PROGRAM MATERIALS
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The Families First Coronavirus Response Act: Lawyer's Ethical Responsibilities in a Rapidly Changing Legislative, Administrative, and Judicial Environment

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The Families First Coronavirus Response Act: Lawyer Responsibilities in a Rapidly Changing Legislative, Administrative, and Judicial Environment.

Agenda and Summary of Materials

Time	Topic	Associated Materials	Pages
12:00-12:05	Introduction & Overview		
12:05-12:10	Overview of Ethics Rules	ABA Model Rules & Commentary: 1.1 1.2 1.3 1.4 2.1	3-19
12:10-12:15	The lay of the land – FMLA and Paid Sick Leave Going into 2020	Paid Sick Leave Laws – Northeastern United States 2019 McCarter Alert 3-28-2014 McCarter Alert 11-13-2017	20-29
12:15-12:20	The Pandemic Hits Pre-FFCRA advice; Hypothetical Discussion # 1	Hypothetical Client Scenario	1-2
12:25-12:30	Families First Coronavirus Response Act (FFCRA)	Relevant Text of FFCRA McCarter Alert 3-19-2020	30-56

12:30-12:35	Department of Labor regulations on Emergency Paid Sick Leave & FMLA Expansion Act	Text of Regulations McCarter Alert 4-6-2020 McCarter Alert 4-14-2020	57-95
12:35-12:40	Hypothetical Discussion #2		1-2
12:40-12:45	Court Challenge to Regulations	*New York v. US Department of Labor* (8/5/2020) McCarter Alert 8-5-2020	96-125
12:45-12:50	Hypothetical Discussion #3		1-2
12:50-12:55	New Emergency Regulations	Text of new Emergency Regulations	126-140
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The Families First Coronavirus Response Act: Lawyer Responsibilities in a Rapidly Changing Legislative, Administrative, and Judicial Environment

Hypothetical Client Situation for Discussion

You are a lawyer in private practice. One of your steady clients, Consolidated Hypothetical Corporation (CHC), imports, sells, and services precision devices used in certain medical procedures and in the aerospace industry.

CHC employs 400 workers in three locations in the Northeastern United States: 100 employees in Connecticut, 240 employee in Massachusetts, and 60 employees in New Jersey.

Over the past several years, you have worked with CHC on a regular basis, advising the Company on, among other things, its personnel policies. You most recently updated CHC's Employee Policy Manual in August, 2019, and it contains up to date policies on employee leaves of absence and sick time that comply with federal law and the laws of Connecticut, Massachusetts, and New Jersey.

Over the years, CHC has complained to you that several of its employees seem to be taking advantage of the generous time off provided under the Company policies. Many of the employees have specifically specialized skills that are difficult and time consuming to learn and to train others to perform. The employees are highly paid for those skills, and CHC has expressed frustration at the interference with operations that happens when these highly skilled employees do not report to work for one reason or another. The Company is not shy about increasing employee pay, but has been clear to you that with regard to time off from work, their goal is to provide the minimum incentive required by law for employees to take time away from work.

As the COVID-19 pandemic hits in February and March of 2020, CHC is deemed an essential business under state and federal shutdown guidelines and continues to operate at full capacity. The demand for its products, particularly those used in medical procedures, is high. CHC has a dedicated employee safety department that makes sure the workplace exceeds all state and CDC guidelines for masking, social distancing, and cleaning the facility.

Your contact at CHC reaches out to you to get a good understanding of the circumstances under which the Company must permit employees to take time away from work, with the understanding that CHC's goal remains the same – it wants as many people showing up to work as possible, without violating any legal requirements.

We will address this scenario at four junctures:

- March 15, 2020 – before passages of the FFCRA
- April 30, 2020 – After FFCRA and accompanying regulations
- August 15, 2020 – After Federal Court decision on regulations
- September 30, 2020 – After revised regulations

Rule 1.1: Competence

Share this:

Client-Lawyer Relationship

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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Rule 1.1 Competence - Comment

Client-Lawyer Relationship

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in

continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

Client-Lawyer Relationship

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Rule 1.2 Scope of Representation And Allocation of Authority Between Client And Lawyer - Comment

Client-Lawyer Relationship

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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Rule 1.3: Diligence

Share this:

Client-Lawyer Relationship

A lawyer shall act with reasonable diligence and promptness in representing a client.

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Rule 1.3 Diligence - Comment

Client-Lawyer Relationship

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial

or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

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Rule 1.4: Communications

Client-Lawyer Relationship

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Rule 1.4 Communication - Comment

Client-Lawyer Relationship

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's

staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules

or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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Rule 2.1: Advisor

Counselor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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Rule 2.1 Advisor - Comment

Counselor

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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Paid Sick Leave – 2019 – Northeastern US

Jurisdiction	# of Employees	Amount of Paid Sick Leave	Type of Employees	Notice Requirements
Washington, DC (2008)	1 or more	Varies with # of employees	Some exclusions	Post notice
Philadelphia (2015)	10 or more	1 hour per every 40 hours worked	All	"Notification of Rights"
New Jersey (2018)	All	1 hour per 30 hours worked, cap of 40 per year	All	Posting & Handbook
New York City (2014)	5 or more	1 hour per 30 hours worked, cap of 40 per year	All	Posting & Handbook
Westchester County (2018)	5 or more	1 hour per 30 hours worked, cap of 40 per year	All	Posting & Handbook
Connecticut (2011)	50 or more	1 hour per every 40 hours worked	"Service Workers"	Posting
Massachusetts (2015)	11 or more	40 hours per year		Posting and Individual Notice

1

Paid Family/Medical Leave – 2019 – Northeastern US

Jurisdiction	Date Benefits Effective	Benefit Structure	Funding Source
Washington, DC	July 1, 2020	Universal Paid Leave	Employers contribute 0.62% of wages of covered -ees
New Jersey	Present	Temporary Disability Insurance Paid Family Leave	Shared between employers and employees
New York	Present	Temporary Disability Insurance Paid Family Leave	Shared (different funding for TDI and PFL
Connecticut	January, 2022	Family and Medical Leave	Workers contributes 0.5% of wages
Massachusetts	July 1, 2021	Family and Medical Leave	Shared between employers and employees

Statutes, Regulations & Cases for Paid Sick Leave

- Conn. Gen. Stat. §§ 31-57r – 31-57w
- Mass. Gen. Laws c. 149 §148C & 940 Code Mass.Regs 33.00
- N.J.S.A. 34:11D-1 through 11D-11
- New York City Administrative Code §§20-911 through 20-925 and Rules of the City of New York §§7.01 through 7-17

Statutes, Regulations & Cases for Paid Sick Leave (cont.)

- Westchester Code of Ordinances Sec. 585.01 et seq.
- Philadelphia Code Chapter 9-4100
- Code of the District of Columbia § 32-531.02

Statutes, Regulations & Cases for Paid Family Medical Leave

- R.I. Gen. Laws § 28-39-1 *et seq.*
- Cal. Unemp. Ins. Code § 2601 *et seq.* [3] N.J. Stat. Ann. § 43:21-25 *et seq.*
- N.J. Stat. Ann. § 43:21-25 *et seq.*
- N.Y. Workers' Comp. Law § 200 *et seq.*
- D.C. Code Ann. § 32-541.01 *et seq.*
- Wash. Rev. Code *et seq.* 50A.04.005.
- Conn. Legis. Serv. P.A. 19-25 (S.B. 1)
- Or. Enrolled House Bill 2005 (HB 2005-B).

McCarter & English

New Paid Sick Time Mandates in New York & New Jersey

M&E Labor & Employment Alert

03.28.2014

A new patchwork of local laws in the New York/New Jersey metro area guaranteeing employees paid or unpaid accrued sick time will complicate employers' sick leave policies and practices. New York City, Jersey City and Newark have each enacted mandates for private employers to provide their employees with accrued paid or unpaid sick time on an annual basis starting this year. The new sick leave laws grant rights to time off from work and protection against retaliation, including discipline or discharge, that are in many ways broader than what is required under the federal Family and Medical Leave Act.

In light of these new laws, employers with employees in New York City, Jersey City or Newark should review their existing sick leave policies and make any necessary changes to conform to the new mandates outlined below, particularly as to accrual and carryover requirements, as well as to the use of "sick time" for absences that are not technically related to an employee's illness (e.g., the closing of the workplace or a child's school due to a public health emergency). In addition, employers subject to the new laws must be sure to comply with the requirement to provide written notice to employees of their sick leave rights and display the required posters in conspicuous locations within their workplaces, as well as adhere to the newly created record-keeping requirements to document their compliance with these local laws.

In the coming year, the trend toward mandating the provision of sick time can be expected to continue in other cities and states.

New York City Earned Sick Time Act

In May 2013, the New York City Council passed the Earned Sick Time Act over then-Mayor Bloomberg's veto. It states that "all employees have the right to sick time" and requires all private employers to provide sick time to employees working in New York City (as reported in our July 2013 Client Alert, available here). In February 2014, before the Act even took effect, the City Council amended and significantly expanded its reach. The amended Act was signed by Mayor de Blasio on March 20, 2014.

- The Act will take effect for most New York City employers on **April 1, 2014**. For those employees covered by a current collective bargaining agreement, the Act will take effect on the date of the CBA's expiration.
- Employers with **5 or more employees** (or at least 1 domestic worker) in New York City must provide accrued paid sick time under the Act. Employers with **fewer than 5 employees**, while not required to provide paid sick time, must provide accrued unpaid sick time to their New York City employees.
- With limited exceptions, any employee who is employed for **more than 80 hours** per year on a full-time, part-time or temporary basis is entitled to accrued sick time.

- Sick time must accrue at a rate of not less than **1 hour for every 30 hours worked**, up to a total of 40 hours for the year (defined as a regular and consecutive 12-month period designated by the employer). An exempt employee is presumed to work a 40-hour week for this purpose, unless his or her regular workweek is less than 40 hours.
- An employee **begins to accrue sick leave at the start of employment** (or April 1, 2014, for current employees) but may not use it until the 120th day thereafter.
- An employee **may use accrued sick time** for absences (1) due to the employee's own illness, medical treatment or preventive care; (2) to care for a family member's illness, treatment or preventive care; or (3) due to the closing of the employee's workplace or a child's school due to a public health emergency declared by city officials. "**Family member**" includes the employee's child, spouse, domestic partner, parent, sibling (including half-sibling, step-sibling and sibling by adoption), grandchild or grandparent, or the child or parent of the employee's spouse or domestic partner.
- Paid sick time must be compensated at not less than **the same regular hourly wage rate** as the employee earns at the time the employee uses such time.
- An **employer may require advance notice** of not more than 1 week when the use of sick time is foreseeable, or notice as soon as practicable when not foreseeable. For an absence of **more than 3 consecutive days**, the employer may require a doctor's note. An employer may require that sick time be used in **increments of not more than 4 hours**.
- An employee shall **carry over unused accrued sick time** into the following year, but the employer need not allow the use by an employee of more than 40 hours of sick time in any year. An employee is **not entitled to be paid for unused accrued sick time** upon termination of employment for any reason.
- An employer that provides its employees with **paid leave, including paid time off (PTO), paid vacation or paid personal days**, sufficient to meet the accrual requirements of the Act, and that allows use of such leave for the same purposes and under the same conditions as required under the Act, is not required to provide additional paid sick time.
- The provisions of the Act may be **expressly waived in a collective bargaining agreement** if the CBA provides for a comparable benefit in the form of paid time off.
- By **May 1, 2014**, all current employees must receive written notice of their right to sick time, including the accrual and use of sick time, the employer's defined year, the right to be free from retaliation, and the right to file a complaint with the New York City Department of Consumer Affairs (DCA). Such notice must also be provided to all new hires. Please click here (link no longer available) to view DCA's model "Notice of Employee Rights."
- Employers must **retain records** of employees' accrual and use of sick time for 3 years.

Jersey City Earned Sick Time Ordinance

On January 24, 2014, Jersey City's Earned Sick Time Ordinance took effect. (For employees covered by a current CBA, the effective date is the CBA's date of termination.) The Jersey City Ordinance is similar in many respects to the New York City Earned Sick Time Act.

- Employers with **10 or more employees** in Jersey City must provide accrued paid sick time under the Act. Employers with **fewer than 10 employees** must provide accrued unpaid sick time to their Jersey City employees.
- As in NYC, with limited exceptions, any employee who is employed for **more than 80 hours** per year on a full-time, part-time or temporary basis in Jersey City is entitled to accrued sick time.
- The rate of accrual under the Jersey City Ordinance is the same as under the New York City Act (**1 hour for every 30 hours worked**, up to a total of 40 hours for the year).
- An employee **begins to accrue sick leave at the start of employment** (or January 24, 2014, for existing employees) but may not use it until the 90th day thereafter.
- An employee may use accrued sick time under the Jersey City Ordinance for the same types of absences as under the New York City Act.

- An employer may require use of accrued sick time in hourly increments or the smallest increment that the employer's payroll system uses for absences or other use of time.
- An employee shall carry over **unused accrued sick time** into the following year, but the employer may cap the carryover at 40 hours and need not allow the use by an employee of more than 40 hours of sick time in any year. An employee is **not entitled to be paid for unused accrued sick time** upon termination of employment for any reason.
- An employer that provides **paid leave, including paid time off (PTO), paid vacation or paid personal days**, sufficient to meet the accrual and use requirements of the Jersey City Ordinance is not required to provide additional paid sick time.
- Employers are required to maintain records for a period of 3 years documenting their compliance with the Jersey City Ordinance.
- By January 24, 2014, employers were required to provide all current employees with **written notice of their right to sick leave**, including the accrual rate, amount and use of sick time; the right to be free from retaliation; and the right to file a complaint with the Jersey City Department of Health and Human Services or bring a civil action if sick time is denied or the employee suffers retaliation for requesting or taking paid sick time. Such notice must also be provided to all new hires. All notices must be given in English, or, if the employee's primary language is other than English, the notice must be given in that language if the Department has made the notice available in that language.
- A **notice of rights poster** must be conspicuously posted in the workplace in English and in any language that is the first language of at least 10% of the employer's workforce if the Department has made posters available in that language.

Newark Paid Sick Leave Ordinance
The City of Newark's Paid Sick Leave Ordinance will take effect on **May 29, 2014** (or, for employees covered by a current CBA, the CBA's date of termination).

- Employers with **10 or more employees** in Newark (whether full-time, part-time or temporary) must provide up to **40 hours of paid sick leave per year** to each employee. Employers with fewer than 10 employees in Newark must provide up to **24 hours of paid sick leave per year** to each employee.
- **Child care, home health care and food service workers** are entitled to accrue up to 40 hours of paid sick leave per year, regardless of the size of the employer's workforce.
- Any employee who works in the city of Newark for **at least 80 hours in a year** is entitled to sick leave under the Newark Ordinance.
- As under the NYC and Jersey City laws, paid sick leave under the Newark Ordinance must accrue at a minimum rate of **1 hour for every 30 hours worked**.
- As in Jersey City, employees begin to accrue sick leave at the start of employment but may not use accrued sick leave until the 90th day of employment.
- An employee may use accrued sick time under the Newark Ordinance for the same types of absences as under the New York City and Jersey City laws.
- A Newark employer may require that accrued sick time be taken in **minimum increments of 1 day**.
- The **carryover** rules are the same as under the Jersey City Ordinance, and an employee is also **not entitled to be paid for unused accrued sick time** upon termination of employment for any reason.
- As under the Jersey City Ordinance, an employer that provides **paid leave, including paid time off (PTO), paid vacation or paid personal days**, sufficient to meet the accrual and use requirements of the Newark Ordinance is not required to provide additional paid sick time.
- By May 29, 2014, all current employees must be provided with **written notice** of their right to paid sick leave; the accrual rate, amount and terms of use of paid sick leave; the right to be free from retaliation; and the right to file a complaint with the Newark Department of Child and Family Well-Being or to bring an action in municipal court for denials of paid sick leave or retaliation for the request or use of paid sick leave. Employers must also provide such notice to all new hires. The

notice must be in English and the primary language spoken by the employee if the language is also the primary language of at least 10% of the employer's workforce.

- A **notice of rights poster** must be posted in a conspicuous and accessible place in the workplace in English and any language that is the first language of at least 10% of the employer's workforce. The Department is authorized to create posters in English and other languages and then make them available to employers. As of the date of this Alert, the Department had not yet made those posters available to the public.
- Employers are required to maintain records for a period of 3 years documenting their compliance with the Newark Ordinance.
- The requirements of the Newark Ordinance may be expressly waived in a collective bargaining agreement.

McCarter & English

New York City Adds "Safe Time" to Paid Sick Leave Law

Labor & Employment Alert

11.13.2017

Related People:
Craig M. Bonnist

New York City employers will need to extend safe time leave to employees who are victims of domestic violence, sexual assault, stalking or human trafficking following the recent expansion of the paid sick leave law that will take effect on May 5, 2018 (180 days after the law was passed). Under the renamed Earned Safe and Sick Time Act, employees may take safe time leave when they or their family members are victims of such crimes, and they need time to receive, or help a family member obtain, health or legal services related to the abuses. The law does not increase the amount of time employees may accrue for paid leave but rather adds to the reasons paid leave may be taken. The law also expands the definition of "family member" to include persons who are so closely associated with the employee as to be equivalent to a family member.

Employers must continue to give employees notice of their rights under the law. Where employers have already given employees notice of their paid sick leave rights, additional notice of the expanded right to safe time will have to be given within 30 days of the new act's effective date. Employers may still require up to seven days' advance notice for foreseeable leave, or as soon as practicable for unforeseeable leave, and may require documentation regarding the events giving rise to the leave.

U.S. GOVERNMENT INFORMATION GPO

PUBLIC LAW 116–127—MAR. 18, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Public Law 116–127
116th Congress

An Act

Mar. 18, 2020
[H.R. 6201]

Making emergency supplemental appropriations for the fiscal year ending September 30, 2020, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Families First Coronavirus Response Act. 29 USC 2601 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Families First Coronavirus Response Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

Second Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020.

DIVISION A—SECOND CORONAVIRUS PREPAREDNESS AND RESPONSE SUPPLEMENTAL APPROPRIATIONS ACT, 2020

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2020, and for other purposes, namely:

the food security needs of affected populations during the emergency, any information or data supporting State agency requests, any additional measures that States requested that were not approved, and recommendations for changes to the Secretary's authority under the Food and Nutrition Act of 2008 to assist the Secretary and States and localities in preparations for any future health emergencies.

DIVISION C—EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Emergency Family and Medical Leave Expansion Act.

SEC. 3101. SHORT TITLE.

29 USC 2601 note.

This Act may be cited as "Emergency Family and Medical Leave Expansion Act".

SEC. 3102. AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

(a) PUBLIC HEALTH EMERGENCY LEAVE.—

(1) IN GENERAL.—Section 102(a)(1) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)(1)) is amended by adding at the end the following:

"(F) During the period beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section 110.".

Time period.

(2) PAID LEAVE REQUIREMENT.—Section 102(c) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(c)) is amended by striking "under subsection (a)" and inserting "under subsection (a) (other than certain periods of leave under subsection (a)(1)(F))".

(b) REQUIREMENTS.—Title I of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.) is amended by adding at the end the following:

"SEC. 110. PUBLIC HEALTH EMERGENCY LEAVE.

29 USC 2620.

"(a) DEFINITIONS.—The following shall apply with respect to leave under section 102(a)(1)(F):

Applicability.

"(1) APPLICATION OF CERTAIN TERMS.—The definitions in section 101 shall apply, except as follows:

"(A) ELIGIBLE EMPLOYEE.—In lieu of the definition in sections 101(2)(A) and 101(2)(B)(ii), the term 'eligible employee' means an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested under section 102(a)(1)(F).

"(B) EMPLOYER THRESHOLD.—Section 101(4)(A)(i) shall be applied by substituting 'fewer than 500 employees' for '50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year'.

"(2) ADDITIONAL DEFINITIONS.—In addition to the definitions described in paragraph (1), the following definitions shall apply with respect to leave under section 102(a)(1)(F):

"(A) QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY.—The term 'qualifying need related to a public health emergency', with respect to leave, means the

employee is unable to work (or telework) due to 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.

"(B) PUBLIC HEALTH EMERGENCY.—The term 'public health emergency' means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

"(C) CHILD CARE PROVIDER.—The term 'child care provider' means a provider who receives compensation for providing child care services on a regular basis, including an 'eligible child care provider' (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

"(D) SCHOOL.—The term 'school' means an 'elementary school' or 'secondary school' as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

"(3) REGULATORY AUTHORITIES.—The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

"(A) to exclude certain health care providers and emergency responders from the definition of eligible employee under section 110(a)(1)(A); and

"(B) to exempt small businesses with fewer than 50 employees from the requirements of section 102(a)(1)(F) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

"(b) RELATIONSHIP TO PAID LEAVE.—

"(1) UNPAID LEAVE FOR INITIAL 10 DAYS.—

"(A) IN GENERAL.—The first 10 days for which an employee takes leave under section 102(a)(1)(F) may consist of unpaid leave.

"(B) EMPLOYEE ELECTION.—An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave under section 102(a)(1)(F) in accordance with section 102(d)(2)(B).

"(2) PAID LEAVE FOR SUBSEQUENT DAYS.—

"(A) IN GENERAL.—An employer shall provide paid leave for each day of leave under section 102(a)(1)(F) that an employee takes after taking leave under such section for 10 days.

"(B) CALCULATION.—

"(i) IN GENERAL.—Subject to clause (ii), paid leave under subparagraph (A) for an employee shall be calculated based on—

"(I) an amount that is not less than two-thirds of an employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)); and

"(II) the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)).

"(ii) CLARIFICATION.—In no event shall such paid leave exceed $200 per day and $10,000 in the aggregate.

"(C) VARYING SCHEDULE HOURS CALCULATION.—In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave under section 102(a)(1)(F), the employer shall use the following in place of such number:

Time period.

"(i) Subject to clause (ii), a number equal to 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 such leave, including hours for which the employee took leave of any type.

"(ii) If the employee did not work over such period, 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.

"(c) NOTICE.—In any case where the necessity for leave under section 102(a)(1)(F) for the purpose described in subsection (a)(2)(A)(iii) is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.

"(d) RESTORATION TO POSITION.—

"(1) IN GENERAL.—Section 104(a)(1) shall not apply with respect to an employee of an employer who employs fewer than 25 employees if the conditions described in paragraph (2) are met.

"(2) CONDITIONS.—The conditions described in this paragraph are the following:

"(A) The employee takes leave under section 102(a)(1)(F).

"(B) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer—

"(i) that affect employment; and

"(ii) are caused by a public health emergency during the period of leave.

"(C) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

"(D) If the reasonable efforts of the employer under subparagraph (C) fail, the employer makes reasonable efforts during the period described in paragraph (3) to contact the employee if an equivalent position described in subparagraph (C) becomes available.

"(3) CONTACT PERIOD.—The period described under this paragraph is the 1-year period beginning on the earlier of—

"(A) the date on which the qualifying need related to a public health emergency concludes; or

"(B) the date that is 12 weeks after the date on which the employee's leave under section 102(a)(1)(F) commences.".

29 USC 2620 note.

SEC. 3103. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under section 110(b)(2) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act, by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

29 USC 2620 note.

SEC. 3104. SPECIAL RULE FOR CERTAIN EMPLOYERS.

An employer under 110(a)(B) shall not be subject to section 107(a) for a violation of section 102(a)(1)(F) if the employer does not meet the definition of employer set forth in Section 101(4)(A)(i).

29 USC 2620 note.

SEC. 3105. SPECIAL RULE FOR HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made under of section 3102 of this Act.

29 USC 2620 note.

SEC. 3106. EFFECTIVE DATE.

This Act shall take effect not later than 15 days after the date of enactment of this Act.

DIVISION D—EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020

Emergency Unemployment Insurance Stabilization and Access Act of 2020.

42 USC 1305 note.

SEC. 4101. SHORT TITLE.

This division may be cited as the "Emergency Unemployment Insurance Stabilization and Access Act of 2020".

SEC. 4102. EMERGENCY TRANSFERS FOR UNEMPLOYMENT COMPENSATION ADMINISTRATION.

(a) IN GENERAL.—Section 903 of the Social Security Act (42 U.S.C. 1103) is amended by adding at the end the following:

SEC. 4105. FULL FEDERAL FUNDING OF EXTENDED UNEMPLOYMENT COMPENSATION FOR A LIMITED PERIOD.

