

**SUPPORTING STATEMENT
PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE
ACT**

This is a new ICR being submitted for the information collected as a result of the Families First Coronavirus Response Act. The ICR is being submitted in conjunction with the publication of a temporary final rule: Paid Leave under the Families First Coronavirus Response Act. The Department requests **EMERGENCY CLEARANCE** pursuant to 5 CFR 1320.13.

A. Justification

1. Circumstances Necessitating Information Collection

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act into law (Public Law 116-127). Division C of the Act is the Emergency Family and Medical Leave Expansion Act and offers temporary expansion of the Family and Medical Leave Act through December 31, 2020. Private sector employers with fewer than 500 workers (and government entities) will have to provide up to 12 weeks of FMLA leave for employees who have been on the job for at least 30 days and who are unable to work or telework because they have to care for a minor child due to the coronavirus. Division E is the Emergency Paid Sick Leave Act. Private sector employers with fewer than 500 workers (and governmental entities) are required to provide employees who cannot work or telework with paid sick time off under certain circumstances. The provisions of the Act take effect no later than fifteen days after the Act is enacted, and expire December 31, 2020. All employees employed by a covered employer are eligible to take paid sick leave under the EPSLA, and all employees who have been employed by a covered employer for at least 30 calendar days are eligible to take leave under the EFMLEA. However, under EFMLEA § 3105 and EPSLA § 5102(a), an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Acts.

The Act authorizes the Department of Labor to promulgate rules to administer the Act. The Department has published a Temporary Final Rule and created new chapter 29 CFR Part 826 for the regulations. A small business may demonstrate that they are exempt from the requirement to provide paid sick leave under section 5102(a)(5) of the FFCRA, as well as exempt from providing expanded medical leave requirements, only if the (1) employer employs fewer than fifty employees; (2) leave is requested because the child's school or place of care is closed, or child care provider is unavailable due to COVID-19 related reasons; and (3) employer can show granting leave would jeopardize the viability of the business as a concern. An employer can make such a showing by demonstrating that:

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

Employers that elect the small business exemption must keep records to demonstrate that the above criteria have been satisfied and to show that they are exempt. This information collection provides a method for the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) to obtain information from such businesses who may utilize the exemption in order to confirm proper use.

The Department is charged with promulgating regulations.

2. Use

WHD staff will use the records provided by the employer to ascertain the proper use of the exemption. The WHD uses this information to determine whether covered employers have complied with the Act.

Sections 826.150 and 826.151 describes certain acts that are prohibited under the EPSLA and EFMLEA, as well as the enforcement schemes for these statutes, respectively. Section 826.150(a) explains that under the EPSLA, employers are prohibited from discharging, disciplining, or discriminating against any employee because such employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding.

Section 826.150(b) explains that an employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage required by section 6 of the FLSA, 20 U.S.C. 206, and an employer who violates the prohibition on discharge, discipline, or discrimination described in section 826.150(a) is considered to have violated section 15(a)(3) of the FLSA, 29 U.S.C. 15(a)(3). With respect to such violations, the relevant enforcement provisions of sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217, apply. The regulatory text describes the types of legal actions, and some of the remedies, that are therefore available.

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

Section 826.151(b) explains that in general, for purposes of the EFMLEA, employers are subject to the enforcement provisions set forth in section 107 of the FMLA, 29 U.S.C. 2617, and 29 CFR 825.400. The regulatory text describes the types of legal actions, and some of the remedies, that are therefore available. In particular, it explains that in general employees may bring private actions regarding alleged violations of the EFMLEA, but an employee may not bring an action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA. In other words, an employer can only bring an action against an employer under the EFMLEA if the employer was already subject to the FMLA.

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

3. Technology

No particular form of records is prescribed to demonstrate the exemption. The Department will examine the records provided by the employer in the format provided.

4. Duplication

This information collection does not duplicate existing WHD requirements. No similar information is available from any other source, since the WHD has enforcement authority over the labor standards laws previously identified.

5. Minimizing Small Entity Burden

While this information collection does not have a significant economic impact on a substantial number of small entities, it does infrequently involve small businesses. Information requested by this information collection is not available from any other source.

