

# LEGALLY SPEAKING

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## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT UPDATED SUMMARY WITH DOL REGULATIONS**

The Families First Coronavirus Response Act (the “Act”) was signed into law by President Trump on March 18, 2020, after passing in the House of Representatives on March 14, 2020, and passing in the Senate on March 18, 2020. The Act has a substantial impact to employers across the country by extending employee sick leave benefits through two components – the Emergency Family and Medical Leave Expansion Act (“E-FMLA”) and the Emergency Paid Sick Leave Act (“E-PSL”). On April 1, 2020, the Department of Labor (“DOL”) issued agency regulations, which provide clarity on many aspects the Act.

### **Emergency Family and Medical Leave Expansion Act**

**Effective Dates:** The E-FMLA leave provisions went into effect on **April 1, 2020**, and will apply to leave taken between April 1, 2020, and December 31, 2020.

**Employers Impacted:** E-FMLA applies to private employers, including religious and non-profit organizations, with **fewer than 500 employees**, which includes both full and part-time employees among all worksites/divisions within the United States, as well as employees currently on leave, temporary employees, and day laborers supplied by a temporary placement agency. 29 CFR § 826.40(a)(1).

Not included in the count are independent contractors and employees who have been laid off or furloughed and have not subsequently been reemployed. 29 CFR § 826.40(a)(1)(iii). Separate corporations may be considered a single employer if the two entities meet the integrated employer test under the FMLA. 29 CFR § 826.40(a)(1)(iii); *see also* 29 CFR 825.104(c)(2).

This determination is dependent on the number of employees at the time an employee would take leave. 29 CFR § 826.40(a)(1). If an employer has fewer than 500 employees at a time when an employee requests leave, the employer must provide leave to that employee (assuming he or she otherwise qualifies for the leave); however, if the same employer hires additional

employees thereafter such that it has greater than 500 employees, the employer would have to honor the leave time for the employees already on leave, but would not be required to provide leave to a different employee, even if the need for leave is the same reason as other employees on leave. 29 CFR § 826.40(a)(1).

E-FMLA also applies to public employers, regardless of the number of employees they employ, except for public employees, including more federal employees, who are covered under Title II of the FMLA, which was not amended by the E-FMLA. 29 CFR § 826.40(c).

E-FMLA does not apply to employers of healthcare providers and emergency responders. 29 CFR § 826.30(c).

**Small Business Exemption:** Employers, including religious and nonprofit organizations, with fewer than 50 employees may qualify for an exemption from the requirement to provide leave “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” 29 CFR § 826.40(b)(1). To be entitled to the exemption, an authorized officer of the business must determine one of three conditions is present:

- (1) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- (2) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

29 CFR § 826.40(b)(1)(i)-(iii).

If a small business denies expanded family and medical leave to an employee on the basis of the small business exemption, the employer must document that a determination has been made pursuant to the above criteria, which includes the facts and circumstances that meet the criteria and justify a denial. 29 CFR § 826.40(b)(2). Such documentation must be retained by the employer for a period of four years. 29 CFR § 826.140. Also, even where an employee qualifies for the

small business exemption, the employer is still required to post a notice pursuant to § 826.80. 29 CFR § 826.40(b)(3).

**Eligible Employees:** E-FMLA applies to all employees who have been employed by the employer for at least 30 calendar days before the leave is requested. 29 CFR § 826.10(a).

The employee must have been on the employer's payroll thirty calendar days immediately prior to when the leave would begin. 29 CFR § 826.30(b)(1)(i). However, if the employee was laid off or terminated by the employer on or after March 1, 2020, but subsequently rehired or otherwise reemployed by the employer on or before December 31, 2020, the employee would be eligible for E-FMLA, provided that the employee was on the payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or terminated. 29 CFR § 826.30(b)(1)(ii). If a temporary employee employed by a temporary placement agency is subsequently hired by the employer, the days worked by the employee as a temporary employee at the employer's workplace will count toward the thirty-day eligibility period. 29 CFR § 826.30(b)(2).

Other eligibility requirements associated with traditional FMLA do not apply to E-FMLA. 29 CFR § 826.30(b)(3).

Employers may exclude employees who are health care providers or emergency responders. For purposes of eligibility exclusions only, a "health care provider" is "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity." 29 CFR § 826.30(c)(1)(i). This also includes "any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments." 29 CFR § 826.30(c)(1)(i).

