 symptoms and seeking a medical diagnosis must be paid the highest applicable minimum wage (federal, state, or local). And, an employee taking paid sick leave for any other COVID–19 qualifying reason must be paid at least two-thirds of the highest applicable minimum wage.

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.

Section 826.23 explains that expanded family and medical leave is a type of FMLA leave that is available for certain eligible employees between April 1, 2020, and December 31, 2020. As such, § 826.23(a) explains that an eligible employee is entitled to up to twelve workweeks of expanded family and medical leave, as provided under section 102 of the FMLA, during that period. *See* 29 U.S.C. 2612; *see also* 29 CFR 825.200. 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. Because the FFCRA amends the FMLA, and in particular references Section 102(d)(2)(B) of the FMLA, § 826.23 explains that an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies would be available to the employee to care for a child, such as vacation or personal leave or paid time off concurrently with the expanded family and medical leave under the EFMLEA. Although Section 102(d)(2)(B) is read broader in the traditional FMLA context to include sick and medical leave, the Department notes that the FMLA is in part a medical leave, whereas the leave provided under the FFCRA is solely for care for a family (*i.e.,* a child whose school or place of care is closed or whose child care provider is unavailable). The Department believes that this flexibility carries out the purposes of the FFCRA by allowing employees to receive full pay during the period for which they have preexisting accrued vacation or personal leave or paid time off, and allowing employers to require employees to take such leave and minimize employee absences.

Section 826.24 explains the amount an employer must pay an employee for each day of expanded family and medical leave under the EFMLEA taken to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. The payment requirement under the EFMLEA is triggered after two weeks that an employee uses leave for this reason. For each day of expanded family and medical leave after the initial two-week period, the employer must pay an employee taking such leave two-thirds of the employee's regular rate times the number of hours the employee would normally be scheduled to work that day, up to a maximum of $200 per day or $10,000 in total for the additional ten workweeks.

Some employees do not have a regular work schedule. If the employee's ''schedule varies week to week to such an extent that an employer is unable to determine with certainty [that] number of hours,'' section 110(b)(2)(C)(i) of the FMLA, as amended by the EFMLEA, requires the employer to compute pay per day of expanded family and medical leave based on ''the average number of hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.'' This six-month average of daily hours is possible only if the employee has been employed for at least six months. The Department does not believe Congress intended for the EFMLEA to use this six-month average only where an employee's ''schedule varies week to week,'' but also where the schedule varies day to day. This is because, even if an employee is scheduled for the same number of hours each workweek, day-to-day variations within each workweek could prevent an employer from determining the number of hours an employee would have been scheduled to work on a particular workday.[2] Thus, § 826.24(b) provides that the six-month average set forth in section 110(b)(2)(C) of the FMLA, as amended by the EFMLEA, is to be used to compute pay for each day of expanded family and medical leave taken where an employee's work schedule varies, without a week-to-week requirement, and has been employed for at least six months.

For an employee with a varying schedule of hours who has been employed for fewer than six months, section 110(b)(2)(C)(i) of the FMLA, as amended by the EFMLEA, provides that ''the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work'' should be used to compute the amount of pay for each day of expanded family and medical leave he or she takes after the initial unpaid period. The Department believes such ''reasonable expectation'' is best evidenced by an agreement between the employer and employee at the time of hiring. Thus, § 826.21(b)(2)(ii) explains the number of hours per day used to compute pay for an employee with a varying schedule who has been employed for less than six months is equal to the number of hours that the employee and the employer agreed at the time of hiring that the employee would be expected to work, on average, each workday. The agreement could have expressed the average number of hours over any time period—*e.g.,* each week, month, or year—so long as that daily average could be extrapolated. In the absence of such an agreement, the Department believes that the actual average number of hours the employee was scheduled to work each workday evinces ''the reasonable expectation . . . of the average number of hours per day that the employee would normally be scheduled to work.'' Accordingly, § 826.21(b)(2)(ii) further states that, in the absence of an agreement regarding the expected number of hours worked each day, the employer should use ''the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type'' to compute the amount of pay for an employee with a varying schedule who

[2] For instance, an employee may always work 40 hours each workweek, but on some weeks the employee works five eight-hour shifts and on other weeks he or she works four ten-hour shifts.

has been employed for fewer than six months.

The Department recognizes that the two-week initial unpaid period of expanded family and medical leave under § 826.60 is different from the ten-day unpaid period set forth in section 110(b)(1)(A) of the FMLA, as amended by the EFMLEA. This deviation is necessary to ensure that expanded family and medical leave provided under the EFMLEA and paid sick leave provided under the EPSLA work together—as Congress intended—to permit an employee to have a continuous income stream while taking FFCRA paid leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason.

The EFMLEA provides that, during the unpaid period of expanded family and medical leave, an employee may receive pay by using other paid leave to which he or she may be entitled, including paid sick leave provided by the EPSLA. Paid sick leave may be used for the same reason as expanded family and medical leave, *i.e.,* to care for a child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. And the amount of pay per hour of paid sick leave is guaranteed to be at least as much as the amount of pay per hour for paid expanded family and medical leave, *i.e.,* two-thirds of the employee's regular rate, up to $200 per day. Furthermore, the entitlement to paid sick leave of an employee with a regular work schedule, *i.e.,* eight hours each day for five days for a total of 40 hours each workweek—is the same as the ten-day period of unpaid expanded family and medical leave. Such an employee is entitled to 80 hours of paid sick leave, which provides pay at two-thirds of the employee's regular rate, as defined in § 826.25, for ten workdays. If the employee were concurrently taking expanded family and medical leave, he or she would be able to take paid expanded family and medical leave at two-thirds the regular rate as soon as the 80 hours of paid sick leave runs out. Thus, paid sick leave and expanded family and medical leave are designed to work in tandem to provide continuous income for an employee to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. Put another way, the reason for an unpaid initial period of expanded family and medical leave is because an eligible employee already may concurrently use paid sick leave for the same reason and get paid at the same rate. The unpaid period is therefore intended to ensure that the employee has sufficient leave for a constant stream of income at two-thirds the regular rate, up to $200 per day, while taking care of his or her child, but not more paid leave than necessary for that purpose.

As explained above, a ten-day period of unpaid expanded family and medical leave satisfies these purposes for an employee who works a regular 40-hour week. But the twin purposes of providing sufficient, yet not excessive, paid leave are not satisfied with respect to employees who work unconventional hours. For instance, consider an employee who works twelve hours each day for three days each workweek, or a total of 36 hours each workweek. This employee would be entitled to 72 hours of paid sick leave under the EPSLA to care for his or her child, which lasts for two workweeks. The employee, however, would not be able to take paid expanded family and medical leave at the end of two workweeks time because he would have taken only six workdays of such leave, and the ten-day period of unpaid leave would still be in effect. In order to have a continuous income stream until the ten-day unpaid period of expanded family and medical leave expired, the employee would need an additional 48 hours of paid sick leave.

As another example, consider a second employee who works six hours each day for six days each workweek, also for a total of 36 hours each workweek. The second employee would likewise be entitled to 72 hours of paid sick leave under the EPSLA to care for his or her child, which lasts for two workweeks or twelve workdays. The period of unpaid expanded family and medical leave would expire after ten workdays—two workdays before the second employee runs out of paid sick leave. The second employee may transition from paid sick leave to expanded family and medical leave after ten workdays, leaving two days of paid sick leave unused. In other words, the second employee would have two more days of paid leave than necessary to have a continuous income stream at two-thirds the regular rate while caring for his or her child.

In short, there is inconsistency between the provisions for expanded family and medical leave under the EFMLEA and paid sick leave under the EPSLA with respect to the first employee because he or she would be 48 hours short of being able to have continuous income. And there is inconsistency between the two Acts with respect to the second employee because he or she would have more hours of leave than needed for that purpose. Accordingly, pursuant to the Secretary's authority to issue regulations ''to ensure consistency'' between the two types of paid leave under the FFCRA, § 826.24 states that the unpaid period for expanded family and medical leave lasts for two weeks rather than ten days.[3]

In subsection (d), we made clear that despite the cap on pay, an employee may elect to use, or an employer may require that an employee take leave under the employer's policies that would be available to the employee to care for a child, such as vacation or personal leave or paid time off, concurrently with expanded family and medical leave, and the employer must pay the employee a full day's pay for that day.

Section 826.25 explains how to calculate the regular rate that is used to determine the amount an employer must pay an eligible employee who takes paid sick leave or expanded family and medical leave (after the initial two-week unpaid period). An employee's regular rate is computed for each workweek as defined under section 7(e) of the FLSA, as ''all [non-overtime] remuneration for employment'' paid to the employee except for eight statutory exclusions, divided by the number of hours worked in that workweek. *See* 29 U.S.C. 207(e); *see also Bay Ridge Operating Co.* v. *Aaron,* 334 U.S. 446, 458 (1948) (stating that the ''regular rate must be computed by dividing the total number of hours worked into the total [non-overtime] compensation received'').

The Department's regulations at 29 CFR parts 531 and 778 explain how to calculate the regular rate in different circumstances. For example, the Department uses the computation of an employee's regular rate with respect to tips in § 531.60. Moreover, the Department clarifies how to compute an employee's regular rate under different compensation arrangements, including commissions and piece rates, at §§ 778.110–.122, and explains what types of compensation are excludable from the regular rate, at §§ 778.200–.225. The regular rate used to determine the amount of pay due an employee who takes paid sick leave or expanded family and medical leave must be computed using the same methods as those described in 29 CFR parts 531 and 778.

[3] As a practical matter, the unpaid period for employees who work regular Monday-through-Friday schedules would still be ten days because that is the number of days they would work in two weeks.

The regular rate must also be computed on a workweek to workweek basis. *See, e.g.,* § 778.104 (''Each workweek stands alone''). Neither the EPSLA nor the EFMLEA, however, explains which workweek should be used to compute the regular rate that is the basis for determining the amount of pay for leave taken. The Department does not believe it would be appropriate to use the workweek in which an employee takes leave because an employee's hours worked, and therefore regular rate, in such a workweek is unlikely to be representative. Indeed, if the employee takes leave for the entire workweek, the regular rate would equal zero.

Instead, the Department believes the regular rate used to determine the amount of pay under the EPSLA and the EFMLEA should be representative of the employee's regular rate from week to week. Section 826.25 therefore requires an employer to use an average of the employee's regular rate over multiple workweeks.[4] Such an average should be weighted by the number of hours worked each workweek. For example, consider an employee who receives $400 of non-excludable compensation in one week for working 40 hours and $200 of non-excludable compensation in the next week for working ten hours. The regular rate in the first week is $10 per hour ($400 ÷ 40 hours), and the regular rate for the second week is $20 per hour ($200 ÷ 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ÷ 50 hours).

To be representative, the period over which the regular rate is averaged should be substantially greater than the two workweeks used in the above example. The Department believes it would be appropriate to compute the average regular rate over the same period used by the EPSLA and the EFMLEA to compute the employee's average number of hours worked per day, *i.e.,* a six-month period ending on the date on which the employee first takes paid sick leave or expanded family and medical leave. The Department has selected this six-month period because it is sufficiently representative under both the EPSLA and the EFMLEA. And it minimizes regulatory burden by allowing employers to use the same payroll and schedule records to compute both an employee's average number of hours worked per day and average regular rate. Of course, computing an average regular rate used to determine the amount of pay should be computed over a six-month period is not possible if the employee at issue has not been employed for at least six months. In such a case, the average regular rate should be computed over the entire term of the employment.

C. Employee Eligibility for Leave Under the EPSLA and the EFMLEA

Section 826.30 sets out the criteria for an employee's eligibility to receive paid sick leave under the EPSLA and/or expanded family and medical leave under the EFMLEA, which have similar, but not identical, eligibility requirements for leave. This section also addresses when employers may elect to exclude certain otherwise-eligible employees from coverage under these Acts.

Sections 826.30(a) and (b) provide that all employees employed by a covered employer are eligible to take paid sick leave under the EPSLA regardless of their duration of employment, and all employees who have been employed by a covered employer for at least thirty calendar days are eligible to take expanded family and medical leave under the EFMLEA, subject to the exceptions described in §§ 826.30(c)–(d) and .40(b).

Section 826.30(b)(1)(i) further explains that an employee is considered to have been employed for at least thirty calendar days for purposes of EFMLEA eligibility if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin. For example, for an employee to be eligible to take leave under the EFMLEA on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020. Section 826.30(b)(1)(ii) provides that an employee who is laid off or otherwise terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least thirty calendar days, provided the employer rehires or otherwise reemploys the employee on or before December 31, 2020, and the employee had been on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. ''For example, an employee who was originally hired by an employer on January 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the EFMLEA and the EPSLA, if the same employer rehired the employee on October 1, 2020.''

The EFMLEA and the EPSLA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Acts. Section 826.30(c) reiterates this option and defines which employees are ''health care providers'' or ''emergency responders'' whom employers may exclude from eligibility for the EPSLA and the EFMLEA's leave requirements. An employer's exercise of this option does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Further, an employer's exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies. Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from taking paid leave under the EPSLA or the EFMLEA, such leave is subject to all other requirements of those laws and this Part, and should be treated in the same manner for purposes of the tax credit created by the FFCRA. To minimize the spread of COVID–19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA.

