

COVID-19 & EMPLOYMENT: *What you Need to Know Now*

COVID-19 is a serious public health and economic challenge for employees, employers, and unions. Our firm has answered some commonly asked questions about new state and federal employment laws below.

Please understand that these laws were enacted emergently and that we have little guidance beyond their plain language. We will modify this Q&A as further questions arise and more information becomes available. Please contact us if we can help you navigate these issues.

NEW YORK STATE LAW

New York's COVID-19 Paid Sick Leave is effective retroactively to January 1, 2020 and will become secondary to the Federal Families First Coronavirus Response Act when that takes effect on April 1, 2020. The law applies to all New York State employers.

The law **only** applies to employees who are subject to a mandatory or precautionary quarantine order issued by New York State, the Department of Health, a local health board, or any government entity duly authorized to issue such an order. It does **not** apply to: (1) non-essential workers who had to stop working because of Governor Cuomo's executive order; (2) employees who are voluntarily quarantined based on their own discretion or a doctor's suggestion; or (3) employees that are able (*or healthy enough*) to work remotely or by other means even if they are subject to a quarantine order.

Q. If an employee is subject to a quarantine order as described above, how is sick leave paid under New York State law?

A. It depends on the employer's characteristics.

Private employers with 1-10 employees and a net income of \$1M or less in the 2019 tax year must:

- provide unpaid leave for the duration of the order OR until April 1 when federal leave begins;
- protect the employee's job through the duration of the quarantine order; and

- provide access to New York Paid Family Leave (“NY-PFL”) and New York Short Term Disability (“NY-STD”) (*discussed below*).

Private employers with 1-10 employees and a net income greater than \$1M in the 2019 tax year and private employers with 11 to 99 employees must:

- provide five days of paid sick leave (*paid by employer*) then provide unpaid sick leave until the quarantine order ends OR until April 1 when federal leave begins;
- protect the employee’s job for the duration of the quarantine order; and
- provide access to NY-PFL and NY-STD for the amount of time needed after the first five days.

Private employers with 100 or more employees and public employers¹ of any size must:

- provide 14 days of paid sick leave (*paid by employer*); and
- protect the employee’s job for the duration of the quarantine order.

Employers with over 500 employees will need to provide this benefit as needed even after federal law takes effect.

Any federal sick leave benefits are offset against New York State benefits, *i.e.*, the State benefits apply only to the extent they exceed any federal benefits.

Q. Are employees who are able to work from home entitled to job protection or any of the other benefits of the newly enacted state law?

A. No, however, they may have other protections if they are represented by a union or have an individual employment contract.

FEDERAL LAW

The Families First Coronavirus Response Act (“FFCRA”) goes into effect on April 1, 2020 and lasts until December 31, 2020. It does two things: creates the Emergency Paid Sick Leave Act and expands the Family & Medical Leave Act (“FMLA”).

¹ Public employers include, but are not limited to the state, counties, cities, towns, villages, school districts, BOCES, government entities operating colleges or universities, public improvement or special districts, and public authorities, commissions, and benefit corporations.

The FFCRA applies to all employers with less than 500 employees; however, employers with less than 50 employees are exempt if compliance will impact the viability of the business (*the United States Secretary of Labor will issue additional guidance in this regard*). Employers who pay employees for leave under the FFCRA will receive payroll tax credits.

The Emergency Paid Sick Leave Act applies to all employees, regardless of how long they have worked for the employer; the FMLA expansion applies only to employees who have worked for the employer for at least 30 days. Neither provision applies to employees who are able (*or healthy enough*) to work remotely, healthcare professionals, or emergency responders.

Q. What happens to employees who cannot work because they have to care for a minor child because the child's school or place of care has closed, or the child's childcare provider is unavailable, due to a public health emergency²?

A. The expansion of the FMLA requires an employee (*who has been employed at least 30 days*) in this situation to receive 12 weeks of job-protected leave.

The first 10 days of this FMLA leave is unpaid; however, an employee may choose (*but cannot be forced*) to use accrued paid leave, including, if applicable, leave under the Emergency Paid Sick Leave Act (*discussed below*). The remaining leave is paid at two-thirds of the employee's regular rate of pay. The calculation is based on the number of hours the employee normally would be scheduled to work, but the leave paid cannot exceed \$200/day and \$10,000 in the aggregate for each employee.

