

COVID-19 and Home Care: Labor and Employment Guidance

New York State Association of Health Care Providers
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Agenda

- ❖ Background and status of outbreak
- ❖ CDC and DOH recommendations
- ❖ Reporting requirements for health care providers
- ❖ Proactive measures and workplace safety
- ❖ Medical inquiries and examinations of employees
- ❖ Wage and hour concerns
- ❖ WARN Act issues
- ❖ Leave and accommodation
- ❖ Discrimination issues
- ❖ Union and CBA impacts
- ❖ Unemployment insurance

Background and Status of Outbreak

- ❖ The Centers for Disease Control and Prevention (“CDC”) is responding to an outbreak of respiratory disease caused by a novel (new) coronavirus.
- ❖ The virus has been named “SARS-CoV-2” and the disease it caused has been named “coronavirus disease 2019” (“COVID-19”).
- ❖ COVID-19 was first detected in Wuhan City, Hubei Province, China in December 2019.
- ❖ There are a total of 174,786 cases of COVID-19 in more than 155 locations internationally, including in the United States.
- ❖ The first U.S. patient was identified on January 21, 2020 and had recently traveled from Wuhan, China.
- ❖ Since that time 3,487 cases have been confirmed in the United States.

Background and Status of Outbreak

- ❖ On January 30, 2020, the World Health Organization (WHO) declared the outbreak to be a public health emergency of international concern.
- ❖ On January 31, 2020, the U.S. Secretary of Health and Human Services, Alex Azar, declared the outbreak a public health emergency in the U.S.
- ❖ On January 31, 2020, President Trump signed a Presidential Proclamation to temporarily suspend the entry of foreign nationals from countries that pose a risk of transmitting COVID-19.
 - ✓ For updated information on affected countries visit:
<https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>;
 - ✓ CDC recommends that travelers avoid any nonessential travel to these destinations;
 - ✓ Upon return, U.S. citizens, and personal residents will be screened and advised whether to stay home for 14 days and practice social-distancing, or comply with mandatory or precautionary isolation or quarantine.
- ❖ On March 11, 2020, the WHO publicly characterized COVID-19 as a pandemic.
- ❖ On March 11, 2020, President Trump signed a Presidential Proclamation declaring a national emergency concerning COVID-19.

Total Cases – New York State

County	Positive Cases
Westchester	220
Nassau	109
Suffolk	63
Rockland	16
Albany	12
Orange	11
Dutchess	10
Monroe	10
Ulster	7
Saratoga	5
Erie	6
Schenectady	4
Greene	2
Putnam	2
Allegany	2
Broome	1
Delaware	1
Herkimer	1
Tioga	1
Tompkins	1
Montgomery	1
Onondaga	1
Ontario	1
New York State (Outside of NYC)	487
New York City:	463
Total Positive Cases (Statewide)	950

CDC Guidance – Severity and Symptoms

- ❖ The nature of the spread of COVID-19 in the United States is rapidly evolving.
- ❖ The complete clinical criteria with regard to COVID-19 is not known.
- ❖ Reported illnesses have ranged from very mild or no symptoms, to severe illnesses resulting in death.
- ❖ Common symptoms include:
 - ✓ Fever;
 - ✓ Cough;
 - ✓ Shortness of breath
- ❖ High risk populations include:
 - ✓ Older adults; and
 - ✓ People with chronic conditions such as heart or lung disease and diabetes.

CDC Guidance – Vaccine and Testing

- ❖ There is no known vaccine or specific treatment for COVID-19.

- ❖ In accordance with guidance from the CDC:
 - ✓ Health Care providers should encourage all personnel who believe that they have been exposed to COVID-19 or develop symptoms to contact their primary care doctor or clinician for assessment, monitoring, and potential testing; and
 - ✓ Anyone who believes that they have been exposed to COVID-19 and develops a fever and symptoms should immediately contact their health care provider for testing.