The Department recognizes that health care providers whom an employer may exempt pursuant to sections 3105 and 5102(a) of the FFCRA is broader than the definition of health care provider under 29 CFR 825.102. Section 5110(4) of the FFCRA adopts the FMLA definition of ''health care providers,'' which includes licensed doctors of medicine or osteopathy and ''any other person determined by the Secretary to be capable of providing health care services.'' 29 U.S.C. 2611(6). The Department defined ''health care provider'' narrowly in § 825.102 to mean medical professionals who are capable of diagnosing serious health conditions in light of the FMLA's requirement for such health care

[4] The Department notes that § 778.104 states that the FLSA ''does not permit averaging of hours over 2 or more weeks'' for the purpose of computing the regular rate. But this prohibition against averaging applies when the regular rate is used for its purpose under the FLSA to compute overtime pay due. It does not apply when, as here, the regular rate is used as a metric for an employee's average hourly non-overtime wages.

providers to issue certifications regarding the nature and probable duration of serious health conditions. *See* 29 U.S.C. 2613; *see also* 58 FR 31800 (''Because health care providers will need to indicate their diagnosis in health care certificates, such a broad definition was considered inappropriate.'').

The term ''health care provider'' as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID–19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID–19 public health emergency. Accordingly, the Department is adopting a definition of ''health care provider'' that is broader than the diagnosing medical professionals under § 825.102 for the limited purpose of identifying employees whom an employer may exclude under sections 3105 and 5102(a) of the FFCRA. The definition of health care provider under § 825.102 continues to apply for other purposes of the FFCRA, such as, for instance, identifying health care providers who may advise an employee to self-quarantine for COVID–19 related reasons under section 5102(a)(2).

The authority for employers to exempt emergency responders is reflective of a balance struck by the FFCRA. On the one hand, the FFCRA provides for paid sick leave and expanded family and medical leave so employees will not be forced to choose between their paychecks and the individual and public health measures necessary to combat COVID–19. On the other hand, providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society, including the functions of emergency responders. The FFRCA should be read to complement—and not detract from—the work being done on the front lines to treat COVID–19 patients, prevent the spread of COVID–19, and simultaneously keep Americans safe and with access to essential services. Therefore, the Department interprets ''emergency responder'' broadly.

The specific parameters of the Department's definition of ''emergency responder'' derive from consultation of various statutory and regulatory definitions and from the consideration of input provided to the Department by various stakeholders and public officials. The Department endeavored to include those categories of employees who (1) interact with and aid individuals with physical or mental health issues, including those who are or may be suffering from COVID–19; (2) ensure the welfare and safety of our communities and of our Nation; (3) have specialized training relevant to emergency response; and (4) provide essential services relevant to the American people's health and wellbeing. While the Department endeavored to identify these categories of workers, it was cognizant that no list could be fully inclusive or account for the differing needs of specific communities. Therefore, the definition allows for the highest official of a state or territory to identify other categories of emergency responders, as necessary.

Section 826.30(d) explains that the CARES Act grants authority to the Director of OMB to exclude, for good cause, certain federal government employers from eligibility to take paid sick leave or expanded family and medical leave. As to the EFMLEA, the Director of OMB may exclude certain categories of United States Executive Branch employees from expanded family and medical leave. As to the EPSLA, the Director of OMB may exclude certain categories of federal government employees if they are covered by Title II of the FMLA, occupy a position in the civil service (as defined in 5 U.S.C. 2101(1)), and/or are employees of a United States Executive Agency (as defined in 5 U.S.C. 105), which includes employees of the U.S. Postal Service and the U.S. Postal and Regulatory Commission.

D. Employer Coverage Under the EPSLA and the EFMLEA

Section 826.40 addresses which employers are covered by the EPSLA and the EFMLEA, that is, which employers must provide paid leave to employees as described in those Acts.

Section 826.40(a) explains which private employers must provide paid sick leave and expanded family and medical leave to their employees. Specifically, it explains that, subject to the exemption described in § 826.40(b), all private employers that employ fewer than 500 employees at the time an employee would take leave must comply with the EPSLA and the EFMLEA.

This determination is dependent on the number of employees at the time an employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID–19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

Section 826.40(a) also addresses how to determine who counts as an employee for this purpose, including discussing categories of workers who do (and do not) count toward the 500-employee threshold. In making this determination, the employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.

Section 826.40(a) further explains that joint or integrated employers must combine employees in determining the number of employees they employ for this purpose. The FLSA's test for joint employer status applies in determining who is a joint employer for purposes of coverage, and the FMLA's test for integrated employer status applies in determining who is an integrated employer, under both the EPSLA and the EFMLEA.

Section 826.40(a) does not distinguish between for-profit and non-profit entities; employers of both types must comply with the FFCRA if they otherwise meet the requirements for coverage.

Section 826.40(b) describes the small employer exemption pursuant to the

Secretary's regulatory authority to exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern. The American Institute of Certified Public Accountants (AICPA) allows companies to use the ''ongoing concern assumption'' to defer some of its prepaid expenses until future accounting periods because the entity can continue in business for the foreseeable future without the intention nor the necessity to liquidate, cease trading, or seek protection from creditors pursuant to laws or regulations. In other words, the business is considered to remain a viable business for the foreseeable future. There is no formula provided by the AICPA to determine the viability of a business as a going concern, but rather the standard considers conditions or events in the aggregate.

The Department believes it is necessary to set forth objective criteria for when a small business with fewer than 50 employees can deny an employee paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID–19 related reasons. To that end, section 826.40(b)(1) explains that a small employer is exempt from the requirement to provide such leave when: (1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Section 826.40(b)(2) explains that if a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

In exercising its authority to exempt certain employers with fewer than 50 employees, the Department balanced two potentially competing objectives of the FFCRA. On the one hand, the leave afforded by the FFCRA was designed to be widely available to employees to assist them navigating the social and economic impacts of COVID–19 as well as public and private efforts to contain and slow the spread of the virus. On the other hand, the Department recognizes that FFCRA leave entitlements have little value if they cause an employer to go out of business and, in so doing, deny employees not only leave but also jobs. In § 826.40(b), the Department attempted to extend the leave benefits as broadly as practicable, but not in circumstances that would significantly increase the likelihood that small businesses would be forced to close. The Department rejected alternative arrangements that excessively favored either the extension of leave or exclusion of small businesses or which imposed compliance requirements that were overly burdensome, particularly in economic conditions resulting from COVID–19.

Section 826.40(c) explains which public employers must comply with the EPSLA and the EFMLEA. It uses the term ''Public Agency,'' which as explained in the definitions section, has the same meaning as in section 203(x) of the FLSA. Specifically, public agency means the Government of the United States; the government of a State or political subdivision of a State; or an agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. All covered public agencies must comply with both the EPSLA and the EFMLEA regardless of the number of employees they employ, although such employers may exclude employees who are health care providers or emergency responders as described in § 826.30(c).

Section 826.40(c) provides further information about which parts of the Federal government must comply with these Acts. Because the EFMLEA only amends Title I of the FMLA, only employers of employees covered by Title I of the FMLA are subject to the requirements of the EFMLEA. Employers of federal employees covered by Title II of the FMLA are not subject to requirements of the EFMLEA.

Section 826.40(c) provides certain clarifications as to the EPSLA's and the EFMLEA's applicability to public employers. It explains that all public agencies must provide their eligible employees with paid sick leave, subject to the exceptions set forth in § 826.30(c)–(d). In general, public agencies must also provide their eligible employees with expanded family and medical leave, subject to the exceptions and limitations set forth in § 826.30(b)–(d). However, as § 826.40(c) clarifies, only certain employees of the United States or agencies of the United States (''federal employees'') are potentially eligible to take expanded family and medical leave. Those who are potentially eligible are the federal employees covered by Title I of the FMLA. Those who are not potentially eligible for expanded family and medical leave are the federal employees whose FMLA coverage is found elsewhere, including in Title II of the FMLA (codified in Title 5 of the U.S. Code). Section 826.40(c)(i)–(viii) sets forth specific examples of federal employees covered by Title I of the FMLA and therefore potentially eligible for expanded family and medical leave.

E. Intermittent Leave

Section 826.50 outlines the circumstances and conditions under which paid sick leave or expanded family and medical leave may be taken intermittently under the FFCRA. In this section, the Department has imported and applied to the FFCRA certain concepts of intermittent leave from its FMLA regulations. However, it has also modified these concepts and added additional limitations on the use of intermittent leave in circumstances where the Department believes it is incompatible with Congress' objectives to slow the spread of COVID–19.

One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently. Subsection (a) does not require an employer and

employee to reduce to writing or similarly memorialize their agreement. But, in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both. Additionally, where an employer and employee agree that the latter may take paid sick leave or expanded family and medical leave intermittently, they also must agree on the increments of time in which leave may be taken, as explained in subsections (b)(1) and (c).

Section 826.50(c) provides that if an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. This section intentionally affords teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business. Moreover, as teleworking employees present no risk of spreading COVID–19 to work colleagues, intermittent leave for any qualifying reason furthers the statute's objective to contain the virus.

In contrast, employees who continue to report to an employer's worksite may only take paid sick leave or expanded family and medical leave intermittently and in any increment—subject to the employer and employee's agreement—in circumstances where there is a minimal risk that the employee will spread COVID–19 to other employees at an employer's worksite. Therefore, subsection (b)(1) allows an employer and employee who reports to an employer's worksite to agree that the employee may take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID–19. In this context, the absence of confirmed or suspected COVID–19 in the employee's household reduces the risk that the employee will spread COVID–19 by reporting to the employer's worksite while taking intermittent paid leave. This is not true, however, when the employee takes paid sick leave for other qualifying reasons.

Subsection (b)(2) prohibits employees who report to an employer's worksite from taking paid sick leave intermittently, notwithstanding any agreement between the employer and employee to the contrary, if the leave is taken 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 due to concerns related to COVID–19; (3) is experiencing symptoms of COVID–19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID–19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. As the Department explains in subsection (b)(2), where paid leave is taken for these reasons, ''the employee is, may be, or is reasonably likely to become, sick with COVID–19, or is exposed to someone who is, may be, or is reasonably likely to become, sick with COVID–19.'' In these situations, the employee may not take intermittent leave due to the unacceptably high risk that the employee might spread COVID–19 to other employees when reporting to the employer's worksite. Once such an employee begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until the employee either uses the full amount of paid sick leave or no longer has a qualifying reason for taking paid sick leave. The Department believes that such a requirement furthers Congress' objective to slow the spread of COVID–19.

Finally, subsection (d) clarifies that where an employer and employee have agreed that FFCRA leave may be taken intermittently, only the amount of leave actually taken may be counted toward the employee's leave entitlements. This is consistent with the requirements for intermittent leave use under the FMLA and ensures that employees are able to use the full leave entitlement.

F. 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

Both the EPSLA and the EFMLEA permit an employee to take paid leave when needed to care for his or her son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID–19 related reasons. Section 826.60 sets forth how the requirements of the EFMLEA and the EPSLA interact when an employee qualifies for both types of leave.

Generally, when an employee qualifies for leave under both Acts, an employee may first use the two weeks of paid leave provided by the EPSLA. This use runs concurrent with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is paid under the EFMLEA.

Section 826.60 further explains that where an employee has already taken some FMLA leave in the current twelve-month leave year as defined by 29 CFR 825.200(b), the maximum twelve weeks of EFMLEA leave is reduced by the amount of the FMLA leave entitlement taken in that year. If an employee has exhausted his or her twelve workweeks of FMLA or EFMLEA leave, he or she may still take EPSLA leave for a COVID–19 qualifying reason.

Section 826.60(b) addresses an employee's prior use of emergency paid sick leave, which does not prevent the employee from taking expanded family and medical leave. For example, if the employee takes two weeks of paid sick leave for a qualifying reason under EPSLA section 5102(a)(1)–(4) and (6), the employee has exhausted the paid sick leave available to the employee under the EPSLA and may not take additional paid sick leave for any qualifying reason. If the employee then needs to take leave under the EFMLEA, the employee may do so, but the first ten days of expanded family and medical leave may be unpaid. The employee may, however, choose to substitute earned or accrued paid leave, as provided by the employer's established policies.

G. Leave To Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection Between the EFMLEA and the FMLA

Section 826.70 addresses the interaction between the new entitlement to take FMLA leave to care for an employee's child due to school or place of care closure or child care unavailability under the EFMLEA and an employee's entitlement to take FMLA leave for other reasons, such as bonding with a newborn or newly placed child, for the employee's own serious health condition, or to care for a covered family member with a serious health condition. The EFMLEA amended the FMLA to add a sixth reason to take the twelve-week FMLA entitlement: To care for an employee's son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons.

Eligibility requirements for employees to take expanded family and medical leave under the EFMLEA differ from standard FMLA leave. Not all employees who are eligible to take expanded family and medical leave will be eligible to take FMLA leave for other reasons. Employees only need to have been employed for 30 calendar days in order to be eligible for expanded family and medical leave to care for their child due to school or place of care closure or child care unavailability under the EFMLEA. In contrast, to be eligible to take FMLA leave for other reasons, employees generally need to have worked for the employer for at least twelve months, have 1,250 hours of service in the twelve-month period prior to the leave, and work at a location where the employer has at least 50 employees within 75 miles.