6. Consequence of Failing to Collect and Obstacles to Reducing Burden

Respondents are asked to provide information relevant to this information collection only when the WHD seeks to enforce the law it is charged with administering. Complaints provide the basis for the overwhelming majority of WHD compliance actions.

7. Special Circumstances

The Families First Coronavirus Response Act expires December 31, 2020. The Department seeks emergency processing due to the unprecedented nature of the national emergency associated with COVID-19.

8. Public Comments

The Department is not seeking public comment on this ICR at this time. The Department has requested emergency processing and will provide a notice and comment period in a subsequent public notice and submission to OMB.

9. Payment or Gifts to Respondents

The DOL offers no payments or gifts to respondents.

10. Assurances of Confidentiality

The DOL gives an assurance of confidentiality. Information gathered during the course of an investigation of a complaint is disclosed only in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552; the Privacy Act, 5 U.S.C. § 552a; and attendant regulations, 29 C.F.R. parts 70 and 71. The FOIA provides an exception from its disclosure requirements for records or information compiled for law enforcement purposes to the extent that release of the information could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis. 5 U.S.C. § 552(b)(7)(D). The FOIA also provides an exemption for business records and trade secrets.

11. Sensitive Questions

While the identification of a health matter may be considered a sensitive question, the regulations specify limits to access with respect to personal health information.

12. Estimated Annual Respondent Burden Hours

The regulations impose burdens on employers and employees similar to those burdens imposed by the Family and Medical Leave Act. As a result, burden estimates are borrowed from the information collection approved by OMB under control number 1235-0003.

A. In § 826.90, an employer may require an employee to follow reasonable notice procedures after the first workday (or portion thereof) for which an employee receives paid sick leave in order to continue to receive paid sick leave. Under this regulation, it is considered reasonable for an employer to require oral notice and sufficient information for an employer to determine whether the requested leave is covered by the EPSLA. An employer may not require notice to include documentation beyond what is allowed under § 826.100. Under § 826.100(a), an employee may be required to provide name, qualifying reason for leave, a statement that the employee is unable to work due to a qualifying reason, and dates requested for the leave. Under § 826.100(b) an employee must also provide a copy of the federal/state/local quarantine or isolation order. Under § 826.100(c), an employee who is taking paid sick leave under § 826.20(a)(1)(ii) of the regulations must attempt to provide a certification or other written documentation from a healthcare provider who advised the employee to self-quarantine due to concerns related to COVID-19.

The Department has used the same time estimate that is used for the Family and Medical Leave Act to estimate this requirement and estimates two minutes for the respondent employee to provide notice to the employer.

Based on the rule's regulatory impact analysis, the Department estimates that 26,950,796 employees are the universe of workers potentially affected by this rulemaking. Not all workers will require leave under EPSLA or EFMLEA.

The Department estimates that one million employees will request and use EPSLA leave. 1 million employees x 2 minutes per employee = 2,000,000 minutes (or 33,333 hours).

Respondents – 1 million
Responses – 1 million
Burden Hours 33,333

This total is comprised of private sector employees and public sector employees. For purposes of ROCIS entry, it is further broken down by first establishing that approximately 90,126 state and local governments exist in the United States (See www.census.gov/data/for/2017). Based on coverage and eligibility requirements, the Department assumes that 5 percent of respondents will be public sector employees and request the leave. NOTE: public sector will be further subdivided between State/local/tribal and Federal for EPSLA ONLY as most federal employees are covered by Title II of FMLA and this was not amended for the expanded family and medical leave portion of the FFCRA.

This adds employee respondent notice burden described below (using the same 2 minutes allotted under FMLA).

Private sector- Respondents is 950,000
Private sector Responses is 950,000
Private sector burden hours is 31,667 burden hours

Public Sector Respondents State/Local/Tribal – 48,000
Public Sector Responses State/Local/Tribal – 48,000
Public Sector Burden Hours State/Local/Tribal – 1,600 hours

Public Sector Respondents Federal – 2,000
Public Sector Responses Federal – 2,000
Public Sector Burden Hours Federal – 66 hours

Additionally, it adds employer recordkeeping burden described below (using the same 1.25 minutes as allotted for FMLA).