26 USC 3304 note.

(a) IN GENERAL.—In the case of sharable extended compensation and sharable regular compensation paid for weeks of unemployment beginning after the date of the enactment of this section and before December 31, 2020 (and only with respect to States that receive emergency administration grant funding under clauses (i) and (ii) of section 903(h)(1)(C) of the Social Security Act (42 U.S.C. 1102(h)(1)(C))), section 204(a)(1) of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note) shall be applied by substituting "100 percent of" for "one-half of".

Applicability.

(b) TEMPORARY FEDERAL MATCHING FOR THE FIRST WEEK OF EXTENDED BENEFITS FOR STATES WITH NO WAITING WEEK.—With respect to weeks of unemployment beginning after the date of the enactment of this Act and ending on or before December 31, 2020, subparagraph (B) of section 204(a)(2) of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note) shall not apply.

(c) DEFINITIONS.—For purposes of this section—

(1) the terms "sharable extended compensation" and "sharable regular compensation" have the respective meanings given such terms under section 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and

(2) the term "week" has the meaning given such term under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970.

(d) REGULATIONS.—The Secretary of Labor may prescribe any operating instructions or regulations necessary to carry out this section.

DIVISION E—EMERGENCY PAID SICK LEAVE ACT

Emergency Paid Sick Leave Act.

SEC. 5101. SHORT TITLE.

29 USC 2601 note.

This Act may be cited as the "Emergency Paid Sick Leave Act".

SEC. 5102. PAID SICK TIME REQUIREMENT.

29 USC 2601 note.

(a) IN GENERAL.—An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.

(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter

has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

Consultation.

(6) 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.

Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

(b) DURATION OF PAID SICK TIME.—

(1) IN GENERAL.—An employee shall be entitled to paid sick time for an amount of hours determined under paragraph (2).

(2) AMOUNT OF HOURS.—The amount of hours of paid sick time to which an employee is entitled shall be as follows:

(A) For full-time employees, 80 hours.

(B) For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

(3) CARRYOVER.—Paid sick time under this section shall not carry over from 1 year to the next.

(c) EMPLOYER'S TERMINATION OF PAID SICK TIME.—Paid sick time provided to an employee under this Act shall cease beginning with the employee's next scheduled workshift immediately following the termination of the need for paid sick time under subsection (a).

(d) PROHIBITION.—An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

(e) USE OF PAID SICK TIME.—

(1) IN GENERAL.—The paid sick time under subsection (a) shall be available for immediate use by the employee for the purposes described in such subsection, regardless of how long the employee has been employed by an employer.

(2) SEQUENCING.—

(A) IN GENERAL.—An employee may first use the paid sick time under subsection (a) for the purposes described in such subsection.

(B) PROHIBITION.—An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under subsection (a).

29 USC 2601 note.

SEC. 5103. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in this Act.

Public information.

(b) MODEL NOTICE.—Not later than 7 days after the date of enactment of this Act, the Secretary of Labor shall make publicly available a model of a notice that meets the requirements of subsection (a).

29 USC 2601 note.

SEC. 5104. PROHIBITED ACTS.

It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—

(1) takes leave in accordance with this Act; and

(2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.

SEC. 5105. ENFORCEMENT. 29 USC 2601 note.

(a) UNPAID SICK LEAVE.—An employer who violates section 5102 shall—

(1) be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

(b) UNLAWFUL TERMINATION.—An employer who willfully violates section 5104 shall—

(1) be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

SEC. 5106. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS. 29 USC 2601 note.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under this Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified under section 5102(a).

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for the uses specified in section 5102(a).

SEC. 5107. RULES OF CONSTRUCTION. 29 USC 2601 note.

Nothing in this Act shall be construed—

(1) to in any way diminish the rights or benefits that an employee is entitled to under any—

(A) other Federal, State, or local law;

(B) collective bargaining agreement; or

(C) existing employer policy; or

(2) to require financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for paid sick time under this Act that has not been used by such employee.

29 USC 2601 note.

SEC. 5108. EFFECTIVE DATE.

This Act, and the requirements under this Act, shall take effect not later than 15 days after the date of enactment of this Act.

29 USC 2601 note.

SEC. 5109. SUNSET.

This Act, and the requirements under this Act, shall expire on December 31, 2020.

29 USC 2601 note.

SEC. 5110. DEFINITIONS.

For purposes of the Act:

(1) EMPLOYEE.—The terms "employee" means an individual who is—

(A)(i) an employee, as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under subparagraph (E) or (F), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a reference to an employer described in clauses (i)(I) and (ii) of paragraph (5)(A); or

(ii) an employee of the Government Accountability Office;

(B) a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a));

(C) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), other than an applicant for employment;

(D) a covered employee, as defined in section 411(c) of title 3, United States Code;

(E) a Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code; or

(F) any other individual occupying a position in the civil service (as that term is defined in section 2101(1) of title 5, United States Code).

(2) EMPLOYER.—

(A) IN GENERAL.—The term "employer" means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under subclause (V);

(II) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

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

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an Executive Agency as defined in section 105 of title 5, United States Code, and including the U.S. Postal Service and the Postal Regulatory Commission; and

(ii) engaged in commerce (including government), or an industry or activity affecting commerce (including government), as defined in subparagraph (B)(iii).

(B) COVERED EMPLOYER.—

(i) IN GENERAL.—In subparagraph (A)(i)(I), the term "covered employer"—

(I) means any person engaged in commerce or in any industry or activity affecting commerce that—

(aa) in the case of a private entity or individual, employs fewer than 500 employees; and

(bb) in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees;

(II) includes—

(aa) includes 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 Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)); and

(bb) any successor in interest of an employer;

(III) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(IV) includes the Government Accountability Office and the Library of Congress.

(ii) PUBLIC AGENCY.—For purposes of clause (i)(IV), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(iii) DEFINITIONS.—For purposes of this subparagraph:

(I) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" means 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)).

(II) EMPLOYEE.—The term "employee" has the same meaning given such term in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)).

(III) PERSON.—The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(3) FLSA TERMS.—The terms "employ" and "State" have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(4) FMLA TERMS.—The terms "health care provider" and "son or daughter" have the meanings given such terms in section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611).

(5) PAID SICK TIME.—

(A) IN GENERAL.—The term "paid sick time" means an increment of compensated leave that—

(i) is provided by an employer for use during an absence from employment for a reason described in any paragraph of section 2(a); and

(ii) is calculated based on the employee's required compensation under subparagraph (B) and the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)), except that in no event shall such paid sick time exceed—

(I) $511 per day and $5,110 in the aggregate for a use described in paragraph (1), (2), or (3) of section 5102(a); and

(II) $200 per day and $2,000 in the aggregate for a use described in paragraph (4), (5), or (6) of section 5102(a).

(B) REQUIRED COMPENSATION.—

(i) IN GENERAL.—Subject to subparagraph (A)(ii), the employee's required compensation under this subparagraph shall be not less than the greater of the following:

(I) The employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)).

(II) The minimum wage rate in effect under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)).

(III) The minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed.

(ii) SPECIAL RULE FOR CARE OF FAMILY MEMBERS.—Subject to subparagraph (A)(ii), with respect to any paid sick time provided for any use described in paragraph (4), (5), or (6) of section 5102(a), the employee's required compensation under this subparagraph shall be two-thirds of the amount described in clause (B)(i).

(C) VARYING SCHEDULE HOURS CALCULATION.—In the case of a part-time employee described in section 5102(b)(2)(B) whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time under section 2(a), the employer shall use the following in place of such number:

Time period.

(i) Subject to clause (ii), a number equal to 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, including hours for which the employee took leave of any type.

(ii) If the employee did not work over such period, 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.

(D) GUIDELINES.—Not later than 15 days after the date of the enactment of this Act, the Secretary of Labor

shall issue guidelines to assist employers in calculating the amount of paid sick time under subparagraph (A).

(E) REASONABLE NOTICE.—After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

SEC. 5111. REGULATORY AUTHORITIES.

29 USC 2601 note.

The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

(1) to exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out;

(2) to exempt small businesses with fewer than 50 employees from the requirements of section 5102(a)(5) when the imposition of such requirements would jeopardize the viability of the business as a going concern; and

(3) as necessary, to carry out the purposes of this Act, including to ensure consistency between this Act and Division C and Division G of the Families First Coronavirus Response Act.

DIVISION F—HEALTH PROVISIONS

SEC. 6001. COVERAGE OF TESTING FOR COVID–19.

42 USC 1320b–5 note. Effective date.

(a) IN GENERAL.—A group health plan and a health insurance issuer offering group or individual health insurance coverage (including a grandfathered health plan (as defined in section 1251(e) of the Patient Protection and Affordable Care Act)) shall provide coverage, and shall not impose any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements, for the following items and services furnished during any portion of the emergency period defined in paragraph (1)(B) of section 1135(g) of the Social Security Act (42 U.S.C. 1320b–5(g)) beginning on or after the date of the enactment of this Act:

(1) In vitro diagnostic products (as defined in section 809.3(a) of title 21, Code of Federal Regulations) for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19 that are approved, cleared, or authorized under section 510(k), 513, 515 or 564 of the Federal Food, Drug, and Cosmetic Act, and the administration of such in vitro diagnostic products.

(2) Items and services furnished to an individual during health care provider office visits (which term in this paragraph includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described in paragraph (1), but only to the extent such items and services relate to the furnishing or administration of such product or to the evaluation of such individual for purposes of determining the need of such individual for such product.

SEC. 6010. CLARIFICATION RELATING TO SECRETARIAL AUTHORITY REGARDING MEDICARE TELEHEALTH SERVICES FURNISHED DURING COVID–19 EMERGENCY PERIOD.

Paragraph (3)(A) of section 1135(g) of the Social Security Act (42 U.S.C. 1320b–5(g)) is amended to read as follows:

Time period.

"(A) furnished to such individual, during the 3-year period ending on the date such telehealth service was furnished, an item or service that would be considered covered under title XVIII if furnished to an individual entitled to benefits or enrolled under such title; or".

DIVISION G—TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

26 USC 3111 note.

SEC. 7001. PAYROLL CREDIT FOR REQUIRED PAID SICK LEAVE.

(a) IN GENERAL.—In the case of an employer, there shall be allowed as a credit against the tax imposed by section 3111(a) or 3221(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to 100 percent of the qualified sick leave wages paid by such employer with respect to such calendar quarter.

(b) LIMITATIONS AND REFUNDABILITY.—

(1) WAGES TAKEN INTO ACCOUNT.—The amount of qualified sick leave wages taken into account under subsection (a) with respect to any individual shall not exceed $200 ($511 in the case of any day any portion of which is paid sick time described in paragraph (1), (2), or (3) of section 5102(a) of the Emergency Paid Sick Leave Act) for any day (or portion thereof) for which the individual is paid qualified sick leave wages.

(2) OVERALL LIMITATION ON NUMBER OF DAYS TAKEN INTO ACCOUNT.—The aggregate number of days taken into account under paragraph (1) for any calendar quarter shall not exceed the excess (if any) of—

(A) 10, over

(B) the aggregate number of days so taken into account for all preceding calendar quarters.

(3) CREDIT LIMITED TO CERTAIN EMPLOYMENT TAXES.—The credit allowed by subsection (a) with respect to any calendar quarter shall not exceed the tax imposed by section 3111(a) or 3221(a) of such Code for such calendar quarter (reduced by any credits allowed under subsections (e) and (f) of section 3111 of such Code for such quarter) on the wages paid with respect to the employment of all employees of the employer.

(4) REFUNDABILITY OF EXCESS CREDIT.—

(A) IN GENERAL.—If the amount of the credit under subsection (a) exceeds the limitation of paragraph (3) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of such Code.

(B) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, any amounts due to an employer under this paragraph shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(c) QUALIFIED SICK LEAVE WAGES.—For purposes of this section, the term "qualified sick leave wages" means wages (as defined in section 3121(a) of the Internal Revenue Code of 1986) and compensation (as defined in section 3231(e) of the Internal Revenue Code) paid by an employer which are required to be paid by reason of the Emergency Paid Sick Leave Act. Definition.

(d) ALLOWANCE OF CREDIT FOR CERTAIN HEALTH PLAN EXPENSES.—

(1) IN GENERAL.—The amount of the credit allowed under subsection (a) shall be increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages for which such credit is so allowed.

(2) QUALIFIED HEALTH PLAN EXPENSES.—For purposes of this subsection, the term "qualified health plan expenses" means amounts paid or incurred by the employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code.

(3) ALLOCATION RULES.—For purposes of this section, qualified health plan expenses shall be allocated to qualified sick leave wages in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

(e) SPECIAL RULES.—

(1) DENIAL OF DOUBLE BENEFIT.—For purposes of chapter 1 of such Code, the gross income of the employer, for the taxable year which includes the last day of any calendar quarter with respect to which a credit is allowed under this section, shall be increased by the amount of such credit. Any wages taken into account in determining the credit allowed under this section shall not be taken into account for purposes of determining the credit allowed under section 45S of such Code.

(2) ELECTION NOT TO HAVE SECTION APPLY.—This section shall not apply with respect to any employer for any calendar quarter if such employer elects (at such time and in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe) not to have this section apply.

(3) CERTAIN TERMS.—Any term used in this section which is also used in chapter 21 of such Code shall have the same meaning as when used in such chapter.

(4) CERTAIN GOVERNMENTAL EMPLOYERS.—This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

(f) REGULATIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this section, including—

(1) regulations or other guidance to prevent the avoidance of the purposes of the limitations under this section,

(2) regulations or other guidance to minimize compliance and record-keeping burdens under this section,

(3) regulations or other guidance providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit allowed under this section,

(4) regulations or other guidance for recapturing the benefit of credits determined under this section in cases where there is a subsequent adjustment to the credit determined under subsection (a), and

(5) regulations or other guidance to ensure that the wages taken into account under this section conform with the paid sick time required to be provided under the Emergency Paid Sick Leave Act.

Time periods.

(g) APPLICATION OF SECTION.—This section shall apply only to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of the enactment of this Act, and ending on December 31, 2020.

(h) TRANSFERS TO FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND.—There are hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231n–1(a)) amounts equal to the reduction in revenues to the Treasury by reason of this section (without regard to this subsection). Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund or Account had this section not been enacted.

26 USC 1401 note.

SEC. 7002. CREDIT FOR SICK LEAVE FOR CERTAIN SELF-EMPLOYED INDIVIDUALS.

(a) CREDIT AGAINST SELF-EMPLOYMENT TAX.—In the case of an eligible self-employed individual, there shall be allowed as a credit against the tax imposed by subtitle A of the Internal Revenue Code of 1986 for any taxable year an amount equal to the qualified sick leave equivalent amount with respect to the individual.

Definition.

(b) ELIGIBLE SELF-EMPLOYED INDIVIDUAL.—For purposes of this section, the term "eligible self-employed individual" means an individual who—

(1) regularly carries on any trade or business within the meaning of section 1402 of such Code, and

(2) would be entitled to receive paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if the individual were an employee of an employer (other than himself or herself).

Definitions.

(c) QUALIFIED SICK LEAVE EQUIVALENT AMOUNT.—For purposes of this section—

(1) IN GENERAL.—The term "qualified sick leave equivalent amount" means, with respect to any eligible self-employed individual, an amount equal to—

(A) the number of days during the taxable year (but not more than the applicable number of days) that the individual is unable to perform services in any trade or business referred to in section 1402 of such Code for a

reason with respect to which such individual would be entitled to receive sick leave as described in subsection (b), multiplied by

(B) the lesser of—

(i) $200 ($511 in the case of any day of paid sick time described in paragraph (1), (2), or (3) of section 5102(a) of the Emergency Paid Sick Leave Act), or

(ii) 67 percent (100 percent in the case of any day of paid sick time described in paragraph (1), (2), or (3) of section 5102(a) of the Emergency Paid Sick Leave Act) of the average daily self-employment income of the individual for the taxable year.

(2) AVERAGE DAILY SELF-EMPLOYMENT INCOME.—For purposes of this subsection, the term "average daily self-employment income" means an amount equal to—

(A) the net earnings from self-employment of the individual for the taxable year, divided by

(B) 260.

(3) APPLICABLE NUMBER OF DAYS.—For purposes of this subsection, the term "applicable number of days" means, with respect to any taxable year, the excess (if any) of 10 days over the number of days taken into account under paragraph (1)(A) in all preceding taxable years.

(d) SPECIAL RULES.—

(1) CREDIT REFUNDABLE.—

(A) IN GENERAL.—The credit determined under this section shall be treated as a credit allowed to the taxpayer under subpart C of part IV of subchapter A of chapter 1 of such Code.

(B) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, any refund due from the credit determined under this section shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(2) DOCUMENTATION.—No credit shall be allowed under this section unless the individual maintains such documentation as the Secretary of the Treasury (or the Secretary's delegate) may prescribe to establish such individual as an eligible self-employed individual.

(3) DENIAL OF DOUBLE BENEFIT.—In the case of an individual who receives wages (as defined in section 3121(a) of the Internal Revenue Code of 1986) or compensation (as defined in section 3231(e) of the Internal Revenue Code) paid by an employer which are required to be paid by reason of the Emergency Paid Sick Leave Act, the qualified sick leave equivalent amount otherwise determined under subsection (c) shall be reduced (but not below zero) to the extent that the sum of the amount described in such subsection and in section 7001(b)(1) exceeds $2,000 ($5,110 in the case of any day any portion of which is paid sick time described in paragraph (1), (2), or (3) of section 5102(a) of the Emergency Paid Sick Leave Act).

(4) CERTAIN TERMS.—Any term used in this section which is also used in chapter 2 of the Internal Revenue Code of 1986 shall have the same meaning as when used in such chapter.

Time periods.

(e) APPLICATION OF SECTION.—Only days occurring during the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of the enactment of this Act, and ending on December 31, 2020, may be taken into account under subsection (c)(1)(A).

(f) APPLICATION OF CREDIT IN CERTAIN POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS WITH MIRROR CODE TAX SYSTEMS.—The Secretary of the Treasury (or the Secretary's delegate) shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the application of the provisions of this section. Such amounts shall be determined by the Secretary of the Treasury (or the Secretary's delegate) based on information provided by the government of the respective possession.

Determination.

(2) PAYMENTS TO OTHER POSSESSIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury (or the Secretary's delegate) as being equal to the aggregate benefits (if any) that would have been provided to residents of such possession by reason of the provisions of this section if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply unless the respective possession has a plan, which has been approved by the Secretary of the Treasury (or the Secretary's delegate), under which such possession will promptly distribute such payments to its residents.

(3) MIRROR CODE TAX SYSTEM.—For purposes of this section, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(4) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, the payments under this section shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(g) REGULATIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this section, including—

(1) regulations or other guidance to effectuate the purposes of this Act, and

(2) regulations or other guidance to minimize compliance and record-keeping burdens under this section.

26 USC 3111 note.

SEC. 7003. PAYROLL CREDIT FOR REQUIRED PAID FAMILY LEAVE.

(a) IN GENERAL.—In the case of an employer, there shall be allowed as a credit against the tax imposed by section 3111(a) or 3221(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to 100 percent of the qualified family leave wages paid by such employer with respect to such calendar quarter.

(b) LIMITATIONS AND REFUNDABILITY.—

(1) WAGES TAKEN INTO ACCOUNT.—The amount of qualified family leave wages taken into account under subsection (a) with respect to any individual shall not exceed—

(A) for any day (or portion thereof) for which the individual is paid qualified family leave wages, $200, and

(B) in the aggregate with respect to all calendar quarters, $10,000.

(2) CREDIT LIMITED TO CERTAIN EMPLOYMENT TAXES.—The credit allowed by subsection (a) with respect to any calendar quarter shall not exceed the tax imposed by section 3111(a) or 3221(a) of such Code for such calendar quarter (reduced by any credits allowed under subsections (e) and (f) of section 3111 of such Code, and section 7001 of this Act, for such quarter) on the wages paid with respect to the employment of all employees of the employer.

(3) REFUNDABILITY OF EXCESS CREDIT.—If the amount of the credit under subsection (a) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of such Code.

(c) QUALIFIED FAMILY LEAVE WAGES.—For purposes of this section, the term "qualified family leave wages" means wages (as defined in section 3121(a) of such Code) and compensation (as defined in section 3231(e) of the Internal Revenue Code) paid by an employer which are required to be paid by reason of the Emergency Family and Medical Leave Expansion Act (including the amendments made by such Act). Definition.

(d) ALLOWANCE OF CREDIT FOR CERTAIN HEALTH PLAN EXPENSES.—

(1) IN GENERAL.—The amount of the credit allowed under subsection (a) shall be increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified family leave wages for which such credit is so allowed.

(2) QUALIFIED HEALTH PLAN EXPENSES.—For purposes of this subsection, the term "qualified health plan expenses" means amounts paid or incurred by the employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code. Definition.

(3) ALLOCATION RULES.—For purposes of this section, qualified health plan expenses shall be allocated to qualified family leave wages in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

(e) SPECIAL RULES.—

(1) DENIAL OF DOUBLE BENEFIT.—For purposes of chapter 1 of such Code, the gross income of the employer, for the taxable year which includes the last day of any calendar quarter with respect to which a credit is allowed under this section, shall be increased by the amount of such credit. Any wages taken into account in determining the credit allowed under

this section shall not be taken into account for purposes of determining the credit allowed under section 45S of such Code.

(2) ELECTION NOT TO HAVE SECTION APPLY.—This section shall not apply with respect to any employer for any calendar quarter if such employer elects (at such time and in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe) not to have this section apply.

(3) CERTAIN TERMS.—Any term used in this section which is also used in chapter 21 of such Code shall have the same meaning as when used in such chapter.

(4) CERTAIN GOVERNMENTAL EMPLOYERS.—This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

(f) REGULATIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this section, including—

(1) regulations or other guidance to prevent the avoidance of the purposes of the limitations under this section,

(2) regulations or other guidance to minimize compliance and record-keeping burdens under this section,

(3) regulations or other guidance providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit allowed under this section,

(4) regulations or other guidance for recapturing the benefit of credits determined under this section in cases where there is a subsequent adjustment to the credit determined under subsection (a), and

(5) regulations or other guidance to ensure that the wages taken into account under this section conform with the paid leave required to be provided under the Emergency Family and Medical Leave Expansion Act (including the amendments made by such Act).

Time periods.

(g) APPLICATION OF SECTION.—This section shall apply only to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of the enactment of this Act, and ending on December 31, 2020.

(h) TRANSFERS TO FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND.—There are hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231n–1(a)) amounts equal to the reduction in revenues to the Treasury by reason of this section (without regard to this subsection). Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund or Account had this section not been enacted.

SEC. 7004. CREDIT FOR FAMILY LEAVE FOR CERTAIN SELF-EMPLOYED INDIVIDUALS. 26 USC 1401 note.

(a) CREDIT AGAINST SELF-EMPLOYMENT TAX.—In the case of an eligible self-employed individual, there shall be allowed as a credit against the tax imposed by subtitle A of the Internal Revenue Code of 1986 for any taxable year an amount equal to 100 percent of the qualified family leave equivalent amount with respect to the individual.

(b) ELIGIBLE SELF-EMPLOYED INDIVIDUAL.—For purposes of this section, the term "eligible self-employed individual" means an individual who— Definition.

(1) regularly carries on any trade or business within the meaning of section 1402 of such Code, and

(2) would be entitled to receive paid leave during the taxable year pursuant to the Emergency Family and Medical Leave Expansion Act if the individual were an employee of an employer (other than himself or herself).

(c) QUALIFIED FAMILY LEAVE EQUIVALENT AMOUNT.—For purposes of this section— Definition.

(1) IN GENERAL.—The term "qualified family leave equivalent amount" means, with respect to any eligible self-employed individual, an amount equal to the product of—

(A) the number of days (not to exceed 50) during the taxable year that the individual is unable to perform services in any trade or business referred to in section 1402 of such Code for a reason with respect to which such individual would be entitled to receive paid leave as described in subsection (b), multiplied by

(B) the lesser of—

(i) 67 percent of the average daily self-employment income of the individual for the taxable year, or

(ii) $200.

(2) AVERAGE DAILY SELF-EMPLOYMENT INCOME.—For purposes of this subsection, the term "average daily self-employment income" means an amount equal to—

(A) the net earnings from self-employment income of the individual for the taxable year, divided by

(B) 260.