Employer coverage also differs under the EFMLEA and the FMLA. Most significantly, the EFMLEA applies to all employers with fewer than 500 employees, while the FMLA generally does not apply to employers with fewer than 50 employees. Further, employers of health care providers and emergency responders may exclude such employees from the EFMLEA's leave requirements, but not the FMLA's.

An employee's ability to take EFMLEA leave depends on his or her use of FMLA leave during the 12-month FMLA leave year pursuant to 29 CFR 825.200(b) for a reason unrelated to COVID–19. If an employee has already taken such leave, the employee may not be able to take the full twelve weeks of expanded family and medical leave under the EFMLEA. For example, if the employer uses the calendar year as the twelve-month FMLA leave year and an employee took three weeks of leave in January 2020 for the employee's own serious health condition, the employee would only have nine weeks of expanded family and medical leave available. Additionally, employees are limited to a total of twelve weeks of expanded family and medical leave under the EFMLEA, even if the applicable time period (April 1 to December 31, 2020) spans two twelve-month leave periods under the FMLA. Finally, for employees who are eligible to take leave under the FMLA and the EFMLEA, and who take leave to care for a service member with a serious injury or illness, the total amount of leave available to the employee will be calculated as set forth in 29 CFR 825.127(e).

As explained in the above discussion of § 826.60, the first two weeks of expanded family and medical leave may be unpaid and the employee may substitute paid sick leave under the EPSLA or employer-provided earned and accrued paid leave during this period. After the first two weeks of leave, expanded family and medical leave is paid at two-thirds the employee's regular rate of pay, up to $200 per day. *See* § 826.24. Because this period of expanded family and medical leave is paid, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where Federal or state law permits, to have accrued paid leave supplement the two-thirds pay under the EFMLEA so that the employee receives the full amount of their normal pay. Federal agencies generally lack authority to provide for such a supplement.

H. Employer Notice

Section 826.80 addresses the FFCRA requirement that employers post and keep posted a notice of the law's requirements. As required by the FFCRA, the Department made a model notice available on March 25, 2020, and employers may, free of charge, download the poster (WHD1422 REV 03/20) from the WHD website at *https://www.dol.gov/whd.* In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by email, or post the required notice electronically on an employee information website to satisfy the FFCRA requirement. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through email, or online. An employer may post or distribute the required information provided in the model notice in a different format, as long as the content is accurate and readable. Although the FFCRA does not require employers to provide a translated notice to employees, the Department has issued a Spanish language version of the poster. For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation. *See* 29 U.S.C. 2619; 29 CFR 825.300.

The Department is aware that employers newly affected by the EFMLEA requirements of the FFCRA will not have established policies and practices for administering FMLA leave. In consideration of these employers, the number of employees who will be eligible to use the FMLA for the first time for a limited period of time, and interruptions to normal business operations from emergency conditions, the Department did not adopt in the FFCRA employer notice regulations or employer ''specific notice'' obligations that are required in the FMLA regulations. The FFCRA regulations do not require employers to respond to employees who request or use EFMLEA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances. However, an employer that has established practices for providing individual employees with specific notices compliant with the FMLA regulatory guidance at 29 CFR 825.300 may prefer to apply their existing practices to EFMLEA leave users.

I. Employee Notice of Need for Leave

Section 826.90 addresses an employee's notice to his or her employer regarding the need to take leave. Section 826.90(a) explains that for paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons, an employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave. Sections 826.90(b) and (c) explain that it will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer

to determine whether the requested leave is covered by the FFCRA. The employer may not require the notice to include documentation beyond what is allowed by § 826.100.

Section 826.90(d) states that it is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. 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 prior to denying the request for leave.

J. Documentation of Need for Leave

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. As provided in § 826.100, such documentation must include a signed statement containing the following information: (1) The employee's name; (2) the date(s) for which leave is requested; (3) the COVID–19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID–19 qualifying reason.

An employee must provide additional documentation depending on the COVID–19 qualifying reason for leave. An employee requesting paid sick leave under § 826.20(a)(1)(i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. An employee requesting paid sick leave under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID–19 related reasons. An employee requesting paid sick leave under § 826.20(a)(1)(iv) to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave under § 826.20(a)(1)(v) or expanded family and medical leave to care for his or her child must provide the following information: (1) The name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID–19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

For leave taken under the FMLA for an employee's own serious health condition related to COVID–19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID–19, the normal FMLA certification requirements still apply. *See* 29 CFR 825.306.

K. Health Care Coverage

Section 826.110 explains that an employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave. *See* 29 U.S.C. 2614(c); *see also* 29 U.S.C. 1182 and 26 CFR 54.9802–1(e)(2)(i); 29 CFR 2590.702(e)(2)(i) and 45 CFR 146.121(e)(2)(i) (providing that an employer cannot establish a rule for group health plan eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work, unless the employer treats employees who are absent from work on sick leave as being actively at work). This rule defines ''group health plan'' using the definition under the FMLA. *See* 29 CFR 825.102. Maintenance of individual health insurance policies purchased by an employee from an insurance provider, as described in 29 CFR 825.209(a), is the responsibility of the employee.

Section 826.110(b)–(g) explains what an employer must do to continue group health plan coverage on the same terms as if the employee did not take paid sick leave or expanded family and medical leave. These requirements are similar to the regulatory requirements for employers when employees take FMLA leave for other reasons. In particular, while an employee is taking paid sick leave or expanded family and medical leave, the employer must maintain the same group health plan benefits provided to an employee and his or her family members covered under the plan prior to taking leave—including medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, and other benefit coverage. This requirement also applies to benefits provided through a supplement to a group health plan, whether or not the supplement is provided through a flexible spending account or other component of a cafeteria plan.

Likewise, if an employer provides a new health plan (including a new benefit package option) or benefits or changes health benefits or plans while an employee is taking paid sick leave or expanded family and medical leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. The employer must give the employee notice of any opportunity to change plans or benefits, and if the employee requests the changed coverage it must be provided by the employer.

Employees in a group health plan who take paid sick leave or expanded family and medical leave remain responsible for paying the same portion of the plan premium that the employee paid prior to taking leave. If premiums are adjusted, the employee is required to pay the new employee premium contribution on the same terms as other employees. The employee's share of premiums must be paid by the method normally used during any paid leave; in many cases, this will be through a payroll deduction. For unpaid leave, or where the pay provided by the EFMLEA or the EPSLA is insufficient to cover the employee's premiums, the rule directs employers to 29 CFR 825.210(c), which specifies how employers can obtain payment. If an employee chooses not to retain group health plan coverage while taking paid sick leave or expanded family and medical leave, the employee is entitled upon returning from leave to be reinstated on the same terms as prior to taking the leave, including family member coverage.

L. Multiemployer Plans

An employer that is a signatory to a multiemployer collective bargaining agreement may satisfy its obligations under the EFMLEA and the EPSLA by making contributions to a multiemployer fund, plan, or other program consistent with its bargaining obligations and its collective bargaining agreement. The contributions must be based on the amount of paid sick leave and expanded family and medical leave to which the employee is entitled under the applicable provisions of the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. The fund, plan, or other program must allow employees to obtain their pay for the leave to which they are entitled under the FFRCA.

Alternatively, an employer that is part of a multiemployer collective bargaining agreement may choose to satisfy its obligations under the FFCRA by means other than through contribution to a plan, fund, or program, provided they are consistent with its bargaining obligations and collective bargaining agreement.

M. Return to Work

Section 826.130 describes an employee's right to return to work after taking paid leave under the EPSLA or the EFMLEA. In most instances, an employee is entitled to be restored to

the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave. *See* the FMLA job restoration provisions at 29 CFR 825.214 and the FMLA equivalent position provisions at 29 CFR 825.215.

However, 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. 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.

The EFMLEA amendments to the FMLA specify that the FMLA's restoration provision in 29 U.S.C. 2614(a)(1) does not apply to an employer who has fewer than twenty-five employees if all four of the following conditions are met:

(a) 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;

(b) The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.,* due to COVID–19 related reasons) during the period of the employee's leave;

(c) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and

(d) If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID–19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.

In addition, as these provisions amend the FMLA, the existing limitation to job restoration for ''key'' employees is applicable to leave taken under the EFMLEA. The FMLA's key employee regulations are in 29 CFR 825.217.

N. Recordkeeping

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.*

O. 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.

Section 826.150(b) explains that an employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage required by section 6 of the FLSA, and an employer who violates the prohibition on discharge, discipline, or discrimination described in section 826.150(a) is considered to have violated section 15(a)(3) of the FLSA. *See* 29 U.S.C. 206, 215(a)(3). With respect to such violations, the relevant enforcement provisions of sections 16 and 17 of the FLSA apply. *See* 29 U.S.C. 216, 217.

For instance, an employee may maintain, on behalf of the employee and any other similarly-situated employees, an action in any federal or state court of competent jurisdiction to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees. Moreover, the Secretary may bring an action against an employer to recover an amount equal to the Federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer. Finally, in the case of a repeated or willful violation, the employer shall also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.

Section 826.151(a) explains that, for purposes of the EFMLEA, employers are subject to the prohibitions that apply with respect to all FMLA leave, which are set forth at 29 U.S.C. 2615. Specifically, employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under the FMLA, including the EFMLEA; discriminating against an employee for opposing any practice made unlawful by the FMLA, including the EFMLEA; or interfering with proceedings initiated under the FMLA, including the EFMLEA.

Section 826.151(b) explains that, for purposes of the EFMLEA, employers are subject to the enforcement provisions set forth in section 107 of the FMLA, with one exception: an employee may not bring a private action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA. *See* 29 U.S.C. 2617; 29 CFR 825.400. In other words, an employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year, as required by section 101(4)(A)(i) of the FMLA.

Section 826.152 provides that employees may file complaints alleging violations of the EPSLA and/or the EFMLEA with WHD.

Section 826.153 sets out the Secretary's investigative authority under the EPSLA and the EFMLEA. Under the EPSLA, the Secretary may investigate and gather data in the same manner as authorized by sections 9 and 11 of the FLSA. *See* 29 U.S.C. 209, 211. Under the EFMLEA, the Secretary may investigate and gather data in the same manner as authorized by sections 106(a) and (d) of the FMLA. *See* 29 U.S.C. 2616(a), (d). The provisions authorize, among other things, the Secretary to enter a workplace and have access to, inspect, and copy documents, and/or require witness attendance and testimony, relating to any matter under investigation, from any person or entity being investigated or proceeded against,

at any stage of any proceeding or investigation, at any place in the United States. They also permit the Secretary to compel the production of relevant documents or testimony by subpoena as permitted by these provisions of law, including that in the event of any failure or refusal to comply with such a subpoena, the Secretary may obtain from any district court in the United States an order to compel production and/or testimony. Failure to obey such an order may be enforced through contempt proceedings.

P. Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements

Section 826.160 discusses the effect of taking paid sick leave and expanded family and medical leave on other rights, benefits, employer practices, and collective bargaining agreements. The statutory provisions underlying this section appear in the EPSLA.

Section 826.160(a)(1) explains that an employee's entitlement to, or actual use of, paid sick leave is not grounds for diminishment, reduction, or elimination of any other right or benefit to which the employee is entitled under any other federal, state, or local law, under any collective bargaining agreement, or under any employer policy that existed prior to April 1, 2020. *See* 29 U.S.C. 2651(b), 2652. Paid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before the EPSLA became operational on April 1, 2020, and effective on April 2, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave.

Section 826.160(a)(2) explains that an employer may not deny an employee paid sick leave or expanded family and medical leave on the grounds that the employee has already taken another type of leave or taken leave from another source, including leave taken for reasons related to COVID–19. Regardless of how much other leave an employee has taken up to the date he or she requests paid sick leave or expanded family and medical leave, the employer must permit the employee to immediately take any and all paid sick leave or expanded family and medical leave to which he or she is entitled and eligible under the EPSLA and the EFMLEA. However, the preceding analysis does not apply to or affect the FMLA's twelve workweeks within a twelve-month period cap.

The Department interprets ''existing employer policy'' in section 5107(1)(C) of the FFCRA to include a COVID–19 related offering of paid leave that the employer voluntarily issued prior to April 1, 2020, and under which employees were offered more paid leave than under the employer's standard or current policy. The Department acknowledges that some employers voluntarily offered and provided such leave to help their employees in this time of emergency. Nonetheless, the FFCRA still requires those employers to provide the entirety of the paid sick leave and expanded family and medical leave to which its employees are eligible, regardless of whether an employee took the additional paid leave the employer voluntarily offered. Doing so is necessary to ensure all eligible employees receive the full extent of paid sick leave and expanded family and medical leave to which they are entitled under the EPSLA and the EFMLEA. However, an employer may prospectively terminate such a voluntary additional paid leave offering as of April 1, 2020, or thereafter, provided that the employer had not already amended its leave policy to reflect the voluntary offering. This means the employer must pay employees for leave already taken under such an offering before it is terminated, but the employer need not continue the offering in light of the FFCRA taking effect.