Private sector- Respondents is 950,000
Private sector Responses is 950,000
Private sector burden hours is 19,792 burden hours

Public Sector Respondents State/Local/Tribal – 48,000
Public Sector Responses State/Local/Tribal – 48,000
Public Sector Burden Hours State/Local/Tribal – 1,000 hours

Public Sector Respondents Federal – 2,000
Public Sector Responses Federal – 2,000
Public Sector Burden Hours Federal – 42 hours

Further, some portion of the one million workers estimated to take EPSLA leave, will take leave due to § 826.20(a)(1)(ii) and will be required to provide a health care certification. The Department estimates five percent of the one million employees will take leave under § 826.20(a)(1)(ii) or 50,000 employees. Additionally, the Department has used the same time estimate for submitting the certification as the Department uses in the FMLA healthcare provider certification process. This certification imposes a burden on the healthcare provider. The Department estimates 20 minutes for each health care provider.

50,000 x 20 minutes = 16,667 burden hours.

Respondents – 50,000
Responses – 50,000
Burden Hours – 16,667

This total is comprised of private sector employees and public sector employees. For purposes of ROCIS entry, the Department assumes that five percent will be public employees and 95 percent will be private sector employees.

Private Sector respondents – 47,500
Private Sector responses – 47,500
Private Sector Burden Hours -15,834

Public Sector Respondents State/Local/Tribal – 2,400
Public Sector Responses State/Local/Tribal – 2,400
Public Sector Burden Hours State/Local/Tribal –800

Public Sector Respondents Federal – 100
Public Sector Responses Federal – 100
Public Sector Burden Hours Federal– 33

Under § 826.90(a)(i), if an employee fails to give proper notice, the employer should give him or her notice of the failure and opportunity to provide the required documentation. This adds a burden to respondent employers. The Department estimates that it will take employers 2 minutes to provide the notice of failure and opportunity to provide documentation for an estimated 100,000 workers. These are subdivided below.

Private Sector respondents – 95,000
Private Sector responses – 95,000
Private Sector Burden Hours -3,167 burden hours

Public Sector Respondents State/Local/Tribal –4,800
Public Sector Responses State/Local/Tribal – 4,800
Public Sector Burden Hours State/Local/Tribal –160

Public Sector Respondents Federal – 200
Public Sector Responses Federal – 200
Public Sector Burden Hours Federal– 7

B. In § 826.110 (d), notice of any opportunity to change health care coverage plans or benefit plans must be provided to an employee taking paid sick leave or expanded medical leave, and if the employee requests the changed coverage it must be provided by the employer.

The Department has used the same estimate that is used for the Family and Medical Leave Act in the IC 1235-0003 when employers are required to notify employees of cancellation of health benefits. As a result, the Department estimates five minutes for the respondent employer to provide the notice. The Department notes that few employers cancel or change health benefits while persons are on leave (as noted in OMB control number 1235-0003). As a result, the Department is using the same percentage of the total number of affected employers as it has used for the FMLA collection (2.85%). Taking the total affected respondent employers (and understanding this is an overestimate as many employers with fewer than 50 employees may be exempt from the leave requirements of this rule, $5,976,761 \times 2.85\% = 170,337$ respondents. $170,337$ responses \times 5 minutes = 851,685 minutes (14,195 hours).

Respondents – 170,337
Responses – 170,337
Burden Hours 14,195

The Department estimates all changes to health benefits will be within the private sector as most public sector employees are governed by union contract, as a result will be based on contract agreement.

C. In § 826.140, the Department issues recordkeeping requirements noting that an employer is required to retain all documentation provided pursuant to § 826.100 as well as 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 the tax credit. The EPSLA requirements are discussed in (A) above generally. In § 826.100(d), the Department notes that to use paid sick leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(v) or for Expanded Family and Medical Leave, an employee must additionally provide documentation indicating closure or unavailability of his or her own son or daughter's school, place of care or child care provider. The documentation is not required to be an individualized certification and may be satisfied with a notice of closure or unavailability from his or her own son or daughter's school, place of care, or child care provider.

§ 826.100(e), an employer may request an employee to provide additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA.