DOH Guidance – Testing

- ❖ COVID-19 testing is currently conducted at the CDC, the NYS Wadsworth center, and the NYC and Erie County Public Health laboratory.
- ❖ On March 13, 2020 the Department obtained authority from the FDA to authorize 28 public and private additional laboratories to conduct testing.
- ❖ New York's first drive-through mobile testing center is in New Rochelle.
- ❖ Pursuant to the DOH, local and state public health officials, in consultation with clinicians, will determine if a patient is a person under investigation for COVID-19, and if the patient meets the CDC's most recent criteria for testing.
- ❖ CDC's criteria for evaluation and testing is available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html>.
- ❖ Medicaid recipients will be provided testing at no cost.
- ❖ To ensure that cost sharing is not a barrier to testing, NYS Medicaid will cover services including testing for COVID-19 and for physician, clinic, and emergency visits without copays for members when the purpose is testing for COVID-19.

DOH Guidance – Health Advisories

- ❖ The New York State Department of Health (DOH) issued health advisories for health care providers, facilities, laboratories, and local health departments.
- ❖ The first health advisory was issued in January and the department has made intermittent updates to these advisories in February and March.
- ❖ The health care advisories include important information including:
 - ✓ Infection Control
 - ✓ Management of Healthcare Personnel with Exposure in a Healthcare Setting
 - ✓ Personal Protective Equipment Conservation Strategies
 - ✓ Laboratory Reporting and Testing
- ❖ All Health Advisories are available at:
<https://www.health.ny.gov/diseases/communicable/coronavirus/providers.htm>.

DOH Health Advisories and Guidance

- ❖ The DOH released guidance in the form of “Dear Administrator Letter” (DAL) for Nursing Homes on March 11, 2020
 - ✓ https://www.health.ny.gov/diseases/communicable/coronavirus/docs/nursing_home_guidance.pdf
- ❖ The DOH issued a DAL for Adult Care Facilities on March 11, 2020
 - ✓ https://www.health.ny.gov/diseases/communicable/coronavirus/docs/adult_care_guidance.pdf
- ❖ The DOH issued a DAL for Home Care Providers on March 14, 2020
 - ✓ https://www.health.ny.gov/diseases/communicable/coronavirus/docs/20-03-14_guide_home_and_comm.pdf

DOH Health Advisories and Guidance

- ❖ **Infection Control Policies.** Providers should review and reinforce policies and procedures regarding:
 - ✓ infection control for standard precautions applicable to the care of patients; and
 - ✓ droplet and contact precautions with agency staff.
- ❖ **Screening Patients upon Admission**
 - ✓ Agencies must screen all new patients regarding symptoms and exposure;
 - ✓ Patients who should be evaluated are those:
 - With signs or symptoms of a respiratory infection;
 - Who have in the last 14 days, had contact with someone with a confirmed diagnosis of COVID-19, or under investigation for COVID-19, or are ill with a respiratory illness; and
 - Who have travelled internationally within the last 14 days to countries with sustained community transmissions (see: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>) or are residing in a community where community-based spread of COVID-19 is occurring.
- ❖ Providers should also contact the local health departments where patient resides before any patient visit to determine precautions or preventative measures especially for any high priority patients.

DOH Health Advisories and Guidance

❖ Monitoring Patients' Changes in Condition.

- ✓ Homecare staff should ask patients questions to obtain information to determine any changes in their health conditions. Recommended questions:
 - Whether the patient has upper respiratory infection symptoms;
 - Whether the patient has traveled to countries with sustained community transmission as determined by the CDC;
 - Whether the patient has had any contact with persons under investigation (PUIs) for COVID-19 within the last 14 days; OR with anyone with confirmed COVID-19.
- ✓ If the patient exhibits signs of “respiratory distress” during the visit, then homecare staff should call 911 and contact the local health department;
- ✓ In the event that a patient has been to a country with sustained community transmissions, or had any contact with a PUI or anyone known with COVID-19, but does not exhibit any signs of respiratory infection, then:
 - Home care staff should inform their agency about the patient’s risk factors based on recent travel or exposure, and report if there are any changes in the patient’s condition based on observation, patient self-report, and other vital signs.
 - The agency must stay in contact with the LHD to confirm that the individual is being monitored and to receive ongoing guidance for service delivery.