Finally, the Department clarifies that employees do not have any right or entitlement to use paid sick leave or expanded family and medical leave retroactively, meaning they have no right or entitlement to be paid through paid sick leave or expanded family and medical leave for any unpaid or partially paid leave taken before April 1, 2020.

Section 826.160(b) explains the sequencing of paid sick leave with other types of leave. Pursuant to section 5102 of the FFRCA, an employee may choose to use paid sick leave prior to using any other type of paid leave to which he or she is entitled under any other Federal, State, or local law; collective bargaining agreement; or employer policy that existed prior to April 1, 2020. As this decision is at the employee's discretion, § 826.160(b)(2) clarifies that no employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking paid sick leave. Of course, an employer may not require or influence an employee to use unpaid leave prior to taking paid sick leave; doing so would be akin to denying or attempting to deny the employee the paid sick leave to which he or she is entitled.

Section 826.160(c) explains the sequencing of expanded family and medical leave with other types of leave. No employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking expanded family and medical leave. However, an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off, concurrently. If expanded family and medical leave is used concurrently with another source of paid leave, then the employer has to 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, even if that amount is greater than $200 per day or $10,000 in the aggregate. But the employer's eligibility for tax credits is still limited to the cap of $200 per day or $10,000 in the aggregate.

Section 826.160(d)–(e) explains that 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 unused expanded family and medical leave in the event the employee's employment ends after April 1, 2020, but before the FFCRA's expiration on December 31, 2020. Moreover, the Department interprets sections 5107(2) and 5109 of the FFCRA to mean that no employer has an obligation to provide, and no employee or former employee has a right or entitlement to receive, financial compensation or other reimbursement for unused paid sick leave or unused expanded family and medical leave upon or after the FFCRA's expiration on December 31, 2020.

Section 826.160(f) explains that any one individual employee is limited to a maximum of two weeks (80 hours) paid sick leave as described in § 826.160. Thus, the absolute upper limit of 80 hours of paid sick leave to which one could potentially be eligible is per person and not per job. Should an employee change positions during the period of time in which the paid sick leave is in effect, he or she is not entitled to a new round of paid sick leave. Once an employee takes the maximum 80 hours of paid sick leave, he or she is not entitled to any paid sick leave from a subsequent employer. If an employee changes positions before taking 80 hours of paid sick leave, then his or her new employer (if covered by FFCRA) must provide paid sick leave

until the employee has taken 80 hours of paid sick leave total regardless of the employer providing it.

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The FFCRA authorizes the Department to issue regulations under the EPSLA and the EFMLEA pursuant to the good cause exception of the APA. FFCRA sections 3102(b) (adding FMLA section 110(a)(3)), 5111.

The Department is bypassing advance notice and comment because of the exigency created by sections 3106 and 5108 of the FFCRA, which go into effect on April 1, 2020, and expire on December 31, 2020. The COVID–19 pandemic has escalated at a rapid pace and scale, leaving American families with difficult choices in balancing work, child care, and the need to seek medical attention for illness caused by the virus. To avoid economic harm to American families facing these conditions, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the Department from successfully exercising the authority created by sections 3106 and 5108. Moreover, such delay would be counter to one of the FFCRA's main purposes in establishing paid leave: enabling employees to leave the workplace now to help prevent the spread of COVID–19.

2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The FFCRA authorizes the Department to issue regulations that are effective immediately under the EPSLA and the EFMLEA pursuant to the good cause exception of the APA. FFCRA sections 3102(b) (adding FMLA section 110(a)(3)), 5111; CARES Act section 3611(1)–(2). For the reasons stated above, the Department has concluded it has good cause to make this temporary rule effective immediately and until the underlying statute sunsets on December 31, 2020.

B. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

1. Introduction

Under E.O. 12866, OIRA determines whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. As described below, this temporary rule is economically significant. The Department has prepared a Regulatory Impact Analysis (RIA) in connection with this rule, as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule. OIRA has designated this rule as a ''major rule'', as defined by 5 U.S.C. 804(2).

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

2. Overview of the Rule

The rule implements the EPSLA and the EFMLEA, as modified by the CARES Act. The EPSLA requires that certain employers provide two workweeks (up to 80 hours) of paid sick leave to eligible employees who need to take leave from work for specified reasons. The EFMLEA requires that certain employers provide up to twelve weeks of expanded family and medical leave to eligible employees who need to take leave from work because the employee is caring for his or her son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons. Payments from employers to employees for such paid leave, as well as allocable costs related to the maintenance of health benefits during the period of the required leave, is to be reimbursed by the Department of the Treasury via tax credits, up to statutory limits, as provided under the FFCRA.

3. Economic Impacts

The Department estimated the number of affected employers and quantified the costs associated with this temporary rule. The paid sick leave and the expanded family and medical leave provisions of the FFCRA both apply to employers with fewer than 500 employees. The 2017 Statistics of U.S. Businesses (SUSB) reports that there are 5,976,761 private firms in the U.S. with fewer than 500 employees.[5] This temporary rule says that small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school or place of care closings or child care unavailability if the leave payments would jeopardize the viability of their business as a going concern. The 2017 SUSB reports that there are 5,755,307 private firms with fewer than 50 employees, representing 96 percent of all impacted firms (firms with fewer than 500 employees). The employers who are not able to qualify for the exemption discussed above are those with fewer than 500 employees but greater than or equal to 50 employees. Using the SUSB data mentioned above, the Department estimates that there are 221,454 firms that meet this criteria.

Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, their employers may have some

[5] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2017 SUSB Annual Data Tables by Establishment Industry.

employees who do not meet this definition, so these employers may still be impacted by the provisions of the FFCRA.

The Department estimates that employees who work for employers with fewer than 500 employees could potentially benefit from this rule. According to the 2017 SUSB data, the 5,976,761 firms that meet this criteria employ 60,556,081 workers. Not all eligible employees will require use of the paid sick leave or expanded family and medical leave provisions of the FFCRA. The Department lacks data to determine how many employees will use this leave, which type of leave they will use and for what reason, and the wages of those who will use the leave.

Certain health care providers and emergency responders may be excluded from this group of impacted employees. The rule defines health care provider to include anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary 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. According to the SUSB data mentioned above, employers with fewer than 500 employees in the health care and social assistance industry employ 9.0 million workers.[6] This estimate is likely to be the upper bound of potentially exempt health care industry workers, because it could include workers that may not be employed at an institution covered by the exemption. This estimate may not, however, include employees who provide services to the health care industry. The SUSB data does not include further industry breakouts, and so the Department is unable to determine the exact number of workers employed at these organizations with fewer than 500 employees.

The rule defines emergency responders as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID–19. The rule provides a list of occupations that 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, and public works personnel. Because this list consists of occupations spread across various industries, the Department is unable to use the SUSB data to determine the magnitude of potential affected emergency responders. According to the May 2018 BLS Occupational Employment and Wages estimates, these occupations have a combined employment of 4.4 million.[7] This may be an over count or an under count of the potentially exempt emergency responders. The estimate may be an over count because it includes employees who work for employers of all sizes, not just those with fewer than 500 employees. The estimate may be an under count because it does not include military or national guard, as they are not counted in the OES estimates.

i. Costs

This temporary rule implementing the paid sick leave and expanded family and medical leave provisions of the FFCRA will result in four different categories of costs to employers: Rule familiarization costs, documentation costs, costs of posting a notice, and other managerial and operating costs. The temporary rule will also result in increased costs to the Department to administer the rule and handle complaints and claims related to the provisions of the Acts.

a. Rule Familiarization Costs

The Department estimates that all employers with fewer than 500 employees will need to review the rule to determine their responsibilities. For those 5,755,307 employers with fewer than 50 employees, they will need to review the rule to determine what the rules are for all businesses, what the small employer exemptions are, and how to either comply or show that the requirements of the rule would jeopardize the viability of their business. The Department estimates that these small employers will likely spend one hour to understand their responsibilities under the rule. For the 221,454 employers with fewer than 500 employees, but greater than or equal to 50 employees, they will likely need to spend one hour to read the rule and determine their responsibilities to provide paid sick leave and expanded family and medical leave. The Department estimates that this will be a one-time rule familiarization cost, as the provisions of the Act sunset on December 31, 2020.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers is $30.29 per hour.[8] In addition, the Department also assumes that benefits are paid at a rate of 46 percent [9] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully-loaded hourly wage of $49.37.[10] The Department estimates that the total rule familiarization cost to employers with fewer than 50 employees, who spend one hour reviewing the rule, will be $284,139,507 (5,755,307 firms × 1 hour × $49.37). The Department estimates that the total rule familiarization cost to employers with greater than or equal to 50 but fewer than 500 employees will be $10,933,184 (221,454 firms × 1 hour × $49.37). Total rule familiarization costs for all impacted firms will therefore be $295,072,691.

b. Costs of Documentation

Employers with fewer than 50 employees are able to be exempt from providing paid sick leave for child care purposes and expanded family and medical leave under the FFCRA if they are able to show that complying with the requirements would jeopardize the viability of their business as a going concern. These employers will need to demonstrate this burden, and to show that they are exempt. These small employers must document the facts and circumstances to demonstrate this burden if they have employees who are requesting paid sick leave or expanded family and medical leave. Although the employers are not required to send such material or documentation to the Department, they are required to retain such records for their own files. Some employers will not qualify for the exemption. The Department lacks specific data to estimate the number of small employers who will use the exemption, but the Department assumes

[6] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2017 SUSB Annual Data Tables by Establishment Industry.

[7] Occupational Employment and Wages, May 2018, *https://www.bls.gov/oes/2018/may/oes131141.htm.* The Department used SOC codes 29–1060 (Physicians and Surgeons), 29–1141 (Registered Nurses), 29–1171 (Nurse Practitioners), 29–2041 (Emergency Medical Technicians and Paramedics), 33–2000 (Fire Fighting and Prevention Workers), and 33–3000 (Law Enforcement Workers), to represent the occupations listed in the rule.

[8] Occupational Employment and Wages, May 2018, *https://www.bls.gov/oes/2018/may/oes131141.htm.*

[9] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

[10] $30.29 + $30.29(0.46) + $30.29(0.17) = $49.37.

that until the end of the year, potentially up to 10 percent of these 5,755,307 employers (575,531) will likely document that the requirements of the Act will jeopardize the viability of their businesses. The Department estimates that each of these employers will spend one hour for creating and documenting these records. Costs of documentation for these small employers will therefore be $28,413,965 (575,531 firms × 1 hour × $49.37).

Employers are required to retain all records or documentation provided by the employee prior to taking paid sick leave or expanded family and medical leave. When employees take expanded family and medical leave, employees must provide their employers with appropriate documentation in support of such leave. Employers must retain this documentation, as it may be required for tax credits and other purposes under the FFCRA. For the 221,454 employers with between 50 and 500 employees, the Department estimates that they will spend an additional one hour, on average, on documentation associated with this rule. For the 5,755,307 employers with fewer than 50 employees, the Department assumes that they will spend 30 minutes, on average, on documentation associated with this rule. The time spent by small employers will be lower because they have fewer employees, and some of them will be able to use the small business exemption from the requirement to provide leave due to school or childcare closings. The Department believes an average of one hour or 30 minutes is appropriate for the year, because some employers will not have any employees that will request leave, so will therefore not need any documentation, while other employers will have multiple employees requesting this leave. Documentation costs for these employers will therefore be $153,002,937 (5,755,307 × 0.5 hours × $49.37) + (221,454 × 1 hour × $49.37).

Total documentation costs for employers of all sizes are therefore estimated to be $181,416,902 ($28,413,965 + $153,002,937).

c. Costs of Posting a Notice

Section 5103(a) of the FFCRA requires employers to post a notice to inform their employees of the requirements of the EPSLA. The notice must be posted in a conspicuous place on the premises of the employer where notices to employees are customarily posted, or emailed or direct mailed to employees, or posted electronically on an employee information internal or external website. All employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA are required to post this notice. The Department estimates that all 5,976,761 employers with fewer than 500 employees will post this notice, and that 99 percent of employers (5,916,993) will post the information electronically while 1 percent (59,768) will physically post the notice on employee bulletin boards. The Department estimates that it will take 15 minutes (or 0.25 hours) for employers posting the provision electronically to prepare and post the provision, and it will take 75 minutes (or 1.25 hours) for employers posting the notice manually to prepare the notice and post it in a conspicuous place where notices to employees are customarily posted. Employers who post electronically will incur a one-time cost of $73,030,486 (5,916,993 × 0.25 × $49.37) and those who physically post the notice will incur a one-time cost of $3,688,433 (59,768 × 1.25 × $49.37). Therefore, the total cost of posting this notice will be $76,718,919. Employers may also incur a small cost of manually producing the notices, including paper, printer ink, etc., but the Department believes that this cost will be minimal compared to the cost of the time spent preparing and posting the notice.

d. Other Managerial and Operating Costs

In order to comply with the paid sick leave and expanded family and medical leave provisions of the FFCRA, employers may incur additional managerial and operating costs that the Department is unable to quantify. For example, when employees require the use of this paid leave, employers will need to determine if their employees are eligible for the leave, and will need to calculate the amount that an employee should receive, and will need to make the adjustments to an employee's paycheck, and will also need to adjust bookkeeping practices to track the amount of leave used by an employee. Because the Department lacks data on how many employees will require either paid sick leave or expanded family and medical leave through the end of the year, the total managerial and operation costs incurred by employers cannot be quantified. However, for illustrative purposes, for each employee that requires the use of this leave, the Department estimates it will take an employer two hours to complete these additional tasks. If these tasks are performed by a Compensation, Benefits, and Job Analysis Specialist with a fully-loaded hourly wage of $49.37, then the cost to each employer per employee requiring leave is $98.74. The Department estimates that all 5,976,761 firms with fewer than 500 employees could potentially incur this cost, but is unable to determine the extent to which leave will be used by employees given the various eligibility requirements, and therefore cannot estimate the total managerial and operation costs incurred.

