

COVID-19 AND EMPLOYEE LEAVE LAWS UPDATE

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AGENDA

- ▶ Overview of Laws that Apply, with Updates
 - ▶ Federal Leave Laws
 - ▶ Family and Medical Leave Act, and Expansions to that Act (“Emergency FMLA”)
 - ▶ Emergency Paid Sick Leave (“Emergency Sick Leave”)
 - ▶ New York State Leave Laws
 - ▶ Recently Enacted, New York COVID State Paid Leave Law (Passed on March 18, 2020)
 - ▶ New York State Paid Family Leave
 - ▶ New York Paid Sick Leave Law (Passed with the Budget)
 - ▶ Local Leave Laws
 - ▶ Unemployment Insurance Implications
- ▶ Common Questions and Answers
- ▶ Questions ?

THE FEDERAL EMERGENCY FMLA LEAVE AND PAID SICK LEAVE

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Overview

- ▶ Signed by President Trump evening of Wednesday, March 18, 2020
- ▶ Amends the federal Family and Medical Leave Act (“FMLA”) and creates the Emergency FMLA provisions
- ▶ Establishes Emergency Paid Sick Leave
- ▶ Both, the Emergency FMLA and the Emergency Paid Sick Leave, are temporary; the leave rights created by these laws “expire” on December 31, 2020
- ▶ Both became effective April 1, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY PAID SICK LEAVE

▶ Covered Employers:

- ▶ A private employer with fewer than 500 employees
- ▶ Small employers with fewer than 50 employees may be exempted from providing paid sick leave benefits to employees who request leave to care for a child because their school or daycare has been closed, if providing such benefits would jeopardize the viability of the business.

▶ Covered Employees:

- ▶ Any employee (there is no 30-day employment requirement)
- ▶ The Secretary of Labor has issued regulations to exclude “certain health care providers” from the definition of “eligible employee.” Per the regulations, the following employees are not covered by the Emergency FMLA or the Emergency Paid Sick Leave: “a health care provider **is anyone employed** at any doctor’s office, hospital, health care center, clinic, postsecondary 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. **This definition 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...”

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY PAID SICK LEAVE

- ▶ Reasons for Leave under the federal Emergency Paid Sick Leave Act (for covered employees):
 - ▶ The employee is ordered into quarantine or isolation by a public official.
 - ▶ The employee has been advised to self-quarantine or isolate by a health care provider.
 - ▶ The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 - ▶ The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine or isolate by a health care provider.
 - ▶ The employee is caring for a child because their school or daycare has been closed.
 - ▶ The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (HHS).

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY PAID SICK LEAVE

▶ AMOUNT OF LEAVE

- ▶ Full-time employees are entitled to 80 hours of paid leave
- ▶ Part-time employees are entitled to the number of hours they work on average over a two-week period

▶ PAY FOR LEAVE

- ▶ Employees who take leave for reasons 1-3 above (i.e., the employee's own quarantine and COVID-19 circumstances necessitate the leave) must be paid at the employee's regular rate of pay, subject to a maximum of \$511 per day, or \$5,110 in the aggregate
- ▶ Employees who take leave for reasons 4-6 must be paid 2/3 of their regular rate of pay, subject to a maximum of \$200 per day, or \$2,000 in the aggregate.
- ▶ Employers cannot require employees to use other accrued leave, such as vacation or sick time, before taking leave.

FEDERAL FMLA

- ▶ The FMLA applies to employers with 50 or more employees.
- ▶ It allows eligible employees to take up to 12 weeks of unpaid job-protected leave during a 52-week period for, among other reasons:
 - ▶ To care for his/her spouse, child, or parent who has a serious health condition;
 - ▶ For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- ▶ Eligible employees are those who:
 - ▶ Have been employed by the employer for at least 12 months;
 - ▶ Have worked at least 1,250 hours for the employer during the 12 month period preceding the leave; and
 - ▶ Work in a location where the employer has 50 or more employees in a 75 mile radius.
- ▶ “Serious health condition” is an illness, injury, impairment, or physical or mental condition that involves:
 - ▶ Inpatient care in a hospital, hospice or residential care facility; or
 - ▶ Inpatient care” is defined as “an overnight stay in a hospital, hospice, or residential medical facility, including any period of incapacity... or subsequent treatment in connection with such inpatient care.”

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY FMLA

▶ COVERED EMPLOYER:

- ▶ An employer with fewer than 500 employees.
- ▶ The law allows the Secretary of Labor to exempt small businesses with fewer than 50 employees if providing the required leave would jeopardize the viability of the business.
 - ▶ Regulations have been issued that codify the process for selecting this exemption. No filing is required in order to claim this exemption. Rather, the “small” employer should document its determination that this “small employer” exemption applies and retain the record and supporting documentation in its files.