DOH Health Advisories and Guidance

❖ Staff Screenings

- ✓ Homecare staff are exposed to the general community each day and could become infected with an acute respiratory illness, including COVID-19;
- ✓ Staff must be screened for respiratory infection and other symptoms upon arrival at work;
- ✓ Agencies should create and implement policies to guide any screening questions to be used for staff screenings;
- ✓ Agencies must strictly enforce their illness and sick-leave policies;
- ✓ Staff showing symptoms of illness or found ill upon screening must not remain at work, or return until completely recovered;
- ✓ Staff who have been potentially exposed to someone with confirmed COVID-19, or to someone who is a person under investigation (PUI) for COVID-19, will be placed under precautionary quarantine or mandatory isolation by public health officials; and
- ✓ If the agency believes that staff may be infected with COVID-19, they must also contact the DOH's Bureau of Healthcare Associated Infections or the NYSDOH's Public Health Duty Officer on call.

DOH Emergency Regulation

- ❖ The New York Department of Health adopted emergency regulation on March 11, 2020 (10 N.Y.C.R.R. 2.1).
- ❖ The regulation:
 - ✓ added the 2019- Novel Coronavirus to the list of communicable diseases under the state sanitary code; and
 - ✓ imposes requirements for physicians, hospitals, nursing homes, diagnostic and treatment centers and clinical laboratories to report all instances of severe or novel coronavirus to the state or local health departments.

Stay Informed

- ❖ CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- ❖ NYS DOH:
<https://www.health.ny.gov/diseases/communicable/coronavirus.htm>
- ❖ Health Commerce System: <https://commerce.health.state.ny.us>
- ❖ Email DOH questions to: covidproviderinfo@health.ny.gov

Workplace Safety

- ❖ Under the Occupational Health and Safety Act, employers have a general obligation to maintain a workplace free from any recognized hazards that may cause death or serious injury to employees.
- ❖ The Occupational Health and Safety Administration (“OSHA”) recommends that employers adopt safe work practices and engineering and administrative controls.
- ❖ Safe work practices:
 - ✓ Maintain cleanliness of facilities;
 - ✓ Encourage employees to wash hands frequently;
 - ✓ Encourage “respiratory etiquette” such as covering coughs and sneezes;
 - ✓ Make soap, hand sanitizer, and disinfectant readily available
 - ✓ Provide appropriate PPE for personnel; and
 - ✓ Train employees on risk factors and protective behaviors.

Workplace Safety

- ❖ Require employees to report to supervisor/HR if they:
 - ✓ Experience symptoms of COVID-19;
 - ✓ Have been in contact with anyone who has been infected with COVID-19 or appears to be ill; or
 - ✓ Have been in contact with anyone who has recently traveled to (the rapidly changing list of) locations with active outbreaks.
- ❖ Require employees to report recent and upcoming travel.
 - ✓ Business and personal travel.
 - ✓ Better approach is likely to require all travel to be reported, not just travel to specified locations with current active outbreaks,
- ❖ Social distancing and remote work
- ❖ Consider off-site communication strategy

Workplace Safety

- ❖ Discontinue / strictly limit nonessential business travel.
 - ✓ Identify trips that are business critical.
 - ✓ Where travel is necessary, be cautious if employees express concern regarding or refuse to go on a trip.
- ❖ Employee “quarantine” following travel.
 - ✓ Employees returning from travel to highly impacted areas (China, Iran, Italy, cruise ships) should be required to stay away from the work site for 14 days post-return.
 - ✓ For travel to other locations, ask about layover locations, etc.
- ❖ According to OSHA, COVID-19 is subject to the agency’s injury and illness recordkeeping and reporting requirements.
 - ✓ Contrast with the common cold and the flu.