In order to estimate the time needed for the respondent employee to provide the notice, the Department has used the same two minutes as described above. The time estimated for the respondent employer to retain the notice provided is estimated at 75 seconds. This 1.25 minutes is the same estimate as the General Recordkeeping estimate for the FMLA collection found in 1235-0003.

Respondent employee notice

The Department assumes that five percent of leave takers will take paid sick leave concurrently with expanded family and medical leave.

$5,000 \times 2 \text{ minutes} = 10,000 \text{ minutes (167 hours rounded)}$.

Respondents – 5,000
Responses – 5,000
Burden Hours – 167

For purposes of ROCIS entry, this is broken down into public sector and private sector.

Private Sector respondents – 4,750
Private Sector responses – 4,750
Private Sector burden hours – 159 burden hours

Public Sector State/Local/Tribal respondents – 230
Public Sector State/Local/Tribal responses- 230
Public Sector State/Local/Tribal burden hours – 7.5 burden hours

As noted, Title II of the FMLA was not amended and so federal employees generally will not take EPSLA and EFMLEA leave concurrently, however, the Department submits a modest estimate for federal workers who may be covered under Title I and take leave.

Public Sector Respondents Federal – 20
Public Sector Responses Federal – 20
Public Sector Burden Hours Federal – .5

Respondent employer recordkeeping

For purposes of this calculation, the Department assumes each respondent employee above will have a separate employer.

5,000 x 75 seconds = 104 hours
Respondents – 5,000
Responses – 5,000
Burden Hours – 104

For purposes of ROCIS entry, this is divided into private sector and public sector.

Private Sector respondents – 4,750
Private Sector responses – 4,750
Private Sector burden hours – 99 burden hours

Public Sector respondents State/Local/Tribal – 230
Public Sector responses State/Local/Tribal – 230
Public Sector burden hours State/Local/Tribal – 4.5 burden hours

Public Sector Respondents Federal – 20
Public Sector Responses Federal – 20
Public Sector Burden Hours Federal – .5

Beyond this requirement for those who take paid sick leave concurrently with expanded medical leave, (d) and (e) impose a burden on respondent employees to provide notice for expanded medical leave and a burden on respondent employers to maintain the record. Under the FMLA, the Department estimates that about 8% of employees use the leave (6.9 million leave takers of 87.2 million eligible). Under the EFMLEA, the Department assumes ten percent will need the leave. As noted in the RIA of this rulemaking, the

Department has estimated that 26,950,796 workers are eligible and work for covered employers.

$26,950,796 \times 10\% = 2,695,080$ employees who will take EFMLEA leave.

The Department has used the same time estimate that is used for the Family and Medical Leave Act to estimate this requirement and estimates two minutes for the respondent employee to provide notice to the employer.

$2,695,080 \times 2 \text{ minutes} / 60 \text{ min per hour} = 89,836$ hours

Respondents- 2,695,080
Responses- 2,695,080
Burden Hours – 89,836

For purposes of ROCIS entry, this estimate is divided into public sector versus private sector.

Private Sector respondents – 2,560,326
Private Sector responses – 2,560,326
Private Sector burden hours – 85,344 burden hours

Public Sector State/Local/Tribal respondents – 134,454
Public Sector State/Local/Tribal responses – 134,454
Public Sector State/Local/Tribal burden hours – 4,482 burden hours

As noted EFMLEA did not amend Title II for federal workers, however, the Department is submitting a modest estimate for the few federal workers who are covered by Title I and will take leave.

Public Sector Respondents Federal – 300
Public Sector Responses Federal – 300
Public Sector Burden Hours Federal – 10

The employer is required to maintain the record. In the RIA, the Department estimates that 2,302,123 employers will maintain the record (this number is 1,726,592 employers with fewer than 50 employees + 575,531 employers with between 50-500 workers). The same 75 seconds for record retention is used as described above.

$2,302,123 \times 1.25 \text{ min} / 60 \text{ min per hour} = 47,961$ burden hours.

Employer Respondent- 2,302,123
Employer Responses – 2,302,123
Burden Hours – 47,961

For purposes of ROCIS entry, this item is further divided into public sector and private sector.