COVERED EMPLOYEE:

- ▶ Any full-time or part-time employee that has been on the employer’s payroll for 30 calendar days.
- ▶ Healthcare workers are excluded, per Secretary of Labor regulations and guidance issued by the U.S. Department of Labor.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY FMLA

▶ REASONS FOR EMERGENCY FMLA LEAVE:

- ▶ Eligible employees are entitled to take up to 12 weeks of FMLA leave for “a qualifying need related to a public health emergency.”
 - ▶ This “qualifying need” is limited to circumstances where an employee is **unable** to work (**or telework**) because the employee is needed to care for a minor child if the child’s school or place of childcare has been closed or is unavailable due to a public health emergency.

OTHER FEDERAL (PRE-EXISTING) LEAVE LAWS

AMERICANS WITH DISABILITIES ACT

- ▶ Covers employers with 15 or more employees
- ▶ Obligation to provide reasonable accommodations for qualified individuals with disabilities, except where accommodation would result in undue hardship.
- ▶ Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
 - ▶ Local anti-discrimination standards may be broader

LEAVE AND ACCOMMODATIONS

- ▶ Employees with underlying medical conditions that render them more susceptible to COVID-19 infection, or more likely to develop severe complications from such an infection, may request accommodations such as:
 - ▶ On-the-job modifications such as isolation or significant social distancing from co-workers and the public.
 - ▶ Telework.
 - ▶ Leave.
- ▶ Employees who become infected with COVID-19 may be entitled to job-protected time off, even if they are not eligible for or have exhausted leave under the laws described above.

NEW YORK STATE LEAVE LAWS

NEW YORK STATE COVID PAID SICK LEAVE

▶ Overview:

- ▶ Effective immediately.
 - ▶ Signed into law by Governor Cuomo on March 18, 2020
- ▶ Covers all employers
 - ▶ Obligations and the extent of leave vary, depending on type and size of employer
- ▶ Covered employees
 - ▶ There appears to be no minimal employment period that is required before an employee can utilize the leave. Thus, any employee appears to be covered so long as they work for a covered employer

NEW YORK STATE PAID SICK LEAVE

▶ Employer Coverage:

- ▶ Private employers with 10 or fewer employees and net income of one million dollars or less in the previous tax year to provide **unpaid** sick leave until the termination of the quarantine/isolation order.
- ▶ Private employers with 10 or fewer employees and net income over one million dollars in the previous tax year must provide at least five (5) days of paid sick leave, followed by unpaid sick leave until the termination of the quarantine/isolation order.
- ▶ Private employers with between 11 and 99 employees, regardless of income, must provide at least five (5) days of paid sick leave, followed by unpaid sick leave until the termination of the quarantine/isolation order.
- ▶ Private employers with 100 or more employees to provide at least **14 days of paid sick leave**, followed by unpaid sick leave until the termination of the quarantine/isolation order.

NEW YORK STATE PAID SICK LEAVE

▶ Scope of Leave:

- ▶ Employees who have been subjected to mandatory or precautionary orders of quarantine or isolation due to COVID-19.
 - ▶ The order must be issued by the State of New York, New York Department of Health, local Board of health or any “government” entity that is authorized to issue the order.
- ▶ Employees are *not eligible* to take sick leave if they are deemed *asymptomatic* or have not yet been diagnosed with a medical condition and are physically able to work remotely or through other means while under a mandatory quarantine or isolation.

NEW YORK STATE PAID SICK LEAVE

Local Health Departments (LHDs) must utilize the following definitions in determining whether or not to institute a mandatory or precautionary quarantine:

Mandatory Quarantine

- Person has been in close contact (6 ft.) with someone who is positive but is not displaying symptoms for COVID-19.
- Person has traveled to China, Iran, Japan, South Korea or Italy and is displaying symptoms of COVID-19.

Mandatory Isolation

- Person has tested positive for COVID-19, whether or not displaying symptoms for COVID-19.
- LHDs must immediately issue an order for Mandatory Quarantine or Isolation once notified, which shall be served on the person impacted.