Workplace Safety

- ❖ If there is a confirmed case among the workforce:
 - ✓ Contact the local health department and follow any guidance issued;
 - ✓ Consider short-term closure to disinfect the premises;
 - ✓ Advise co-workers who have close contact with the affected employee of the confirmed case, while also maintaining the confidentiality of the affected employee;
 - ✓ Require such co-workers to immediately report, and not come to the work site, if they experience COVID-19 symptoms; and
 - ✓ Consider sending co-workers who have close contact with the affected employee home for a 14-day quarantine period.

Medical Inquiries and Examinations

- ❖ The Americans with Disabilities Act (“ADA”), New York State Human Rights Law (“NYSHRL”), and New York City Human Rights Law (“NYCHRL”) generally prohibit employers from making medical inquiries or requiring medical examinations of current employees, except:
 - ✓ In connection with an accommodation request, to confirm the existence of a disability and need for accommodation (except where obvious); or
 - ✓ Where job-related and consistent with business necessity.
- ❖ The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued guidance related to COVID-19, which states that the ADA “rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the coronavirus.”

Medical Inquiries and Examinations

- ❖ In issuing its COVID-19 guidance, EEOC relied on earlier guidance from 2009 related to pandemic preparedness in the workplace, which provides:
 - ✓ If CDC or state or local health authorities determine that pandemic influenza is significantly more severe than seasonal influenza, it can pose a direct threat, thereby allowing the employer to “make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.”
 - ✓ Before influenza pandemic occurs, employer cannot ask employees to disclose if they have compromised immune systems or other chronic health condition that would make them more susceptible to influenza complications.
 - Can make inquiries designed to identify, through “yes” or “no” questions, potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on equal footing with medical reasons.

Medical Inquiries and Examinations

- ❖ According to the EEOC, if state or local health officials or the CDC recommend that people who visit specified locations remain at home for a period of time until it is clear they do not have symptoms, employers may ask employees who return from travel (including personal travel) if they visited such locations.
- ❖ During a pandemic, employers may ask employees if they are experiencing influenza-like symptoms, but must maintain such information as a confidential medical record.
- ❖ Employers also may send employees home if they display influenza-like symptoms.

Medical Inquiries and Examinations

- ❖ Another question that has been posed is whether employers may take its employees' temperatures to determine whether they have a fever?
 - ✓ According to the EEOC, measuring an employee's body temperature is generally a medical examination.
 - ✓ However, if pandemic influenza symptoms become more severe than the seasonal flu, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

Medical Inquiries and Examinations

❖ Quarantine-return protocols

- ✓ Likely permissible to ask if employee experienced any COVID-19 symptoms.
- ✓ If employee reports no symptoms, should employer request medical confirmation?
- ✓ How to handle report that the employee experienced symptoms that have now abated?
- ✓ Other medical examination?

Wage and Hour Issues

❖ Exempt employees

- ✓ Generally must be paid their full salary in any week in which they perform any work.
- ✓ If exempt employees are permitted or required to work from home, the employer can institute protocols to monitor productivity (e.g., work logs, timesheets) and discipline for lack of productivity.
- ✓ Employers generally may require exempt staff to use available PTO benefits (assuming there is a bona fide plan) in the case of an office closure or other COVID-19 related absence, whether full or partial day.
- ✓ Deductions may be made for absences of one or more full days due to sickness or disability, if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness.
- ✓ After an exempt employee exhausts PTO, partial-week absences occasioned by an office closure may not be deducted from salary.

Wage and Hour Issues

❖ Non-exempt employees

- ✓ Must be paid at least the minimum wage for all hours worked, plus overtime for all hours worked in excess of 40, in a workweek.
- ✓ Employers should be particularly cautious about allowing non-exempt employees to work from home.
- ✓ If working from home, non-exempt employees must accurately track and report all hours worked.
- ✓ As with exempt employees, employers generally may require non-exempt staff to use available vacation or other PTO benefits during COVID-19 related absences.
- ✓ If a non-exempt employee takes time off related to COVID-19, does not work from home, and has exhausted all paid time off and paid leave, the time off can generally be unpaid.