Q. Do employers have to provide paid sick leave under federal law?

A. Yes, under the Emergency Paid Sick Leave Act, a public or private employer with less than 500 employees must give paid sick leave to an employee who cannot work (*or telework*) because he or she is:

1. subject to a COVID-19 federal, state, or local quarantine or isolation order;
2. advised by a health care provider to self-quarantine due to COVID-19-related concerns;
3. experiencing COVID-19 symptoms AND seeking a medical diagnosis;

² A "public health emergency" is limited to a COVID-19 emergency declared by a federal, state, or local authority.

4. caring for an individual who is subject to a federal, state, or local quarantine or isolation order or whose healthcare provider has advised them to self-quarantine;
5. caring for their child because the child's school or place of care has closed or their childcare provider is unavailable due to COVID-19 precautions; or
6. is "experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor."

Q. How is sick leave paid for the above reasons?

- A. Full-time employees receive 80 hours of paid sick leave. Part-time employees are paid sick leave for the number of hours they work on average over a two week period.

The employee gets their full rate of pay if they are taking leave for reasons 1, 2, or 3 above, capped at \$511 per day (\$5,110 total). The employee gets two-thirds their regular rate of pay for reasons 4, 5, or 6 above, capped at \$200 per day (\$2,000 total). The employee can use other accrued leave time to reach full pay, but the employer cannot force them to do so or make them use such leave before using Emergency Paid Sick Leave.

**NEW YORK PAID FAMILY LEAVE ["NY-PFL"] &
NEW YORK SHORT TERM DISABILITY ["NY-STD"]**

Q. What happens when employer-provided paid sick leave is exhausted for individuals subject to a quarantine order?

- A. Once employer-provided paid sick leave is exhausted (*including all leave mandated by federal and state law and any other paid leave the employer provides*), employees are entitled to lost income benefits under the employer's NY-PFL and NY-STD policies.

Q. How much is the lost income benefit under the NY-PFL or NY-STD policies?

- A. Affected employees will receive 100% of their weekly wage but not more than \$2,884.62/week (*which annualizes to \$150K*) for the duration of the quarantine order. Most employees pay at least part of the cost for coverage under these policies.

Q. Does the usual one-week waiting period apply before benefits are paid under the NY-PFL or NY-STD policies?

A. No, the waiting period has been waived for employees affected by COVID-19.

OTHER

Q. What about sick and other forms of paid leave that the employee accrued before these new laws were enacted?

A. Leave granted under the newly enacted state law must “be provided without loss of the . . . employee’s accrued sick leave.” It is unclear whether employers can rely on existing vacation, paid time off, and other time off banks not designated as “sick leave” to satisfy their obligations under the new law. The New York State Department of Labor is authorized to issue regulations to implement this newly enacted law; we hope they address this issue.

Q. If the employer closes their business due to COVID-19, may affected employees apply for unemployment insurance benefits?

A. Yes. The job protection contained in the applicable laws apply only if the business continues to operate.

Q. What is Matilda’s law?

A. Matilda’s law (*named after Governor Cuomo’s mother*) is not actually a law or a legally-binding order (yet). It provides protections for the most vulnerable populations, *i.e.*, New Yorkers age 70 or older, those with compromised immune systems, and those with underlying illnesses. It appears to apply to individuals and not to employers. Matilda’s law tells us what we **should** be doing at this time, such as:

- staying indoors;
- going outside for solitary exercise;
- pre-screening visitors and aides by taking their temperature;
- not visiting households with multiple people;
- requiring vulnerable individuals to wear a mask when in the company of others;

- requiring, if possible, those in the presence of vulnerable individuals to wear a mask;
- staying six feet away from others; and
- avoiding public transportation unless urgent and absolutely necessary.

Q. Can you share some helpful resources?

A. <https://paidfamilyleave.ny.gov/covid19>

<https://coronavirus.health.ny.gov/home>

<https://www.dol.gov/agencies/whd/pandemic>

<https://www.dol.gov/coronavirus>

Again, please understand that the legal arena related to COVID-19 is changing daily. We will share updated information as appropriate and as it becomes available to us. Please contact us if we can help you with employment or other issues during this difficult time.