There are likely other costs to employers for which the Department is unable to quantify in part because the number of employees who will qualify for leave under the FFCRA and take such leave at each employer is unknown and because the productivity losses caused by employees taking leave likely vary by employer and for each individual employee, but which are discussed qualitatively here. The new paid leave provisions of the Act may result in an increase in the number of employees who take advantage of sick leave and family and medical leave, compared to the number of employees who would use leave absent the new provisions. When an employee takes leave, the overall productivity of the business likely will suffer (although there could be some offsetting productivity improvements if coworkers are less likely to become infected) and, in some instances, the business may face unique operational challenges which could hinder its ability to continue operations for the same duration or at the same capacity as before the employee(s) took leave. These costs are difficult to quantify, but likely will be significant, especially if a large number of employees are eligible for, and take, leave. These costs are not created specifically because of any unique features of this temporary rule, but are directly linked to the statute's leave provisions.

e. Costs to the Department

WHD will also incur costs associated with the paid sick leave and expanded family and medical leave provisions of the FFCRA. Prior to this Act, WHD had not enforced a comprehensive paid sick leave program applicable to a large segment of the U.S. workforce (minus the exemptions). WHD will incur the additional costs of setting up a new enforcement program, administering the program, and processing complaints associated with this new provision. The Department does not have data to assess this cost to the Department.

ii. Cost Summary

As discussed above, the quantified costs associated with the paid sick leave and expanded family and medical leave provisions of the FFCRA and with this temporary rule are rule familiarization

costs, costs of documentation, and the cost of posting a notice. Table 1 summarizes all of these costs in 2018 dollars. The Department estimates that total costs in 2020 are $553 million.

Table 1. Costs

Rule Familiarization Costs	$295,072,691
Documentation Costs	$181,416,902
Cost of Posting a Notice	$76,718,919
Total Costs	**$553,208,512**

iii. Transfers

The transfers associated with this rule are the paid sick leave and expanded family and medical leave that employees will receive as a result of the FFCRA. The paid leave will initially be provided by employers, who will then be reimbursed by the Department of the Treasury through a tax credit, up to statutory limits, which is then ultimately paid for by taxpayers (although there may be some offsetting taxpayer effects due to statutory limits, which is then ultimately paid for by taxpayers' reduced reliance on social assistance programs). Such transfers may be reduced if employees opt to use or employers require that employees use certain pre-existing leave (*i.e.,* personal or vacation leave or paid time off) concurrently with any EFMLEA leave. As discussed above, the total number of employees who are potentially eligible for this leave is as high as 61 million, but the number of employees who will actually use the leave will be a smaller share of this total. The Department does not know to what extent employees will be exposed to COVID–19 themselves, will be subject to a Federal, State, or local quarantine, will be caring for an individual exposed to COVID–19, or will need to stay home to take care of a child out of school or child care (and unable to telework), and therefore does not know how many employees will require use of the paid leave provided in the Act. In order to quantify the potential transfer, the Department would need to determine the number of days of leave that would be taken, and the monetary value of those days of leave. The FFCRA requires employers to pay leave based on an employee's regular rate, so the Department would need to determine the regular rate of each employee who requests leave. This estimate could vary greatly depending on the occupations and industries of employees requesting leave. The share of the regular rate used to calculate the transfer would also depend on the reason for which an employee requires the use of paid leave. The Department would also need to determine the number of days each employee would take leave, the type of leave employees would take, and whether EFMLEA leave would run concurrently with certain previously-provided leave, all of which would vary depending on whether they are taking paid sick leave or expanded family and medical leave. If an employee requires the use of paid sick leave to self-quarantine, they will likely take the entire 80 hours allotted, because the CDC's guidelines recommend a quarantine period of two weeks. Additionally, an employee may take up to ten weeks of paid expanded family and medical leave to care for his or her child whose school or place of care is closed or child care provider is unavailable. For school districts that have closed through the end of the 2020 school year, it is likely that these parents would take the entire twelve week allotment. The Department lacks data to determine which employees will need leave, how many days of leave will ultimately be used, and how much pay employers will be required to provide for such leave. Although the Department is unable to quantify the transfer of paid leave, we expect that it is likely to exceed $100 million in 2020.

iv. Benefits

The benefits of the paid sick leave and expanded family and medical leave provisions of the FFCRA are vast, and although unable to be quantified, are expected to greatly outweigh any costs of these provisions. With the availability of paid leave, sick or potentially exposed workers will be encouraged to stay home, thereby helping to curb the spread of the virus and lessen the strain on hospitals and health care providers. If employees still receive pay while on leave, they will benefit from being able to cover necessary expenses, and to continue to spend money to help support the economy. This will have spillover effects not only on the individuals who receive pay while on leave, but also on their communities and the national economy as a whole, which is facing unique challenges due to the COVID–19 global pandemic.

The expanded family and medical leave provisions of the FFCRA will allow parents to care for their children who are out of school, or whose childcare provider is unavailable due to COVID–19 related reasons. This will allow parents to avoid extra childcare costs that they otherwise may have to incur.

Without this paid sick leave and expanded family and medical leave (that is, without the policy of tying some federal COVID–19 assistance to employment arrangements), there could be long-term costs in addition to the short term impacts listed above. For example, there could be substantial rehiring costs for employers when the public health concern has abated and, simultaneously, transition costs to workers as they restart their careers. A spillover effect of these frictions might be increased reliance on social assistance programs.

v. Regulatory Alternatives

The Department notes that the FFCRA delegates to the Secretary the authority to issue regulations to ''exclude certain health care providers and emergency responders from the definition of eligible employee'' under section 110(a)(1)(A) of the EFMLEA and 5110(1) of the EPSLA; ''to exempt small businesses with fewer than 50 employees from the requirements'' of section 102(a)(1)(F) of EFMLEA and 5102(a)(5) of the EPSLA ''when the imposition of such requirements would jeopardize the viability of the business as a going concern''; and ''as necessary to carry out the purposes of the EPSLA to ensure consistency between it and Division C and Division G of the FFCRA.''

Because the FFCRA itself establishes the basic expanded family and medical leave and paid sick leave requirements that the Department is responsible for implementing, many potential regulatory alternatives would be beyond the scope of the Department's authority in issuing this temporary rule. The

Department considered two regulatory alternatives to determine the correct balance between providing benefits to employees and imposing compliance costs on covered employers. This section presents the two alternatives to the provisions set forth in this temporary rule.

The Department considered one regulatory alternative that would be less restrictive than what is currently being issued and two that would be more restrictive. For the less-restrictive option, the Department considered excluding all small businesses with fewer than 50 employees from the requirements of the FFCRA, assuming that any requirement to provide expanded family and medical leave or paid sick leave for child care to their employees would jeopardize the viability of those small businesses. The Department concluded, however, that requiring small businesses to demonstrate that the viability of their business will be jeopardized if they have to provide paid leave would ensure uniformity among these employers, help the Department administer sections 102(a)(1)(F) of FMLA and 5102(a)(5) of the EPSLA, and would best conform to the FFCRA.

For the first more restrictive alternative, the Department considered requiring small businesses with fewer than 50 employees to maintain formal records in order to demonstrate a need for exemption from the rule's requirements. The Department concluded, however, that this requirement would be unnecessarily onerous for these employers, particularly given that they are not otherwise subject to the FMLA. The Department believes that the requirements issued in this temporary rule will ensure that small employers have the flexibility they need to balance their staffing and business needs during the COVID–19 public health emergency.

For the second more restrictive alternative, the Department considered using a more narrow definition of health care provider and emergency responder for purposes of excluding such employees from the EPSLA's paid sick leave requirements and/or the EFMLEA's expanded family and medical leave requirements. The Department considered only allowing employers to exclude those workers who directly work with COVID–19 patients, but felt that such a limitation would not provide sufficient flexibility to the health care community to make necessary staffing decisions to address the COVID–19 public health emergency. Further, a more narrow definition could leave health care facilities without staff to perform critical services needed to battle COVID–19.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604.

As discussed above, the Department calculated rule familiarization costs, documentation costs, and the cost of posting a notice for all employers with fewer than 500 employees. For employers with fewer than 50 employees, their one-time rule familiarization cost would be $49.37. Their cost for documentation would be $24.69, and the cost of posting a notice would be $12.84. Total cost to these employers would be $111.58. An additional ten percent of employers with fewer than 50 employees will have an additional documentation cost of $49.37 for qualifying for the small employer exemption, bringing their total cost to $160.95. For employers with at least 50 employees but fewer than 500 employees, their one-time rule familiarization cost would be $49.37. Their cost for documentation would be $49.37, and the cost of posting a notice would be $12.84. The average managerial and operational cost to an employer would be $98.74. Total cost to these employers would be $210.32. These estimated costs will be minimal for small business entities, and will be well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses. Based on this determination, the Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) requires agencies to prepare a written statement for rules that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation using the CPI–U) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

(1) Authorizing Legislation

This rule is issued pursuant to the FFCRA.

(2) Assessment of Quantified Costs and Benefits

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures of more than $165 million in the first year. Based on the cost analysis in this temporary rule, the Department determined that the rule will result in Year 1 total costs for rule familiarization, documentation, and posting of notices totaling $553 million (*see* Table 1). There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[11] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $51.5 billion to $102.9 billion (using 2018 GDP). A regulation with smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

(3) Least Burdensome Option Explained

The Department believes that it has chosen the least burdensome option

[11] *See* 2 U.S.C. 1532(a)(4).

given the FFCRA's provisions. Although the Department is requiring small employers with fewer than 50 employees to maintain formal records in order to demonstrate a need for exemption from the rule's requirements they are not required to provide any documents to the Department. The Department believes that the requirements issued in this temporary rule will ensure that small employers have the flexibility they need to balance their staffing and business needs during the COVID–19 pandemic.

E. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order No. 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 13175, Indian Tribal Governments

This rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

G. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The Department is seeking emergency approval related to the collection of information described herein. Persons are not required to respond to the information collection requirements until OMB approves them under the PRA. This temporary rule creates a new information collection specific to paid leave under the FFCRA. The Department has created a new information collection request and submitted the request to OMB for approval under OMB control number 1235–0NEW (Paid Leave under the Families First Coronavirus Response Act) for this action.

Summary: Section 826.140(a) requires covered employer to document and retain information submitted by an employees to support requests for paid sick leave and expanded family and medical leave. Section 826.140(a) further requires any employer that denies a request for leave pursuant to the small business exemption under § 826.40(b) must document and retain the determination by its authorizing officer that it meets the criteria for that exemption. Finally, § 826.140(c) advises, but does not require, employers to create and maintain certain records for the purpose of obtaining a tax credit from the Internal Revenue Service.

Purpose and Use: WHD and employees use employer records to determine whether covered employers have complied with various requirements under the FFCRA. Employers use the records to document compliance with the FFCRA.

Technology: The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

Minimizing Small Entity Burden: Although the FLSA recordkeeping requirements do involve small businesses, including small state and local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection.

Total annual burden estimates, which reflect the new responses for the recordkeeping information collection, are summarized as follows:

Type of Review: Approval of a new collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Paid Leave under the Families First Coronavirus Response Act.

OMB Control Number: 1235–0NEW.

Affected Public: Private Sector: businesses or other for-profits, farms, and not-for-profit institutions: State, Local and Tribal governments; and individuals or households.

Estimated Number of Respondents: 7,903,071.

Estimated Number of Responses: 7,903,071.

Estimated Burden Hours: 801,962 hours.

Estimated Time per Response: Various.

Frequency: Various.

Other Burden Cost: $4,255,500 (operations/maintenance).

List of Subjects in 29 CFR Part 826

Wages.

Signed at Washington, DC, this 1st day of April, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

■ For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations by adding part 826 to read as follows:

PART 826—PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Sec.

826.10 General.
826.20 Paid leave entitlements.
826.21 Amount of Paid Sick Leave.
826.22 Amount of pay for Paid Sick Leave.
826.23 Amount of Expanded Family and Medical Leave.
826.24 Amount of pay for Expanded Family and Medical Leave.
826.25 Calculating the Regular Rate under the FFCRA.
826.30 Employee eligibility for leave.
826.40 Employer coverage.
826.50 Intermittent leave.
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.
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.
826.80 Employer notice.
826.90 Employee notice of need for leave.
826.100 Documentation of need for leave.
826.110 Health care coverage.
826.120 Multiemployer plans.
826.130 Return to work.
826.140 Recordkeeping.
826.150 Prohibited acts and enforcement under the EPSLA.
826.151 Prohibited acts and enforcement under the EFMLEA.
826.152 Filing a complaint with the Federal Government.
826.153 Investigative authority of the Secretary.
826.160 Effect on other laws, employer practices, and collective bargaining agreements.