(d) SPECIAL RULES.—

(1) CREDIT REFUNDABLE.—

(A) IN GENERAL.—The credit determined under this section shall be treated as a credit allowed to the taxpayer under subpart C of part IV of subchapter A of chapter 1 of such Code.

(B) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, any refund due from the credit determined under this section shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(2) DOCUMENTATION.—No credit shall be allowed under this section unless the individual maintains such documentation as the Secretary of the Treasury (or the Secretary's delegate) may prescribe to establish such individual as an eligible self-employed individual.

(3) DENIAL OF DOUBLE BENEFIT.—In the case of an individual who receives wages (as defined in section 3121(a) of the Internal Revenue Code of 1986) or compensation (as defined

in section 3231(e) of the Internal Revenue Code) paid by an employer which are required to be paid by reason of the Emergency Family and Medical Leave Expansion Act, the qualified family leave equivalent amount otherwise described in subsection (c) shall be reduced (but not below zero) to the extent that the sum of the amount described in such subsection and in section 7003(b)(1) exceeds $10,000.

(4) CERTAIN TERMS.—Any term used in this section which is also used in chapter 2 of the Internal Revenue Code of 1986 shall have the same meaning as when used in such chapter.

(5) REFERENCES TO EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT.—Any reference in this section to the Emergency Family and Medical Leave Expansion Act shall be treated as including a reference to the amendments made by such Act.

Time periods.

(e) APPLICATION OF SECTION.—Only days occurring during the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of the enactment of this Act, and ending on December 31, 2020, may be taken into account under subsection (c)(1)(A).

(f) APPLICATION OF CREDIT IN CERTAIN POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS WITH MIRROR CODE TAX SYSTEMS.—The Secretary of the Treasury (or the Secretary's delegate) shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the application of the provisions of this section. Such amounts shall be determined by the Secretary of the Treasury (or the Secretary's delegate) based on information provided by the government of the respective possession.

(2) PAYMENTS TO OTHER POSSESSIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury (or the Secretary's delegate) as being equal to the aggregate benefits (if any) that would have been provided to residents of such possession by reason of the provisions of this section if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply unless the respective possession has a plan, which has been approved by the Secretary of the Treasury (or the Secretary's delegate), under which such possession will promptly distribute such payments to its residents.

Definition.

(3) MIRROR CODE TAX SYSTEM.—For purposes of this section, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(4) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, the payments under this section shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(e) REGULATIONS.—The Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this section, including—

(1) regulations or other guidance to prevent the avoidance of the purposes of this Act, and

(2) regulations or other guidance to minimize compliance and record-keeping burdens under this section.

SEC. 7005. SPECIAL RULE RELATED TO TAX ON EMPLOYERS.

26 USC 3111 note.

(a) IN GENERAL.—Any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for purposes of section 3111(a) of the Internal Revenue Code of 1986 or compensation for purposes of section 3221(a) of such Code.

(b) ALLOWANCE OF CREDIT FOR HOSPITAL INSURANCE TAXES.—

(1) IN GENERAL.—The credit allowed by section 7001 and the credit allowed by section 7003 shall each be increased by the amount of the tax imposed by section 3111(b) of the Internal Revenue Code of 1986 on qualified sick leave wages, or qualified family leave wages, for which credit is allowed under such section 7001 or 7003 (respectively).

(2) DENIAL OF DOUBLE BENEFIT.—For denial of double benefit with respect to the credit increase under paragraph (1), see sections 7001(e)(1) and 7003(e)(1).

(c) TRANSFERS TO FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND.—There are hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231n–1(a)) amounts equal to the reduction in revenues to the Treasury by reason of this section (without regard to this subsection). Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund or Account had this section not been enacted.

DIVISION H—BUDGETARY EFFECTS

SEC. 8001. BUDGETARY EFFECTS.

(a) STATUTORY PAYGO SCORECARDS.—The budgetary effects of division B and each succeeding division shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.

(b) SENATE PAYGO SCORECARDS.—The budgetary effects of division B and each succeeding division shall not be entered on any PAYGO scorecard maintained for purposes of section 4106 of H. Con. Res. 71 (115th Congress).

(c) CLASSIFICATION OF BUDGETARY EFFECTS.—Notwithstanding Rule 3 of the Budget Scorekeeping Guidelines set forth in the joint explanatory statement of the committee of conference accompanying Conference Report 105–217 and section 250(c)(8) of the Balanced Budget and Emergency Deficit Control Act of 1985, the

budgetary effects of division B and each succeeding division shall not be estimated—

(1) for purposes of section 251 of such Act; and

(2) for purposes of paragraph (4)(C) of section 3 of the Statutory Pay-As-You-Go Act of 2010 as being included in an appropriation Act.

Approved March 18, 2020.

LEGISLATIVE HISTORY—H.R. 6201:

CONGRESSIONAL RECORD, Vol. 166 (2020):
Mar. 13, considered and passed House.
Mar. 18, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2020):
Mar. 18, Presidential statement.

○

McCarter & English

COVID-19 Legislation Assists Employers and Employees in Response to Pandemic [updated March 26, 2020]

Related People:
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Labor & Employment Law Alert

03.19.2020

The worldwide pandemic caused by the coronavirus disease (COVID-19), and the private and public attempts to respond to and slow its spread, have impacted every aspect of personal and economic life. Given the speed with which measures have been recommended and implemented, employers have largely been left to their own devices to address issues related to their employees. The federal government has recognized that the current employment laws do not adequately enable employers to take appropriate measures to continue operations while providing employees with some income and job continuation protection.

On Wednesday, March 18, 2020, Congress and President Trump provided some clarity and some assistance to employers and employees in dealing with this unprecedented and swift sea change through passage of the "Families First Coronavirus Response Act."

While the legislation deals with a number of pressing concerns—including health care, food assistance, and financial assistance to states for activities related to processing and paying unemployment insurance benefits—there are two parts of the overall legislative package that directly relate to employers with fewer than 500 employees: (i) the Emergency Paid Sick Leave Act and (ii) the Emergency Family and Medical Leave Expansion Act. A third section of the law provides federal funding through tax credits to employers who make payments to employees under these provisions.

The law goes into effect April 1, 2020, two weeks after it was signed by the President. On March 24, 2020, the Department of Labor issued some guidance on the two interlocking laws and provided a mandatory posting for employers to use in notifying employees of these benefits. (Covered employers must post this notice in a conspicuous place on their premises and may satisfy this requirement by emailing or direct mailing the notice to employees, or posting it on an employee information website.) Legislative efforts to counter the economic effects of the pandemic are continuing. For example, late in the day on March 25, 2020, the Senate passed the CARES Act which, once passed by the House and signed by the President, will have additional programs and relief. Given the trajectory of this pandemic and the legislative response to it, employers must remain proactive and anticipate implementing policies that incorporate new legislation.

A. The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act will require private employers with fewer than 500 employees to provide up to two weeks (80 hours) of paid sick leave to all full-time employees for specified purposes related to the COVID-19 outbreak. Part-time employees are entitled to paid sick leave equal to the number of hours that they work on average over a typical

two-week period. Note, however, that the statute permits an employer of healthcare providers or emergency responders to elect to exclude such employees from the paid sick leave benefit requirement. Furthermore, the Secretary of Labor is authorized to issue regulations to exclude certain healthcare providers and emergency responders from the definition of an eligible employee, as well as to exempt businesses with less than 50 employees from the requirements of granting paid sick leave in scenario (v) discussed below, where requiring paid leave would jeopardize the viability of the business as a going concern. As of this writing, no such regulations have yet been issued.

The paid sick leave must be available for immediate use, meaning that employees do not need to earn the time through any period of prior or continued employment, but rather employers must provide their employees the paid leave prescribed under the Act regardless of the worker's length of employment. Notably, employers may not require employees to use other types of leave before using this newly required federal paid sick leave. Thus, the new paid sick leave is entirely in addition to existing sick leave laws and policies.

This category of paid sick leave applies only if the employee is unable to work (or telework) due to a need for a leave because that employee (i) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (iii) is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (iv) is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine; (v) is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (vi) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. This appears to be an intentionally broad description of eligible employees. Employers remain free to pay employees absent for other reasons, but such payments neither reduce the 80-hour requirement nor qualify for the federal tax credits that are available for absences not covered by the Act.

The amount paid to the employee depends on the reason for the leave. For reasons (i)-(iii) above (related to the employee's own infection or quarantine), the employer must pay the employee at the employee's full regular rate up to $511 per day (or $5,110 in the aggregate). For reasons (iv)-(v) (related to the employee's need to care for others or if the employee experiences a similar condition that may be specified by the Department of Health and Human Services), the employer must pay the employee two-thirds of the employee's regular rate of pay up to $200 per day (or $2,000 in the aggregate).

As with other employment laws, the law prohibits employers from discharging, disciplining, or in any other manner discriminating against any employee who (a) takes leave in accordance with this Act; or (b) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding.

The law states that it is not intended to diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law. This could become important as states pass their own patchwork version of enhanced paid sick leave.

B. The Emergency Family and Medical Leave Expansion Act

Another employment-related part of the Families First Coronavirus Response Act is the Emergency Family and Medical Leave Expansion Act. This law will allow employees who have been employed for at least 30 calendar days (a much lower threshold than the 12-month period applicable to regular FMLA) to take up to 12 weeks of job-protected leave under the FMLA if the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years old if the school or place of care has been closed or if the child care provider of the son or daughter is unavailable due to a COVID-19-related emergency declared by a federal, state, or local authority (i.e., the grounds identified in reason (v) above for Emergency Paid Sick Leave). These instances would not have to be qualifying events under the existing FMLA.

The first 10 days of this expanded FMLA may be unpaid (subject to the employee's choice to substitute accrued vacation leave, personal leave, or medical or sick leave for unpaid leave) and thereafter the employee is entitled to be paid two-thirds of his or her regular rate of pay up to $200 per day and $10,000 in the aggregate for the remainder of the leave of absence. Note that in conjunction with the

Emergency Paid Sick Leave component of the law, this can result in an employee receiving an aggregate of $12,000 for this purpose over the 12-week period.

This expanded FMLA obligation applies to employers with 500 or fewer employees. However, small businesses with fewer than 50 employees may be exempted by the Secretary of Labor if the requirements would jeopardize the viability of the business. The Secretary of Labor may, through regulatory action, also exempt certain health care providers and emergency responders from the definition of eligible employee. In addition, another section of the statute provides that employers of healthcare providers and emergency responders may elect to exclude such employees from this expanded FMLA leave. Moreover, employers with 25 or fewer employees may be exempted from the job restoration provisions of this expanded FMLA if, during the period of leave, an employee's job title is eliminated due to changed economic conditions or other changes in operating conditions of the employer caused by the public health emergency—provided that the employer makes reasonable efforts to restore the employee to an equivalent position at the end of the leave and thereafter makes reasonable efforts to contact the employee if an equivalent position becomes available within the next year.

As with the laws' paid sick leave provisions, the expanded FMLA requirements do not take effect until April 1, 2020. Therefore, the time an employee takes away from work before the effective date of the law will NOT count against the 12-week entitlement.

C. Federal Tax Credits

The Families First Coronavirus Response Act sets up a mechanism for employers to be reimbursed for the costs of providing payments under the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act through federal tax credits. Employers therefore need to carefully track and document expenditures under these laws to justify taking such tax credits. As with many large scale government disaster relief programs, some small number of recipients will likely take improper advantage of the program and the government will, once the crisis is over, carefully review the tax credits claimed by employers for payments to employees under this emergency legislation.

On a final note (for now), the Department of Labor has announced that until April 17, 2020 it will focus exclusively on compliance with rather than enforcement of these new laws so long as employers show "good faith" efforts to comply with the laws. Accordingly, employers should document efforts made at compliance.

Given the unprecedented impact of COVID-19 on employers, employees, and the U.S. economy as a whole, it is a virtual certainty that additional federal legislation, as well as actions by state and local governments, will be forthcoming.

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).

SUPPLEMENTARY INFORMATION:

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.

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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McCarter & English

DOL Regulations Clarify Paid Leave Requirements Under the Families First Coronavirus Response Act

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Coronavirus Legal Advisory

04.06.2020

The U.S. Department of Labor (DOL) has now issued temporary regulations providing guidance on the Families First Coronavirus Response Act (FFCRA), which was signed into law on March 18, 2020, and took effect on April 1, 2020, in response to the growing COVID-19 pandemic. The temporary regulations, which were issued on April 1 and became effective immediately, address both types of leave established by the FFCRA: paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) and family and medical leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA), both of which we summarized in a previous client alert (available here).

The regulations follow the DOL's issuance of more informal questions and answers (available here), which explain the requirements imposed by the new law, and the DOL's release of a notice of employee rights (available here), which employers are required to post and distribute to employees. The new regulations were not subject to the usual notice and comment period due to the emergent nature of the law. Although the regulations elaborate on a number of provisions set forth in the FFCRA, we outline below some key takeaways for employers eager to understand their obligations under the legislation.

Although the DOL has said that until April 17, 2020, it will focus on compliance with, rather than enforcement of, the FFCRA where employers show "good faith" efforts to comply, employers should take steps now to familiarize themselves with the requirements of these paid leave laws.

EPSLA qualifying reasons

The EPSLA requires private employers with fewer than 500 employees to provide up to two weeks of paid sick leave to employees who are unable to work or telework for any one of six specified reasons related to the COVID-19 pandemic. We discuss two of those qualifying reasons below.

Subject to a quarantine or isolation order

One qualifying reason to take paid sick leave under EPSLA is when an employee is subject to a federal, state, or local quarantine or isolation order related to the COVID-19 pandemic. The regulations clarify that such an order need not be one directed specifically toward the employee seeking leave; rather, an order that advises some or all individuals to quarantine or stay at home would qualify for leave an employee who is subject to that order. However, the regulations also state that an employee may take leave for this reason only if, but for the quarantine or isolation order, he or she would otherwise be able to perform work for his or her employer. In other words, when an employer does not have work for the employee, even if that is a direct result of the same order, the employee's absence from work is not covered by the EPSLA, and the employer will not be able to claim a tax credit under the EPSLA for any

payments made during that time. Since many businesses have been or will be compelled to close or furlough employees during this crisis, this limitation will significantly curtail employee eligibility for sick leave under the FFCRA.

Caring for an individual

Another qualifying reason is when the employee is unable to work because he or she is caring for an individual who is subject to a quarantine or isolation order, or has been advised by a health care provider to self-quarantine. The regulations define this "individual" as an employee's immediate family member, a person who regularly resides in the employee's home (including a roommate, according to the DOL's discussion preceding the regulations), or someone whose relationship with the employee "creates an expectation" that the employee would care for that person. An employee cannot take sick leave to care for an individual with whom the employee has no "personal relationship." As with the quarantine or isolation order situation, the regulations limit eligibility for this qualifying reason to circumstances (1) where the employee, but for the need to care for this individual, would otherwise be able to perform work for the employer, and (2) where the employer has work for the employee.

EFMLEA-eligible employees

The EFMLEA requires employers with fewer than 500 employees to provide up to 12 weeks of leave—two weeks of unpaid leave followed by 10 weeks of paid leave—to eligible employees who are unable to work or telework due to a need to care for their children under 18 years old whose school or place of care is closed or whose child care provider is unavailable because of the COVID-19 pandemic. The EFMLEA defines eligible employees as ones who have been employed for at least 30 calendar days; the subsequently enacted federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amended that definition to include an employee who was terminated on or after March 1, 2020, had worked for the employer for at least 30 of the past 60 calendar days before the termination, and was then rehired by the employer. The FFCRA regulations add to that amendment that the employee must be rehired by the employer on or before December 31, 2020, to qualify as an eligible employee under this definition.

Given the CARES Act's incentives for small businesses to retain employees during this crisis, as explained in previous alerts (available at these links—alert1, alert2, alert3, alert4—or on our Coronavirus Resource Center page), some businesses may decide to rehire employees who had already been terminated. Such rehired employees would benefit from this provision even before reaching 30 days of employment since the date of rehire.

Exclusion of health providers

The regulations permit employers to exclude health care providers and emergency responders from eligibility to take leave under both the EPSLA and the EFMLEA. An employer's exercise of this option concerning a specific employee has no impact on that employee's right to take earned or accrued leave under employer-established policies, according to the DOL's discussion preceding the regulations. The new regulations define "health care providers" quite broadly in an attempt to encapsulate anyone "who is capable of providing health care services necessary to combat the COVID-19 public health emergency." This includes anyone employed at a doctor's office, hospital, clinic, medical school, local health department, nursing home, laboratory, pharmacy, or similar institution, or at an entity involved in making medical products or COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. Moreover, anyone employed by an entity that contracts with such an institution to provide services or maintain operations "where that individual's services support the operation of the facility" can be deemed a health care provider as well.

Despite the breadth of this regulation's definition of health care providers, the DOL's discussion of its regulation "encourages employers to be judicious" when choosing which employees are considered health care providers exempt from paid leave requirements to minimize the spread of the COVID-19 disease. When an employer denies a request for leave based on a determination that the employee is a health care provider, the employer must document that decision and retain such documentation for four years.

Small-business exemption

Both the EPSLA and the EFMLEA provide for exemptions from their paid leave requirements for employers with fewer than 50 employees when providing such paid leave "would jeopardize the viability of the business as a going concern." Under the EPSLA, the exemption applies only when the request for leave is based on the need to care for a child whose school or place of care is closed or whose care provider is unavailable, but not for the five other qualifying reasons. To use this exemption, the regulations require an authorized officer of the small business to make one of the following three determinations and document it in a record to be maintained by the business:

- The requested paid leave would result in the business's "expenses and financial obligations exceeding available business revenues" and cause the business "to cease operating at a minimal capacity";
- The employee(s) requesting leave have "specialized skills, knowledge of the business, or responsibilities," and their absence would "entail a substantial risk to the financial health or operational capabilities of the business"; or
- There are insufficient workers who can fill in for the employee(s) requesting leave, whose work is needed for the business to "operate at a minimal capacity."

Documentation of need for leave

Because employers will be entitled to a tax credit for payments made for leave taken under the FFCRA—whether for paid sick leave or expanded family and medical leave—the regulations have addressed the documentation required by employees to support the reasons for such leaves. In all instances, the requesting employee must provide the employer with his/her name, the date(s) for which leave is requested, the qualifying reason for the leave, and an oral or written statement that he/she is unable to work because of the qualifying reason. The requesting employee must provide additional documentation depending on the basis for the qualifying reason:

- For paid sick leave due to the employee being subject to a quarantine or isolation order, provide the name of the government entity that issued the order;
- For paid sick leave due to the employee's need to self-quarantine on advice of a health care provider, provide the name of the health care provider;
- For paid sick leave due to the employee's need to care for an individual who is subject to a quarantine or isolation order or who was advised to self-quarantine, provide the name of the governmental entity that issued the order or the name of the health care provider; or
- For paid sick leave or expanded family and medical leave due to the employee's need to care for a child whose school or place of care was closed or whose child care provider is unavailable, provide the name of the child being cared for; the name of the school, place of care, or child care provider; and "a representation that no other suitable person" will care for the child during the period of leave.

Employers are required to retain all documentation provided by employees pursuant to these requirements for a period of four years, whether the leave is granted or denied. To the extent an employee provides oral statements supporting the request for leave, the employer must document the statement and maintain it for four years as well.

Some, but not all, circumstances that qualify for paid sick leave under the EPSLA will also qualify for traditional FMLA leave, either because the employee has a "serious health condition" or because the employee is caring for a child, spouse, or parent with a serious health condition. In those cases, employers that were already subject to the FMLA should follow their normal FMLA documentation process—which is likely based at least in part on prior DOL-issued forms—as well as obtain the FFCRA documentation described above.

Documentation to claim tax credits

The FFCRA provides that employers can be reimbursed for the costs of providing paid leave through federal tax credits. The regulations advise employers that wish to claim tax credits from the IRS to maintain the following records for four years:

- Documentation to show how the employer determined the amount of leave paid to employees;
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS; and
- Other documents required by IRS forms and instructions.

Furthermore, the employer may ask requesting employees to provide additional documentation that may be necessary for the employer to claim tax credits, and may refuse to provide leave if such documentation is not provided.

McCarter & English

Leave in the Time of COVID-19: Tracking Employee Leave under the FFCRA and the FMLA

Related People:
Hugh F. Murray, III

Coronavirus Legal Advisory

04.14.2020

Since 1993, the federal Family and Medical Leave Act (FMLA) has provided job protection to eligible employees who need to take time away from work for specific reasons related to their own health, to care for ill family members, or in connection with the birth and care of the employee's newborn child. Many states have their own versions of the FMLA that generally overlap with, but can also differ from, the federal FMLA in certain respects. If leave is taken for a reason that is covered under both state and federal FMLAs, the employee is eligible for leave under both statutes, and the employee has available leave left under both laws, then the leave periods run concurrently. In addition, employers often allow employees time away from work for reasons that may or may not be covered under the leave laws. Coordinating and tracking absences taken for these varying purposes can be a daunting task in ordinary times.

And these are most certainly not ordinary times. The COVID-19 pandemic and the response to it have disrupted normal working conditions and resulted in a new world in terms of workplace attendance. Congress recognized as much when it passed the Families First Coronavirus Relief Act (FFCRA), which contained the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. As described more fully in our prior alerts on these topics (here and here), the two components of the FFCRA provide income replacement and job protection for certain COVID-19-related events. Some of the circumstances covered by the two FFCRA laws would have been covered by the traditional federal FMLA and its state counterparts, but the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act also cover circumstances that would have fallen through the cracks in preexisting leave laws.

Employers need to keep track of an employee's use of statutory leave time in order to know what available time the employee has left. An employer may voluntarily provide employees with additional leave time beyond statutory entitlements, and in this environment many will, but tracking available time remains important. In order for an employer to properly track the amount of protected leave time an employee has under various statutes, the employer needs to look closely at the circumstances of the employer and the employee, and the reasons for the leave.

Which Laws Cover the Employer?

A primary determinant of coverage under the traditional FMLA, the FFCRA, and state FMLA laws is the size of the employer. For employers with fewer than 50 employees, the traditional FMLA does not apply, while the FFCRA does apply. On the other side, employers with more than 500 employees are covered by traditional FMLA but are not covered by the FFCRA, and therefore nothing has changed for these employers in terms of tracking FMLA. For purposes of the interaction of the traditional FMLA and the FFCRA, those employers with more than 50 but fewer than 500

employees must be meticulous in how they track time away from work in order to properly comply with these laws.

State FMLA laws have their own size requirements. California, Hawai'i, Minnesota, Oregon, New Jersey, Rhode Island, Washington state, and Wisconsin track the traditional federal FMLA requirement of 50 or more employees for coverage. Connecticut's FMLA currently applies to employers with 75 or more employees. The District of Columbia's FMLA applies to employers with 20 or more employees, while the Maine and Vermont versions of the FMLA apply to employers with 15 or more employees. Employers that have operations in these states and are covered by the state law need to separately track leave for employees under these laws.

Which Employees Are Eligible for Which Leaves?

Under the traditional FMLA, employees are not eligible for leave unless they (i) have worked for the employer for 12 months, (ii) have worked at least 1,250 hours in the preceding 12 months, and (iii) work at a work site that has 50 or more employees within a 75-mile radius. The FFCRA's Emergency Paid Sick Leave Act applies to all employees, regardless of length of service, while the FFCRA's Emergency Family and Medical Leave Expansion Act applies to employees who have worked for the employer for at least 30 calendar days. Therefore, there may be times when individual employees are eligible for one form of time off and not another. In such cases, the time taken by the employee counts only against the leave entitlement for which the employee is eligible.

State FMLAs have their own rules with regard to employee eligibility, with some states (e.g., Hawai'i and Oregon) making employees eligible with shorter tenure of employment, while others use the amount of work done in the relevant period preceding the leave. Connecticut, New Jersey, Wisconsin, and the District of Columbia require 1,000 hours; Washington state requires 820 hours; Rhode Island and Vermont require an average of 30 hours per week; and Oregon requires an average of at least 25 hours per week. Covered employers in these states must determine whether the individual employee seeking leave qualifies for the state leave.

What Is the Reason For Leave?

For each employee taking time away from work for COVID-19-related reasons, the employer should determine whether the employee is also absent for an event that qualifies for traditional FMLA leave and for leave under a relevant state FMLA. If it does, then the employer should follow its traditional FMLA documentation procedures and count the time against the employee's 12-week entitlement under federal law.