New York COVID-19 Leave Requirements

Law	What Triggers Benefits?	What is the Benefit?		Additional Information
<p>NY COVID-19 Sick Leave Law (eff. March 18, 2020)</p> <p>Applies to all NY employers and all NY employees.</p>	<p>Mandatory or precautionary order of quarantine or isolation issued by State of NY, Dep't of Health, local board of health or any gov't entity authorized to issue such order due to COVID-19.</p> <p>EXCEPTION: Does not apply if order is because the employee returned after personal travel to a country for which the CDC issued a Level 2 or 3 health notice AND the employee was provided notice of the travel health notice and this limitation prior to such travel. If this limitation applied, the employee may still use accrued sick leave or unpaid sick leave for the duration of the order.</p> <p>EXCEPTION: Does not apply if employee is deemed asymptomatic or has not been diagnosed with any medical condition and is physically able to work while under order, whether through remote access or similar means.</p>	10 or fewer employees as of January 1, 2020.	<p>Unpaid leave for duration of order. PFL/DBL benefits available (no waiting period for DBL).</p> <p>Cap on PFL of \$840.70/week and DBL of \$2,043.92/week.</p>	Must be restored to same job w/ same pay/benefits.
		10 or fewer employees as of January 1, 2020, with net income greater than \$1 million in previous tax year.	5 days of paid sick leave and then unpaid leave for duration of order. PFL/DBL benefits available (no waiting period for DBL).	<p>Paid sick leave shall be provided without loss of employee's accrued sick leave.</p> <p>Must be restored to same job w/ same pay/benefits.</p> <p>Any federal sick leave benefits are offset against these NY benefits (i.e., these NY benefits will apply only to the extent they are in excess of any federal benefits)</p>
		11-99 employees as of January 1, 2020.	Cap on PFL of \$840.70/week and DBL of \$2,043.92/week.	
		100+ employees as of January 1, 2020 and public employers.	14 days of paid sick leave.	



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Federal COVID-19 Leave Requirements

Law	What Triggers Benefits?	What is the Benefit?	Additional Information
<p>FMLA Expansion (eff. April 1, 2020 to December 31, 2020)</p> <p>Applies to public and private employers with fewer than 500 employees.</p> <p>Applies to any employee who has employed for at least 30 calendar days.</p>	<p>Employee unable to work (or telework) to care for a minor child if the child's elementary or secondary school or place of child care has been closed or is unavailable due to a public health emergency.</p> <p>A "public health emergency" is limited to a COVID-19 emergency declared by a Federal, State or local authority.</p> <p>A "child care provider" means a provider who receives compensation for providing child care services on a regular basis.</p>	<p>First 10 days of this FMLA leave is unpaid, but an employee may elect (i.e., cannot be forced) to use his/her accrued paid leave, including Federal Emergency Paid Sick Leave (if applicable). Remaining leave is paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work. Capped at \$200 per day and \$10,000 total.</p>	<p>Job restoration to the same or equivalent position, but under certain circumstances employers with fewer than 25 employees may be exempt from this requirement.</p> <p>Employers of health care providers and/or emergency responders may exclude such employees from this emergency FMLA leave entitlement.</p>
<p>Federal Emergency Paid Sick Leave (eff. April 1, 2020 to December 31, 2020)</p> <p>Applies to public and private employers with fewer than 500 employees.</p> <p>Applies to all employees, regardless of length of employment.</p>	<p>Employee is unable to work (or telework) because they are:</p> <ol style="list-style-type: none"> subject to a federal, state or local quarantine or isolation order related to COVID-19; advised by a health care provider to self-quarantine due to concerns related to COVID-19; experiencing symptoms of COVID-19 and seeking medical diagnosis; caring for "an individual" subject to (1) or (2) above; caring for the employee's child if the child's school or place of care is closed or unavailable due to COVID-19 precautions; or experiencing any other substantially similar condition specified by the Sec. of Health & Human Services in consultation with the Sec. of the Treasury and the Sec. of Labor. 	<p>FT employees receive 80 hours of paid sick leave.</p> <p>PT employees number of hours of paid sick leave that they work on average over a two-week period.</p> <p>Full pay for reasons 1, 2 or 3. Two-thirds pay for reasons 4, 5 or 6.</p> <p>Capped at \$511 per day (\$5,110 total) for reasons 1, 2, or 3. Capped at \$200 per day (\$2,000 total) for reasons 4, 5 or 6.</p> <p>Paid sick time may not be carried over to the following year.</p>	<p>Employers must post a required notice concerning this Emergency Paid Sick Leave. Notice will be available from the Sec. of Labor by March 25, 2020.</p> <p>Employers cannot require employees to use their other accrued leave time before using this emergency sick leave and cannot require the employee to find a replacement worker.</p> <p>Employers of health care providers and/or emergency responders may exclude such employees from this Emergency Paid Sick Leave.</p>
<p>There will be a tax credit each calendar quarter for 100% of the qualified sick leave wages paid in that calendar quarter by an employer (capped at the same amounts as the benefit itself) for Federal Emergency FMLA leave and/or Emergency Paid Sick Leave, as well as tax credits for the cost of continuing health insurance for employees on leave. Consult a tax professional for more details.</p>			



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