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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 [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through December 31, 2020.

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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

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

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 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:

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.

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.

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

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

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).

that the work-availability requirement was invalid for 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

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.

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

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 through the FFCRA may be classified as a remedial statute under which Congress sought to protect workers. *See, e.g., Encino Motorcars*,

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

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.

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 § 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

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

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

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.

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

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.

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 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

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.

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* Pub. L. 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 EPSLA and EFMLEA (which amends the FMLA) and to ensure consistency between the two laws.¹⁷ As

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). These 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).

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 permit¹⁸ or prohibit¹⁹ 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

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.

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 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

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.

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.

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

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.

(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

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.

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 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.

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.

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

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.

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

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. Cuomo, the National Guard and FEMA transform the Javits Center into a hospital, CNCN, Mar 28, 2020, available at <https://www.cnn.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).

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 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 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

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.

§ 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

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

“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

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.

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 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 percent³⁵ 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

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

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 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

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*

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

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/>.

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.

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.

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

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.

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, D.C. 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.

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