For purposes of eligibility exclusions only, an "emergency responder" is "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19." 29 CFR § 826.30(c)(2). Emergency responders include but are not limited to "military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility." 29 CFR § 826.30(c)(2).

**Paid Leave Benefit:** E-FMLA requires employers to provide up to 12 workweeks of leave to eligible employees based on a qualifying reason (less any FMLA the employee has already used during the preceding 12 months). 29 CFR § 826.23(a) and (b). Under E-FMLA, the type of leave is **unpaid leave for the first two weeks of leave**. After the first two weeks of unpaid leave, employers must pay employees two-thirds their average regular rate times the employee's scheduled number of hours for each day of leave taken. 29 CFR § 826.24. However, in no event is the employer required to pay the employee more than \$200 per day, or \$10,000 over the entire course of E-FMLA leave. 29 CFR § 826.24(a). As an alternative to computing the “scheduled number of hours,” the amount of pay may be computed in hourly increments instead of full days, in which case the employee would be paid two-thirds his or her average rate (following the first two weeks of unpaid leave). 29 CFR § 826.24(c).

Intermittent leave is only available if the employer and employee agree. 29 CFR § 826.50(a). The agreement to utilize intermittent leave may be memorialized by a written agreement, but is not necessary so long as a clear and mutual understanding between the parties exists. 29 CFR § 826.50(a). An employee is only able to take E-FMLA intermittently if the reason for the leave is to care for the employee's son or daughter whose school or place of care is closed, or if the childcare provider is unavailable, because of reasons related to COVID-19. 29 CFR § 826.50(b)(1). If the employer directs or permits the employee to telework, then the employer and employee may agree that the employee may take E-FMLA intermittently in any agreed-upon increments of time (but only when the employee is unavailable to telework because of a COVID-19 related reason). 29 CFR § 826.50(c). When taken intermittently, only the amount of leave actually taken will be counted toward the employee's leave entitlements. 29 CFR § 826.50(d).

Employers and employee may agree, where permitted by state law, to permit the employee to use accrued paid leave to supplement the two-thirds pay under the E-FMLA so that the employee receives the full amount of their normal pay. 29 CFR § 826.70(f).

**Qualifying Reasons for Leave:** Employees are entitled to up to 12 weeks of E-FMLA (less any FMLA leave the employee has already used in the preceding 12 months) due to a “qualifying need related to a public health emergency.” 29 CFR § 826.60. If an employee has exhausted his or her 12 weeks of FMLA, the employee is not eligible for E-FMLA (but may be eligible for E-PSL).

Under the E-FMLA, a “qualifying need related to a public health emergency” means that the employee is “unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID-19.” 29 CFR § 826.20(b).

The term “child care provider” means a provider who receives compensation for providing child care services on a regular basis; however, the child care provider need not be compensated or licensed if the caregiver is a family member or friend who regularly cares for the child. 29 CFR § 826.10(a).

The term “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under the age of 18; it also includes

adult children 18 years of age or older who are incapable of self-care because of a mental or physical disability. 29 CFR § 826.10(a).

**Notice Obligations:** If the need for leave is foreseeable, employees must notify employers about their request for E-FMLA “as soon as practicable.” 29 CFR § 826.90(a)(2). If an employee fails to give proper notice, the employer should provide give notice to the employee of the failure and an opportunity to provide the required documentation prior to denying a leave request. 29 CFR § 826.90(a)(2). Notice may not be required in advance, but may only be required after the first workday for which an employee takes E-FMLA; thereafter, it will be reasonable for an employer to require notice as soon as practicable based on the facts and circumstances of the individual case. 29 CFR § 826.90(b). Notice may be given by the employee’s spokesperson if the employee is unable to personally deliver the notice. 29 CFR § 826.90(b). Absent unusual circumstances, it will be reasonable for the employer to require the employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave. 29 CFR § 826.90(d).

Employers covered under the Act, including employers that meet the small business exemption, must post and keep posted on its premises, in a conspicuous place, a notice explaining the paid leave provisions and providing information concerning the process for filing complaints for violations of the FFCRA. 29 CFR § 826.80(a). An employer may also email or direct mail the notice to employees, or post the notice on an internal or external website available to employees. 29 CFR § 826.80(b). The employer may use DOL’s poster, or its own notice, to fulfil the obligation. 29 CFR § 826.80(c). Translation is not required. 29 CFR § 826.80(d).