Authority: Pub. L. 116–127 sections 3102(b) and 5111(3); Pub. L. 116–136 section 3611(7).

§ 826.10 General.

(a) *Definitions.* For the purposes of this rule:

Child Care Provider. The term ''Child Care Provider'' means a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law as described in section 9858c(c)(2)(E) of Title 42; and satisfies the State and local

requirements, including those referred to in section 9858c(c)(2)(F) of Title 42. Under the Families First Coronavirus Response Act (FFCRA), the eligible 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.

Commerce. The terms ''Commerce'' and ''industry or activity affecting commerce'' mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'', and any ''industry affecting commerce'', as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act of 1947 (29 U.S.C. 142 (1) and (3)).

COVID–19. The term ''COVID–19'' has the meaning given the term in section 506 of the Coronavirus Preparedness Response Supplemental Appropriations Act, 2020.

EFMLEA. The term ''EFMLEA'' means the Emergency Family and Medical Leave Expansion Act, Division C of the FFCRA.

Employee. The term ''Employee'' has the same meaning given that term in section 3(e) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. 203(e)).

Eligible Employee. For the purposes of the EFMLEA, the term ''Eligible Employee'' means an Employee who has been employed for at least 30 calendar days by the Employer.

Employer:

(i) Subject to paragraph (ii) of this definition, ''Employer'':

(A) Means any person engaged in Commerce or in any industry or activity affecting commerce that:

(*1*) In the case of a private entity or individual, employs fewer than 500 Employees; and

(*2*) In the case of a Public Agency or any other entity that is not a private entity or individual, 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 (within the meaning of such phrase in section 3(d) of the FLSA (29 U.S.C. 203(d));

(*2*) Any successor in interest of an employer;

(*3*) Joint employers as defined under the FLSA, part 791 of this chapter, with respect to certain Employees; and

(*4*) Integrated employers as defined under the Family and Medical Leave Act (FMLA), § 825.104(c)(2) of this chapter.

(C) Includes any Public Agency; and

(D) Includes the Government Accountability Office and the Library of Congress.

(ii) For purposes of the EPSLA, ''Employer'' also specifically identifies the following as an employer:

(A) An entity employing a State Employee described in section 304(a) of the Government Employee Rights Act of 1991;

(B) An employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(C) An employing office, as defined in 3 U.S.C. 411(c); and

(D) An Executive Agency as defined in section 5 U.S.C. 105, and including the U.S. Postal Service and the Postal Regulatory Commission.

EPSLA. The term ''EPSLA'' means the Emergency Paid Sick Leave Act, Division E of the FFCRA.

Expanded Family and Medical Leave. The term ''Expanded Family and Medical Leave'' means paid leave under the EFMLEA.

FFCRA. The term ''FFCRA'' means the Families First Coronavirus Response Act, Public Law 116–127.

FLSA Terms. The terms ''employ'', ''person'', and ''State'' have the meanings given such terms in section 3 of the FLSA (29 U.S.C. 203).

Paid Sick Leave. The term ''Paid Sick Leave'' means paid leave under the EPSLA.

Place of Care. The term ''Place of Care'' means a physical location in which care is provided for the Employee's child while the Employee works for the Employer. The physical location does not have to 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 term ''Public Agency'' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. *See* 29 U.S.C. 203(x); 29 U.S.C. 5110(2)(B)(i)(III). A Public Agency shall be considered to be a person engaged in Commerce or in an industry or activity affecting Commerce. *See* 29 U.S.C. 2611(4)(B); 29 U.S.C. 5110(2)(B)(ii). Whether an entity is a Public Agency, as distinguished from a private Employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official. *See* § 825.108 of this chapter.

Public Health Emergency. The term ''Public Health Emergency'' means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

School. The term ''School'' means an ''elementary school'' or ''secondary school'' as such terms are defined below, in accordance with section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801). ''Elementary school'' means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under State law. ''Secondary school'' means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

Secretary. The term ''Secretary'' means the Secretary of Labor or his or her designee.

Son or Daughter. The term ''Son or Daughter'' has the meaning given such term in section 101 of the FMLA (29 U.S.C. 2611). Accordingly, the term means 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 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.

Subject to a quarantine or isolation order. For the purposes of the EPSLA, 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. The term ''Telework'' means work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace. An Employee is able to Telework if: His or her Employer has work for the Employee; the Employer permits the Employee to work from the

Employee's location; and there are no extenuating circumstances (such as serious COVID–19 symptoms) that prevent the Employee from performing that work. 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 as required by applicable law 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. However, the provisions of § 790.6 of this chapter shall not apply to Employees while they are teleworking for COVID–19 related reasons.

(b) *Effective period.* (1) This part became operational on April 1, 2020, and effective on April 2, 2020.

(2) This part expires on December 31, 2020.

§ 826.20 Paid Leave Entitlements.

(a) *Qualifying reasons for Paid Sick Leave.* (1) An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to any of the following reasons:

(i) The Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19;

(ii) The Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(iii) The Employee is experiencing symptoms of COVID–19 and seeking medical diagnosis from a health care provider;

(iv) The Employee is caring for an individual who is subject to an order as described in this paragraph (a)(1)(i) or directed as described in this paragraph (a)(1)(ii);

(v) The Employee is caring for his or her Son or Daughter whose School or Place of Care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID–19; or

(vi) The Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the Effective Period. This rule became operational on April 1, 2020, and will be effective April 2, 2020, to December 31, 2020.

(2) *Subject to a Quarantine or Isolation Order.* Any Employee Subject to a Quarantine or Isolation Order may take Paid Sick Leave for the reason described in paragraph (a)(1)(i) of this section 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 as a result of the order or other circumstances.

(3) *Advised by a health care provider to self-quarantine.* For the purposes of this section, the term health care provider has the same meaning as that term is defined in § 825.102 of this chapter. An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(ii) of this section 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, either at the Employee's normal workplace or by Telework.

(4) *Seeking medical diagnosis for COVID–19.* An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(iii) of this section if the Employee is experiencing any of the following symptoms:

(i) Fever;

(ii) Dry cough;

(iii) Shortness of breath; or

(iv) Any other COVID–19 symptoms identified by the U.S. Centers for Disease Control and Prevention.

(v) Any Paid Sick Leave taken for the reason described in paragraph (a)(1)(iii) of this subsection is limited to time the Employee is unable to 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.

(5) *Caring for an individual.* For the purpose of paragraph (a)(1)(iv) of this section, ''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. For this purpose, ''individual'' does not include persons with whom the Employee has no personal relationship.

(6) An Employee may not take Paid Sick Leave for the reason described in paragraph (a)(1)(iv) of this section unless, but for a need to care for an individual, 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 an individual may not take Paid Sick Leave where the Employer does not have work for the Employee.

(7) An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(iv) of this section if the Employee is unable to perform work for his or her Employer and if the individual depends on the Employee to care of him or her and is either:

(i) Subject to a Quarantine or Isolation Order as described in paragraph (a)(1)(ii) of this subsection; 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

(C) The individual is particularly vulnerable to COVID–19.

(8) *Caring for a Son or Daughter.* An Employee has a need to take Paid Sick Leave if he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID–19 only if no other suitable person is available to care for the Son or Daughter during the period of such leave.

(9) An Employee may not take Paid Sick Leave to care for his or her Son or Daughter unless, but for a need to care for the Son or Daughter, 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 Expanded Family and Medical Leave.* An Eligible Employee may take Expanded Family and Medical Leave because he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID–19. Eligible Employee has need to take Expanded Family and Medical Leave 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.

(1) An Eligible Employee may not take Expanded Family and Medical Leave to care for his or her Son or Daughter unless, but for a need to care for an individual, the Eligible Employee would be able to perform work for his or her Employer, either at the Eligible Employee's normal workplace or by Telework. An Eligible Employee caring for his or her Son or Daughter may not take Expanded Family and Medical Leave where the Employer does not have work for the Eligible Employee.

(2) [Reserved]

(c) *Impact on FLSA exemptions.* The taking of Paid Sick Leave or Expanded Family and Medical Leave shall not impact an Employee's status or eligibility for any exemption from the requirements of section 6 or 7, or both, of the FLSA.

§ 826.21 Amount of Paid Sick Leave.

(a) *Full-time Employees.* (1) A full-time Employee is entitled to up to 80 hours of Paid Sick Leave.

(2) An Employee is considered to be a full-time Employee under this section if he or she is normally scheduled to work at least 40 hours each workweek.

(3) An Employee who does not have a normal weekly schedule under § 826.21(a)(2) is considered to be a full-time Employee under this section if the average number of hours per workweek that the Employee was scheduled to work, including hours for which the Employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of:

(i) The six-month period ending on the date on which the Employee takes Paid Sick Leave; or

(ii) The entire period of the Employee's employment.

(b) *Part-time Employees.* An Employee who does not satisfy the requirements of § 826.21(a) is considered to be a part-time Employee.

(1) If the part-time Employee has a normal weekly schedule, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to the number of hours that the Employee is normally scheduled to work over two workweeks.

(2) If the part-time Employee lacks a normal weekly schedule under § 826.21(b)(1), the number of hours of Paid Sick Leave to which the Employee is entitled is calculated as follows:

(i) If the part-time Employee has been employed for at least six months, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the average number of hours that the Employee was scheduled to work each calendar day over the six-month period ending on the date on which the Employee takes Paid Sick Leave, including any hours for which the Employee took leave of any type.

(ii) If the part-time Employee has been employed for fewer than six months, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the number of hours the Employee and the Employer agreed to at the time of hiring that the Employee would work, on average, each calendar day. If there is no such agreement, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the average number of hours per calendar day that the Employee was scheduled to work over the entire period of employment, including hours for which the Employee took leave of any type.

§ 826.22 Amount of Pay for Paid Sick Leave.

(a) Subject to § 826.22(c), for each hour of Pick Sick Leave taken by an Employee for qualifying reasons set forth in sections § 826.20(a)(1) through(3), the Employer shall pay the higher of:

(1) The Employee's average regular rate as computed under § 826.25;

(2) The Federal minimum wage to which the Employee is entitled; or

(3) Any State or local minimum wage to which the Employee is entitled.

(b) Subject to § 826.22(c), for each hour of Paid Sick Leave taken by an Employee for qualifying reasons set forth in § 826.20(a)(4) through (6), the Employer shall pay the Employee two-thirds of the amount described in § 826.24(a).

(c) Limitations on payments:

(1) In no event shall an Employer be required to pay more than $511 per day and $5,110 in the aggregate per Employee when an Employee takes Paid Sick Leave for qualifying reasons set forth in sections § 826.20(a)(1) through (3).

(2) In no event shall an Employer be required to pay more than $200 per day and $2,000 in the aggregate per Employee when an Employee takes Paid Sick Leave for qualifying reasons set forth in sections § 826.20(a)(4) through (6).

§ 826.23 Amount of Expanded Family and Medical Leave.

(a) An Eligible Employee is entitled to take up to twelve workweeks of Expanded Family and Medical Leave during the period April 1, 2020 through December 31, 2020.

(b) Any time period of Expanded Family and Medical Leave that an Eligible Employee takes counts towards the twelve workweeks of FMLA leave to which the Eligible Employee is entitled for any qualifying reason in a twelve-month period under § 825.200 of this chapter, *see* § 826.70.

(c) Section 2612(d)(2)(A) of the FMLA shall be applied, provided however, that the Eligible Employee may elect, and the Employer may require the Eligible Employee, to use only leave that would be available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's existing policies, such as personal leave or paid time off. Any leave that an Eligible Employee elects to use or that an Employer requires the Eligible Employee to use would run concurrently with Expanded Family and Medical Leave taken under this section.

§ 826.24 Amount of pay for Expanded Family and Medical Leave.

Subject to § 826.60, after the initial two weeks of Expanded Family and Medical Leave, the Employer shall pay the Eligible Employee two-thirds of the Eligible Employee's average regular rate, as computed under § 826.25, times the Eligible Employee's scheduled number of hours for each day of such leave taken.

(a) In no event shall an Employer be required to pay more than $200 per day and $10,000 in the aggregate per Eligible Employee when an Eligible Employee takes Expanded Family and Medical Leave for up to ten weeks after the initial two-week period of unpaid Expanded Family and Medical Leave.

(b) For the purpose of this section, the ''scheduled number of hours'' is determined as follows:

(1) If the Eligible Employee has a normal work schedule, the number of hours the Eligible Employee is normally scheduled to work on that workday;

(2) If the Eligible Employee has a work schedule that varies to such an extent that an Employer is unable to determine the number of hours the Eligible Employee would have worked on the day for which leave is taken and has been employed for at least six months, the average number of hours the Eligible Employee was scheduled to work each workday, over the six-month period ending on the date on which the Eligible Employee first takes Expanded Family and Medical Leave, including hours for which the Eligible Employee took leave of any type; or

(3) If the Eligible Employee has a work schedule that varies to such an extent that an Employer is unable to determine the number of hours the Eligible Employee would have worked on the day for which leave is taken and

the Eligible Employee has been employed for fewer than six months, the average number of hours the Eligible Employee and the Employer agreed at the time of hiring that the Eligible Employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the Eligible Employee was scheduled to work over the entire period of employment, including hours for which the Eligible Employee took leave of any type.