Private Sector respondents – 2,187,017
Private Sector responses – 2,187,017
Private Sector burden hours – 45,563 burden hours

Public Sector respondents State/Local/Tribal – 110,502
Public Sector responses State/Local/Tribal – 110,502
Public Sector burden hours State/Local/Tribal – 2,302 burden hours

Public Sector Respondents Federal – 4,604
Public Sector Responses Federal – 4,604
Public Sector Burden Hours Federal – 96

Small Employer Exemption

Section 826.40(b) describes the small employer exemption pursuant to the Secretary’s regulatory authority to exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern. The American Institute of Certified Public Accountants (AICPA) allows companies to use the “ongoing concern assumption” to defer some of its prepaid expenses until future accounting periods because the entity can continue in business for the foreseeable future without the intention nor the necessity to liquidate, cease trading, or seek protection from creditors pursuant to laws or regulations. In other words, the business is considered to remain a viable business for the foreseeable future. There is no formula provided by the AICPA to determine the viability of a business as a going concern, but rather the standard considers conditions or events in the aggregate. The Department believes it is necessary to set forth objective criteria for when a small business with fewer than 50 employees can deny an employee paid sick leave or expanded family and medical leave to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons. To that end, section 826.40(b)(1) explains that a small employer is exempt from the requirement to provide such leave when: (1) such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

In § 826.40(b)(2), the regulations require an employer asserting the exemption to document why their business meets these criteria. The regulations require that the employer retain the records. This imposes a burden on such respondent employers. Based on the regulatory impact analysis accompanying this rule, the Department estimates 575,531 employers will document and retain such records. The Department estimates one hour for compiling and maintaining such records in the regulatory impact analysis.

Respondents – 575,531
 Responses – 575,531
 Burden Hours- 575,531

For purposes of ROCIS entry, this is further divided into public sector and private sector.

Private Sector respondents – 546,755
 Private Sector responses – 546,755
 Private Sector burden hours – 546,755 burden hours

Public Sector respondents – 28,776
 Public Sector responses – 28,776
 Public Sector burden hours – 28,776 burden hours

TOTAL ESTIMATED ANNUALIZED RESPONDENT BURDEN AND COSTS

Citation	Respondents	Responses	Burden Hours
826.90 EE	1,050,000	1,050,000	50,000
826.90 ER	1,100,000	1,100,000	24,168
826.110	170,337	170,337	14,195
826.100	5,000	5,000	167
	5,000	5,000	104
826.100	2,695,080	2,695,080	89,836
	2,302,123	2,302,123	47,961
Exemption	575,531	575,531	575,531
TOTALS	7,903,071	7,903,071	801,962

To estimate cost the Department used the BLS Employment Situation, Table B-3 and took the average hourly earnings for February 2020 (\$28.52). To this amount we added 46% benefit cost plus 17% overhead cost for a total loaded wage rate of \$46.47.

801,962 burden hours x \$46.47 = \$37,267,174. (rounded)

13. Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs

As noted above, the issuance of a health care provider certification imposes a burden for operations and maintenance costs for health care providers. The Department has estimated 50,000 certifications will be submitted. The Department used the median hourly wage for a physician assistant from the BLS Occupational Employment and Wages report (May 2018) to estimate costs plus 46% benefit cost plus 17% overhead cost. See <https://www.bls.gov/oes/current/oes291071.htm>. This amount is base wage of $\$52.22 + \$24.02 + \$8.87 = \85.11 .

$$50,000 \times \$85.11 = \$4,255,500$$

14. Estimated Annual Federal Costs

While the Department of Labor will incur costs with a new enforcement program in training enforcement staff to respond to additional complaints for a new leave entitlement. However, the Department does not have data to assess the cost to the Department. The Department thinks the enforcement cost will be relatively small as the law expires in December 2020.

15. Reasons for Program Changes or Adjustments Affecting Public Burdens

This is a new law and the burdens reported here are new.

16. Publishing Data From Information Collection

The DOL does not publish the results of this information collection.

17. Display of OMB Approval Expiration

The DOL does not seek an exception to the requirement to display the expiration date on this information collection.

18. Exceptions to Certification Statement

The DOL is not requesting an exception to any of the certification requirements for this information collection. This request complies with 5 C.F.R. § 1320.9.

B. Employing Statistical Methods

Not applicable.