A careful examination of the reasons for Emergency Paid Sick Leave compared with the reasons for traditional FMLA leave reveals the following areas of overlap:

- *Emergency Paid Sick Leave Act Reason # 1*: The employee is unable to work or telework due to a need for leave because the employee is subject to a federal state or local quarantine order related to COVID-19. As the regulations make clear, this applies when the employer has work for the employee to perform and the employee could perform that work but for the quarantine or isolation order. This circumstance is not covered by traditional FMLA, so time away from work for these circumstances does not count against the employee's traditional FMLA entitlement.
- *Emergency Paid Sick Leave Act Reason # 2*: The employee is unable to work or telework due to a need for leave because the employee has been advised by a health care provider to self-quarantine for a reason related to COVID-19. A person in this situation also may be entitled to traditional FMLA leave. Traditional FMLA leave is available when the employee has a "serious health condition." A serious health condition under the FMLA is an illness, injury, impairment, or physical or mental condition that requires either inpatient care or, in the absence of inpatient care, a period of incapacity of more than three consecutive days and treatment two or more times within 30 days of the first day of incapacity (unless extenuating circumstances exist). Given the current circumstances, with limited testing and an apparently large number of asymptomatic cases of COVID-19, there likely will be many health care providers who advise individuals to quarantine for COVID-19 when the individual does not actually have a serious health condition. Others in that situation may well have a case of COVID-19 that qualifies as a serious health condition. Employers may ask employees for information necessary to determine whether the employee's condition qualifies for traditional FMLA leave. The employer should use its normal FMLA paperwork for such

inquiries. If the employee is suffering from his or her own serious health condition, then the time would be covered by the FMLA and would count against the 12-week entitlement; if not, then it would not.

- *Emergency Paid Sick Leave Act Reason # 3*: The employee is unable to work or telework due to a need for leave because the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. As with reason # 2, this may or may not qualify as a serious health condition under the FMLA; the employer should grant the Emergency Paid Sick Leave under the FFCRA and follow up to determine whether the employee has a serious health condition.
- *Emergency Paid Sick Leave Act Reason # 4*: The employee is unable to work or telework due to a need for leave because the employee is caring for an individual subject to an order described in reason # 1 or self-quarantine as described in reason # 2. Unless the person being cared for is a son, daughter, spouse, or parent as defined under the FMLA and has a serious health condition, this would not count against the employee's FMLA leave entitlement. The employer must ask for the documentation identified in the U.S. Department of Labor's FFCRA regulations, specifically 29 CFR § 826.100 (these documentation requirements are discussed in our prior Alert on the FFCRA regulations), and may ask for a medical certification if it believes that this is an FMLA-qualifying event.
- *Emergency Paid Sick Leave Act Reason # 5/Emergency Expanded Family and Medical Leave Expansion Act Sole Reason*: The employee is unable to work or telework due to a need for leave because the employee is caring for his or her child due to a school closure or child care unavailability. For employees with less than 30 days' tenure with the employer, this time is available only under the Emergency Paid Sick Leave Act and therefore will not count against the FMLA or Expanded FMLA entitlement. For employees with more than 30 days' service with the employer, the paid sick time runs concurrently with the Expanded FMLA and counts against the employee's total FMLA entitlement.

For leave taken under the Emergency Family and Medical Expansion Act, moreover, there is an additional consideration that arises from the fact that the law is in place only from April 1 through December 31, 2020, and involves reimbursement by the federal government. Under the traditional FMLA, an employer may choose the 12-month period applicable to the leave using (i) a calendar year; (ii) any other fixed 12-month period; (iii) the 12-month period measured from the employee's first day of leave; or (iv) a "rolling" 12-month period measured backward from the date the employee first uses any FMLA leave. Under the Emergency Family and Medical Leave Expansion Act, however, an employee may take a maximum of 12 weeks of Expanded Family and Medical Leave during the period from April 1 to December 31, 2020. Therefore, if an employer has designated a 12-month period beginning July 1 each year, for example, then an employee would be entitled to take 12 weeks of traditional FMLA during April, May, and June 2020, and then on July 1, 2020, the employee would have 12 more weeks' leave available, totaling 24 weeks. Under the Emergency Family and Medical Leave Expansion Act, however, no more than 12 weeks of that leave could be taken as Expanded FMLA leave.

Employers should, as always, make and maintain good records concerning employee use of various leaves of absence and separately calculate the use by each employee of each type of leave, noting when they run concurrently and when, for one reason or another, they run separately. If during 2020 an employer believes that an employee is running out of any type of state or federal mandated leave, it makes sense to discuss the particulars of the situation with experienced labor and employment counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
Plaintiff,

-v-

UNITED STATES DEPARTMENT OF LABOR, *et al.*
Defendants.

20-CV-3020 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

The ongoing COVID-19 pandemic has visited unforeseen and drastic hardship upon American workers. In response to this extraordinary challenge, Congress passed the Families First Coronavirus Response Act, which, broadly speaking, entitles employees who are unable to work due to COVID-19's myriad effects to federally subsidized paid leave. Congress charged the Department of Labor ("DOL") with administering the statute, and the agency promulgated a Final Rule implementing the law's provisions. *See* 85 Fed. Reg. 19,326 (Apr. 6, 2020) ("Final Rule").

The State of New York brings this suit under the Administrative Procedure Act, claiming that several features of DOL's Final Rule exceed the agency's authority under the statute. The parties have cross-moved for summary judgment, and DOL has moved to dismiss for lack of standing. For the reasons that follow, the Court concludes that New York has standing to sue and that several features of the Final Rule are invalid. New York's motion for summary judgment is therefore granted in substantial part, as explained below.

I. Background

"COVID-19 [is] a novel severe acute respiratory illness that has killed . . . more than 1[5]0,000 nationwide" to date. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct.

1613, 1613 (2020) (Mem.) (Roberts, C.J., concurring in denial of application for injunctive relief); *see also* Centers for Disease Control and Prevention, Coronavirus Disease 2019: Cases and Deaths in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html (last visited Aug. 1, 2020). "At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church*, 140 S. Ct. at 1613. Accordingly, social-distancing measures have been taken nationwide, by state and local governments and by civil society, to stem the spread of the virus. The impact on American workers is multifold, as both the infection itself and the public-health response have been dramatically disruptive to daily life and work.

The legislation at the heart of this litigation, the Families First Coronavirus Response Act, is one of several measures Congress has taken to provide relief to American workers and to promote public health. *See* Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020) ("FFCRA"). Broadly speaking, and as relevant here, the FFCRA obligates employers to offer sick leave and emergency family leave to employees who are unable to work because of the pandemic. By granting the employers a corresponding, offsetting tax credit, Congress subsidizes these benefits, though the employers front the costs.

This litigation involves two major provisions of that law: the Emergency Family and Medical Leave Expansion Act ("EFMLEA ") and the Emergency Paid Sick Leave Act ("EPSLA").

A. Emergency Family and Medical Leave Expansion Act

As its name suggests, the EFMLEA entitles employees who are unable to work because they must care for a dependent child due to COVID-19 to paid leave for a term of several

weeks.[1] *See* FFCRA §§ 3102(a)(2); 3102(b). Formally, it is an amendment to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Congress ultimately foots the bill for these benefits, by way of a tax credit to the employer or self-employed individual. *See* FFCRA §§ 7003(a), 7004(a).

An employer of "an employee who is a health care provider or emergency responder may elect to exclude such employee" from the benefits provided by the EFMLEA. *See* FFCRA § 3105. The FMLA defines "health care provider" as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate)," or "any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6)(B).

B. Emergency Paid Sick Leave Act

The EPSLA requires covered employers to provide paid sick leave[2] to employees with one of six qualifying COVID-19-related conditions. *See* FFCRA §§ 5102, 5110(2). The conditions include that 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 seeking a medical diagnosis"; (4) "is caring for an individual subject" to a quarantine or isolation order by the government or a healthcare provider; (5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or (6) "is experiencing any other substantially similar condition specified by the Secretary of Health

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[1] The first ten days for which an employee of a covered employer takes emergency family leave under the EFMLEA may be unpaid, but after ten days, employees are entitled to job-protected emergency family leave at two-thirds of their regular wages for another ten weeks. *See* FFCRA § 3102(b) (adding FMLA § 110(b)(2)).

[2] The EPSLA entitles full-time employees to 80 hours — or roughly two weeks — of job-protected paid sick leave. *Id.* §§ 5102(b)(2)(A), 5104(1).

and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor." *Id.* § 5102(a). In parallel to the EFMLEA's exemption for healthcare providers, under the EPSLA, an employer may deny leave to an employee with a qualifying condition if the employee "is a health care provider or an emergency responder." *Id.* The statute specifies that "health care provider" has the same meaning given that term in the FMLA. *Id.* § 5110(4) (citing 29 U.S.C. § 2611). And the Secretary of Labor "may issue regulations to exclude certain health care providers and emergency responders from the definition of employee." *Id.* § 5111(1). As it does under the EFMLEA, the federal government ultimately covers the cost of the benefits through a tax credit to employers. FFCRA §§ 7001(a), 7002.

C. The Department of Labor's Final Rule

On April 1, 2020, DOL promulgated its Final Rule implementing the FFCRA.[3] As explained in greater detail below, the present challenge relates to four features of that regulation: its so-called "work-availability" requirement; its definition of "health care provider"; its provisions relating to intermittent leave; and its documentation requirements. Broadly speaking, New York argues that each of these provisions unduly restricts paid leave.

On April 14, 2020, New York filed this suit and simultaneously moved for summary judgment. (*See* Dkt. No. 1.) On April 28, 2020, DOL cross-moved for summary judgment and moved to dismiss for lack of standing. (*See* Dkt. No. 24.) Those motions are now fully briefed, and the Court has received the brief of amici curiae Service Employees International and 1199SEIU, United Healthcare Workers East in support of New York.[4] (*See* Dkt. No. 31.) The Court heard oral argument on May 12, 2020.

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[3] The Rule was promulgated without notice-and-comment procedures, pursuant to a statutory designation of good cause under the APA. *See* FFCRA §§ 501(a)(3), 5111.

[4] The unions' motion to file their amicus brief is granted. (*See* Dkt. No. 31.)

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When "a party seeks review of agency action under the APA, the 'entire case on review is a question of law,' such that 'judicial review of agency action is often accomplished by filing cross-motions for summary judgment.'" *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (alteration and citation omitted). Sitting as an "appellate tribunal," the district court must "decid[e], as a matter of law, whether the agency action is . . . consistent with the APA standard of review." *Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting *Kadi v. Geithner*, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015).

III. Discussion

A. Standing

The Court's analysis begins with its jurisdiction, specifically the State of New York's standing to sue. Though DOL styled its objection to New York's standing as a motion to dismiss pursuant to Rule 12(b)(1), "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). New York has moved for summary judgment on its claims, and it bears the burden of proof at trial to show its own standing. Irrespective of DOL's labeling, then, New York must demonstrate, through "affidavit or other evidence," *id.* at 561, that there exists no genuine dispute of material fact that it has standing, as it must do with respect to every element of its claim to obtain summary judgment.

To establish its constitutional standing, New York must demonstrate (1) an injury in fact . . . [that is] concrete and particularized [and] actual or imminent, not conjectural or

hypothetical," (2) that the injury is "fairly traceable to the challenged action," and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal alterations, quotation marks, and citations omitted). All three components of standing — injury-in-fact, causation, and redressability — are contested here.

In the context of state standing, courts generally recognize three types of constitutionally cognizable injuries. First, like a private entity, a state may suffer a direct, proprietary injury, for example, a monetary injury. *See New York v. Mnuchin*, 408 F. Supp. 3d 399, 408 (S.D.N.Y. 2019). Second, a state may suffer an injury to its so-called "quasi-sovereign interests." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Though the universe of "quasi-sovereign interests" has never been comprehensively defined, it is understood to encompass both "the health and well-being — []physical and economic — of its residents in general," as well as the state's interest in "not being discriminatorily denied its rightful status within the federal system." *Id.* When a state sues to vindicate its quasi-sovereign interests, it is said to be suing in its *parens patriae* capacity. *Id.* (The third type of injury, which is not at issue in this case, is an injury to a sovereign interest, such as "the power to create and enforce a legal code," *id.*, or those implicated in the "adjudication of boundary disputes or water rights," *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000).) Importantly, these categories (proprietary, quasi-sovereign, and sovereign) are not hermetically sealed from one another, and a single act may injure a state in more than one respect.

New York claims that the Final Rule's challenged features, which either limit paid leave or burden its exercise, impose both proprietary and quasi-sovereign injuries on the state. (*See* Dkt. No. 27 at 3–13.) Without paid leave, New York argues, employees must choose between taking unpaid leave and going to work even when sick. (*See* Dkt. No. 27 at 7–13.) Some

employees will elect the former, the State predicts, diminishing their taxable income and therefore the State's tax revenue. (*See* Dkt. No. 27 at 11–13.) Some will choose the latter, escalating the spread of the virus and thereby raising the State's healthcare costs. (*See* Dkt. No. 27 at 7–10.) And overall, the bind employees are left in will result in greater reliance on various state-administered programs, increasing the State's administrative burden. (*See* Dkt. No. 27 at 10–11.)

These predictions are supported by New York's record evidence, which consists of declarations from public-health and policy experts opining, based on empirical studies, that when paid leave is diminished, fewer sick employees take leave, transmission of flu-like diseases rises, and more employees take unpaid leave. (*See* Dkt. No. 26, Ex. 1, ¶ 17; Dkt. No. 26, Ex. 4 ¶ 12.) Indeed, the Final Rule itself is grounded in an acknowledgement that a dearth of paid leave will result in employees' being "forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19." Final Rule at 19,335. The evidence also suggests that the predictable consequence of the Final Rule will be less taxable income for the state, because both regular wages and paid leave benefits are taxable income, but unpaid leave generates no taxable income. (*See* Dkt. No. 26, Ex. 3.) Because "[a] state's 'loss of *specific* tax revenues' is a 'direct [proprietary] injury' capable of supporting standing," New York may sue to vindicate this "[e]xpected financial loss." *New York*, 408 F. Supp. 3d at 409 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992)) (emphasis added).

DOL complains that New York's evidence is insufficient because at summary judgment, the State is required to show "empirical" evidence quantifying these effects "in minimally concrete numbers and terms." (Dkt. No. 30 at 5.) But no precedent requires the Court to disregard non-quantitative evidence, or to demand specific numerical projections. To the

contrary, because even "an identifiable trifle" suffices to demonstrate standing, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973), all New York must show is that it will be injured, not the magnitude of its injury. Indeed, the very out-of-circuit precedent cited by DOL eschews any notion that the specific amount of the financial loss, rather than the mere fact of it, must be shown to demonstrate standing. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 923 F.3d 209, 226 (1st Cir. 2019) ("The Departments' attack on the accuracy of the numbers provided by the Commonwealth misses the point: the Commonwealth need not be exactly correct in its numerical estimates in order to demonstrate an imminent fiscal harm."); *id.* ("Whether costs to the Commonwealth are above or below this [estimate], they are not zero.") In urging that New York's injury is not sufficiently "concretized," DOL confuses a qualitatively concrete harm, which the standing precedents require, with a quantitatively concrete harm, which has no special constitutional significance.

Nor is the causal chain between the challenged action and the predicted harm too attenuated. The chain consists of few links, none of which DOL can seriously contest: Restricting eligibility and increasing administrative burdens for paid leave will reduce the number of employees receiving paid leave; some employees who need leave will therefore take unpaid leave;[5] their income will decrease, shrinking the state's income tax base. Despite the federal government's characterization, this is hardly an argument "that actions taken by United States Government agencies [will] injure[] a State's economy and thereby cause[] a decline in general tax revenues." *Wyoming*, 502 U.S. at 448. To the contrary, it is the specific and

[5] The Court need not and does not address the alleged diminution in the State's *sales* tax revenue, which admittedly rests on a more attenuated causal chain.

imminently threatened diminution of an identifiable source of tax revenue. And by the same token, New York's injury will be redressed by a favorable ruling. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (Kavanaugh, J.) ("Causation and redressability typically overlap as two sides of a causation coin . . . . [I]f a government action causes an injury, enjoining the action usually will redress that injury." (citation and internal quotation marks omitted)).

Because the threatened injury to New York's tax revenue is sufficient to support standing, the Court need not address the state's alternative theories of standing, namely, the potential burden on its healthcare system or the injury to its quasi-sovereign interests.[6]

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[6] Though the Court does not reach New York's argument regarding *parens patriae* standing, a few words are in order about that theory. By invoking its *parens patriae* standing, New York invites the Court to enter something of a legal thicket. It is well established that an injury to a State's quasi-sovereign interest fulfills Article III's requirement that a State suffer an injury-in-fact. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. But the courts have also long recognized that generally, at least in constitutional cases, a State may not invoke its *parens patriae* standing against the federal government, because, the traditional justification goes, "[i]n that field, it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). This common-law limitation is known as the "*Mellon* bar," named for the almost hundred-year-old case in which it was first articulated. *See id.*

The success of New York's *parens patriae* argument turns on a fundamental but arguably unresolved doctrinal question about the *Mellon* bar: Does *Mellon* apply in suits, like this one, brought by a state to enforce a statute rather than the Constitution? *See Connecticut v. U.S. Dep't of Commerce*, 204 F.3d 413, 415 n.2 (2d Cir. 2000) (declining to address question). The traditional justification for the judge-made limitation would seem to hold no water in that context, because "[t]he prerogative of the federal government to represent the interests of its citizens . . . is not endangered so long as Congress has the power of conferring or withholding" the statutory right. *Maryland People's Counsel v. FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (Scalia, J.).

New York contends that the Supreme Court's decision in *Massachusetts v. EPA* definitively resolves this doctrinal question in favor of a state's *parens patriae* standing in statutory actions. (*See* Dkt. No. 27 at 3–5; *see also* 549 U.S. 497 (2007).) The *Massachusetts* majority's discussion of *parens patriae* standing is not a paragon of clarity, but that case aside, sound arguments nonetheless still seem to support the conclusion that the *Mellon* bar does not prohibit suits in which Congress has conferred a statutory cause of action upon a state. There is

no serious question that a quasi-sovereign injury satisfies the "irreducible minimum" of *Article III* standing; "[o]therwise the numerous cases allowing *parens patriae* standing in suits not involving the federal government would be inexplicable." *Maryland People's Counsel*, 760 F.2d at 321. Moreover, as noted at the outset, the traditional justification for the *Mellon* bar is seemingly inapt in the context of claims involving statutory rights. And the imposition of a judge-made, prudential bar to suit when there exists a constitutional case or controversy and Congress has endowed the litigant with a statutory cause of action is seemingly incongruous with the modern recognition that "a federal court's obligation to hear and decide" cases within its jurisdiction "is virtually unflagging," *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014) (internal quotation marks and citation omitted), as well as with basic separation-of-powers principles.

The relevant question, then, would seem to be not whether the state has *constitutional* standing to bring a suit in its *parens patriae* capacity (it does, if it has suffered a quasi-sovereign injury), but rather whether the state has *statutory* standing. Or, to use modern parlance, the relevant question is whether the state's congressionally conferred cause of action is capacious enough to support a *parens patriae* suit. *See Lexmark*, 572 U.S. at 128 n.4 (2014) (explaining that "prudential standing" is really a question of a litigant's cause of action). Indeed, even Defendants accept the conclusion that *if* Congress has furnished a cause of action to New York for this kind of suit, the *Mellon* bar has no application. (*See* Dkt. No. 25 at 13.) That conclusion squares with the Second Circuit's approach in *parens patriae* cases involving private defendants, which distinguishes between the question of constitutional injury to a quasi-sovereign interest and statutory standing to bring a *parens patriae* action. *See Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 120 (2d Cir. 2002). The touchstone, then, is congressional intent.

The D.C. Circuit, which DOL invokes repeatedly, takes just such an approach. That court has long recognized "that the courts must dispense with [the *Mellon* bar] if Congress so provides." *Maryland People's Counsel,* 760 F.2d at 321; *see also Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019) ("Because the *Mellon* bar is prudential, we have held that the Congress may by statute authorize a State to sue the federal government in its *parens patriae* capacity."). And though a recent D.C. Circuit opinion, heavily relied upon by the federal government here, held that the general cause of action in the APA did not *alone* evince an intent to authorize *parens patriae* suits by states against the federal government; it withheld judgment on the forfeited argument that the underlying statute forming the basis of the action (in that case, the National Environmental Policy Act) did so. *Id.* n.4. In short, the D.C. Circuit did not adopt a bright-line rule that APA suits can never be brought in a state's *parens patriae* capacity, but rather indicated that the question may turn on congressional intent as expressed in the *underlying* statute that the litigant claims was violated. That the inquiry might turn on the underlying statute is consistent with direct-injury cases under the APA, where the question of "statutory standing" (*i.e.*, the cause of action) also turns on "the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 (1991) (internal quotation marks and citation omitted).

Having determined that the State possesses standing based on its proprietary injury to its tax revenue, the Court proceeds to the merits.

B. The Work-Availability Requirement

New York's first challenge goes to a fundamental feature of the regulatory scheme, the work-availability requirement. By way of reminder, the EPSLA grants paid leave to employees who are "unable to work (or telework) due to a need for leave because" of any of six COVID-19-related criteria. FFCRA § 5102(a). The EFMLEA similarly applies to employees "unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency." FFCRA § 101(a)(2)(A). The Final Rule implementing each of these provisions, however, excludes from these benefits employees whose employers "do[] not have work" for them. *See* Final Rule at 19,349–50 (§§ 826.20(a)(2), (6), (9), (b)(1)).

The limitation is hugely consequential for the employees and employers covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed. The work-availability requirement may therefore greatly affect the breadth of the statutory leave entitlements.

The question posed to the Court is whether the work-availability requirement is consistent with the FFCRA. But before turning to that central issue, the Court must address the

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That understanding has considerable virtues: it harmonizes *parens patriae* cases with modern standing doctrine, and it confines the *Mellon* doctrine to its justifiable limits. Neither party here, however, has briefed the question of precisely how this Court should discern such congressional intent — for example, whether the normal zone-of-interests test for statutory standing under the APA applies, or whether, in *parens patriae* suits against the federal government, federalism concerns require something more searching. And ultimately, the State's direct, proprietary injury is sufficient to confer constitutional standing, and the federal government has not disputed that the State possesses a right of action to vindicate that injury. The Court therefore need not decide these thorny academic issues.

antecedent question of the work-availability requirement's scope. Specifically, in the context of the EPSLA, the express language of the Final Rule applies the work-availability requirement to only three of the six qualifying conditions. *See* Final Rule at 19,349–50 (§ 826.20(a)(2), (6), (9).) DOL nonetheless urges the Court to superimpose the requirement onto the three remaining conditions. In its view, the statute's language compels the work-availability requirement, and therefore, the Final Rule must be interpreted to apply it to each of the six enumerated circumstances. (*See* Dkt. No. 30 at 8.)

Even if DOL's statutory premise were correct, however, its conclusion would not follow. No canon of regulatory interpretation requires this Court to adopt a saving construction of the Final Rule, or to interpret it so as to avoid conflict with the statute. To the contrary, the Court must interpret the Final Rule based on its "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In arguing that the regulation must be interpreted consistent with the statute, even if such an interpretation is contrary to the regulation's unambiguous terms, DOL puts the proverbial cart before the horse.[7]

This Court therefore undertakes anew the task of interpreting the Final Rule, and in so doing, concludes that its terms are clear: The work-availability requirement applies only to three

[7] The doctrine of *Auer* or *Seminole Rock* deference is of no help to DOL here. Just last term, the Supreme Court made clear that "convenient litigating positions" are not entitled to such deference, *Kisor*, 139 S. Ct. at 2417, and DOL has not explained how the interpretation advanced before this Court is anything more than a newly articulated litigating position.

It is true that deference to an interpretation of a regulation embodied in the regulation's preamble is usually warranted, as it "is evidence of an agency's contemporaneous understanding of its proposed rules." *Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 52–53 (2d Cir. 2016) (citation omitted). But the preamble only reinforces that the work-availability requirement applies only to three of the six qualifying conditions, in that it only mentions the requirement in its discussion of some qualifying conditions. *See* 85 Fed. Reg. 19329–30. And, in any event, even if the preamble supported the agency's position, it could not countermand the unambiguous terms of the regulation itself.

of the Emergency Paid Sick Leave Act's six qualifying conditions. Nothing in the Final Rule's text or structure suggests the requirement applies outside of the three circumstances to which it is explicitly attached. And, as traditional tools of textual interpretation teach, the explicit recitation of the requirement with respect to some qualifying circumstances suggests by negative implication its inapplicability to the other three. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017). DOL has proffered no reason, apart from its statutory argument, that the regulation should be interpreted to apply the requirement more broadly than the Final Rule's express terms command. Accordingly, the Court concludes that the work-availability requirement applies only to three of the six qualifying conditions under the EPSLA, as well as family leave under the EFMLEA.