Precautionary Quarantine

Person meets one or more of the following criteria:

- Has traveled to China, Iran, Japan, South Korea or Italy while COVID-19 was prevalent, but is not displaying symptoms.
- Proximate exposure to a positive person but has not had direct contact with a positive person and is not displaying symptoms.
- Any person the Local Health Department believes should be quarantined that is not addressed through the interim guidelines, should contact the Department of Health

NEW YORK STATE PAID SICK LEAVE

- ▶ Maximum Pay for employees on Leave:
 - ▶ Employers with 100 or more employees
 - ▶ An employee who works for an employer with more than 100 employees as of January 1, 2020, is entitled to at least 14 days of paid sick leave at his/her regular rate of pay.
 - ▶ Employers with 11 -99 employees
 - ▶ At least 5 days of paid sick leave
 - ▶ After those days are used, the employee may be eligible to receive his/her weekly wages through a combination of Paid Family Leave and disability benefits, up to a maximum of \$2,884.62 per week.
 - ▶ Employers with 10 or fewer employees and a net income of greater than 1 Million
 - ▶ At least 5 days of paid sick leave
 - ▶ After those days are used, the employee may be eligible to receive his/her weekly wages through a combination of Paid Family Leave and disability benefits, up to a maximum of \$2,884.62 per week.
 - ▶ Employers with 10 or fewer employees and a net income of less than \$1 million
 - ▶ Unpaid, job-protected, leave for the duration of the mandatory or precautionary order of quarantine or isolation
 - ▶ The employee may be eligible to receive his/her weekly wages through a combination of Paid Family Leave and disability benefits, up to a maximum of \$2,884.62 per week.

NEW YORK STATE PAID SICK LEAVE

▶ Expansion of PFL and DBL Benefits

- ▶ The law expands the definitions of “family leave” under the State’s PFL and Disability laws to include COVID-19-related uses for employers with fewer than 100 employees.
- ▶ Consequently, an employee may utilize PFL after the 5 days of paid sick leave are used up (1) due to the employee’s own quarantine or isolation order, or (2) to provide care for a minor dependent child who is subject to a quarantine or isolation order.
 - ▶ FAQs issued by the State provide that PFL may be available to an employee whose child’s school was closed due to a “mandatory or precautionary quarantine or order of isolation issued by the State, department of health, local board of health, or government entity.” This is a bit unclear, because the State Paid Sick Leave, as passed, does not provide that employees may take time off from work due to a child’s school closure.
- ▶ Disability and PFL benefits may be payable concurrently to eligible employees upon the first full day of the unpaid period of a quarantine or isolation order, up to a maximum of \$840.70 in PFL and \$2,043.92 in disability benefits per week.

LOCAL LEAVE LAWS THAT MAY ALSO APPLY

NEW YORK CITY SAFE AND SICK LEAVE

▶ Coverage under the Law:

- ▶ Employers who have 5 or more employees must provide up to 40 hours of paid sick leave per year.
- ▶ Employees who work 80 hours or more in New York City are eligible for leave

▶ Use of the Leave:

- ▶ the employee's or a family member's mental or physical illness or injury;
- ▶ the closure of the employee's workplace, or the school or care facility attended by the employee's child, due to a declared public health emergency; or (iii) matters related to a sexual offense, stalking, and human trafficking involving the employee or the employee's family member.
 - ▶ "Public health emergency" is defined as a "declaration made by the commissioner of health and mental hygiene or by the Mayor of New York City
- ▶ Employers may not require employees to use available paid time off under this law.
- ▶ Payout of accrued and unused time is not required if an employee is terminated from employment.

WESTCHESTER COUNTY SICK LEAVE

▶ Coverage under the Law:

- ▶ Private employers that employ 5 or more employees, or one or more domestic workers, must provide paid sick time, whereas other employers must provide unpaid sick time.
- ▶ Covers employees who work in Westchester County for more than 80 hours in a calendar year.
- ▶ For CBA-covered employees as of April 10, 2019, the law's requirements will apply after the CBA expires, if the CBA provides for a comparable benefit, or the law's requirements are expressly waived in the CBA.

▶ Use of the Leave:

- ▶ The employee's or a family member's (1) mental or physical illness, injury, or health condition; (2) medical diagnosis, care, or treatment of such condition; and/or (3) preventive medical care.
- ▶ An employee's place of business, or the employee's child's day care, elementary or secondary school is closed due to a public health emergency by a public official.
- ▶ A public health authority determines the presence of an employee or covered relation in the community may jeopardize others' health because of the individual's exposure to a communicable disease, whether or not the individual has actually contracted the communicable disease.
- ▶ "Earned sick time shall be provided upon the request of an employee."