**Documentation of Need for Leave:** Employee are required to provide employers with documentation substantiating the need for leave prior to taking E-FMLA. 29 CFR § 826.100. The employee must provide: (1) his or her name; (2) the date(s) for which leave is requested; (3) the qualifying reason for the leave; and (4) an oral or written statement that the employee is unable to work because of the qualified reason for leave. 29 CFR § 826.100(a). The employee must also provide to the employer:

- (1) The name of the son or daughter being cared for;
- (2) The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- (3) A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes E-FMLA.

29 CFR § 826.100(e).

The employer may also request additional documentation needed to support a request for tax credits. 29 CFR § 826.100(f). An employer is not required to provide leave if documentation is insufficient to substantiate the applicable tax credit. 29 CFR § 826.100(f).

**Health Care Coverage:** While an employee is taking E-FMLA, the employer must maintain the employee’s coverage under any group health plan (as defined in the Internal Revenue Code at 26 U.S.C. § 5000(b)(1)) on the same conditions as coverage would have been provided if

the employee had been continuously employed during the entire leave period. 29 CFR § 826.110(a). Maintenance of an individual policy purchased by an employee is the responsibility of the employee. 29 CFR § 826.110(a).

The same group health plan benefits provided to the employee prior to taking leave must be maintained while the employee is on leave; however, if an employee provides a new plan while an employee is taking leave, the employee is entitled to the new plan to the same extent as if the employee was not on leave. 29 CFR § 826.110(b)-(c). Any other plan changes, including coverage, premiums, and deductibles, must apply to all employees of the workforce, including those on leave. 29 CFR § 826.110(c). The employer must provide the employee on leave with notice of any opportunity to change plans/benefits, and the employer must provide to changed coverage if requested by the employee. 29 CFR § 826.110(d).

An employee on leave remains responsible for paying his or her portion of group health plan premiums that had been paid by the employee prior to taking leave. 29 CFR § 826.110(e). The employee's share must be paid by the method normally used during any paid leave, which likely involves payroll deduction. If the employee's leave is unpaid, or the employee's pay during leave is insufficient to cover the employee's share of the premiums, the employer may obtain payment from the employee. 29 CFR § 826.110(e). Thus, an employer may require that payment be made to the employer or to the insurance carrier through any of the following ways:

- (1) Payment would be due at the same time as it would be made if by payroll deduction;
- (2) Payment would be due on the same schedule as payments are made under COBRA;
- (3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;
- (4) The employer's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,
- (5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

29 CFR § 825.210(c).

An employee may elect not to retain group health plan coverage while on leave; however, when the employee returns from leave, he or she is entitled to be reinstated on the same terms as prior to taking leave, including family or dependent coverage, without any additional requirements, such as a qualifying period, physical examination, or exclusion of pre-existing conditions. 29 CFR § 826.110 (f). The employer's obligation to maintain health care benefits while the employee is on

leave ends if and when the employment relationship would have terminated without regard to the employee's leave, such as the employee fails to return from leave or the entitlement to leave ends because the employer closes its business. 29 CFR § 826.110(g).

**Obligation to Restore Employee to Equivalent Position:** Employers are obligated to restore employees who take E-FMLA to an equivalent position upon their return to work. 29 CFR § 826.130(a). Employees are not protected from employment actions, such as furloughs or layoffs, which would have affected the employee regardless of whether leave was taken. 29 CFR § 826.130(b)(1). To deny job restoration, the employer must show that the employee would not otherwise have been employed at the time of reinstatement. 29 CFR § 826.130(b)(1). However, the employer may deny job restoration to key eligible employees if such denial is necessary to prevent substantial and grievous economic injury to the employer's operations. 29 CFR § 826.130(b)(2).

Employers with less than 25 employees may deny job restoration if the following four conditions are met:

- (1) The Eligible Employee took leave to care for his or her Son or Daughter whose School or Place of Care was closed, or whose Child Care Provider was unavailable, for COVID-19 related reasons;
- (2) The position held by the Eligible Employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the Employer that affect employment and are caused by a Public Health Emergency during the period of leave;
- (3) The Employer makes reasonable efforts to restore the Eligible Employee to a position equivalent to the position the Eligible Employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and
- (4) Where the reasonable efforts of the Employer to restore the Eligible Employee to an equivalent position fail, the Employer makes reasonable efforts to contact the Eligible Employee during a one-year period, if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave related to a Public Health Emergency concludes or the date twelve weeks after the Eligible Employee's leave began.