The question remains, however, whether that regime exceeds the agency's authority under the statute. To answer that question, the Court must apply *Chevron*'s familiar two-step framework. *See Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue," courts will defer to an agency's interpretation as long as it is reasonable. 467 U.S. at 843. Thus, at Chevron's first step, the Court must determine whether the statute is ambiguous. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 507 (2d Cir. 2017). If it is, the Court must proceed to step two and determine whether the agency's interpretation of the ambiguous statute is reasonable. *See id.*

The statute here grants paid leave to employees who, in the case of the EPSLA, are "unable to work (or telework) due to a need for leave because" of any of the six qualifying conditions or, in the case of the EFMLEA, are "unable to work (or telework) due to a need for leave to care for" a child due to COVID-19. *See* FFCRA §§ 5102(a), 110(a)(2)(A). According

to DOL, those terms are unambiguous, such that the Court's need not advance to *Chevron*'s second step. Specifically, DOL urges that the terms "due to" (as it appears in both provisions at issue) and "because" *compel* the conclusion that an employee whose employer "does not have work" for them is not entitled to leave irrespective of any qualifying condition. The terms "due to" and "because," DOL argues, imply a but-for causal relationship. If the employer lacks work for the employee, the employee's qualifying condition would not be a but-for cause of their inability to work, but rather merely one of multiple sufficient causes. And, DOL adds, an absence from work due to a lack of work is not "leave."

DOL is correct, of course, that the traditional meaning of "because" (and "due to") implies a but-for causal relationship. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020). But to say that these terms usually connote but-for causation is not to say that they unambiguously do. Nor does it necessarily follow that the baseline requirement of but-for causation cannot be supplemented with a special rule for the case of multiple sufficient causation. *See Burrage v. United States*, 571 U.S. 204, 214 (2014) (acknowledging that but-for causation, in typical legal usage, is sometimes supplemented with a special rule for multiple sufficient causation). Indeed, as the Supreme Court recently recognized in another statutory context interpreting the term "because,"

> Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law. *Cf.* 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because of" . . . . *Cf.* 22 U.S.C. § 2688. But none of this is the law we have.

Bostock, 140 S. Ct. 1731, 1739 (2020). Here, the Court cannot conclude that the terms "because" or "due to" unambiguously foreclose an interpretation entitling employees whose

inability to work has multiple sufficient causes — some qualifying and some not — to paid leave.

Nor is the Court persuaded that the term "leave" requires that the inability to work be caused solely by a qualifying condition. "Leave," DOL argues, connotes "authorized especially extended absence from duty or employment," or "time permitted away from work, esp[ecially] for a medical condition or illness or for some other purpose." (*See* Dkt. No. 25 at 23 (first quoting Definition of Leave, Merriam-Webster, https://www.merriam-webster.com/dictionary/leave (last accessed Aug. 2, 2020), and then quoting Definition of Leave, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/leave (last accessed Aug. 2, 2020).) But those definitions can accommodate New York's view as well as DOL's. An employee may need leave (*i.e.*, an agreed-upon and permitted absence from work) tethered to one reason even if her employer has no present work for her due to some other reason. For example, in ordinary usage, a teacher on paid parental leave may still be considered on "leave" even if school is called off for a snow day.

New York, for its part, argues that the statute unambiguously forecloses DOL's argument. (*See* Dkt. No. 4 at 8–10.) The statute, New York notes, both uses mandatory language to describe the obligation to provide paid leave and contains several express exceptions to that obligation, suggesting the absence of other implied limitations. (*See* Dkt. No. 4 at 8.) But those features of the statute are entirely consistent with DOL's interpretation. The causation requirement in the Final Rule is not an additional, implicit exception, nor a negation of the mandatory nature of the leave obligations, but rather a limiter of the universe of individuals who qualify for the leave in the first instance. The statutory regime cannot be implemented without ascribing *some* causal requirement to the causal language, and doing so is not tantamount to

adding an additional, exogenous criterion. New York also perceives a conflict between requiring but-for causation and the broader remedial goals of the statute, given that the Final Rule would dramatically narrow the pool of employees entitled to leave as compared to New York's preferred interpretation. (*See* Dkt. No. 4 at 10–11.) But any such conflict is immaterial at *Chevron*'s first step, where the Court's charge is only to determine whether the statute's text is ambiguous. And in any event, that Congress's aim in passing the statute was remedial does not require that every provision of the statute be read to unambiguously be given maximal remedial effect. The statute, like virtually all statutes, reflects a balance struck by Congress between competing objectives.

The statute's text, the Court concludes, is ambiguous as to whether it requires but-for causation in all circumstances, or instead whether some other causal relationship — specifically, multiple sufficient causation — satisfies its eligibility criteria. The Court must therefore proceed to *Chevron*'s second step.

At its second step, *Chevron* requires an inquiry into "whether the agency's answer [to the interpretive question] is based on a permissible construction." *Catskill Mountains*, 846 F.3d at 520 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011)). A reviewing court should not "disturb an agency rule at *Chevron* step two unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Id.* Even under this deferential standard of review, interpretations "arrived at with no explanation," like interpretations "picked out of a hat," are unacceptable, even if they "might otherwise be deemed reasonable on some unstated ground." *Catskill Mountains*, 846 F.3d at 520.

The Final Rule's work-availability requirement fails at *Chevron* step two, for two reasons. First, as to the EPSLA, the Final Rule's differential treatment of the six qualifying

conditions is entirely unreasoned. Nothing in the Final Rule explains this anomaly. And that differential treatment is manifestly contrary to the statute's language, given that the six qualifying conditions share a single statutory umbrella provision containing the causal language. *See* FFCRA § 5102(a). Second, and more fundamentally, the agency's barebones explanation for the work-availability requirement is patently deficient. The requirement, as an exercise of the agency's delegated authority, is an enormously consequential determination that may considerably narrow the statute's potential scope. In support of that monumental policy decision, however, the Final Rule offers only *ipse dixit* stating that "but-for" causation is required. *See, e.g.,* Final Rule at 19329 (reasoning that the work-availability requirement is justified "because the employee would be unable to work even if he or she" did not have a qualifying condition). That terse, circular regurgitation of the requirement does not pass *Chevron*'s minimal requirement of reasoned decision-making. The work-availability requirement therefore fails *Chevron*'s second step.

C. Definition of "Health Care Provider"

The State of New York next contends that the Final Rule's definition of a "health care provider" exceeds DOL's authority under the statute. (*See* Dkt. No. 4 at 11–16.) Because employers may elect to *exclude* "health care providers" from leave benefits, the breadth of the term "health care provider" has grave consequences for employees.

The FMLA, which supplies the relevant statutory definition for both provisions of the FFCRA at issue, defines a "health care provider" as: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6). The Final Rule's definition is worth quoting at

length; invoking the Secretary's authority under subsection (B), it defines a "health care provider" for the purposes of the FFCRA leave provisions as:

> 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,

as well as

> 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, [and] 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.

Final Rule at 19,351 (§ 826.25). The definition, needless to say, is expansive: DOL concedes that an English professor, librarian, or cafeteria manager at a university with a medical school would all be "health care providers" under the Rule. (*See* Dkt. No. 25 at 29.)

Returning to *Chevron*'s first step, the Court concludes that the statute unambiguously forecloses the Final Rule's definition. The broad grant of authority to the Secretary is not limitless. The statute requires that the Secretary determine that the *employee* be capable of furnishing healthcare services. It is the "person" — *i.e.*, the employee — that the Secretary must designate. 29 U.S.C. § 2611(6). And the Secretary's determination must be that the person is *capable of providing healthcare services*; not that their work is remotely related to someone else's provision of healthcare services. Of course, this limitation does not imply that the Secretary's designation must be made on an individual-by-individual basis. But the statutory text requires at least a minimally role-specific determination. DOL's definition, however, hinges

entirely on the identity of the *employer*, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees.

DOL nonetheless urges that its definition is consistent with the context in which the term is used. The term "health care provider," as used in the FFCRA, serves to exempt employees who are essential to maintaining a functioning healthcare system during the pandemic. *See* Final Rule at 19,335. A broad definition of "health care provider" operationalizes that goal, because employees who do not directly provide healthcare services to patients — for example, lab technicians or hospital administrators — may nonetheless be essential to the functioning of the healthcare system. (*See* Dkt. No. 25 at 28.) But that rationale cannot supersede the statute's unambiguous terms. And, in any event, the Final Rule's definition is vastly overbroad even if one accepts the agency's purposivistic approach to interpretation, in that it includes employees whose roles bear *no nexus whatsoever* to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system's vitality. Think, again, of the English professor, who no doubt would be surprised to find that as far as DOL is concerned, she is essential to the country's public-health response. The definition cannot stand.[8]

[8] New York levies an additional challenge against the definition of "health care provider." The Final Rule purports to define a "health care provider" solely for the purposes of the EFMLEA and EPSLA, while leaving in place the narrower definition in pre-existing regulations implementing the FMLA. The definition, New York claims, must track the definition ascribed to the same words elsewhere in the FMLA, because the same provision gives the definition of "health care provider" for both relevant sections the FFCRA and for the remainder of the FMLA. (*See* Dkt. No. 4 at 15–16.) But the Supreme Court has occasionally suggested that an agency may interpret a shared term differently across various sections of a statute, even if the statute provides a single statutory definition, as long as the different definitions individually are reasoned and do not exceed the agency's authority. *See, e.g., Barber v. Thomas*, 560 U.S. 474, 574–75 (2010); *but see id.* at 582–83 (Thomas, J., dissenting). Nonetheless, because the Court rejects the Final Rule's definition on other grounds, it has no occasion to consider whether the differentiation is permissible.

D. Intermittent Leave

New York next argues that the regulation's prohibition on intermittent leave exceeds DOL's authority under the statute. The Final Rule permits "employees to 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," and, even then, only for a subset of the qualifying conditions. *See* Final Rule at 19,353 (§§ 826.50(a)-(c)). By constraining the exercise of intermittent leave to "circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees," the Final Rule balances the statute's goals of employee welfare and public health. *Id.* at 19,337.

The parties again disagree on the meaning of the regulations. New York reads the regulations to require employees to take *any* qualifying leave in a single block, and that any leave not taken consecutively in a single block is thereafter forfeited. (*See* Dkt. No. 4 at 17–20.) On this understanding, an employee who took two days off while seeking a COVID-19 diagnosis but thereafter returned to work could not take any additional EFMLEA leave, even if the employee later developed a different qualifying condition. DOL responds that the regulations forbid intermittent leave only for any *single* qualifying reason. (*See* Dkt. No. 25 at 30–31.) Thus, if the employee returns to work after taking two days of qualifying leave while seeking a diagnosis, the employee may later take more paid leave if she develops another qualifying condition.

This time, the language of the regulation favors DOL's view. The Final Rule states that "[o]nce the Employee begins taking Paid Sick Leave for one or more of [the reasons for which intermittent leave is forbidden], the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave." Final Rule at 19,353. That provision, however, says nothing about forfeiting *remaining* days of

leave after leave is taken intermittently. The most natural reading of the provision, then, squares with the interpretation advanced by DOL: An employee taking leave for an intermittent-leave-restricted reason must take his or her leave consecutively until his or her need for leave abates. But once the need for leave abates, the employee retains any remaining paid leave, and may resume leave if and when another qualifying condition arises. That understanding is also in harmony with the Rule's stated justification for the restriction, which, as discussed in more detail below, relates to the public-health risk of an employee who may be infected with COVID-19 returning to work before the risk of contagion dissipates.

Turning to the heart of New York's challenge, the Court concludes that the intermittent-leave constraints, as properly interpreted, are largely though not entirely consistent with the FFCRA. Congress did not address intermittent leave at all in the FFCRA; it is therefore precisely the sort of statutory gap, under *Chevron* step one, that DOL's broad regulatory authority empowers it to fill. FFCRA § 5111(3) (delegating the authority to the Secretary to promulgate regulations "as necessary, to carry out the purposes of this Act"); *see id.* § 3102(b), *amended by* CARES Act § 3611(7) (same). Moreover, Congress knows how to address intermittent leave if it so desires; the FFCRA's silence contrasts with the presence of both affirmative grants and affirmative proscriptions on intermittent leave in the FMLA. *See* 29 U.S.C. § 2612(b)(1). Unlike in those instances, in the context of the FFCRA, Congress left this interstitial detail to the agency's expert decision-making. And though New York points to several provisions in the FFCRA that would be nonsensical if leave could not be accrued incrementally (*see* Dkt. No. 4 at 18–20), those provisions cohere with the Final Rule's intermittent leave restrictions as properly interpreted, because the Final Rule as construed contemplates leave taken in multiple increments, as long as each increment is attributable to a

different instance of qualifying conditions. DOL's intermittent-leave rules are therefore entitled to deference if they are reasonable. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168 (2d Cir. 2017).

The intermittent-leave provisions falter in part, however, at *Chevron*'s second step. Under the Final Rule, intermittent leave is allowed for only certain of the qualifying leave conditions, and, even then, only if the employer agrees to permit it. Final Rule at 19,353 (§§ 826.50(a)-(c)). The conditions for which intermittent leave is entirely barred are those which logically correlate with a higher risk of viral infection.[9] As explained in the Final Rule's preamble, this restriction advances Congress's public-health objectives by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus. *See id.* at 19,337. Fair enough. But that justification, while sufficient to explain the Final Rule's *prohibitions* on intermittent leave for qualifying conditions that correspond with an increased risk of infection, utterly fails to explain why employer *consent* is required for the remaining qualifying conditions, which concededly do not implicate the same public-health considerations. For example, as the Final Rule explains, if an employee requires paid leave "solely to care for the employee's son or daughter whose school or place of care is closed," 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

[9] These include leave because employees: are subject to government quarantine or isolation order related to COVID-19, have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, are experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis, are taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

worksite while taking intermittent paid leave." Final Rule at 19,337. The Final Rule therefore acknowledges that the justification for the bar on intermittent leave for certain qualifying conditions is inapplicable to other qualifying conditions, but provides no other rationale for the blanket requirement of employer consent. Insofar as it requires employer consent for intermittent leave, then, the Rule is entirely unreasoned and fails at *Chevron* step two. It survives *Chevron* review insofar as it bans intermittent leave based on qualifying conditions that implicate an employee's risk of viral transmission.

E. Documentation Requirements

Finally, New York argues that the Final Rule's documentation requirements are inconsistent with the statute. (*See* Dkt. No. 4 at 21–23.) The Final Rule requires that employees submit to their employer, "prior to taking [FFCRA] leave," documentation indicating, *inter alia*, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. *See* Final Rule at 19,355 (§ 826.100). But the FFCRA, as New York points out, contains a reticulated scheme governing prior notice. With respect to emergency paid family leave, the EFMLEA provides that, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." FFCRA § 3102(b) (adding FMLA § 110(c)). And with respect to paid sick leave, the EPSLA provides that "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." *Id.* § 5110(5)(E). To the extent that the Final Rule's documentation requirement imposes a different and more stringent precondition to leave, it is inconsistent with the statute's unambiguous notice provisions at fails at *Chevron* step one.

The federal government urges the Court to distinguish between the question of prior notice (which is what the statutory scheme addresses) and documentation requirements (which is what the regulation describes). (*See* Dkt. No. 33–34.) But a blanket (regulatory) requirement that an employee furnish documentation *before taking leave* renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice completely nugatory. Labels aside, the two measures are in unambiguous conflict. The federal government also contends that the documentation requirements are not onerous (*see* Dkt. No. 34 at 25); be that as it may, the requirement is an unyielding condition precedent to the receipt of leave and, in that respect, is more onerous than the unambiguous statutory scheme Congress enacted. The documentation requirements, to the extent they are a precondition to leave, cannot stand.

F. Severability

The APA requires courts to "hold unlawful and set aside agency action" that is not in accordance with law or in excess of statutory authority. 5 U.S.C. § 706(2). "Agency action" may include "the whole or a part of an agency rule." 5 U.S.C. § 551(13). "Thus, the APA permits a court to sever a rule by setting aside only the offending parts of the rule." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019). To that end, the "'invalid part' of a statute or regulation 'may be dropped if what is left is fully operative as a law,' absent evidence that 'the [agency] would not have enacted those provisions which are within its power, independently of that which is not.'" *United States v. Smith*, 945 F.3d 729, 738 (2d Cir. 2019) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

Here, New York contends that each offending portion of the Final Rule is severable from the remainder of the Final Rule. (*See* Dkt. No. 4 at 23–25.) DOL does not dispute the provisions' severability, and the Court sees no reason that the remainder of the Rule cannot

operate as promulgated in the absence of the invalid provisions. The following portions, and only the following portions, of the Final Rule are therefore vacated: the work-availability requirement; the definition of "health care provider"; the requirement that an employee secure employer consent for intermittent leave; and the temporal aspect of the documentation requirement, that is, the requirement that the documentation be provided before taking leave. The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, as distinguished from its temporal aspect, stand.

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The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.

G. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is DENIED. Plaintiff's motion for summary judgment is GRANTED as to the work-availability requirement, the definition of "health care provider," and the temporal aspect of the documentation requirements, and is GRANTED in part and DENIED in part as to the intermittent-leave provision. Defendants' motion for summary judgment is GRANTED in part as to the intermittent-leave prohibition, and is otherwise DENIED.

The Clerk of Court is directed to close the motions at Docket Numbers 3, 24, and 31.

SO ORDERED.

Dated: August 3, 2020
New York, New York

J. PAUL OETKEN
United States District Judge

McCarter & English

Wait – Could You Go Over That Again?? Federal Court Sows Confusion by Invalidating Some FFCRA Regulations

Related People:
Hugh F. Murray, III
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Labor & Employment Law Alert

08.05.2020

A federal judge in New York recently invalidated several parts of the U.S. Department of Labor's ("USDOL") regulations related to the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, which Congress passed earlier this year as part of the Families First Coronavirus Response Act ("FFCRA"). The Court struck down the provision that made paid leave available to employees only if their employers had work available for them to do; the expansive definition of an excludable "health care provider;" the ability of an employer to withhold consent for intermittent leave; and the requirement of advance documentation of the need for leave. Subject to the outcome of a possible appeal by the USDOL, the Court's invalidation of parts of the FFCRA regulations will require employers to carefully review and adjust their policies related to these two programs.

Background

The very first piece of legislation Congress passed in response to the COVID-19 pandemic was the FFCRA. Among other things, the FFCRA mandated Emergency Paid Sick Leave for certain COVID-19-related absences and expanded coverage (including by providing for partial pay) under the Family and Medical Leave Act (FMLA) for employees who could not work because school or child care had been disrupted. For an outline of those laws, see https://www.mccarter.com/insights/covid-19-legislation-assists-employers-and-employees-in-response-to-pandemic/. These two FFCRA programs require covered employers to pay eligible employees during certain COVID-19-related leaves of absence and then be reimbursed by the federal government through payroll tax credits or refunds. If an employer fails to provide the mandated paid leave, it can face legal action from the employee. On the other hand, if the employer provides payment when that payment is not required by the FFCRA, the federal government will not reimburse the employer.

Because the statute had been drafted and passed very quickly due to urgent needs created by the pandemic, it had some ambiguous provisions. In keeping with the urgency underlying the statute, the USDOL then quickly issued regulations interpreting the FFCRA (the "Regulations"), which we previously summarized. The New York Attorney General soon thereafter filed suit challenging the validity of the Regulations under the Administrative Procedures Act.

On August 3, 2020, more than four months after the USDOL issued the Regulations, a federal district court in New York declared that several important provisions of the Regulations were invalid. As a result, employers covered by the FFCRA could face potential liability for past decisions made in reliance on the Regulations and some significant uncertainty over how to interpret the laws going forward.

The Work Availability Requirement

The Emergency Paid Sick Leave Act requires employers to provide paid leave to employees who are "unable to work (or telework) due to a need for leave because of" six specific COVID-19-related reasons. Similarly, the Emergency Family and Medical Leave Expansion Act provides partial pay for an employee who "is unable to work (or telework) due to a need for leave to care for" the employee's child whose school or day care is closed due to a public health emergency.

Under the Regulations, an employee who satisfied certain of the eligibility requirements of those programs was nonetheless NOT eligible for paid leave "where the Employer does not have work for the Employee." The Regulations provided that when an employee was unable to work because he or she was (a) subject to a quarantine or isolation order, (b) caring for a relative or household member, or (c) caring for a child whose school or day care is closed, the employer did not have to provide leave if the employer did not have work for the employee. However, the Regulations did not explicitly provide such a requirement where the employee was unable to work because he or she was (a) advised by a health care provider to self-quarantine or (b) seeking a medical diagnosis after experiencing COVID-19 symptoms. The Regulations also applied this work availability requirement to expanded FMLA leave.

Thus, in the circumstances to which the work availability requirement applied, an employer that did not have available work for an employee because of a slowdown or a shutdown was not required to provide paid sick leave or expanded FMLA leave to an otherwise eligible employee. If the employer chose to provide such paid leave despite not being required to by the Regulations, the federal government would not reimburse the cost of providing such paid leave.

Agreeing with New York's Attorney General, the district judge determined that the USDOL's application of the work availability requirement in the Regulations was invalid. In so holding, the Court first concluded that the terms of the statute were ambiguous. One reasonable reading was that in order for the employee to be eligible for the paid or partially paid leave, the qualifying reason must be the reason for the employee's inability to work – in other words, that where the employee would not be working anyway because work was unavailable, there was no occasion for leave. But equally reasonable, the Court believed, was the idea that if an employee were unable to work due to a qualifying reason, then the government, through the conduit of the employer, would pay the employee even if the employer did not have work for the employee.

Typically, where a provision of a statute is subject to two reasonable alternate meanings and Congress has authorized an agency like the USDOL to issue regulations interpreting the law, the agency can, through regulations, choose one of the competing reasonable interpretations. In such circumstances, when and if a court is ultimately forced to decide between reasonable interpretations, it will give significant deference to the interpretation of the agency Congress has charged with interpreting the statute.

In the case of the work availability requirement, however, the Court held that the USDOL did not act reasonably because it did not choose a single interpretation of the language but instead applied the work availability requirement to only three of the six qualifying reasons under the Emergency Paid Sick Leave Act. The Court held that the USDOL could not interpret the same statutory language differently in the same act. Therefore, the Court struck down the work availability requirement as it applied to those specific instances.

This ruling creates a significant problem for employers trying to comply with the FFCRA. The Court did NOT say that the Emergency Paid Sick Leave Act definitely covered cases in which work was unavailable. Instead, it effectively erased the Regulation that said there was a work availability requirement for some, but not all, of the qualifying reasons for Emergency Paid Sick Leave. Thus, employers are left with statutory language that this Court at least says is ambiguous and no valid regulatory guidance to help resolve the ambiguity. Ultimately, either the USDOL will issue a new regulation that consistently takes a position, or perhaps the USDOL will appeal to the Second Circuit to seek to overturn the district judge and have its Regulation upheld as a reasonable interpretation of the statutory language.

In the meantime, employers face a quandary. If an employer does not have work available for an employee, and that employee nonetheless requests paid leave under the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act, what should the employer do? It can grant such leave, but the Treasury Department could take the position that it will not reimburse the employer because there was no work from which the employee could be taking leave. Alternatively, the employer could deny the

requested leave, saying that it had no available work, but then the employee could bring a claim for violating the law based on the New York district court's invalidation of the USDOL's Regulation imposing a work availability requirement in certain settings.

At this point and subject to possible appellate proceedings in the New York litigation, the more cautious approach would be to provide the paid leave when requested even if the employer generally does not have work available for the employee. But there is risk in either approach, and because the law on this point is likely to evolve quickly through either a new statute, additional regulations, or an appeals court decision, employers should consult with counsel if and when this situation arises.