NEW (and yet another) NEW YORK STATE PAID SICK LEAVE LAW

NYS PAID SICK LEAVE

- ▶ Employees will be eligible to use time accrued under this law effective January 1, 2021.
- ▶ The NYS Paid Sick Leave Law provides a different set of paid sick leave benefits to employees, depending on the size of their employer.
 - ▶ Employers with 4 or fewer employees in any calendar year and a net income of \$1 million or less in the previous tax year must provide employees with up to 40 hours of unpaid sick leave per calendar year.
 - ▶ Employers with 4 or fewer employees in any calendar year and a net income greater than \$1 million in the previous tax year must provide employees with up to 40 hours of paid sick leave per calendar year.
 - ▶ Employers with 5 to 99 employees in any calendar year: Must provide employees with up to 40 hours of paid sick leave per calendar year.
 - ▶ Employers with 100 or more employees in any calendar year: Must provide employees with up to 56 hours of paid sick leave per calendar year.

NYS PAID SICK LEAVE

- ▶ Employees may use sick leave for the following purposes:
 - ▶ for a mental or physical illness, injury, or health condition of such employee or such employee's family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
 - ▶ for the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member;
 - ▶ for certain absences from work when the employee or employee's covered family member has been the victim of domestic violence as defined under New York law, a family offense, sexual offense, stalking or human trafficking.
 - ▶ Employees will accrue one hour of paid sick leave for every 30 hours worked. Employers may also choose to "frontload" or advance sick leave by providing the total amount of sick leave at the beginning of the calendar year.

NYS PAID SICK LEAVE

- ▶ Employers can set a reasonable minimum increment for use of sick leave, which may not be greater than four hours.
- ▶ Employers must allow employees to carryover unused sick leave at year-end but, irrespective of how many hours are carried over into the following year, the law imposes a cap on annual usage of the sick leave.
- ▶ Employers with existing paid sick leave or paid time off policies will not be required to provide any additional sick leave if their policies are at least as generous as the law with regard to amount of leave, accrual, carryover, and use requirements.
- ▶ The law specifically permits waivers within CBAs that provide a comparable benefit, and permits unions to negotiate terms of sick leave that differ from the requirements of the law. However, the law provides that if one of these options is chosen, the CBA must specifically acknowledge the provisions of the sick leave law.
- ▶ There is no requirement for employers to pay employees for earned, unused sick leave upon separation of employment.

UNEMPLOYMENT INSURANCE

OVERVIEW OF UI CHANGES

On March 27, 2020, the President of the United States signed a law that provides additional Unemployment Insurance (“UI”) assistance to workers impacted by COVID-19. This new law provides:

- ▶ Pandemic Unemployment Assistance – Extended eligibility for individuals who have traditionally been ineligible for UI benefits (e.g., self-employed workers, independent contractors);
- ▶ Pandemic Unemployment Compensation – An additional \$600 per week, on top of regular benefits, to all UI recipients; and,
- ▶ Pandemic Emergency Unemployment Compensation – An additional 13 weeks of UI benefits, beyond the regular 26 weeks already provided, for a total of 39 weeks of coverage.

WHAT DOES PUA PROVIDE?

Individuals are eligible for PUA if they do not qualify for regular UI benefits (including self-employed workers and independent contractors) and cannot work because they:

- ▶ Are diagnosed COVID-19 or have COVID-19 symptoms and are seeking diagnosis;
- ▶ Have a member of the household who is diagnosed with COVID-19;
- ▶ Are providing care for a family or household member diagnosed with COVID-19;
- ▶ Are the primary caregiver for a child whose school or care facility closed, due to COVID-19;
- ▶ Are unable to reach their place of employment due to an imposed quarantine, or because advised by medical provider to self-quarantine, due to COVID-19;
- ▶ Were scheduled to start new employment and cannot reach the workplace as direct result of COVID-19;
- ▶ Became the major breadwinner because the head of household died from COVID-19;
- ▶ Quit their job as a direct result of COVID-19;
- ▶ Had their place of employment closed as a direct result of COVID-19; or
- ▶ Meet any additional criteria specified by U.S. Secretary of Labor. Individuals are not eligible for PUA if they can telework or are receiving paid sick leave or other paid leave benefits (regardless of meeting a category listed above).

COMMONLY ASKED QUESTIONS

COMMONLY RAISED QUESTIONS

- ▶ My employee, an aide, is concerned about getting the coronavirus so she has cancelled all her shifts and is refusing to take any new shifts. What rights does she have?
- ▶ My employee, a nurse, was exposed to the virus but is asymptomatic. What rights does she have, and what obligations do I have as a home care agency?
- ▶ My employee, an aide, has tested positive for the coronavirus. What rights does she have?
- ▶ We found out that one of our office employees has been exposed to the virus and that employee has been working in the office, in close contact with other office workers. What do we do now?
- ▶ My PA in CDPAP called and said that her consumer has cancelled all the shifts. What rights does the PA have?
- ▶ My employee does not want to work because Governor Cuomo just continued the closure of schools and she needs/wants to be home with his/her children to care for them. What obligations do I have with respect to this employee?

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