29 CFR § 826.130(b)(3)(i)-(iv).

**Recordkeeping Obligations:** The employer is required to retain all documentation for a period of four years, regardless of whether leave was granted or denied. 29 CFR § 826.140(a). If an employer accepted oral statements from an employee to support the request for leave, then the employer must document and maintain such information in its records for four years. 29 CFR § 826.140(a). An employer that denies a leave request based on the small business exemption must

document the determination by its authorized officer that the employer is eligible for the exception and retain such documentation for four years. 29 CFR § 826.140(b).

The employer must retain additional documentation for a period of four years in order to claim tax credits from the IRS, including:

- (1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;
- (2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;
- (3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;
- (4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941, and
- (5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

29 CFR § 826.140(c).

**Prohibited Acts:** The employer is prohibited from interfering with employees' exercise of rights, discrimination, and interfering with proceedings or inquiries under the FMLA with respect to eligible employees taking or attempting to take E-FMLA leave. 29 CFR § 826.151(a).

**Penalties:** Violation of the E-FMLA is subject to the same penalties and enforcement mechanisms as the FMLA, except that an eligible employee may not file a private action to enforce the E-FMLA if the employer is not otherwise subject to the FMLA in the absence of E-FMLA. 29 CFR § 826.151(b). The Secretary of Labor has investigative authority and subpoena authority under the E-FMLA. 29 CFR § 826.153(b).

### **Emergency Paid Sick Leave Act**

**Effective Dates:** The E-PSL sick leave provisions will go into effect on **April 1, 2020**, and will apply to sick leave taken between April 1, 2020, and December 31, 2020.

**Employers Impacted:** E-PSL applies to private employers, including religious and non-profit organizations, with **fewer than 500 employees**, which includes both full and part-time employees among all worksites/divisions within the United States, as well as employees currently

on leave, temporary employees, and day laborers supplied by a temporary placement agency. 29 CFR § 826.40(a)(1).

Not included in the count are independent contractors and employees who have been laid off or furloughed and have not subsequently been reemployed. 29 CFR § 826.40(a)(1)(iii). Separate corporations may be considered a single employer if the two entities meet the joint employer test under the FLSA. 29 CFR § 826.40(a)(1)(ii); *see also* 29 CFR 791.

E-PSL also applies to public employers, regardless of the number of employees they employ, except for health care providers and emergency responders, and other categories excluded by the Office of Management and Budget. 29 CFR § 826.40(c)(1); 29 CFR § 826.30(c)-(d).

**Small Business Exemption:** Employers, including religious and nonprofit organizations, with fewer than 50 employees may qualify for an exemption from the requirement to provide paid sick leave “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” 29 CFR § 826.40(b)(1). The requirements for the small business exemption are consistent with those related to leave under the E-FMLA, which are detailed above.

**Eligible Employees:** E-PSL applies to all employees, regardless of how long they have been employed, with the exception of health care providers, emergency responders, and employees who have been excluded by the Office of Management and Budget. 29 CFR § 826.30(a).

**Paid Leave Benefit:** E-PSL requires employers to provide up to 80 hours of paid sick leave for **full-time employees**, which includes employees who are normally scheduled to work at least 40 hours each workweek. 29 CFR § 826.21(a)(1)-(2). If an employee does not have a normal weekly schedule, he or she is considered to be a full-time employee if the average number of hours per workweek that the employee was scheduled to work (including hours for which the employee took leave of any type) is at least 40 hours per workweek over a period of that time that is the *lesser* of (1) the six-month period ending on the date the employee takes paid sick leave, or (2) the entire period of the employee’s employment. 29 CFR § 826.21(3).

E-PSL requires employers to provide leave to part-time employee up to the number of hours that the employee is normally scheduled to work over two workweeks. 29 CFR § 826.21(b)(1). If the part-time employee has an irregular weekly schedule, then the employee’s paid sick leave is calculated as follows:

- If the employee has been employed for at least 6 months, then the employee is entitled to an amount of leave equal to fourteen times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes E-PSL, including hours the employee took leave of any kind; or
- If the employee has been employed for less than 6 months, then the employee is entitled to an amount of leave equal to four times the number of hours the employee and employer agreed upon, at the time the employee was hired, that the

employee would work, on average, each calendar day. Absent such agreement, the employee is entitled to up to the number of hours of leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours the employee took leave of any kind.