Wage and Hour Issues

- ❖ During closure or shortage, employers may be inclined to look for “volunteers” to help out.
 - ✓ Under New York law, private for-profit employers generally cannot have uncompensated volunteers.
 - ✓ Non-profits and public agencies can use bona-fide volunteers – but not to replace or augment paid staff to do the work of paid staff or do anything but tasks traditionally reserved for volunteers (among other restrictions).
 - ✓ Any “volunteers” will likely need to be compensated in accordance with federal and state law.

WARN Act – Basics

- ❖ As the COVID-19 situation evolves, employers may have to cease or significantly curtail operations. The New York Worker Adjustment and Retraining Notification (“WARN”) Act requires that **90 days’ notice** be given to employees before ordering a “**mass layoff**” or “**plant closing**”.
- ❖ A “**mass layoff**” is a reduction in force which is not the result of a plant closing and results in an **employment loss** at the single site of employment during any 90-day period for either:
(a) at least **25 employees constituting 33% or more** of the site’s employees or (b) at least **250 employees**.
- ❖ A “**plant closing**” is the shutdown of a facility or operating unit at a single site of employment during any 90-day period that results in an **employment loss** for at least **25 employees**.
 - ✓ Employment loss includes a layoff that exceeds 6 months in duration.

WARN Act – Potential Exceptions

❖ Unforeseeable Business Circumstances Exception

- ✓ To qualify, business circumstances must not have been reasonably foreseeable when notice would have been required. May be established by the occurrence of some **sudden, dramatic and unexpected action or condition outside the employer's control**
- ✓ The employer must exercise **commercially reasonable business judgment** in determining whether a business circumstance is reasonably foreseeable, and provide **as much notice as is practicable**.

❖ Natural Disaster Exception

- ✓ To qualify for this exception, the employer must establish that the reduction was a **direct result** of a natural disaster (e.g., floods, earthquakes, droughts, storms, tidal waves, tsunamis, or **similar effects of nature**).
- ✓ The employer must provide **as much notice as is practicable and available** under the circumstances.

Leave and Accommodations

- ❖ Absences related to COVID-19 may be legally protected and/or may need to be compensated under the following laws:
 - ✓ Family and Medical Leave Act (“FMLA”)
 - ✓ New York Paid Family Leave Law (“NYPFL”)
 - ✓ New York City Earned Sick and Safe Time Act;
 - ✓ Other local paid sick leave laws;
 - ✓ ADA/NYSHRL/NYCHRL (reasonable accommodations); and
 - ✓ H.R. 6201, passed by the U.S. House of Representatives and pending in the U.S. Senate.
- ❖ Employers should also check their employee handbooks and other policies and applicable CBAs for any policies related to office closure protocols and the compensability of time off when the business is closed.

Leave and Accommodations

FMLA

- ❖ The FMLA allows eligible employees of covered employers 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.
- ❖ Applies to employers with “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”
- ❖ 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.

Leave and Accommodations

FMLA

- ❖ “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.”
 - ✓ *Continuing treatment* by a health care provider.
 - “Continuing treatment” is defined to include, among other things, “a period of incapacity... of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves... treatment two or more times by a health care provider... or by a provider of health care services under orders of, or on referral by, a health care provider”
 - The term “treatment” includes examinations to determine whether a serious health condition exists and evaluations of the condition, but excludes routine physical examinations.