(c) As an alternative, the amount of pay for Expanded Family and Medical Leave may be computed in hourly increments instead a full day. For each hour of Expanded Family and Medical Leave taken after the first two weeks, the Employer shall pay the Eligible Employee two-thirds of the Eligible Employee's average regular rate, as computed under § 826.25.

(d) Notwithstanding paragraph (a) of this section, if an Eligible Employee elects or is required to use leave available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave, the Employer must pay the Eligible Employee a full day's pay for that day. However, the Employer is capped at taking $200 a day or $10,000 in the aggregate in tax credits for Expanded Family and Medical Leave paid under the EFMLEA.

§ 826.25 Calculating the Regular Rate under the Family First Coronavirus Response Act.

(a) *Average regular rate.* The ''average regular rate'' used to compute pay for Paid Sick Leave and Expanded Family and Medical Leave is calculated as follows:

(1) Use the methods contained in parts 531 and 778 of this chapter to compute the regular rate for each full workweek in which the Employee has been employed over the lesser of:

(i) The six-month period ending on the date on which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave; or

(ii) The entire period of employment.

(2) Compute the average of the weekly regular rates under paragraph (a)(1) of this section, weighted by the number of hours worked for each workweek.

(b) *Calculating the regular rate for commissions, tips, and piece rates.* An Employee's commissions, tips, and piece rates are incorporated into the regular rate for purposes of the FFCRA to the same extent that they are included in the calculation of the regular rate under the FLSA, and § 531.60 and part 778 of this chapter.

§ 826.30 Employee eligibility for leave.

(a) *Eligibility under the EPSLA.* All Employees of an Employer are eligible for Paid Sick Leave under the EPSLA, except as provided in paragraphs (c) and (d) of this section and in § 826.40(b).

(b) *Eligibility under the EFMLEA.* All Employees employed by an Employer for at least thirty calendar days are eligible for Expanded Family and Medical Leave under the EFMLEA, except as provided in paragraphs (c) and (d) in this section and in § 826.40(b).

(1) An Employee is considered to have been employed by an Employer for at least thirty calendar days if:

(i) The Employer had the Employee on its payroll for the thirty calendar days immediately prior to 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 or otherwise reemployed by the Employer on or before December 31, 2020, provided that the Employee had been on the Employer's payroll for thirty or more of the sixty calendar days prior to the date the Employee was laid off or otherwise terminated.

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

(3) An Employee who has been employed by a covered Employer for at least thirty calendar days is eligible for Expanded Family and Medical Leave under the EFMLEA regardless of whether the Employee would otherwise be eligible for leave under the FMLA. Thus, for example, an Employee need not have been employed for 1,250 hours of service and twelve months of employment as otherwise required under the FMLA, *see* § 825.110(a)(1)(2) of this chapter, to be eligible for leave under the EFMLEA.

(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 the EPSLA's Paid Sick Leave requirements and/or the EFMLEA's Expanded Family and Medical Leave requirements.

(1) Health care provider—

(i) For the purposes of this definition Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary 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 definition includes any individual employed by an entity that contracts with any of these 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 the making of COVID–19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID–19.

(iii) Application limited to leave under the EPSLA and the EFMLEA. The definition of ''health care provider'' contained in this subsection applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, and does not otherwise apply for purposes of the FMLA or section 5102(A)(2) of the EPSLA.

(2) Emergency responders—

(i) For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, an emergency responder is 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, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID–19.

(ii) [Reserved]

(d) *Exclusion by OMB.* The Director of the Office of Management and Budget (OMB) has authority to exclude, for good cause, certain U.S. Government Employers with respect to certain categories of Executive Branch Eligible Employees from the requirement to provide paid leave under the EFMLEA. *See* CARES Act section 4605.

(e) The Director of the OMB has authority to exclude certain Employees, for good cause, from the definition of ''Employee'' for purposes of the EPSLA. *See* CARES Act section 4605. The categories of Employees the Director of the OMB has authority to so exclude from EPSLA are:

(1) Federal officers or Employees covered under Title II of the FMLA (which is codified in subchapter V of chapter 63 of title 5 of the United States Code);

(2) Other individuals occupying a position in the civil service (as that term is defined in 5 U.S.C. 2101(1)); and

(3) Employees of a United States Executive Agency, as defined in 5 U.S.C. 105, including the U.S. Postal Service and U.S. Postal Regulatory Commission.

§ 826.40 Employer coverage.

(a) *Private Employers.* Any private entity or individual who employs fewer than 500 Employees must provide Paid Sick Leave and Expanded Family and Medical Leave, except as provided in paragraph (b) of this section or in § 826.30(c).

(1) To determine the number of Employees employed, the Employer must count all full-time and part-time Employees employed within the United States at the time the Employee would take leave. For purposes of this count, every part-time Employee is counted as if he or she were a full-time Employee.

(i) For this purpose, ''within the United States'' means any State within the United States, the District of Columbia, or any Territory or possession of the United States.

(ii) The number of Employees includes:

(A) All Employees currently employed, regardless of how long those Employees have worked for the Employer;

(B) Any Employees on leave of any kind;

(C) Employees of temporary placement agencies who are jointly employed under the FLSA, *see* part 791 of this chapter, by the Employer and another Employer (regardless of which Employer's payroll the Employee appears on); and

(D) Day laborers supplied by a temporary placement agency (regardless of whether the Employer is the temporary placement agency or the client firm).

(iii) The number of Employees does not include workers who are independent contractors, rather than Employees, under the FLSA. Nor does the number of Employees include workers who have been laid off or furloughed and have not subsequently been reemployed.

(2) To determine the number of Employees employed, all common Employees of joint employers or all Employees of integrated employers must be counted together.

(i) Typically, a corporation (including its separate establishments or divisions) is considered a single Employer and all of its Employees must be counted together.

(ii) Where one corporation has an ownership interest in another corporation, the two corporations are separate Employers unless they are joint employers under the FLSA, *see* part 791 of this chapter, with respect to certain Employees.

(iii) In general, two or more entities are separate Employers unless they meet the integrated employer test under the FMLA. *See* § 825.104(c)(2) of this chapter. If two entities are an integrated employer under this test, then Employees of all entities making up the integrated employer must be counted.

(b) *Exemption from requirement to provide leave under the EPSLA Section 5102(a)(5) and the EFMLEA for Employers with fewer than 50 Employees.*

(1) An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

(i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

(ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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 or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

(2) To elect this small business exemption, the Employer must document that a determination has been made pursuant to the criteria set forth by the Department in § 826.40(b)(1). The Employer should not send such documentation to the Department, but rather retain the records in its files.

(3) Regardless of whether a small Employer chooses to exempt one or more Employees, the Employer is still required to post a notice pursuant to § 826.80.

(c) *Public Employers.* (1) Any public Employer must provide its Employees Paid Sick Leave except as provided in § 826.30(c) through (d).

(2) Any public Employer must provide its Eligible Employees Expanded Family and Medical Leave, except as provided in paragraph (c)(3) of this section and in § 826.30(c) through (d).

(3) The EFMLEA amended only Title I of the FMLA, resulting in a divide in coverage as to Employees of the United States and of agencies of the United States (Federal Employees). Federal Employees covered by Title I of the FMLA are eligible for Expanded Family and Medical Leave. But most Federal Employees are instead covered under Title II of the FMLA, which was not amended by the EFMLEA. Such Federal Employees are not within the EFMLEA's purview and are therefore not eligible for Expanded Family and Medical Leave. The Federal Employees covered by Title I of the FMLA are therefore eligible for Expanded Family and Medical Leave, subject to the limitations and exceptions set forth in § 826.30(b) through (d), including:

(i) Employees of the U.S. Postal Service;

(ii) Employees of the U.S. Postal Regulatory Commission;

(iii) Part-time Employees who do not have an established regular tour of duty during the administrative workweek;

(iv) Employees serving under an intermittent appointment or temporary appointment with a time limitation of one year or less;

(v) Employees of the Government Accountability Office;

(vi) Employees of the Library of Congress; and

(vii) Other Federal Employees not covered by Title II of the FMLA.

§ 826.50 Intermittent leave.

(a) *General Rule.* Subject to the conditions and applicable limits, an Employee may take Paid Sick Leave or Expanded Family and Medical Leave intermittently (*i.e.,* in separate periods of time, rather than one continuous period) only if the Employer and Employee agree. The Employer and Employee may memorialize in writing any agreement under this section, but a clear and mutual understanding between the parties is sufficient.

(b) *Reporting to Worksite.* The ability of an Employee to take Paid Sick Leave or Expanded Family and Medical Leave intermittently while reporting to an Employer's worksite depends upon the reason for the leave.

(1) If the Employer and Employee agree, an Employee may take up to the entire portion of Paid Sick Leave or Expanded Family and Medical Leave intermittently to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, because of reasons related to COVID–19. Under such circumstances, intermittent Paid Sick Leave or paid Expanded Family and Medical Leave may be taken in any increment of time agreed to by the Employer and Employee.

(2) An Employee may not take Paid Sick Leave intermittently if the leave is taken for any of the reasons specified in § 826.20(a)(1)(i) through (iv) and (vi). Once the Employee begins taking Paid Sick Leave for one or more of such reasons, the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave.

(c) *Teleworking.* If an Employer directs or allows an Employee to Telework, or the Employee normally works from home, the Employer and Employee may agree that the Employee may take Paid Sick Leave for any qualifying reason or Expanded Family and Medical Leave 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.* If an Employee takes Paid Sick Leave or Expanded Family and Medical Leave intermittently as the Employee and Employer have agreed, only the amount of leave actually taken may be counted toward the Employee's leave entitlements. For example, an Employee who normally works forty hours in a workweek only takes three hours of leave each work day (for a weekly total of fifteen hours) has only taken fifteen hours of the Employee's Paid Sick Leave or 37.5% of a workweek of the Employee's Expanded Family and Medical Leave.

§ 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.

(a) An Eligible Employee who needs leave to care for his or her Son or Daughter whose School or Place of Care is closed, or whose Child Care Provider is unavailable, due to COVID–19 related reasons may be eligible to take leave under both the EPSLA and the EFMLEA. If so, the benefits provided by the EPSLA run concurrently with those provided under the EFMLEA.

(1) *Intersection between the EPSLA and the EFMLEA.* An Eligible Employee may take up to twelve weeks of Expanded Family and Medical Leave to care for his or her Son or Daughter 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; the subsequent weeks are paid under the EFMLEA.

(3) An Employee's prior use of Paid Sick Leave under EPSLA will impact the amount of Paid Sick Leave that remains available to the Employee.

(4) An Eligible Employee who has exhausted his or her twelve workweek FMLA entitlement, *see* § 826.70, is not precluded from taking Paid Sick Leave.

(b) *Supplementing Expanded Family and Medical Leave with other accrued Employer-provided leave.*

(1) Where an Eligible Employee takes Expanded Family and Medical Leave after taking all or part of his or her Paid Sick Leave for a reason other than that provided in § 826.20(a)(1)(v), all or part of the Eligible Employee's first ten days (or first two weeks) of Expanded Family and Medical Leave may be unpaid because the Eligible Employee will have exhausted his or her Paid Sick Leave entitlement.

(2) Under the circumstances in (b)(1) of this section, the Eligible Employee may choose to substitute earned or accrued paid leave provided by the Employer during this period. The term substitute means that the preexisting paid leave provided by the Employer, which has been earned or accrued pursuant to established policies of the Employer, will run concurrently with the unpaid Expanded Family and Medical Leave. Accordingly, the Eligible Employee receives pay pursuant to the Employer's preexisting paid leave policy during the period of otherwise unpaid Expanded Family and Medical Leave.

(3) If the Eligible Employee does not elect to substitute paid leave for unpaid Expanded Family and Medical Leave under the above conditions and circumstances, the Eligible Employee will remain entitled to any paid leave that the Eligible Employee has earned or accrued under the terms of his or her Employer's plan.

§ 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.

(a) Certain employees are entitled to a total of twelve workweeks of FMLA leave in the twelve-month period defined in § 825.200(b) of this chapter for the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job;

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty); and

(6) To care for the Eligible Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, due to COVID–19 related reasons.

(b) If an Eligible Employee has already taken some FMLA leave for reasons (a)(1) through (5) during the twelve-month period, the Eligible Employee may take up to the remaining portion of

the twelve workweek leave for Expanded Family and Medical Leave. If an Eligible Employee has already taken the full twelve workweeks of FMLA leave during the twelve-month period, the Eligible Employee may not take Expanded Family and Medical Leave. An Eligible Employee's entitlement to take up to two weeks of Paid Sick Leave under the EPSLA is not impacted by the Eligible Employee's use of FMLA leave. For example, if an Eligible Employee used his or her full FMLA leave entitlement for birth and bonding with a newborn, he or she would still be entitled to take Paid Sick Leave (for any covered reason), but could not take Expanded Family and Medical Leave in the same twelve-month period if his or her child's day care closed due to COVID–19 related reasons.