Definition of "Health Care Provider"

Under the FFCRA, an employer may, if it chooses, exclude a "health care provider" from both the Emergency Paid Sick Leave and the Expanded FMLA programs. For purposes of certifying health-related issues in the FFCRA, only an individual who is authorized to practice medicine by the state in which he or she practices or some other person specifically determined to be capable of providing health care services qualifies as a "health care provider." But for purposes of deciding whom an employer may exclude from eligibility for Emergency Paid Sick Leave or Expanded FMLA leave, the Regulations are far more expansive.

The Regulations provide that any person employed by any health care facility – such as a hospital, nursing home, or lab – and any person employed by any entity that contracts with a health care facility to provide services to maintain the operations of a health care facility is a "health care provider" subject to exclusion from the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act. To illustrate the breadth of the interpretation set forth in the Regulations, the district court noted that the USDOL agreed that "an English professor, librarian, or cafeteria manager at a university with a medical school would all be 'health care providers' under the Rule."

The Court had little difficulty concluding that the USDOL had overstepped its bounds with this broad definition. It held that the law required the USDOL to define "health care provider" only to include *individuals* capable of providing health care services, and invalidated the broad definition in the Regulations.

Unlike the work availability requirement, this conclusion creates less confusion for employers going forward. Only employees who are themselves traditional health care providers may be denied Emergency Paid Sick Leave and Expanded FMLA leave. Subject to the outcome of a possible appeal by the USDOL, employers who have in the past four months applied the broader definition that had been set forth in the Regulations should consult with counsel to evaluate their risks and consider steps to address those risks.

Intermittent Leave

The FFCRA did not address intermittent leave in the statute. The Regulations provided that as a general matter leave could be taken intermittently if both the employer and the employee agreed. However, in those circumstances that, as the Court said, "logically correlate with a higher risk of viral infection," intermittent leave could not be agreed to if it required that the employee report to the employer's work site.

Finding no rationale for the Regulations to impose a blanket requirement of employer consent to intermittent leave, the Court invalidated part of this Regulation. Under the Court's ruling, employees are entitled under both the Emergency Paid Sick Leave Act and the FMLA Expansion Act to take leave intermittently whether or not the employer consents, unless working intermittently would require reporting to the employer's work site and the reason for leave is due to the employee:

- Being subject to a government quarantine or isolation order;
- Receiving a recommendation by a health care provider that the employee quarantine;
- Experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Taking care of another individual who is subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine.

Thus, subject to further rule-making by the USDOL or a reversal of the district court if an appeal to the Second Circuit is pursued, employer consent is no longer a requirement for intermittent leave. Importantly, unlike in the FMLA, there is no provision that allows an employer to transfer an employee to a different position that better accommodates an intermittent schedule.

Documentation Requirements

Finally, the Court struck down the requirement in the Regulations that employees provide advance documentation of the need for Emergency Paid Sick Leave or Expanded FMLA leave. The Court noted that the statute requires only "reasonable notice" and held that a blanket requirement of advance documentation would, in some circumstances, not be reasonable.

Employees must still provide employers with reasonable notice and sufficient documentation, but the failure to provide documentation in advance of the leave will neither prevent leave nor interfere with reimbursement through tax credits.

Conclusion

Employers who are subject to the FFCRA should review their policies and practices in light of these new developments. Employers should also pay attention to additional changes that may come through legislation, new regulations, or appellate court decisions. And of course, both the Emergency Paid Sick Leave Act and the FMLA Expansion Act expire at the end of 2020.

Designated Altitudes. 2,500 feet MSL to but not including 5,000 feet MSL.

Times of designation. From 0600 to 1800 local time, daily, or other times as specified by NOTAM issued 48 hours in advance.

Controlling agency. FAA, Boston Approach Control.

Using agency. Commander, U.S. Army Garrison, Camp Edwards, MA.

R–4101C Camp Edwards, MA [New]

Boundaries. Beginning at lat. 41°40′52″ N, long. 70°33′07″ W; to lat. 41°41′01″ N, long. 70°33′58″ W; to lat. 41°41′58″ N, long. 70°34′56″ W; to lat. 41°42′52″ N, long. 70°34′56″ W; to lat. 41°43′52″ N, long. 70°34′30″ W; to lat. 41°44′30″ N, long. 70°34′14″ W; to lat. 41°45′17″ N, long. 70°34′11″ W; to lat. 41°45′12″ N, long. 70°33′59″ W; to lat. 41°46′07″ N, long. 70°33′02″ W; to lat. 41°45′18″ N, long. 70°31′16″ W; to lat. 41°44′37″ N, long. 70°30′40″ W; to lat. 41°44′11″ N, long. 70°29′38″ W; to lat. 41°43′06″ N, long. 70°30′06″ W; to lat. 41°43′07″ N, long. 70°30′34″ W; to lat. 41°42′45″ N, long. 70°30′48″ W; to lat. 41°42′38″ N, long. 70°30′31″ W; to lat. 41°41′51″ N, long. 70°30′50″ W; to lat. 41°41′38″ N, long. 70°31′16″ W; to lat. 41°41′20″ N, long. 70°31′27″ W; to lat. 41°41′18″ N, long. 70°31′24″ W; to lat. 41°41′06″ N, long. 70°31′52″ W; to the point of beginning.

Designated Altitudes. 5,000 feet MSL to 9,000 feet MSL.

Times of designation. By NOTAM issued 48 hours in advance.

Controlling agency. FAA, Boston Approach Control.

Using agency. Commander, U.S. Army Garrison, Camp Edwards, MA.

* * * * *

Issued in Washington, DC, on August 28, 2020.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

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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 revisions and clarifications to the temporary rule issued on April 1, 2020, implementing 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 the Coronavirus Disease 2019 (COVID–19) global pandemic, in response to an August 3, 2020 district court decision finding certain portions of that rule invalid. Both types of emergency paid leave were created by a time-limited statutory authority established under the Families First Coronavirus Response Act (FFCRA), and are set to expire on December 31, 2020. The FFCRA and its implementing regulations, including this temporary rule, do not affect the FMLA after December 31, 2020.

DATES: This rule is effective from September 16, 2020 through December 31, 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). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Background

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 of covered employers to take up to two weeks of paid sick leave if the employee is unable to work for specific qualifying reasons related to COVID–19. These qualifying reasons are: (1) Being subject to a Federal, state, or local quarantine or isolation order related to COVID–19; (2) being advised by a health care provider to self-quarantine due to COVID–19 concerns; (3) experiencing COVID–19 symptoms and seeking a medical diagnosis; (4) caring for another individual who is either 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 COVID–19 concerns; (5) caring for the employee's son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID–19 related reasons; and (6) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services (HHS).[1] FFCRA section 5102(a)(1)–(6). 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 of covered employers to take up to 12 weeks of expanded family and medical leave, ten of which are paid, if the employee is unable to work due to a need to care for his or her son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID–19 related reasons. FFCRA section 3012, adding FMLA section 110(a)(2)(A).

These paid sick leave and expanded family and medical leave requirements will expire on December 31, 2020. The costs to private-sector employers of providing paid leave required by the EPSLA and the EFMLEA (collectively "FFCRA leave") are ultimately covered by the Federal Government as Congress provided tax credits for these employers in the full amount of any FFCRA leave taken by their employees. 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.

FFCRA leave is part of a larger set of Federal Government-provided COVID–19 economic relief programs, which also include the Paycheck Protection Program and expanded unemployment benefits provided under the CARES Act. The Paycheck Protection Program, CARES Act sections 1101–1114, provided an incentive for employers to keep workers on their payrolls. FFCRA leave provides paid leave to certain employees who continue to be employed but are prevented from working for specific COVID–19 related reasons. And the CARES Act's expanded unemployment benefits, CARES Act sections 2101–2116, provided help to workers whose

[1] The Secretary of HHS has not identified any other substantially similar condition that would entitle an employee to take paid sick leave.

positions have been affected by COVID–19. Together, these three programs provide relief with respect to: (1) Employed individuals whose employers continue to pay them; (2) employed individuals who must take leave from work; and (3) unemployed individuals who no longer had work or had as much work.

The FFCRA grants authority to the Secretary to issue regulations for certain purposes. Section 3102(b) of the FFCRA, 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, the EFMLEA, and the Act's tax credit reimbursement provisions. Due to the exigency created by COVID–19, the FFCRA authorizes the Secretary to issue EPSLA and EFMLEA regulations under two exceptions to the usual requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* One of those exceptions permits issuing a rule without prior public notice or the opportunity for the public to comment if there is good cause to believe that doing so is "impractical, unnecessary, or contrary to the public interest"; the other permits a rule to become effective immediately, rather than after a 30-day delay, if there is good cause to do so. FFCRA sections 3102(b) (as amended by section 3611(7) of the CARES Act), 5111 (referring to 5 U.S.C. 553(b)(B) and (d)(3)). Relying on those exceptions, the Department promulgated a temporary rule to carry out the EPLSA and EFMLEA, which was made public on April 1, 2020. 85 FR 19326 (published April 6, 2020); *see also* 85 FR 20156–02 (April 10, 2020 correction and correcting amendment to April 1 rule).

On April 14, 2020, the State of New York filed suit in the United States District Court for the Southern District of New York ("District Court") challenging certain parts of the temporary rule under the APA. On August 3, 2020, the District Court ruled that four parts of the temporary rule are invalid: (1) The requirement under § 826.20 that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave; (2) the requirement under § 826.50 that an employee may take FFCRA leave intermittently only with employer approval; (3) the definition of an employee who is a "health care provider," set forth in § 826.30(c)(1), whom an employer may exclude from being eligible for FFCRA leave; and (4) the statement in § 826.100 that employees who take FFCRA leave must provide their employers with certain documentation before taking leave. *New York* v. *U.S. Dep't of Labor,* No. 20–CV–3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).[2]

The Department has carefully examined the District Court's opinion and has reevaluated the portions of the temporary rule that the court held were invalid. Given the statutory authorization to invoke exemptions from the usual requirements to engage in notice-and-comment rulemaking and to delay a rule's effective date, *see* FFCRA sections 3102(b), 5111, the time-limited nature of the FFCRA leave benefits, the urgency of the COVID–19 pandemic and the associated need for FFCRA leave, and the pressing need for clarity in light of the District Court's decision, the Department issues this temporary rule, effective immediately, to reaffirm its regulations in part, revise its regulations in part, and further explain its positions. In summary:

1. The Department reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave and explains further why this requirement is appropriate. This temporary rule clarifies that this requirement applies to all qualifying reasons to take paid sick leave and expanded family and medical leave.

2. The Department reaffirms that, where intermittent FFCRA leave is permitted by the Department's regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently under § 825.50 and explains further the basis for this requirement.

3. The Department revises the definition of "health care provider" under § 825.30(c)(1) to mean employees who are health care providers under 29 CFR 825.102 and 825.125,[3] and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.

4. The Department revises § 826.100 to clarify that the information the employee must give the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

5. The Department revises § 826.90 to correct an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to his or her employer.

II. Reaffirming and Explaining the Work-Availability Requirement Under § 826.20, Consistent With Supreme Court Precedent and FMLA Principles

The Department's April 1, 2020 rule stated that an employee is entitled to FFCRA leave only if the qualifying reason is a but-for cause of the employee's inability to work. 85 FR 19329. In other words, the qualifying reason must be the actual reason the employee is unable to work, as opposed to a situation in which the employee would have been unable to work regardless of whether he or she had a FFCRA qualifying reason. This means an employee cannot take FFCRA paid leave if the employer would not have had work for the employee to perform, even if the qualifying reason did not apply. *Id.* This work-availability requirement was explicit in the regulatory text as to three of the six qualifying reasons for leave.[4] As explained below, the Department's intent, despite not explicitly including the work-availability requirement in the regulatory text regarding the other three qualifying reasons, was to apply the requirement to all reasons.

The work-availability requirement and the but-for causation standard that undergirds it were part of the legal challenge to the rule. *New York,* 2020 WL 4462260 at *6–7. The FFCRA uses the words "because" and "due to" in identifying the reasons for which an employee may take FFCRA leave. *See* FFCRA sections 3102 and 5102(a). The District Court held that the FFCRA's use of "because" and "due to" in referring to the reasons an employee is unable to work or telework were ambiguous as to the causation standard imposed and further concluded that the work-availability requirement was invalid for

[2] The District Court invalidated § 826.20 because the Department did not sufficiently explain the positions taken in that provision and because the regulatory text explicitly applied the work availability requirement only to three of the six qualifying reasons for taking FFCRA leave, § 826.50 because the Department did not sufficiently explain the positions taken in that provision, and §§ 826.30(c)(1) and .100 as being inconsistent with the statute. *Id.* at *8–12.

[3] The definition of "health care provider" under § 825.102 is identical to the definition under § 825.125.

[4] *Compare* § 826.20(a)(2), (6) and (9) (applying requirement to leave due to a government quarantine or isolation order, to care for a person subject to such an order or who has been advised by a health care provider to self-quarantine, and to care for the employee's child whose school or place of care is closed or child care provider is unavailable, respectively) *with* § 826.20(a)(3), (4), and (1)(vi) (no language applying requirement to leave due to being advised by a health care provider to self-quarantine, to having COVID–19 symptoms and seeking a diagnosis, or to other substantially similar conditions defined by the Department of Health and Human Services, respectively).

two reasons. One, the Department's explicit application of the requirement to only three of the six reasons for taking leave was unreasoned and inconsistent with the statutory text; two, the Department did not sufficiently explain the reason for imposing this requirement at all. *Id.* at *7–9.

The Department has carefully considered the District Court's opinion and now provides a fuller explanation for its original reasoning regarding the work-availability requirement. With this revised rule, the Department explains why it continues to interpret the FFCRA to impose a but-for causation standard that in turn supports the work-availability requirement for all qualifying reasons for leave.[5] Further, the Department revises § 826.20 to explicitly include the work-availability requirement in all qualifying reasons for leave.

The FFCRA states that an employer shall provide its employee FFCRA leave to the extent that the employee is unable to work (or telework) due to a need for leave "because" of or "due to" a qualifying reason for leave under FFCRA sections 3102 and 5102(a).[6] The terms "because," "due to," and similar statutory phrases have been repeatedly interpreted by the Supreme Court to require "but-for" causation.[7] "[A]n act is not a 'but-for' cause of an event if the event would have occurred even in the absence of the act[,]"[8] including where the event would have occurred due to another sufficient cause.[9] The District Court recognized that the "traditional meaning of 'because' (and 'due to') implies a but-for causal relationship," but concluded that these terms' use in the FFCRA did not necessarily foreclose a different interpretation. *New York*, 2020 WL 4462260, at *7.

After considering the District Court's conclusion that the statute does not necessarily require the traditional result, the Department continues to believe that the traditional meaning of "because" and "due to" as requiring but-for causation is the best interpretation of the FFCRA leave provisions in this context. This standard is especially compelling in light of Supreme Court precedent applying the "ordinary meaning" of but-for causation where the underlying statute did not specify an alternative standard. *Burrage* v. *United States*, 571 U.S. 204, 216 (2014) ("Congress could have written [a statute] to impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes . . . . It chose instead to use language that imports but-for causality."). Here too, the Department sees no textual basis or other persuasive reason to deviate from the standard meanings of these terms.[10] The Department's regulations thus interpret the FFCRA to require that an employee may take paid sick leave or expanded family and medical leave only to the extent that a qualifying reason for such leave is a but-for cause of his or her inability to work.

In the FFCRA context, if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave—perhaps the employer closed the worksite (temporarily or permanently)—that qualifying reason could not be a but-for cause of the employee's inability to work.[11] Instead, the individual would have no work from which to take leave. The Department thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work. Because the Department agrees with the District Court that there is no basis, statutory or otherwise, to apply the work-availability requirement only to some of the qualifying reasons for FFCRA leave, and in keeping with the Department's original intent, the Department amends § 826.20(a)(3), (a)(4) to state explicitly, as § 826.20(a)(2), (6), and (9) do, that an employee is not eligible for paid leave unless the employer would otherwise have work for the employee to perform. The Department similarly adds § 826.20(a)(10) to make clear such requirement is likewise needed when an employee requests paid leave for a substantially similar condition as specified by the Secretary of Health and Human Services.[12]

The Department's continued application of the work-availability requirement is further supported by the fact that the use of the term "leave" in the FFCRA is best understood to require that an employee is absent from work at a time when he or she would otherwise have been working. As to this point, the District Court concluded that the statute did not mandate such an interpretation. *New York*, 2020 WL 4462260, at *7–8. After reconsideration, the Department now reaffirms that even if "leave" could encompass time an employee would not have worked regardless of the relevant qualifying reason, the Department, based in significant part on its experience administering and enforcing other mandatory leave requirements, interprets the FFCRA as allowing employees to take paid leave only if they would have worked if not for the qualifying reason for leave. "Leave" is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave. This interpretation is consistent with the Department's long-standing interpretation of the term "leave" in the FMLA (which the EFMLEA amended). *See* 29 U.S.C. 2612(a). For instance, the Department's FMLA regulation at

[5] To the extent that the District Court required addition or further explanation of the Department's final action in promulgating this rule, the additional explanation here should be read as a supplement to—and not a replacement of—the discussion of causation included in the April 1 temporary rule.

[6] The statute's use of the mandatory language "shall," in setting forth the employer's obligation, FFCRA section 5102(a), 29 U.S.C. 2612(a), is therefore limited by prerequisites: What the employer is obligated to provide to employees is "leave" and the employer's obligation is triggered only when the employee's need for leave is because of one of the qualifying reasons. These *prerequisites,* set forth in the plain text, to employers having an obligation to provide FFCRA leave are unaffected by the fact that the FFCRA elsewhere provides certain *exceptions* to that obligation (*e.g.,* the health care provider exception).

[7] *See, e.g., Burrage* v. *United States*, 571 U.S. 204, 211 (2014) (the phrase "results from" in a criminal statute "requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct") (internal citations and quotation marks omitted); *Univ. of Tex. SW. Ctr.* v. *Nassar*, 570 U.S. 338, 346–47 (2013); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) ("[T]he ordinary meaning of the [Age Discrimination in Employment Act's] requirement that an employer took adverse action 'because of' age is that . . . age was the 'but-for' cause of the employer's adverse decision."); *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007) ("[T]he phrase 'based on' indicates a but-for causal relationship. . . .").

[8] *In re Fisher*, 649 F.3d 401, 403 (5th Cir. 2011); *see also, e.g., Burrage*, 571 U.S. at 219 (heroin use was not proven to be a cause of death where "the Government concedes that there is no 'evidence that [the decedent] would have lived but for his heroin use'").

[9] *See Brandt* v. *Fitzpatrick*, 957 F.3d 67, 76 (1st Cir. 2020) (employer may avoid damages in an employment discrimination case "if it can show it would have made the same decision even if race hadn't factored in (meaning race wasn't the 'but-for' cause of the failure to hire)").

[10] This conclusion reflects a fair and natural reading of the FFCRA, and there is no textual basis here to deviate from such a reading. This is so even though the FFCRA may be classified as a remedial statute under which Congress sought to protect workers. *See, e.g., Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (statute's remedial purpose did not justify departing from "a fair reading" of the plain text). This is particularly true in light of the fact that FFCRA leave is but one part of a wider universe of COVID–19-related government-provided relief. Moreover, the text of the FFCRA demonstrates that Congress was attuned to not only employees' need for leave but also to employers' circumstances. *See, e.g.,* FFCRA 3102(b); 3105, 5102(a).

[11] *See Brandt*, 957 F.3d at 76.

[12] The Department notes that as of the date of this publication, the Secretary of Health and Human Services had not specified a substantially similar condition in accordance with this subsection.

§ 825.200(h) states that "if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work," the time that "the employer's activities have ceased do not count against the employee's FMLA leave entitlement." Time that an employee is not required to work does not count against an employee's 12 workweek leave entitlement under the FMLA—including any EFMLEA leave—because it is not "leave." [13] In addition, the Department's regulations implementing Executive Order 13706, which require certain federal contractors to provide employees with paid sick leave under certain circumstances, reflect this same understanding. The regulations explicitly define "paid sick leave" to mean "compensated absence *from employment,*" 29 CFR 13.2 (emphasis added), and explain that "a contractor must permit an employee to use paid sick leave to be absent from work for that contractor *during time the employee would have been performing work on or in connection with a covered contract* or, [under other specified circumstances], during *any work time* because of [the enumerated qualifying reasons for leave]," 29 CFR 13.5(c)(1) (emphasis added).

The Department notes that removing the work-availability requirement would not serve one of the FFCRA's purposes: Discouraging employees who may be infected with COVID–19 from going to work. If there is no work to perform, there would be no need to discourage potentially infected employees from coming to work through the provision of paid FFCRA leave. Nor is there a need to protect a potentially infected employee who stays home from an employer's disciplinary actions if the employer has no work for the employee to perform.

Removing the work-availability requirement would also lead to perverse results. Typically, if an employer closes its business and furloughs its workers, none of those employees would receive paychecks during the closure or furlough period because there is no paid work to perform. But if an employee with a qualifying reason could take FFCRA leave even when there is no work, he or she could take FFCRA leave, potentially for many weeks, even when the employer closes its business and furloughs its workers. The employee on FFCRA leave would continue to be paid during this period, while his or her co-workers who do not have a qualifying reason for taking FFCRA leave would not. The Department does not believe Congress intended such an illogical result.

To be clear, the Department's interpretation does not permit an employer to avoid granting FFCRA leave by purporting to lack work for an employee. The work-availability requirement for FFCRA leave should be understood in the context of the applicable anti-retaliation provisions, which prohibit employers from discharging, disciplining, or discriminating against employees for taking such leave. *See* 29 U.S.C. 2615; FFCRA section 5104, as amended by CARES Act section 3611(8); 29 CFR 826.150(a), 826.151(a). Accordingly, employers may not make work unavailable in an effort to deny FFCRA leave because altering an employee's schedule in an adverse manner because that employee requests or takes FFCRA leave may be impermissible retaliation. *See Burlington N. & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53, 69 (2006) ("A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children."); *see also Welch* v. *Columbia Mem'l Physician Hosp. Org., Inc.,* No. 1:13–CV–1079 GLS/CFH, 2015 WL 6855810, at *7 (N.D.N.Y. Nov. 6, 2015) (employee's "return[ ] from FMLA leave days before her supervisors changed her schedule . . . . suffic[ed] to support an inference of retaliation."). There must be a legitimate, non-retaliatory reason why the employer does not have work for an employee to perform. This may occur, for example, where the employer has temporarily or permanently ceased operations at the worksite where the employee works or where a downturn in business forces the employer to furlough the employee for legitimate business reasons. *See, e.g., Mullendore* v. *City of Belding,* 872 F.3d 322, 329 (6th Cir. 2017) (no FMLA retaliation where employer "has demonstrated a legitimate [and non-pretextual] reason for terminating" the employee). Although an out-of-work employee would not be eligible for FFCRA leave in these scenarios, he or she may be eligible for unemployment insurance and other assistance programs.

New York State has argued that the work-availability requirement would "insert[] a capacious and unpredictable loophole basing eligibility on the hour-by-hour or day-by-day happenstance that work may not be available." Pl's Mem. Of L., *New York* v. *U.S. Dep't of Labor,* 2020 WL 3411251 (S.D.N.Y. filed May 5, 2020). But as discussed above, the requirement is not a loophole but rather a longstanding principle in the Department's employee-leave regulations. It does not operate as an hour-by-hour assessment as to whether the employee would have a task to perform but rather questions whether the employee would have reported to work at all. Moreover, the availability or unavailability of work must be based on legitimate, non-discriminatory and non-retaliatory business reasons.[14]

Furthermore, FFCRA leave is only one form of relief that has been made available during the COVID–19 crisis. Among other things, FFCRA paid leave ensures workers are not forced to choose between their paychecks and the public health measures needed to combat the virus; for example, an employee who may have been exposed to COVID–19 is encouraged not to go to work and thereby risk spreading the virus. Other provisions of the CARES Act assist workers in other circumstances. To encourage employers to maintain employees on the payroll, the Paycheck Protection Program, CARES Act sections 1101–1114, made available low-interest, and potentially forgivable, loans to employers who use those funds to continue to pay employees who might otherwise be laid off. To furnish relief to employees whose employers are not able to maintain them on the payroll, the Relief for Workers Affected by Coronavirus Act, CARES Act sections 2101–2116, expanded the Federal Government's support of unemployment insurance by enlarging the scope of unemployment coverage, the length of time for which individuals were eligible for unemployment payments, and the amount of those payments. And most directly, the CARES Act created a refundable tax credit, advances of which are being paid in 2020, to address the financial stress of the pandemic. The credit is worth up to $1,200 per eligible individual or up to $2,400 for individuals filing a joint return, plus up to $500 per qualifying child. CARES Act

[13] Under the FMLA, a period during which an employer has no work for an employee is not counted against the employee's entitlement to leave. Because FFCRA leave is paid, an added result in the same scenario is that the employee would not receive pay for that period because that period would not count as leave. The introduction of pay, however, does not change the meaning of "leave." Paid leave under the FFCRA provides employees income for time during which they otherwise would have worked and therefore would have otherwise been paid. If an employer has no work for an employee, the employee would not have reported to work (or telework) or been paid, and therefore any payments for FFCRA leave would not, as intended, substitute for wages that he or she would otherwise have received.

