



COVID-19 – Employee Leave Laws

March 2020

On March 18, 2020, both New York State and the federal government passed new laws responding to the COVID-19 pandemic. The new laws require employers to provide job-protected paid leave for employees affected by COVID-19 as set forth below.

New York Paid Sick Leave for COVID-19

The New York Paid Sick Leave for COVID-19 Law is effective immediately. This law provides paid sick leave and job protections for workers subject to a mandatory or precautionary order of quarantine or isolation, and expands Paid Family Leave to allow an employee to take leave to care for a minor dependent child who is subject to a mandatory or precautionary order of quarantine or isolation.

Paid Sick Leave, Paid Family Leave and disability benefits under the New York Paid Sick Leave for COVID-19 are only available to the extent the leave and benefits exceed those available to the employee under federal law, including the federal Families First Coronavirus Response Act which becomes effective on April 1, 2020.

Mandatory or Precautionary Order of Quarantine or Isolation: A mandatory or precautionary order of quarantine or isolation due to COVID-19 means an order issued by the State of New York, the department of health, local board of health, or any other government entity authorized to issue an order due to COVID-19.

Paid Leave Entitlements: The paid leave requirements vary based on the nature and size of the employer as follows:

Public Employers: Public employers must provide an officer or employee subject to an order of quarantine or isolation with at least 14 days of paid sick leave. The employee must be paid for the regular work hours that the employee is unable to work due to quarantine or isolation.

Employers With 100 or More Employees: Employers with 100 or more employees must provide an employee subject to an order of quarantine or isolation with at least 14 days of paid sick leave.

Employers With 11 to 99 Employees: Employers with 11 to 99 employees must provide an employee subject to an order of quarantine or isolation with at least five days of paid sick leave, and unpaid sick leave until the termination of the quarantine or isolation. An employee may be eligible for Paid Family Leave benefits and disability benefits during the portion of this leave that is not paid by the employer.

Employers With 10 or Fewer Employees: Employers with 10 or fewer employees with a net income of less than one million dollars must provide an employee subject to an order of quarantine or isolation with unpaid sick leave until the termination of the quarantine or isolation. An employee may be eligible for Paid Family Leave benefits and disability benefits during the portion of this leave that is not paid by the employer.

Employers with 10 or fewer employees with a net income of more than one million dollars must provide an employee subject to an order of quarantine or isolation with at least five days of paid sick leave, and unpaid sick leave until the termination of the quarantine or isolation. An employee may be eligible for Paid Family Leave benefits and disability benefits during the portion of this leave that is not paid by the employer.

Employer-Provided Leave: Employers cannot require an employee to use up accrued sick leave before using emergency paid sick leave.

Restoration to Position: Paid Sick Leave is job-protected and an employee taking Paid Sick Leave must be restored to his or her same position when he or she returns to work.

Paid Family Leave: After exhausting Paid Sick Leave, an employee may be eligible for Paid Family Leave benefits for the remainder of an order of quarantine or isolation. Any employee may be eligible for Paid Family Leave benefits to provide care for a minor dependent child who is subject to an order of quarantine or isolation.

No Discrimination or Retaliation: Employers cannot fire or otherwise discriminate or retaliate against an employee because the employee has taken Paid Sick Leave for COVID-19.

Exceptions: Employers need not provide Paid Sick Leave to an employee who is deemed asymptomatic or who has not yet been diagnosed with any medical condition and is physically able to work remotely while under an order of quarantine or isolation.

An employee is not entitled to Paid Sick Leave benefits or any other paid benefit described above if the employee is subject to a mandatory or precautionary order of quarantine or isolation because the employee traveled for non-business reasons to a country which the CDC has issued a level two or three travel health notice, if the employee was provided notice of the CDC travel health notice and this limitation prior to traveling. Employers must provide an employee subject to this exception with unpaid sick leave until the termination of the quarantine or isolation and allow the employee to use any accrued leave provided by the employer.

Federal Families First Coronavirus Response Act

The federal Families First Coronavirus Response Act becomes effective on April 1, 2020, and expires on December 31, 2020. The federal law has two major provisions that impact employers: (1) The Emergency Paid Sick Leave Act and (2) The Emergency Family and Medical Leave Expansion Act. Both Leave Acts apply to public employers and private employers with fewer than 500 employees.

The Families First Coronavirus Response Act also provides for refundable tax credits for employers to cover the significant costs associated with providing paid leave required by this law, which are beyond the scope of this summary.

The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act requires public employers and private employers with fewer than 500 employees to provide any employee who is unable to work (or telework) due to COVID-19 with two weeks of paid sick leave. There are no employee eligibility requirements, and paid sick leave will be available for the employee to use immediately, regardless of how long the employee has been employed.