29 CFR § 826.21(b)(2).

Intermittent leave is only available if the employer and employee agree. 29 CFR § 826.50(a). The agreement to utilize intermittent leave may be memorialized by a written agreement, but is not necessary so long as a clear and mutual understanding between the parties exists. 29 CFR § 826.50(a). An employee is only able to take E-PSL intermittently if the reason for the leave is to care for the employee's son or daughter whose school or place of care is closed, or if the childcare provider is unavailable, because of reasons related to COVID-19. 29 CFR § 826.50(b)(2). Once an employee takes E-PSL for any of the other qualifying reasons, the employee must use the leave days consecutively until the employee no longer has a qualifying need for the leave or the leave runs out. 29 CFR § 826.50(b)(2). If the employer directs or permits the employee to telework, then the employer and employee may agree that the employee may take E-PSL intermittently in any agreed-upon increments of time (but only when the employee is unavailable to telework because of a COVID-19 related reason). 29 CFR § 826.50(c). When taken intermittently, only the amount of leave actually taken will be counted toward the employee's leave entitlements. 29 CFR § 826.50(d).

An employee who takes leave to care for a son or daughter whose school or place of care is closed due to COVID-19 may take E-PSL concurrently with E-FMLA. 29 CFR § 826.60(a). Thus, the ten-day (or two-week) period of unpaid leave under the E-FMLA may be paid through use of the E-PSL. 29 CFR § 826.60(a)(2). If an employee has exhausted his or her E-FMLA entitlement due to prior use of traditional FMLA, the employee is not precluded from using the E-PSL benefit. 29 CFR § 826.60(a)(4).

**Qualifying Reasons for Leave:** Employees are entitled to use E-PSL for the following reasons:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis from a health care provider;
- (4) The employee is caring for an individual who is subject to an order as described in [1 or 2 above];
- (5) The employee is caring for his or her Son or Daughter whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID-19; or

(6) The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

29 CFR § 826.20(a)(1).

A quarantine or isolation order includes a broad range of governmental orders, including stay at home and shelter in place orders directed toward some or all citizens. An employee subject to a quarantine or isolation order may only use E-PSL if, but for being subject to the order, he or she would be able to perform work, either at the employee's workplace or by telework. 29 CFR § 826.20(a)(2). Thus, E-PSL will not be available if an employer closes its business, even if the closure is due to a governmental stay at home order. 29 CFR § 826.20(a)(2).

An employee may take E-PSL based on a health care directive to self-quarantine only if:

- (1) 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
- (2) 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.

29 CFR § 826.20(a)(3). If an employee is able to telework, he or she may not take paid sick leave if “(1) his or her employer has work for the employee to perform, (2) the employer permits the employee to perform that work from the location where the employee is self-quarantining, and (3) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.” 29 CFR § 826.20(a)(3); 29 CFR § 826.10(a).

An employee may take E-PSL if the employee is experiencing a fever, dry cough, shortness of breath, or any other COVID-19 symptoms set forth by the CDC. 29 CFR § 826.20(a)(4). The leave available will be limited to time the employee is actually unable to work because the employee is taking *affirmative steps* to obtain a medical diagnosis, which includes making, waiting for, or attending an appointment. 29 CFR § 826.20(a)(4). The employee may not take E-PSL to self-quarantine without seeking a medical diagnoses. An employee who is awaiting test results and is able to telework will not be eligible for leave if the telework conditions above are met; however, if the employee is unable to telework, he or she may take leave while awaiting test results, regardless of the severity of the employee's symptoms.

An employee may take E-PSL if, but for the need to care for an individual, the employee would be able to perform work for the employer. 29 CFR § 826.20(a)(5). If the employer does not have work for the employee, then the employee is not eligible for leave. Moreover, the employee must have a genuine need to care for the individual, and the individual being care for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person. 29 CFR §

826.20(a)(5). The employee cannot take E-PSL if the employee is able to telework and the conditions for telework (above) are satisfied. 29 CFR § 826.20(a)(5).