[14] Regardless, any economic incentive for private-sector employers to wrongfully deny their employees FFCRA leave is limited by the fact that, for these employers, FFCRA leave is fully funded by the Federal Government through tax credits.

section 2201. All of this was in addition to industry-specific support measures and myriad changes to the Internal Revenue Code. *See, e.g.,* CARES Act sections 2202–2308; 4001–4120. Against this backdrop, the Department interprets the FFCRA's paid sick leave and emergency family and medical leave provisions to grant relief to employers and employees where employees cannot work because of the enumerated reasons for leave, but not where employees cannot work for other reasons, in particular the unavailability of work from the employer.

III. Reaffirming and Explaining the Employer-Approval Requirement for Intermittent Leave Under § 826.50 in Accordance With FMLA Principles

The Department reaffirms the April 1 temporary rule's position that employer approval is needed to take intermittent FFCRA leave, and explains the basis for this requirement, which is consistent with longstanding FMLA principles governing intermittent leave. Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason, with the employee reporting to work intermittently during an otherwise continuous period of leave taken for a single qualifying reason.[15] Under the FMLA, intermittent leave is specifically defined as "leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks." 29 CFR 825.102. In the original FMLA statute, Congress expressly authorized employees taking FMLA leave for any qualifying reason to do so intermittently but only under certain circumstances. Depending on the reason for taking FMLA leave, the statute requires a medical need to take intermittent leave or an agreement between the employer and employee before an employee may take intermittent leave. *See* Public Law 103–3, sec. 102(b)(1), codified at 29 U.S.C. 2612(b)(1). In 2008, Congress amended the FMLA to create two new reasons for FMLA leave: Qualifying exigencies due to service in the Armed Forces and to care for injured service members. 29 U.S.C. 2612(a)(1)(E), (a)(3). Like the FMLA in 1993, the 2008 amendments explicitly authorized intermittent leave for these new qualifying FMLA leave reasons. 29 U.S.C. 2612(b)(1).

In contrast to the FMLA, in the FFCRA, Congress said nothing about intermittent leave,[16] but granted the Department broad regulatory authority to effectuate the purposes of the EPLSA and EFMLEA (which amends the FMLA) and to ensure consistency between the two laws.[17] As the District Court acknowledged, because "Congress did not address intermittent leave at all in the FFCRA[,] it is therefore precisely the sort of statutory gap . . . that DOL's broad regulatory authority empowers it to fill." *New York,* 2020 WL 4462260, at *11.

The Department did not interpret the absence of language authorizing intermittent leave under the FFCRA to categorically permit[18] or prohibit[19] intermittent leave. Rather, § 826.50 permits an employee who is reporting to a worksite to take FFCRA leave on an intermittent basis only when taking leave to care for his or her child whose school, place of care, or child care provider is closed or unavailable due to COVID–19, and only with the employer's consent. 29 CFR 826.50(b). Because this is the only qualifying reason for EFMLEA leave, such leave may always be taken intermittently provided that the employer consents. As to EPSLA leave, this constitutes only one of the six potential qualifying reasons. The Department reasoned that the other reasons for taking EPSLA leave correlate to a higher risk of spreading the virus and therefore that permitting intermittent leave would hinder rather than further the FFCRA's purposes.

An employee who is teleworking (and not reporting to the worksite) may take intermittent leave for any of the FFCRA's qualifying reasons as long as the employer consents. 29 CFR 826.50(c). The District Court upheld the rule's prohibition on intermittent leave for employees who are reporting to the worksite when the reason for leave correlates to a higher risk of spreading the virus, *i.e.,* all qualifying reasons except for caring for the employee's child due to school or childcare closure or unavailability. *New York,* 2020 WL 4462260, at *11–12 & n.9; 29 CFR 826.50(b)(2). However, the District Court held that the Department did not adequately explain the rationale for the requirement that intermittent leave, where available, can only be taken with the employer's consent. *New York,* 2020 WL 4462260, at *12. After reconsideration, the Department affirms its earlier interpretation—with additional explanation.[20]

As the April 1 rule explained, the Department "imported and applied to the FFCRA certain concepts of intermittent leave from its FMLA regulations." 85 FR 19336.[21] Under

[15] Intermittent leave occurs only when the employee has periods of leave interrupted with periods of reporting to work (or telework). In contrast, an employee who works a schedule that itself could be characterized as "intermittent" or sporadic in which he or she has, for example, several days off in between each shift, is not taking intermittent leave where the periods between the shifts for which leave is used are periods during which the employee is not scheduled to work.

[16] Congress did, however, include temporal language as to leave, which is consistent with a recognition that an employee with a qualifying reason for leave might not need to take his or her full FFCRA leave entitlement of two weeks (up to 80 hours) of EPSLA leave and twelve weeks of EFMLEA leave, ten of which are paid. *See* FFCRA section 3102(b) ("An employer shall provide paid leave for each day of [EFMLEA] leave that an employee takes"); *id.* § 5110(f)(A)(i) (defining "paid sick time" as "an increment of compensated leave that . . . is provided by an employer for use during an absence from employment" for an EPSLA qualifying reason); *id.* § 7001(b) (referencing days and calendar quarters for tax credit purposes). Those provisions do not mention "intermittent leave," a term Congress has previously invoked and therefore could have used but did not.

[17] FFCRA section 5111(3) (delegating to the Secretary of Labor authority to promulgate regulations "as necessary, to carry out the purposes of this Act, *including to ensure consistency*" between the EPSLA and the EFMLEA) (emphasis added); *id.* section 3102(b), *amended by* CARES Act section 3611(7) (same).

[18] Permitting employees to take intermittent leave without restriction would create tension with how both Congress and the Department have understood intermittent leave in most of the circumstances for which it is permitted under the FMLA. Further, while the Department recognizes that the FFCRA is intended in part to allow eligible employees to take paid leave for certain COVID–19-related reasons, unrestricted intermittent leave would undermine a statutory purpose of combating the COVID–19 public health emergency. For example, giving employees who take paid sick leave because an individual in their care could be infected with COVID–19, *see* FFCRA section 5102(a)(4), unrestricted flexibility to go to work on days of their choosing could increase the risk of COVID–19 contagion. *See New York,* 2020 WL4462260, at *12. Accordingly, the Department did not interpret the FFCRA to permit unrestricted intermittent leave.

[19] An alternative construction that prohibits employees from intermittently taking paid sick leave and expanded family and medical leave in any circumstance is arguably more consistent with Congress' and the Department's practice of explicitly identifying circumstances in which FMLA leave may be taken intermittently. It also would be more consistent with the FFCRA's public health objectives because employees who take FFCRA leave for some, but not all, qualified reasons may have been infected or exposed to COVID–19, and allowing them to return to work intermittently would exacerbate COVID–19 contagion. Nevertheless, the Department does not believe this is the best interpretation because it would unnecessarily limit employer and employee flexibilities in accommodating work and leave needs in situations that do not as directly implicate public health concerns.

[20] The Department gives the additional explanation here as a supplement to—and not a replacement of—the discussion of intermittent leave included in the April 1 temporary rule.

[21] In so doing, the Department aligned the availability, conditions, and limits of intermittent leave under EPSLA and EFMLEA to the greatest extent possible consistent with 29 U.S.C. 2612(b) and 29 CFR 825.202, while at the same time applying and balancing Congress' broader objectives to contain COVID–19 through furnishing paid leave to employees.

those regulations, "FMLA leave may be taken intermittently . . . under certain circumstances" specified in the statute and applied in the regulation. 29 CFR 825.202.[22] In other words, as Congress has previously specified, and as the Department's regulations require, FMLA leave must be taken in a single block of time unless specific conditions are met. These conditions are: (1) A medical need for intermittent leave taken due to the employee's or a family member's serious health condition, which the employer may require to be certified by a health care provider; (2) employer approval for intermittent leave taken to care for a healthy newborn or adopted child; or (3) a qualifying exigency related to service in the Armed Forces. *Id.*

The regulations concerning intermittent leave due to service in the Armed Forces are not relevant in the very different FFCRA context. *See* 29 CFR 825.202(d). The Department further believes certified medical need is not an appropriate condition for FFCRA intermittent leave. As the District Court explained, an employer may not require documentation of any sort as a precondition to taking FFCRA leave, *New York,* 2020 WL 4462260, at *12, so the Department does not believe certification could be required as a precondition for such leave taken intermittently. Moreover, certified medical need is inapplicable where an employee takes expanded family and medical leave or paid sick leave under § 826.20(a)(v) due to the closure or unavailability of his or her child's school, place of care, or child care provider because those qualifying reasons bear no relationship to any medical need.

The remaining qualifying reasons to take paid sick leave under § 826.20(a)(i)–(iv) and (vi) are medically related but do not lend themselves to the allowance of intermittent leave for medical reasons. A COVID–19-related quarantine or isolation order under § 826.20(a)(i) prevents certain employees from going to work because the issuing government authority has determined that allowing such employees to work would exacerbate COVID–19 contagion. Similarly, a health care provider may advise an employee to self-quarantine under § 826.20(a)(ii) because that employee is at particular risk if he or she is infected by the coronavirus or poses a risk of infecting others. In both cases, the government authority and health care provider may be concerned that an individual to whom the order or advice is directed has an elevated risk of having COVID–19.[23] If so, an employee who takes leave under § 826.20(a)(iv) to care for such an individual may have elevated risk of COVID–19 exposure. Finally, an employee who is experiencing COVID–19 symptoms under § 826.20(a)(iii), or other similar symptoms identified by the Secretary of HHS under § 826.20(a)(iii), would also have elevated risk of having COVID–19.

At bottom, the qualifying reasons to take paid sick leave under § 826.20(a)(i)–(iv) are medically related because they include situations where the employee may have an elevated risk of being infected with COVID–19, or is caring for someone who may have an elevated risk of being infected with COVID–19. Rather than justifying intermittent leave, these medical considerations militate against intermittent FFCRA leave where the employee may have an elevated risk of being infected with COVID–19 or is caring for someone who may have such elevated risk. Permitting such an employee to return to work intermittently when he or she is at an elevated risk of transmitting the virus would be incompatible with Congress' goal to slow the spread of COVID–19. *See* 85 FR 19336; *New York,* 2020 WL 4462260, at *12. The same is broadly true where an individual is at higher risk if infected: Permitting an individual who has been ordered or advised to self-isolate due to his or her vulnerability to COVID–19 to return to work intermittently would also undermine the FFCRA's public health objectives. Accordingly, the regulations do not allow employees who take paid sick leave under § 826.20(a)(i)–(iv) and (vi) to return to work intermittently at a worksite.[24] Employees who take paid sick leave for these reasons, however, may telework on an intermittent basis without posing the risk of spreading the contagion at the worksite or being infected themselves.

The Department believes the employer-approval condition for intermittent leave under its FMLA regulation is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate risk of COVID–19 contagion. It is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid "unduly disrupting the employer's operations." 29 CFR 825.302(f). It best meets the needs of businesses that this general principle is carried through to the COVID–19 context, by requiring employer approval for such leave. In the context of intermittent leave being required for medical reasons, the FMLA long has recognized certified medical needs for intermittent leave as paramount, unless the leave is for planned medical treatment, in which case the employee must make reasonable efforts to schedule the leave in a manner that does not unduly disrupt operations. 29 U.S.C. 2612(e)(2)(A); 29 CFR 825.302(e). However, when intermittent leave is not required for medical reasons, the FMLA balances the employee's need for leave with the employer's interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave. 29 CFR 825.120(b); .121(b). The Department's FFCRA regulations already provide that employees may telework only where the employer permits or allows. *See* § 826.10(a). Since employer permission is a precondition under the FFCRA for telework, the Department believes it is also an appropriate condition for teleworking intermittently due to a need to take FFCRA leave.[25] On the other hand, the Department does not believe that an employee should be required to obtain certification of medical need in order to telework intermittently because it may be unduly burdensome in this context for an employee to obtain such certification. Medical certification would also be redundant because the employee must already obtain employer permission to telework in the first place. The Department has thus aligned the employer-agreement requirements to

[22] In 1995, the Department promulgated regulations implementing the intermittent leave provisions as part of its final rule implementing the FMLA, which had been enacted in 1993. *See* 60 FR 2180. The current version of the regulation includes organizational and other minor amendments made in 2008, 2013, and 2015. *See* 29 CFR 825.202; *see also* 80 FR 10001; 78 FR 8902; 73 FR 67934.

[23] This is not the only reasons why a government entity or a health care provider may order or advise an individual to quarantine. For instance, the government entity or health care provider may be concerned that the individual has elevated vulnerability to COVID–19 because that individual falls within a certain age range or has a certain medical condition.

[24] Employees are not required to use up their entire FFCRA leave entitlement the first time they face a qualifying reason for taking FFCRA leave. Depending on their circumstances, employees may not need to take their full FFCRA leave entitlement when taking leave for one of these qualifying reasons. If so, they will be eligible to take the remainder of their FFCRA leave entitlement should they later face a separate qualifying reason for such leave. Taking leave at a later date for a distinct qualifying reason is not intermittent leave.

[25] For example, consider an employee who takes paid sick leave after being advised to self-isolate by a health care provider. If the employer does not permit telework, the employee would be unable to work intermittently at the worksite during the period of paid sick leave. Intermittent leave would be possible only if the employer allows the employee to telework.

apply to both telework and intermittent leave from telework. The Department believes that its approach affords both employers and employees flexibility. In many circumstances, these agreed-upon telework and scheduling arrangements may reduce or even eliminate an employee's need for FFCRA leave by reorganizing work time to accommodate the employee's needs related to COVID–19.

Employer approval is also an appropriate condition for taking FFCRA leave intermittently to care for a child, whether the employee is reporting to the worksite or teleworking. This condition already applies where an employee takes FMLA leave to care for his or her healthy newborn or adopted child, which is similar to where an employee takes FFCRA leave to care for his or her child because the child's school, place of care, or child care provider is closed or unavailable.

The employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent under § 826.50. In an alternate day or other hybrid-attendance schedule implemented due to COVID–19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (*i.e.,* the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.,* school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person. This is distinguished from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.

With those explanations and exceptions in mind, the Department reaffirms that employer approval is needed to take FFCRA leave intermittently in all situations in which intermittent FFCRA leave is permitted.

IV. Revisions to Definition of "Health Care Provider" Under § 826.30(c)(1) to Focus on the Employee

Sections 3105 and 5102(a) of the FFCRA, respectively, allow employers to exclude employees who are "health care provider[s]" or who are "emergency responder[s]" from eligibility for expanded family and medical leave and paid sick leave. The Department understands that the option to exclude health care providers and emergency responders serves to prevent disruptions to the health care system's capacity to respond to the COVID–19 public health emergency and other critical public health and safety needs that may result from health care providers and emergency responders being absent from work. The FFCRA adopts the FMLA definition of "health care provider," FFCRA section 5110(4), which covers (i) licensed doctors of medicine or osteopathy and (ii) "any other person determined by the Secretary to be capable of providing health care services," 29 U.S.C. 2611(6). The FFCRA, however, uses the term "health care provider" in two markedly different contexts. Section 5102(a)(2) of the FFCRA uses "health care provider" to refer to medical professionals who may advise an individual to self-isolate due concerns related to COVID–19 such that the individual may take paid sick leave to follow that advice. In the Department's April 1 temporary rule implementing the FFCRA's paid leave provisions, the Department used the definition of this term it adopted under the FMLA, 29 CFR 825.125, to define this group of health care providers. § 826.20(a)(3). In the second context, Sections 3105 and 5102(a) of the FFCRA allow employers to exclude employees who are "health care providers" or who are "emergency responders" from the FFCRA's entitlement to paid leave. The Department promulgated a different definition of "health care provider" to identify these employees, § 826.30(c)(1), which the District Court held was overly broad. *See New York,* 2020 WL 4462260, at *9–10.

The District Court explained that because the FFCRA adopted the FMLA's statutory definition of "health care provider" in 29 U.S.C. 2611(6), including the portion of that definition permitting the Secretary to determine that additional persons are "capable of providing health care services," any definition adopted by the Department must require "at least a minimally role-specific determination" of which persons are "capable of providing healthcare services." *New York,* 2020 WL 4462260, at *10. In other words, the definition cannot "hinge[ ] entirely on the identity of the *employer,*" but must depend on the "skills, role, duties, or capabilities" of the employee. *Id.* To define the term otherwise would sweep in certain employees of health care facilities "whose roles bear *no nexus whatsoever* to the provision of healthcare services." *Id.* The District Court did not foreclose, however, an amended regulatory definition that is broader than the FMLA's regulatory definition, explaining that there is precedent for the proposition that an agency may define a term shared by two sections of a statute differently "as long as the different definitions individually are reasoned and do not exceed the agency's authority." *Id.* at *10 n.8.

After careful consideration of the District Court's order, this rule adopts a revised definition of "health care provider," to appear at § 826.30(c)(1), for purposes of the employer's optional exclusion of employees who are health care providers from FFCRA leave. First, revised § 826.30(c)(1)(i) defines a "health care provider" to include employees who fall within the definition of health care provider under 29 CFR 825.102 and 825.125. Specifically, revised § 826.30(c)(1)(i)(A) cites 29 CFR 825.102 and 825.125—to bring physicians and others who make medical diagnoses within this term. Second, revised § 826.30(c)(1)(i)(B), consistent with the District Court's order, identifies additional employees who are health care providers by focusing on the role and duties of those employees rather than their employers. It expressly states that an employee is a health care provider if he or she is "capable of providing health care services." The definition then further limits the universe of relevant "health care services" that the employee must be capable of providing to qualify as a "health care provider"—*i.e.,* the duties or role of the employee. Specifically, a health care provider must be "employed to provide diagnostic services, preventive services, treatment services,

or other services that are integrated with and necessary to the provision of patient care."

Neither the FMLA nor FFCRA defines "health care services," leaving a statutory gap for the Department to fill. When used in the context of determining who may take leave despite a need to respond to a pandemic or to ensure continuity of critical operations within our health care system, the term "health care services" is best understood to encompass a broader range of services than, as in the FMLA context, primarily those medical professionals who are licensed to diagnose serious health conditions. To interpret this critical term, the Department is informed by how other parts of Federal law define this term. In one notable example, the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019 (Pandemic Act) defines "health care service" in the context of a pandemic response to mean "any services provided by a health care professional, or by any individual working under the supervision of a health care professional, that relate to (A) the diagnosis, prevention, or treatment of any human disease or impairment; or (B) the assessment or care of the health of human beings." 42 U.S.C. 234(d)(2). The services listed in subparagraphs (A) and (B) of this definition reflect Congress's view of health care services that are provided during a pandemic. In the Department's view, the Pandemic Act's description of the categories of services that qualify as "health care services" provides a useful baseline for interpretation of "health care services" as that term is used in connection with the FFCRA because both statutes focus on pandemic response. Accordingly, for purposes of who may be excluded by their employers from taking FFCRA leave, the revised regulation provides that an employee is "capable of providing health care services," and thus may be a "health care provider" under 29 U.S.C. 2611(6)(B), if he or she is employed to provide diagnostic services, preventative services, or treatment services. The Department also includes a fourth category, services that are integrated with and necessary to the provision of patient care and that, if not provided, would adversely impact patient care, which is analogous to but narrower than the Pandemic Act's reference to services "related to . . . the assessment or care of the health of human beings." *See* U.S.C. 234(d)(2)(B). These categories are codified in the revised § 826.30(c)(1)(i)(B).

The Pandemic Act and the FFCRA diverge in an important way, however. The provision of the Pandemic Act cited above limits the liability of "health care professionals," defined to be limited to individuals "licensed, registered, or certified under Federal or State laws or regulations to provide health care services," who provide services as members of the Medical Reserve Corps or in the Emergency System for Advance Registration of Volunteer Health Professionals. 42 U.S.C. 234(d)(1). The FFCRA's optional exclusion from its leave entitlements has a different purpose: Ensuring that the health care system retains the capacity to respond to COVID–19 and other critical health care needs. *See* 85 FR 19335. Congress' optional exclusion of emergency responders in addition to health care providers demonstrates that Congress was intending to provide a safety valve to ensure that critical health and safety services would not be understaffed during the pandemic. Given this context, the Department concluded Congress did not intend to limit the optional health care provider exclusion to only physicians and others who make medical diagnoses, *i.e.* the persons that qualify as a health care provider in the different contexts posed by the FMLA and EPSLA. The Department thus interprets "health care services" for the purpose of this definition to encompass relevant services even if not performed by individuals with a license, registration, or certification. For the same reason, the Department has determined that an employee is "capable" of providing health care services if he or she is employed to provide those services. That is, the fact that the employee is paid to perform the services in question is, in this context, conclusive of the employee's capability. While a license, registration, or certification may be a prerequisite for the provision of some health care services, the Department's interpretation of "health care services" encompasses some services for which license, registration, or certification is not required at all or not universally required.

In any event, Congress defined health care services, listed in 42 U.S.C. 234(d)(2)(A) and (B), in the context of combatting a pandemic. The Department also recognizes that the definition must have limits, as the District Court held. The Department's revised "health care provider" definition is thus clear that employees it covers must themselves must be capable of providing, and employed to provide diagnostic, preventative, or treatment services or services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care. It is not enough that an employee works for an entity that provides health care services. Moreover, the Department has designed the fourth category to encompass only those "services that are integrated with and necessary to the provision of patient care" and that, "if not provided, would adversely impact patient care." Health care services that do not fall into any of these categories are outside the Department's definition. Finally, the Department adds descriptions to emphasize that the definition of "health care provider" is far from open-ended by identifying specific types of employees who are and are not included within the definition and by describing the types of roles and duties that would make an employee a "health care provider."

Revised § 826.30(c)(1)(ii) lists the three types of employees who may qualify as "health care providers" under § 826.30(c)(1)(i)(B). First, § 826.30(c)(1)(ii)(A) explains that included within the definition are nurses, nurse assistants, medical technicians, and any other persons who directly provide the services described in § 826.30(c)(1)(i)(B), *i.e.*, diagnostic, preventive, treatment services, or other services that are integrated with and necessary to the provision of patient care are health care providers.

Second, § 826.30(c)(1)(ii)(B) explains that, included within the definition, are employees providing services described in paragraph (c)(1)(i)(B) under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) (that is, employees who are health care providers under the usual FMLA definition) or (c)(1)(ii)(A) (that is, nurses or nurse assistants and other persons who directly provide services described in paragraph (c)(1)(i)(B)).

Finally, under § 826.30(c)(1)(ii)(C), "health care providers" include employees who may not directly interact with patients and/or who might not report to another health care provider or directly assist another health care provider, but nonetheless provide services that are integrated with and necessary components to the provision of patient care. Health care services reasonably may include services that are not provided immediately, physically to a patient; the term health care *services* may reasonably be understood to be broader than the term *health care*. For example, a laboratory technician who processes test results would be providing diagnostic health care services because,

although the technician does not work directly with the patient, his or her services are nonetheless an integrated and necessary part of diagnosing the patient and thereby determining the proper course of treatment.[26] Processing that test is integrated into the diagnostic process, like performing an x-ray is integrated into diagnosing a broken bone.

Individuals who provide services that affect, but are not integrated into, the provision of patient care are not covered by the definition, because employees who do not provide health care services as defined in paragraph (c)(1)(i)(B) are not health care providers. Accordingly, revised § 826.30(c)(1)(iii) provides examples of employees who are not health care providers. The Department identifies information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers. While the services provided by these employees may be related to patient care—*e.g.*, an IT professional may enable a hospital to maintain accurate patient records—they are too attenuated to be integrated and necessary components of patient care. This list is illustrative, not exhaustive.

