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employees, regardless of time actually worked or paid, multiplied by the statutory 26-workweek entitlement for military caregiver leave.

(b) *Increments of FMLA leave for intermittent or reduced schedule leave.* When an airline flight crew employee takes FMLA leave on an intermittent or reduced schedule basis, the employer must account for the leave using an increment no greater than one day. For example, if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and counts against the employee's FMLA entitlement.

(c) *Application of § 825.205.* The rules governing calculation of intermittent or reduced schedule FMLA leave set forth in § 825.205 do not apply to airline flight crew employees except that airline flight crew employees are subject to § 825.205(a)(2), the physical impossibility provision.

§ 825.803 Special rules for airline flight crew employees, recordkeeping requirements.

(a) Employers of eligible airline flight crew employees shall make, keep, and preserve records in accordance with the requirements of Subpart E of this Part (§ 825.500).

(b) Covered employers of airline flight crew employees are required to maintain certain additional records ''on file with the Secretary.'' To comply with this requirement, those employers shall maintain:

(1) Records and documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents; and

(2) Records of hours worked and hours paid, as those terms are defined in § 825.801(b)(2).

PART 826—PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (Eff. until 12-31-20)

Sec.

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

SOURCE: 85 FR 19347, Apr. 6, 2020, unless otherwise noted.

EFFECTIVE DATE NOTE: At 85 FR 19347, Apr. 6, 2020, part 826 was added, effective through Dec. 31, 2020.

§ 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.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20157, Apr. 10, 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) *Caring for an individual.* 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 for him or her and is either:

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

(ii) Has been advised to self-quarantine by a health care provider as described in paragraph (a)(1)(ii) of this section, because of a belief that—

(A) The individual has COVID–19;

(B) The individual may have COVID–19 due to known exposure or symptoms; or

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

(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. An Eligible Employee has need to take Expanded Family and Medical Leave for the purposes of this paragraph (b) only if no suitable person is available to care for his or her Son or Daughter during the period of such leave.

(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.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20157, Apr. 10, 2020]

§ 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 paragraph (c) of this section, for each hour of Paid Sick Leave taken by an Employee for qualifying reasons set forth in § 826.20(a)(1)(i) through (iii), 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 paragraph (c) of this section, for each hour of Paid Sick Leave taken by an Employee for qualifying reasons set forth in § 826.20(a)(1)(iv) through (vi), the Employer shall pay the Employee two-thirds of the amount described in § 826.24(a).

(c) The limitations on payments are as follows:

(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 § 826.20(a)(1)(i) through (iii).

(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 § 826.20(a)(1)(iv) through (vi).

[85 FR 20157, Apr. 10, 2020]

§ 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) and (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) 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.

(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 from EFMLEA.* 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) *Exclusion by OMB from EPSLA.* 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.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20157, Apr. 10, 2020]

§ 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 and 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 entitlement.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20157, Apr. 10, 2020]

§ 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 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 1, 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.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20158, Apr. 10, 2020]

§ 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)(iv) 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*.

[85 FR 19347, Apr. 6, 2020, as amended at 85 FR 20158, Apr. 10, 2020]

§ 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.