An employee may take E-PSL if he or she needs to, and actually is, caring for a son or daughter whose school or place of care has been closed, but only if no other suitable person is available to care for the child during the period of such leave. 29 CFR § 826.20(a)(6). If another suitable individual, such as a co-parent, co-guardian, or other child care provider, is available to provide care to the child, then the employee does not have a need for leave. 29 CFR § 826.20(a)(6).

**Benefit Calculation:** Pay is calculated differently depending on the reason for the leave. If the employee takes leave related to reasons (1), (2), or (3) above, then the employee will be paid his or her average regular rate (or minimum wage, if higher) up to \$511/day or \$5,110 in the aggregate. 29 CFR § 826.22(a) and (c). If the employee takes leave related to reasons (4), (5), or (6) above, then employees will be paid two-thirds their average regular rate (or minimum wage, if higher) up to \$200/day or \$2,000 in the aggregate. 29 CFR § 826.22(b) and (c).

The average regular rate is calculated as follows:

- (1) Use the methods contained in 29 CFR Parts 531 and 778 to compute the regular rate for each full workweek in which the Employee has been employed over the lesser of:
  - (i) The six-month period ending on the date on which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave; or
  - (ii) The entire period of employment.
- (2) Compute the average of the weekly regular rates [above], weighted by the number of hours worked for each workweek.

29 CFR § 826.25(a)(1). To calculate the regular rate for commissions, tips, and piece rates, these figures must be incorporated into the regular rate to the same extent they are included in the calculation of the regular rate under the FLSA and 29 CFR Parts 531.60 and 778. 29 CFR § 826.25(b).

**Single Use Benefit:** Once an employee has used his or her E-PSL benefit (up to 80 hours), the employee is not entitled to additional paid sick leave, even if the employee changes employers. 29 CFR § 826.160(f). If an employee uses some but not all of the E-PSL benefit and then changes employers, then the employee is entitled only to the remaining portion of E-PSL from the new employer. 29 CFR § 826.160(f).

**Notice Obligations:** An employer may require employees to follow reasonable notice procedures after the first workday for which the employee takes E-PSL. 29 CFR § 826.90(a)(1). Employees should notify employers about their request for E-PSL “as soon as practicable.” 29 CFR § 826.90(a)(1).

If the need for leave to care for a child is foreseeable, employees must notify employers about their request for E-PSL “as soon as practicable.” 29 CFR § 826.90(a)(2). If an employee fails to give proper notice, the employer should provide give notice to the employee of the failure

and an opportunity to provide the required documentation prior to denying a leave request. 29 CFR § 826.90(a)(2). Notice may not be required in advance, but may only be required after the first workday for which an employee takes E-PSL; thereafter, it will be reasonable for an employer to require notice as soon as practicable based on the facts and circumstances of the individual case. 29 CFR § 826.90(b). Notice may be given by the employee's spokesperson if the employee is unable to personally deliver the notice. 29 CFR § 826.90(b). Absent unusual circumstances, it will be reasonable for the employer to require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. 29 CFR § 826.90(d).

Employers covered under the Act, including employers that meet the small business exemption, must post and keep posted on its premises, in a conspicuous place, a notice explaining the paid leave provisions and providing information concerning the process for filing complaints for violations of the FFCRA. 29 CFR § 826.80(a). An employer may also email or direct mail the notice to employees, or post the notice on an internal or external website available to employees. 29 CFR § 826.80(b). The employer may use DOL's poster, or its own notice, to fulfil the obligation. 29 CFR § 826.80(c). Translation is not required. 29 CFR § 826.80(d).

**Documentation of Need for Leave:** Employee are required to provide employers with documentation substantiating the need for leave prior to taking E-PSL. 29 CFR § 826.100. The employee must provide: (1) his or her name; (2) the date(s) for which leave is requested; (3) the qualifying reason for the leave; and (4) an oral or written statement that the employee is unable to work because of the qualified reason for leave. 29 CFR § 826.100(a).