Recognizing that a health care provider may provide services at a variety of locations, and to help the regulated community identify the sorts of employees that may perform these services, § 826.30(c)(2)(iv) provides a non-exhaustive list of facilities where health care providers may work, including temporary health care facilities that may be established in response to the COVID–19 pandemic.[27] This list contains almost the same set of health care facilities listed in the original § 826.30(c)(1)(i) and is drawn from 42 U.S.C. 300jj(3), which also contains a non-exhaustive list of entities that qualify as "health care providers." [28] Consistent with the District Court's decision, however, the revised regulatory text explicitly provides that not all employees who work at such facilities are necessarily health care providers within the definition. For example, the categories of employees listed in § 826.30(c)(1)(iii) would not qualify as "health care providers" even if they worked at a listed health care facility. On the other hand, employees who do not work at any of the listed health care facilities may be health care providers under FFCRA sections 3105 and 5102(a). Thus, the list is merely meant to be a helpful guidepost, but itself says nothing dispositive as to whether an employee is a health care provider.

Under this revised definition, § 826.30(c)(1)(v) provides specific examples of services that may be considered "diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care" under § 826.30(c)(1)(i). These examples are non-exhaustive and are meant to be illustrative.

Diagnostic services include, for example, taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results. These services are integrated and necessary because without their provision, patient diagnosis would be undermined and individuals would not get the needed care. To illustrate, a technician or nurse who physically performs an x-ray is providing a diagnostic service and therefore is a health care provider.

Preventative services include, for example, screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems. As with diagnostic services, preventative services are integrated and necessary because they are an essential component of health care. For example, a nurse providing counseling on diabetes prevention or on managing stress would be providing preventative services and therefore would be a health care provider.

Treatment services are the third category of services which make up health care services. Treatment services include, for example, performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments.

The last category of health care services are those services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care. This final category is intended to cover other integrated and necessary services that, if not provided, would adversely affect the patient's care. Such services include, for example, bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples. These tasks must be integrated and necessary to the provision of patient care, which significantly limits this category.

For example, bathing, dressing, or hand feeding a patient who cannot do that herself is integrated into to the patient's care. In another example, an individual whose role is to transport tissue or blood samples from a patient to the laboratory for analysis for the purpose of facilitating a diagnosis would be providing health care services because timely and secure transportation of the samples is integrated with and necessary to provide care to that patient.[29] These tasks also must be something that, if not performed, would adversely affect the patient's care, and they also must be integrated into that patient's care. Thus, tasks that may be merely indirectly related to patient care and are not necessary to providing care are not health care services. Further, the Department notes that some of the exemplar services listed in § 826.30(c)(1)(v)(D) may fit into more than one category.

Finally, § 826.30(c)(1)(vi) explains that the above definition of "health care

[26] The District Court's opinion noted that "lab technicians" do not "directly provide healthcare services to patients." *See New York*, 2020 WL 4462260, at *10. However, the precise question whether any lab technician may be a health care provider was not before or decided by the District Court. The relevant statutory definition does not limit the persons the Secretary may determine capable of providing health care services to only those who provide health care services directly to patients. As explained in this context, the Department concludes some persons who provide health care services will do so indirectly. Importantly, however, the Department's definition includes only persons who themselves provide health care services, whether indirectly or directly. Accordingly, the Department concludes based on the explanation provided above that, while not all lab technicians will necessarily qualify as health care providers, some will. The determination requires a role-specific analysis.

[27] The Javits Center in New York City, for example, was converted into a temporary hospital to treat COVID–19 patients. *See, e.g.*, Adam Jeffery and Hannah Miller, Coronavirus, Gov. Guomo, the National Guard and FEMA transform the Javits Center into a hospital, CNCN, Mar 28, 2020, available at *https://www.cnbc.com/2020/03/27/coronavirus-gov-cuomo-the-national-guard-and-fema-transform-the-javits-center-into-a-hospital.html.*

[28] "The term 'health care provider' includes a hospital, skilled nursing facility, nursing facility, home health entity or other long term care facility, health care clinic, community mental health center . . ., renal dialysis facility, blood center, ambulatory surgical center . . ., emergency medical services provider, Federally qualified health center, group practice, a pharmacist, a pharmacy, a laboratory, a physician . . ., a practitioner . . ., a rural health clinic, . . . an ambulatory surgical center . . ., a therapist, . . .and any other category of health care facility, entity, practitioner, or clinician determined appropriate by the Secretary [of Health and Human Services]." 42 U.S.C. 300jj(3).

[29] Again, this requirement operates against the backdrop that a health care provider must be employed to provide the identified health care services. Therefore, a person employed to provide general transportation services that does not, for example, specialize in the transport of human tissue or blood samples is not a health care provider.

provider" applies only for the purpose of determining whether an employer may exclude an employee from eligibility to take FFCRA leave. This definition does not otherwise apply for the purposes of the FMLA. Nor does it identify health care providers whose advice to self-quarantine may constitute a qualified reason for paid sick leave under FFCRA section 5102(a)(2).

Revised § 826.30(c)(1)'s definition of "health care provider" for purposes of FFCRA sections 3105 and 5102(a) remains broader than the definition of "health care provider" under § 825.125, which defines the term for the pre-existing parts of FMLA and for purposes of FFCRA section 5102(a)(2). This is because these two definitions serve different purposes. The same term is usually presumed to have the same meaning throughout a single statute. *Brown* v. *Gardner,* 513 U.S. 115, 118 (1994). But "this presumption . . . yields readily to indications that the same phrase used in different parts of the same statute means different things." *Barber* v. *Thomas,* 560 U.S. 474, 484 (2010) (collecting cases). The Department purposefully limited § 825.125's definition of "health care provider" to licensed medical professionals because the pre-existing FMLA definition used that term in the context of who could certify the diagnosis of serious health conditions for purposes of FMLA leave.[30] As a result, the definition in 29 CFR 825.125 is narrower than the ordinary understanding of "health care provider," since many "providers" of health care services—such as nurses, physical therapists, medical technicians, or pharmacists—do not diagnose serious health conditions. *See* 29 CFR 825.115(a)(1) (defining continuing treatment for incapacity to require "[t]reatment two or more times, within 30 days of the first day of incapacity, by a health care provider, a *nurse* under direct supervision of a health care provider, or by a *provider of health care services (e.g., physical therapist)* under orders of, or on referral by, a health care provider") (emphases added); *id.* 825.115(c)(1) (defining continuing treatment for a chronic condition as including "periodic visits for treatment by a health care provider *or a nurse* under the direct supervision of a health care provider" (emphasis added)).

In contrast, and as explained above, the term "health care provider" serves an entirely different purpose in FFCRA sections 3105 and 5102(a). The Department believes these sections are best understood to have granted employers the option to exclude from paid leave eligibility health care providers whose absence from work would be particularly disruptive because those employees' services are important to combating the COVID–19 public health emergency and are essential to the continuity of operations of our health care system in general.[31] The definition of "health care provider" as limited only to diagnosing medical professionals under 29 CFR 825.125 is, in the Department's view, incompatible with this understanding of these sections. For example, nurses provide crucial services, often directly related to the COVID–19 public health emergency or to the continued operations of our health care system in general, but as noted, most nurses are not "health care providers" under § 825.125.[32] Nor are laboratory technicians who process COVID–19 or other crucial medical diagnostic tests, or other employees providing the critical services described above. But these workers are vital parts of the health system capacity that the Department believes Congress sought to preserve with the exclusions in FFCRA sections 3105 and 5102(a). A purposefully narrow definition of "health care providers" such as that in 29 CFR 825.125 would make excludable only a small class of employees that the Department believes would lack a connection to the identified policy objective. In accord with that understanding, revised § 826.30(c)(1) adopts a broader, but still circumscribed, definition of "health care provider" than 29 CFR 825.125.

V. Revising Notice and Documentation Requirements Under §§ 826.90 and .100 To Improve Consistency

The FFCRA permits employers to require employees to follow reasonable notice procedures to continue to receive paid sick leave after the first workday (or portion thereof) of leave. FFCRA section 5110(5)(E). Section 3102(b) of the FFCRA amends the FMLA to require employees taking expanded family and medical leave to provide their employers with notice of leave as practicable, when the necessity for such leave is foreseeable.

Section 826.100 lists documentation that an employee is required to provide the employer regarding the employee's need to take FFCRA leave, and states that such documentation must be provided "prior to" taking paid sick leave or expanded family and medical leave. The District Court held that the requirement that documentation be given "prior to" taking leave "is inconsistent with the statute's unambiguous notice provision," which allows an employer to require notice of an employee's reason for taking leave only "after the first workday (or portion thereof)" for paid sick leave, or "as is practicable" for expanded family and medical leave taken for school, place of care, or child care provider closure or unavailability. *New York,* 2020 WL 4462260, at *12.

In keeping with the District Court's conclusion, the Department amends § 826.100 to clarify that the documentation required under § 826.100 need not be given "prior to" taking paid sick leave or expanded family and medical leave, but rather may be given as soon as practicable, which in most cases will be when the employee provides notice under § 826.90. The Department is also revising § 826.90(b) to correct an

[30] Commenters to the 1993 proposed FMLA regulations asked the Department to define "health care provider" to include "providers of a broad range of medical services." 58 FR 31800. The Department considered "such a broad definition . . . inappropriate" because, at that time, the term "health care provider" was used in the FMLA to refer to those who "will need to indicate their diagnosis in health care certificates." *Id.*

[31] Although the statute does not explicitly articulate the purpose of these exceptions, the Department believes it is the only reasonable inference given that FFCRA sections 3015 and 5102(a) each allowed employers to exclude both "health care providers" and "emergency responders" from FFCRA leave. Moreover, at the time the FFCRA was passed, many people feared that the health system capacity would be strained, and these provisions appear to have been calculated to ameliorate that issue. *See, e.g.,* NYC Mayor urges national enlistment program for doctors, Associated Press, Apr. 3, 2020, available at *https://www.pbs.org/newshour/health/nyc-mayor-urges-national-enlistment-program-for-doctors;* Jack Brewster, Cuomo: 'Any Scenario That Is Realistic Will Overwhelm The Capacity Of The Current Healthcare System,' Forbes, Mar. 26, 2020, available at *https://www.forbes.com/sites/jackbrewster/2020/03/26/cuomo-any-scenario-that-is-realistic-will-overwhelm-the-capacity-of-the-current-healthcare-system/#2570066e7cf1;* Melanie Evans and Stephanie Armour, Hospital Capacity Crosses Tipping Point in U.S. Coronavirus Hot Spots, WSJ.com, Mar. 26, 2020, available at *https://www.wsj.com/articles/hospital-capacity-crosses-tipping-point-in-u-s-coronavirus-hot-spots-11585215006;* Beckers Hospital Review, COVID–19 response requires 'all hands on deck' Atlantic Health System CEO says, Mar. 20, 2020, available at *https://www.beckershospitalreview.com/hospital-management-administration/covid-19-response-requires-all-hands-on-deck-atlantic-health-system-ceo-says.html.* The Department recognizes that this understanding of FFCRA sections 3105 and 5102(a) means that fewer people may receive paid leave. However, as explained, the Department believes this was the balance struck by Congress.

[32] The 1995 FMLA final rule added to § 825.125's definition of health care provider "nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions, especially at health maintenance organizations and in rural areas where other health care providers may not be available) if performing within the scope of their practice as allowed by State law." 60 FR 2199. Other nurses, however, are not generally considered health care providers under 29 CFR 825.125.

inconsistency regarding the timing of notice for employees who take expanded family and medical leave.

Sections 826.90 and 826.100 complement one another. Section 826.90 sets forth circumstances in which an employee who takes paid sick leave or expanded family and medical leave must give notice to his or her employer. Section 826.100 sets forth information sufficient for the employer to determine whether the requested leave is covered by the FFCRA. Section 826.100(f) also allows the employer to request an employee furnish additional material needed to support a request for tax credits under Division G of the FFCRA.

Section 826.90(b) governs the timing and delivery of notice. Previous § 826.90(b) stated, "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." This statement is correct with respect to paid sick leave. FFCRA section 5110(5)(E). However, section 110(c) of the FMLA, as amended by FFCRA section 3102, explicitly states that "where the necessity for [expanded family and medical leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." Thus, for expanded family and medical leave, advance notice is not prohibited; it is in fact typically required if the need for leave is foreseeable. Revised § 826.90(b) corrects this error by stating that advanced notice of expanded family and medical leave is required as soon as practicable; if the need for leave is foreseeable, that will generally mean providing notice before taking leave. For example, if an employee learns on Monday morning before work that his or her child's school will close on Tuesday due to COVID–19 related reasons, the employee must notify his or her employer as soon as practicable (likely on Monday at work). If the need for expanded family and medical leave was not foreseeable—for instance, if that employee learns of the school's closure on Tuesday after reporting for work—the employee may begin to take leave without giving prior notice but must still give notice as soon as practicable.

Section 826.100(a) previously stated that an employee is required to give the employer certain documentation "prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA." As noted above, the District Court held that the requirement that documentation be provided prior to taking leave "is inconsistent with the statute's unambiguous notice provision," which allows an employer to require notice of an employee's reason for taking leave only "after the first workday (or portion thereof)" for paid sick leave, or "as is practicable" for expanded family and medical leave taken for school, place of care, or child care provider closure or unavailability. *New York*, 2020 WL 4462260, at *12. Accordingly, the Department is revising § 826.100(a) to require the employee to furnish the listed information as soon as practicable, which in most cases will be when notice is provided under § 826.90. That is to say, an employer may require an employee to furnish as soon as practicable: (1) The employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work. The employer may also require the employee to furnish the information set forth in § 826.100(b)–(f) at the same time.

VI. 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 and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The Department has determined that this temporary rule does not add any new information collection requirements. The information collection associated with this temporary rule was previously approved by the Office of Management and Budget (OMB) under OMB control number 1235–0031.

VII. 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).

A. 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.

As it did in the initial April 1, 2020 temporary rule, the Department is bypassing advance notice and comment because of the exigency created by the COVID–19 pandemic, the time limited nature of the FFCRA leave entitlement which expires December 31, 2020, the uncertainty created by the August 3, 2020 district court decision finding certain portions of the April 1 rule invalid, and the regulated community's corresponding immediate need for revised provisions and explanations from the Department. A decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, which would be counter to one of the FFCRA's main purposes in establishing paid leave: enabling employees to leave the workplace immediately to help prevent the spread of COVID–19 and to ensure eligible employees are not forced to choose between their paychecks and the public health measures needed to combat the virus. In sum, the Department determines that issuing this temporary rule as expeditiously as possible is in the public interest and critical to the Federal Government's relief and containment efforts regarding COVID–19.

B. 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.

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

A. Introduction

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (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 not 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 not 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.

B. Overview of the Rule

The temporary final rule promulgated by the Department in April 2020 implemented 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 related to COVID–19. The EFMLEA requires that certain employers provide up to 12 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.

The Department is issuing this revised, new temporary rule, effective immediately, to reaffirm, revise, and clarify its regulations. The Department reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave, and that employees must receive employer approval to take paid sick leave or expanded family and medical leave intermittently. The Department narrows the definition of "health care provider" to employees who are health care providers under 29 CFR. 825.125 and employees capable of providing health care services, meaning those who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care. In this rule, the Department also clarifies that the information the employee gives the employer to support the need for leave should be given as soon as practicable, and corrects an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to their employer.

C. Economic Impacts

1. Costs

This rule revises and clarifies the temporary rule implementing the paid sick leave and expanded family and medical leave provisions of the FFCRA. The Department estimates that these revisions will result in additional rule familiarization costs to employers.

The Department noted that according to the 2017 Statistics of U.S. Businesses (SUSB), there are 5,976,761 private firms in the U.S. with fewer than 500 employees.[33] The Department estimates that all 5,976,761 employers with fewer than 500 employees will need to review the rule to determine how and if their responsibilities have changed from the initial temporary rule. The Department estimates that these employers will likely spend fifteen minutes on average reviewing the new rule, and that this will be a one-time rule familiarization cost.

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 $31.04 per hour.[34] In addition, the Department also assumes that benefits are paid at a rate of 46 percent [35] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully-loaded hourly wage of $50.60.[36] The Department estimates that the total rule familiarization cost to employers with fewer than 500 employees, who spend 0.25 hour reviewing the rule, will be $75,606,027 (5,976,761 firms × 0.25 hour × $50.60) in the first year. This results in a ten-year annualized cost of $10.1 million at 7 percent and $8.6 million at 3 percent.

In the initial rule, the Department estimated the costs to employers of both documentation and of posting a notice, and qualitatively discussed managerial and operating costs and costs to the Department. The Department does not expect these revisions and clarifications to result in additional costs in any of these categories.

ii. Transfers

In the initial temporary rule, the Department estimated that 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 Treasury Department through tax credits, up to statutory limits, which is then ultimately paid for by taxpayers. In the economic analysis of the initial temporary rule, the Department noted that it lacked data to determine which employees will need leave, and how many days of leave will ultimately be used. Because the share of employees who will use leave is likely to be only a partial share of those who are eligible, the Department was therefore unable to quantify the transfer of paid leave.

Certain health care providers and emergency responders may be excluded from this group of impacted employees. This new rule limits the definition of health care provider to employees who are health care providers under 29 CFR 825.125 and other employees capable of

[33] 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.

[34] Occupational Employment and Wages, May 2019, *https://www.bls.gov/oes/2019/may/oes_nat.htm*.

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

[36] $31.04 + $31.04(0.46) + $31.04(0.17) = $50.60.

providing health care services, meaning those who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care. As discussed in the initial temporary rule, 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.[37] The Department estimated that this is likely to be the upper bound of potential excluded health care providers, because some of these employees' employers could decide not to exclude them from eligibility to use paid sick leave or expanded family and medical leave. In this new rule, the Department is narrowing the definition of health care provider, which means that fewer employees could potentially be excluded from receiving paid sick leave and expanded family and medical leave. If more employees are able to use this leave, transfers to employees will be higher. Because the Department lacks data on the number of workers who were potentially excluded under the prior definition, and how that number will change under the new definition, the Department is unable to quantify the change in transfers associated with this new rule. However, the Department does not expect that this new temporary rule will result in a transfer at or more than $100 million dollars annually.

iii. Benefits

This new temporary rule will increase clarity for both employers and employees, which could lead to an increase in the use of paid sick leave and expanded family and medical leave. As discussed in the initial rule, 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 employees will be encouraged to stay home, thereby helping to curb the spread of the virus at the workplace. 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 to their communities and the national economy as a whole, which is facing unique challenges due to the COVID–19 global pandemic.

[37] A few estimates from other third party analyses confirm that this 9 million figure is reasonable. *See* Michelle Long and Matthew Rae, *Gaps in the Emergency Paid Sick Leave Law for Health Care Workers,* KFF, Jun. 17, 2020 (estimating that 8.1 million workers are subject to the exemption), available at *https://www.kff.org/coronavirus-covid-19/issue-brief/gaps-in-emergency-paid-sick-leave-law-for-health-care-workers/;* Sarah Jane Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers from Coverage,* American Progress (Apr. 17, 2020) (estimating that 8,984,000 workers are subject to the exemption), available at *https://www.americanprogress.org/issues/economy/news/2020/04/17/483287/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/.*

IX. 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 for all 5,976,761 employers with and fewer than 500 employees. For the 5,755,307 employers with fewer than 50 employees, their one-time rule familiarization cost would be $12.65.[38] The Department calculated this cost by multiplying the 15 minutes of rule familiarization by the fully-loaded wage of a Compensation, Benefits, and Job Analysis Specialist (0.25 hour × $50.60). 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.

X. 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. Based on the cost analysis in this temporary rule, the Department determined that the rule will not result in Year 1 total costs greater than $165 million.

[38] 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.

XI. 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.

XII. 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.

List of Subjects in 29 CFR Part 826

Wages.

Signed at Washington, DC, this 10th day of September, 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 part 826 as follows:

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

■ 1. The authority citation for part 826 continues to read as follows:

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

■ 2. Amend § 826.20 by revising paragraphs (a)(3) and (a)(4) and adding paragraph (a)(10), to read as follows:

§ 826.20 Paid leave entitlements.

(a) * * *

(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 and 825.125 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. An Employee who is advised to self-quarantine by a health care provider may not take Paid Sick Leave where the Employer does not have work for the Employee.

(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. An Employee seeking medical diagnosis for COVID–19 may not take Paid Sick Leave where the Employer does not have work for the Employee.

* * * * *

(10) *Substantially similar condition.* An Employee may take leave for the reason described in paragraph (a)(1)(vi) of this section if he or she 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, April 1, 2020, to December 31, 2020. An Employee may not take Paid Sick Leave for a substantially similar condition as specified by the Secretary of Health and Human Services where the Employer does not have work for the Employee.

* * * * *

■ 3. Amend § 826.30 by revising paragraph (c)(1) to read as follows:

§ 826.30 Employee eligibility for leave.

* * * * *

(c) * * *

(1) *Health care provider*—(i) *Basic definition.* For the purposes of 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

(A) Any Employee who is a health care provider under 29 CFR 825.102 and 825.125, or;

(B) Any other Employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

(ii) *Types of Employees.* Employees described in paragraph (c)(1)(i)(B) include only:

(A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A) of this section; and

(C) Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

(iii) Employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.

(iv) *Typical work locations.* Employees described in paragraph (c)(1)(i) of this section may include Employees who work at, for example, a doctor's office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided. This list is illustrative. An Employee does not need to work at one of these facilities to be a health care provider, and working at one of these facilities does not necessarily mean an Employee is a health care provider.

(v) *Further clarifications.* (A) Diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.

(B) Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

(C) Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

(D) Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

(vi) The definition of *health care provider* contained in this section 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.

* * * * *

■ 4. Amend § 826.90 by revising paragraph (b) to read as follows:

§ 826.90 Employee notice of need 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. 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. Notice for taking Expanded

Family and Medical Leave is required as soon as practicable. If the reason for this leave is foreseeable, it will generally be practicable to provide notice prior to the need to take leave.

* * * * *

■ 5. Amend § 826.100 by revising paragraph (a) to read as follows:

§ 826.100 Documentation of need for leave.

(a) An Employee is required to provide the Employer documentation containing the following information as soon as practicable, which in most cases will be when the Employee provides notice under § 826.90:

(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.

* * * * *

[FR Doc. 2020–20351 Filed 9–11–20; 5:00 pm]

BILLING CODE 4510–27–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG 2020–0027]

RIN 1625–AA09

Drawbridge Operation Regulation; Trent River, New Bern, NC

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operating schedule that governs the US 70 (Alfred C. Cunningham) Bridge across the Trent River, mile 0.0, in New Bern, North Carolina. This modification will allow the drawbridge to be maintained in the closed position during peak traffic hours and provide daily scheduled openings to meet the reasonable needs of navigation.

DATES: This rule is effective October 16, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov*. Type USCG–2020–0027 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Martin A. Bridges, Fifth Coast Guard District (dpb), at (757) 398–6422, email *Martin.A.Bridges@uscg.mil*.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Proposed Management and Budget
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Basis and Purpose, and Regulatory History

The purpose of this rule is to alter the operating schedule that governs the US 70 (Alfred C. Cunningham) Bridge across the Trent River, mile 0.0, in New Bern, North Carolina. This modification will allow the drawbridge to be maintained in the closed position during peak traffic hours and provide daily scheduled openings to meet the reasonable needs of navigation. On May 13, 2020, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) entitled "Drawbridge Operation Regulation; Trent River, New Bern, NC" in the **Federal Register** (85 FR 28546). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action. During the comment period that ended June 12, 2020, we received one comment and that comment is addressed in Section IV of this Final Rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The US 70 (Alfred C. Cunningham) Bridge across the Trent River, mile 0.0, in New Bern, North Carolina, has a vertical clearance of 14 feet above mean high water in the closed position and unlimited vertical clearance above mean high water in the open position. The current operation schedule for the drawbridge is published in 33 CFR 117.843(a)

Trent River is used predominately by recreational vessels, sailing vessels, and pleasure craft. The 16-month average of bridge openings, average number of vessels, and maximum number of bridge openings by month, as drawn from the data contained in the bridge tender logs provided by the North Carolina Department of Transportation, is presented below.

Month	Average openings	Average vessels	Maximum openings
January	28	24	28
February	36	28	36
March	67	56	67
April	204	212	271
May	236	265	302
June	245	251	306
July	199	185	242
August	261	260	261
September	161	163	161
October	119	106	119
November	122	85	122
December	65	39	65
Monthly	145	139	165
Daily	56	54	63