Reasons for Sick Leave: An employee may take sick time for any of 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 health care 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.
- (4) The employee is caring for an individual who is subject to an order or has been advised as described in (1) or (2) above.
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- (6) The employee 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.

Duration of Paid Sick Time: Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to be paid for the number of hours that the employee works, on average, over a two-week period. For those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay

those employees based on the average number of hours the employee worked over the prior 6 months, or (if the employee did not work the prior 6 months – such as in the case of new employees), the number of hours the employee was expected to work.

How Paid Sick Leave Is Paid: An employee receiving paid sick leave due to his or her own illness or quarantine (the reasons set forth as (1)-(3) above) receives his or her full pay up to a maximum of \$511 per day and \$5,110 in the aggregate.

An employee receiving paid sick leave to care for a family member who is ill or quarantined, or to care for his or her son or daughter due to school closure or unavailability of child care (the reasons set forth as (4)-(6) above), will be paid two-thirds of his or her full pay up to a maximum of \$200 per day and \$2,000 in the aggregate.

Employer-Provided Leave: Employers cannot require an employee to use up other paid time off before using emergency paid sick leave.

No Replacement: Employers may not condition the use of paid sick leave on the employee finding a replacement to “cover” for them.

No Carry-Over: Paid sick leave hours cannot be carried over after December 31, 2020.

Employee Notice Requirement: After the first workday (or portion thereof) that an employee receives paid sick time, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time.

Employer Notice Requirement: Employers are required to notify their employees of their rights under the Emergency Paid Sick Leave Act by posting the required notice in a conspicuous location.

Exemptions: Employers may exclude employees who are health care providers or emergency responders. The Secretary of Labor also has the authority to issue regulations for good cause to allow employers of certain health care providers and emergency responders to opt out, and to exempt small businesses with fewer than 50 employees from the requirement to provide leave due to school closings or child care unavailability when the imposition of the paid leave requirements would jeopardize the viability of the business.

No Retaliation: The Emergency Paid Sick Leave Act includes a prohibition on retaliating against any employee who takes leave in accordance with the new law, or files a complaint alleging violations of the Act.

Penalties for Violation: Any employers who fail to provide their employees with paid sick time as outlined above will be considered to have failed to pay minimum wages in violation of the FLSA.

The Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act amends the Family and Medical Leave Act (FMLA) on a temporary basis and requires public employers and private employers with fewer than 500 employees to provide certain employees with up to 12 weeks of FMLA-protected leave for reasons related to COVID-19 defined as a qualifying need related to a public health emergency. To be eligible for Emergency FMLA leave, an employee (full- or part-time) must have been employed for at least 30 calendar days by the employer.

Reasons for Leave: A qualifying need related to a public health emergency means the employee is unable to work (or telework) due to a need for leave to care for the employee's son or daughter (under 18 years of age) due to school closure or unavailability of child care due to a public health emergency declared due to COVID-19.

Duration and Pay: The first 10 days of Emergency FMLA leave are unpaid. However, an employee will also be entitled to paid sick leave pursuant to the Emergency Paid Sick Leave Act as set forth above.

After the 10 days of unpaid leave, employers must provide up to 10 additional weeks of paid Emergency FMLA leave at no less than two-thirds the employee's regular pay for the number of hours the employee would have been normally scheduled, up to a maximum of \$200 per day and \$10,000 in the aggregate. See "Duration of Paid Sick Time" on page 3, above, for calculation of hours for those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the employee would have worked.

Employee Notice Requirement: In the case where the need for Emergency FMLA leave is foreseeable, an employee is required to give as much notice as is practicable.

Restoration to Position: Like traditional FMLA leave, Emergency FMLA leave is job-protected and an employee taking Emergency FMLA leave must be restored to his or her same or equivalent position when he or she returns to work. However, employers with less than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer and are caused by a public health emergency during the period of leave and the employer makes reasonable efforts to contact any displaced employee for up to a year after they are displaced.

Exemptions: Employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement. The Secretary of Labor also has the authority to issue regulations for good cause to allow employers of certain health care providers and emergency responders to exclude such employees, and to

exempt small businesses with fewer than 50 employees when the imposition of the paid leave requirements would jeopardize the viability of the business.

The information set forth above is intended for informational purposes only. We recommend that you consult with legal counsel on any specific issues in order to fully understand the available options and potential ramifications.

Webster Szanyi LLP attorneys are ready and prepared to assist you with any questions you may have regarding the above, or any other questions you may have concerning COVID-19. Please do not hesitate to contact any members of our Education or Labor and Employment groups: Ryan Smith, Susan McClaren, Melanie Beardsley, Marnie Smith, Heather Dechert.