The employee must provide additional documentation, depending on the reason for the leave. 29 CFR § 826.100(b). To take E-PSL because the employee is subject to a government-mandated quarantine or isolation order related to COVID-19, the employee must provide the Employer with the name of the government entity that issued the quarantine or isolation order. 29 CFR § 826.100(b). To take E-PSL because the employee has been advised by a healthcare provider to self-quarantine due to COVID-19, the employee must provide the employer with the name of the health care provider who advised the employee to self-quarantine. 29 CFR § 826.100(c). To take E-PSL because the employee is caring for another individual covered under § 826.20(a)(1)(iii), the employee must provide the employer with either: (1) the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject, or (2) the name of the health care provider who advised the individual being care for to self-quarantine. 29 CFR § 826.100(d). To take E-PSL because the employee is caring for a child whose school has been closed or the child care provider is unavailable due to COVID-19, the employee must provide: (1) the name of the son or daughter being cared for, (2) the name of the school, place of care, or childcare provider that has closed or become unavailable, and (3) a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes E-PSL. 29 CFR § 826.100(e).

The employer may also request additional documentation needed to support a request for tax credits. 29 CFR § 826.100(f). An employer is not required to provide leave if documentation is insufficient to substantiate the applicable tax credit. 29 CFR § 826.100(f).

**Health Care Coverage:** The employer must maintain the employee’s coverage under any group health plan while an employee is taking E-PSL. The requirements associated with maintaining health care coverage are outlined above.

**Obligation to Restore Employee to Equivalent Position:** Employers are obligated to restore employees who take E-PSL to an equivalent position upon their return to work. 29 CFR § 826.130(a). Employees are not protected from employment actions, such as furloughs or layoffs, which would have affected the employee regardless of whether leave was taken. 29 CFR § 826.130(b)(1). To deny job restoration, the employer must show that the employee would not otherwise have been employed at the time of reinstatement. 29 CFR § 826.130(b)(1).

**Recordkeeping Obligations:** The employer is required to retain all documentation for a period of four years, regardless of whether leave was granted or denied. 29 CFR § 826.140(a). All recordkeeping obligations outlined above also apply to E-PSL.

**Prohibited Acts:** The employer is prohibited from disciplining, discharging, and discriminating or retaliating against employees who take leave under the E-PSL or who file a complaint or institute a proceeding related to the use of E-PSL. 29 CFR § 826.150(a).

**Penalties:** Violation of the E-PSL will result in a finding that the employer failed to pay minimum wages in violation of the Fair Labor Standards Act. 29 CFR § 826.150(b)(1). Violations will be subject to the same penalties and enforcement mechanisms as the Fair Labor Standards Act. 29 CFR § 826.150(b). The Secretary of Labor has investigative authority and subpoena authority under the E-PSL. 29 CFR § 826.153(a).

### **Relation to Other Laws / Employer Practices / CBAs**

**Other Benefits:** An employee’s entitlement to or use of E-PSL or E-FMLA is in addition to – not instead of – existing rights and benefits to which the employee is entitled under (1) another federal, state, or local law (except FMLA); (2) a collective bargaining agreement (“CBA”); or (3) an employer policy in existence prior to April 1, 2020. 29 CFR § 826.160(a)(1).

If an employee used any time of leave prior to April 1, 2020, due to COVID-19, the employer cannot deny the employee use of E-PSL or E-FMLA (assuming the employee qualifies), or delay or postpone the employee’s use of such benefits, except as associated with the use of traditional FMLA. 29 CFR § 826.160(a)(2).

An employee may elect to use other accrued benefits prior to using E-PSL, but an employer may not require an employee use other available benefits prior to taking E-PSL. 29 CFR § 826.160(b)(1)-(2). However, an employer may require that an eligible employee use provided or accrued leave, such as vacation or PTO, concurrently with the employee’s use of E-FMLA. 29 CFR § 826.160(c)(1). If the employee elects or the employer requires use of accrued leave concurrently with E-FMLA, then the employer must pay the employee the full amount to which the employee is entitled under the employer’s existing policy for the period of leave taken. 29 CFR § 826.160(c)(2).

**No Payout Requirements:** An employer is not required to provide financial compensation, payout, or reimbursement to employees for any unused E-PSL or E-FMLA upon the expiration of the FFCRA on December 31, 2020. 29 CFR § 826.160(e).

**Multi-Employer CBAs:** Employers who are signatories to a multi-employer CBA may fulfill their obligations to provide benefits under the E-FMLA and E-PSL by making contributions to a multi-employer fund or plan if such mechanisms exist under the applicable CBA, provided that the employee has access to secure payments from such funds. 29 CFR § 826.120.

For more specific information, contact Nadia A. Lampton at (937) 641-2055 or email [nlampton@taftlaw.com](mailto:nlampton@taftlaw.com).

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