(c) If an Eligible Employee takes fewer than twelve weeks of Expanded Family and Medical Leave, the Employee may take up to the remaining portion of the twelve weeks FMLA leave entitlement for reasons described in paragraphs (a)(1) through (5) of this section. For example, if an Eligible Employee takes eight weeks of Expanded Family and Medical Leave to care for his or her Son or Daughter whose School is closed due to COVID–19 related reasons, he or she could take up to four workweeks of unpaid FMLA leave for his or her own serious health condition later in the twelve-month period.

(d) If an employee has taken FMLA leave to care for a covered service member with a serious injury or illness, the remaining FMLA leave entitlement that may be used for Expanded Family and Medical Leave is calculated in accordance with § 825.127(e) of this chapter.

(e) An Eligible Employee can take a maximum of twelve workweeks of Expanded Family and Medical Leave during the period in which the leave may be taken (April 2, 2020 to December 31, 2020) even if that period spans two FMLA leave twelve-month periods. For example, if an Employer's twelve-month period begins on July 1, and an Eligible Employee took seven weeks of Expanded Family and Medical Leave in May and June, 2020, the Eligible Employee could only take up to five additional weeks of Expanded Family and Medical Leave between July 1 and December 31, 2020, even though the first seven weeks of Expanded Family and Medical Leave fell in the prior twelve-month period.

(f) The first two weeks of Expanded Family and Medical Leave may be unpaid and the Eligible Employee may substitute Paid Sick Leave under the EPSLA at two-thirds the Employee's regular rate of pay or accrued paid leave provided by the Employer during this period (see § 826.60). After the first two weeks of leave, Expanded Family and Medical Leave is paid at two-thirds the Eligible Employee's regular rate of pay, up to $200 per day per Eligible Employee. Because this period of Expanded Family and Medical Leave is not unpaid, the FMLA provision for substitution of the Employee's accrued paid leave is inapplicable, and neither the Eligible Employee nor the Employer may require the substitution of paid leave. However, Employers and Eligible Employees may agree, where Federal or state law permits, to have paid leave supplement pay under the EFMLEA so that the Employee receives the full amount of his or her normal pay. For example, an Eligible Employee and Employer may agree to supplement the Expanded Family and Medical Leave by substituting one-third hour of accrued vacation leave for each hour of Expanded Family and Medical Leave. If the Eligible Employee and Employer do not agree to supplement paid leave in the manner described above, the Employee will remain entitled to all the paid leave which is earned or accrued under the terms of the Employer's plan for later use. This option is not available to Federal agencies if such partial leave payment would be contrary to a governing statute or regulation.

§ 826.80 Employer notice.

(a) Every Employer covered by FFCRA's paid leave provisions is required to post and keep posted on its premises, in conspicuous places a notice explaining the FFCRA's paid leave provisions and providing information concerning the procedures for filing complaints of violations of the FFCRA with the Wage and Hour Division.

(b) An Employer may satisfy this requirement by emailing or direct mailing this notice to Employees, or posting this notice on an Employee information internal or external website.

(c) To meet the requirements of paragraph (a) of this section, Employers may duplicate the text of the Department's model notice (WHD 1422 REV 03/20) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Prototypes are available at *www.dol.gov/whd.* Employers furnishing notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(d) This section does not require translation or provision of the notice in languages other than English.

(e) For Employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation. *See* 29 U.S.C. 2619; § 825.300 of this chapter.

§ 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 for any reason other than that described in § 826.20(a)(1)(v). Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case. Nothing in this section precludes an Employee from offering notice to an Employer sooner; the Department encourages, but does not require, Employees to notify Employers about their request for Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable. 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 prior to denying the request for leave.

(2) In any case where an Employee requests leave in order to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, due to COVID–19 related reasons, if that leave was foreseeable, an Employee shall provide the Employer with notice of such Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable. 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 prior to denying the request for leave.

(b) *Timing and delivery of notice.* Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave or Expanded Family and Medical Leave. After the first workday, it will be reasonable for an Employer to require notice as soon as practicable under the facts and circumstances of the particular case. Generally, it will be reasonable for notice to be given by the Employee's spokesperson (*e.g.,* spouse, adult family member, or other responsible party) if the Employee is unable to do so personally.

(c) *Content of notice.* Generally, it will be reasonable for an Employer to require oral notice and sufficient information for an Employer 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.

(d) *Complying with Employer policy.* Generally, it will be reasonable for the Employer 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 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.

(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.

(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.

(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.

(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.*

§ 826.110 Health care coverage.

(a) While an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave, an Employer must maintain the Employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the Employee had been continuously employed during the entire leave period. All Employers covered by the EPSLA or the EFMLEA are subject to the requirement to maintain health coverage. The term ''group health plan'' has the same meaning as under the FMLA (see § 825.102 of this chapter). Maintenance of individual health insurance policies purchased by an Employee from an insurance provider, as described in § 825.209(a) of this chapter, is the responsibility of the Employee.

(b) The same group health plan benefits provided to an Employee prior to taking Paid Sick Leave or Expanded Family and Medical Leave must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. For example, if family member coverage is provided to an Employee, family member coverage must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. Similarly, benefit coverage for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave if provided in an Employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(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 Expanded Family and Medical Leave, 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 Expanded Family and Medical Leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an Employee taking Paid Sick Leave or Expanded Family and Medical Leave. 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 which had been paid by the Employee prior to taking Paid Sick Leave or Expanded Family and Medical Leave. If premiums are raised or lowered, the Employee would be required to pay the new Employee premium contribution on the same terms as other Employees. 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 in accordance with § 825.210(c) of this chapter.

(f) An Employee may choose not to retain group health plan coverage while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. 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, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

(g) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an Employer's obligation to maintain health benefits while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave ceases under this section if and when the employment relationship would have terminated if the Employee had not taken Paid Sick Leave or Expanded Family and Medical Leave (*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.

(a) *Paid Sick Leave.* In accordance with its existing collective bargaining obligations, an Employer signatory to a

multiemployer collective bargaining agreement may satisfy its obligations to provide Paid Sick Leave by making contributions to a multiemployer fund, plan, or other program. Such contributions must be based on the hours of Paid Sick Leave to which each Employee is entitled under the EPSLA according to each Employee's work under the multi-employer collective bargaining agreement.

(b) *Expanded Family and Medical Leave.* In accordance with its existing collective bargaining obligations, an Employer signatory to a multiemployer collective bargaining agreement may satisfy its obligations to provide Expanded Family and Medical Leave by making contributions to a multiemployer fund, plan, or other program. Such contributions must be based on the hours of paid family and medical leave to which each Eligible Employee is entitled under the EFMLEA, according to each Eligible Employee's work under the multiemployer collective bargaining agreement.

(c) *Employee access.* Any multiemployer fund, plan, or program under section (a) or (b) of this section must enable or otherwise allow Employees to secure payments for Paid Sick Leave or Expanded Family and Medical Leave. If the multiemployer fund, plan, or program does not enable or otherwise allow Employees to secure payments for paid leave to which they are entitled under the FFCRA based on their work under the multiemployer collective bargaining agreement, the multiemployer fund, plan, or program does not satisfy the requirements of the FFCRA.

(d) *Alternative means of compliance.* In accordance with its existing collective bargaining obligations, an Employer signatory to a multiemployer collective bargaining agreement may satisfy its obligations to provide Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA by means other than those set forth in paragraph (a) and (b) of this section, provided such means are consistent with its existing bargaining obligations and any applicable collective bargaining agreement.

§ 826.130 Return to work.

(a) *General rule.* On return from Paid Sick Leave or Expanded Family and Medical Leave, an Employee has a right to be restored to the same or an equivalent position in accordance with §§ 825.214 and 825.215 of this chapter.

(b) *Restoration limitations.* Notwithstanding paragraph (a) of this section:

(1) An Employee is not protected from employment actions, such as layoffs, that would have affected the Employee regardless of whether he or she took leave. In order to deny restoration to employment, an Employer must be able to show that an Employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

(2) For leave taken under the EFMLEA, an Employer may deny job restoration to key Eligible Employees, as defined under the FMLA (§ 825.217 of this chapter), 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 twenty-five Eligible Employees may deny job restoration to an Eligible Employee who has taken Expanded Family and Medical Leave if all four of the following conditions exist:

(i) The Eligible 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 Eligible 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 Eligible Employee to a position equivalent to the position the Eligible Employee held when the leave 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 Eligible Employee to an equivalent position fail, the Employer makes reasonable efforts to contact the Eligible 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 related to a Public Health Emergency concludes or the date twelve weeks after the Eligible Employee's leave began.

§ 826.140 Recordkeeping.

(a) An Employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless 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 maintain such information in its records for four years.

(b) An Employer that denies an Employee's request for Paid Sick Leave or Expanded Family and Medical Leave pursuant to § 826.40(b) shall document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years.

(c) In order to claim tax credits from the Internal Revenue Service (IRS), an Employer is advised to maintain the following records for four years:

(1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;

(2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;

(3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;

(4) Copies of the completed IRS Forms 941 that 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 pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. 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.*

§ 826.150 Prohibited acts and enforcement under the EPSLA.

(a) *Prohibited acts.* An Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee took Paid Sick Leave under the EPSLA. Likewise, an Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee has 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.* (1) *Failure to provide Paid Sick Leave.* An Employer who fails to provide its Employee Paid Sick Leave under the EPSLA is considered to have

failed to pay the minimum wage as required by section 6 of the FLSA, 29 U.S.C. 206, and shall be subject to the enforcement provisions set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

(2) *Discharge, discipline, or discrimination.* An Employer who discharges, disciplines, or discriminates against an Employee in the manner described in subsection (a) is considered to have violated section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3), and shall be subject to the enforcement provisions relevant to such violations set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

§ 826.151 Prohibited acts and enforcement under the EFMLEA.

(a) *Prohibited acts.* The prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries described in the FMLA, 29 U.S.C. 2615, apply to Employers with respect to Eligible Employees taking, or attempting to take, leave under the EFMLEA.

(b) *Enforcement.* An Employer who commits a prohibited act described in paragraph (a) of this section shall be subject to the enforcement provisions set forth in section 107 of the FMLA, 29 U.S.C. 2617, and § 825.400 of this chapter, except that an Eligible Employee may file a private action to enforce the EFMLEA only if the Employer is otherwise subject to the FMLA in the absence of EFMLEA.

§ 826.152 Filing a complaint with the Federal Government.

A complaint alleging any violation of the EPSLA and/or the EFMLEA may be filed in person, by mail, or by telephone, with the Wage and Hour Division, U.S. Department of Labor, including at any local office of the Wage and Hour Division. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and/or omissions, with pertinent dates, that are believed to constitute the violation.

§ 826.153 Investigative authority of the Secretary.

(a) *Investigative authority under the EPSLA.* For purposes of the EPSLA, the Secretary has the investigative authority and subpoena authority set forth in sections 9 and 11 of the FLSA, 29 U.S.C. 209, 211.

(b) *Investigative authority under the EFMLEA.* For purposes of EFMLEA, the Secretary has the investigative authority set forth in section 106(a) of the FMLA, 29 U.S.C. 2616(a), and the subpoena authority set forth in section 106(d) of the FMLA, 29 U.S.C. 2616(d).

§ 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 actual use of, Paid Sick Leave under the EPSLA is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit, including regarding Paid Sick Leave, to which the Employee is entitled under any of the following:

(i) Another Federal, State, or local law, except the FMLA as provided in § 826.70;

(ii) A collective bargaining agreement; or

(iii) An Employer policy that existed prior to April 1, 2020.

(2) That an Employee already used any type of leave prior to April 1, 2020, for reasons related to COVID–19 or otherwise, shall not be grounds for his or her Employer to deny him or her Paid Sick Leave and Expanded Family and Medical Leave or for the Employer to delay or postpone the Employee's use of Paid Sick Leave and Expanded Family and Medical Leave. The foregoing is subject to the exception of FMLA leave as provided in § 826.70. An Employer shall permit an Employee to immediately use the Paid Sick Leave and Expanded Family and Medical Leave to which he or she is entitled under the EPSLA and the EFMLEA. However, no Employer is obligated or required to provide, and no Employee has a right or entitlement to receive, any retroactive reimbursement or financial compensation through Paid Sick Leave or Expanded Family and Medical Leave for any unpaid or partially paid leave taken prior to April 1, 2020, even if such leave was taken for COVID–19-reated reasons.

(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 by any:

(i) Other Federal, State, or local law;

(ii) Collective bargaining agreement; or

(iii) Employer policy that existed prior to April 1, 2020.

(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 prior to taking Paid Sick Leave.

(c) *Sequencing of Expanded Family and Medical Leave.* (1) Consistent with section 102(d)(2)(B) of the FMLA, 29 U.S.C. 2612(d)(2)(B), an Eligible Employee may elect to use, or an Employer may require that an Eligible Employee use, provided or accrued leave available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave.

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

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

(f) *One time use.* Any person is limited to a total of 80 hours Paid Sick Leave. An Employee who has taken all such leave and then changes Employers is not entitled to 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 his or her new Employer is covered by the Emergency Paid Sick Leave Act. Such an Employee's Paid Sick Leave would expire upon reaching 80 hours of Paid Sick Leave total, regardless of the Employer providing it, or when the Employee reaches the number of hours of Paid Sick Leave to which he or she is entitled based on a part-time schedule with the new Employer.

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