Leave and Accommodations

NYPFL

- ❖ NYPFL applies to virtually all private employers in New York.
- ❖ Covered employees:
 - ✓ Employees whose regular schedule is 20 or more hours per week:
Covered after having been in employment for at least 26 consecutive work weeks; and
 - ✓ Employees whose regular schedule is under 20 hours per week:
Covered after having worked 175 days in such employment.
- ❖ Provides job-protected leave, with paid benefits through the employer's NYPFL insurance, to care for a covered family member with a serious health condition.
 - ✓ Covered family member is broader than under FMLA and applies to the employee's spouse, domestic partner, child (any age), parent, parent-in-law, parents or child of domestic partner, grandparent, or grandchild.

Leave and Accommodations

NYPFL

- ❖ Care includes necessary physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.
 - ✓ An employee must be in close and continuing proximity to the care recipient to be providing care. This means present at the same location as the family member during the majority of the employment period from which leave has been taken.
 - ✓ Travel necessitated to secure medication or to arrange care for the family member, or other such deviations reasonably related to providing care, also constitute “care.”
- ❖ Similar to the FMLA, “serious health condition” means an illness, injury, impairment or physical or mental condition that involves:
 - ✓ Inpatient care in a hospital, hospice, or residential health care facility; or
 - ✓ Continuing treatment or continuing supervision by a healthcare provider.
- ❖ NYPFL may not be taken for the employee’s own serious health condition.

Leave and Accommodations

Local Paid Sick Leave Laws

❖ Under NYC Paid Sick Leave:

- ✓ Employees who work more than 80 hours per calendar year in New York City are entitled to accrue up to 40 hours per year of paid sick and safe leave.
- ✓ Accrued sick leave may be used for, among other reasons:
 - The employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care;
 - Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or preventive medical care;
 - Closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

❖ Other localities, including Westchester County, have adopted paid sick leave laws that allow for similar accruals and time off.

Leave and Accommodations

ADA/NYSHRL/NYCHRL

- ❖ 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.”
 - ✓ NYSHRL standard is broader and includes “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or* is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
 - ✓ NYCHRL standard is also broad and includes “any physical, medical, mental or psychological impairment, or a history or record of such impairment.”

Leave and Accommodations ADA/NYSHRL/NYCHRL

- ❖ 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.

Leave and Accommodations

H.R. 6201 – FMLA Expansion

- ❖ The Emergency Family and Medical Leave Expansion Act expands FMLA to be available for “qualifying needs related to a public health emergency” between the effective date of the Act and December 31, 2020.
- ❖ “Qualifying need related to a public health emergency” means that the employee has need for leave:
 - ✓ To comply with a recommendation or order by a health authority or health care provider on the basis that his or her physical presence on the job would jeopardize the health of others because of (a) “exposure of the employee to coronavirus” or (b) “exhibition of symptoms of coronavirus by the employee”
 - Applies where the employee is unable to both perform the functions of the position and comply with the order/recommendation.
 - ✓ To care for a family member with respect to whom a health authority or health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of (a) “exposure of such family member to coronavirus” or (b) exhibition of symptoms of coronavirus by such family member.”
 - ✓ To care for his or her son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to an emergency with respect to coronavirus declared by a federal, state, or local authority.

Leave and Accommodations

H.R. 6201 – FMLA Expansion

- ❖ For leave taken for a “qualifying need related to a public health emergency” only:
 - ✓ Applies to employers with fewer than 500 employees.
 - ✓ The Department of Labor may issue regulations to except certain health care workers and employees of employers with fewer than 50 employees.
 - ✓ Applies to employees who have been employed by the employer for at least 30 days.
 - ✓ The definition of family member is expanded to include the employee’s:
 - Parent (including in-laws and parents of the employee’s domestic partner);
 - Spouse;
 - Son or daughter under 18 years of age; or
 - Son or daughter of any age, next of kin, person for whom the employee is next of kin, grandparent, or grandchild if such person is a pregnant woman, senior citizen, or individual with a disability or has access or functional needs.
 - ✓ The first 14 days may consist of unpaid leave. During this time, the employee may elect to use accrued vacation, personal, or medical/sick leave – but the employer may not require the employee to do so.
 - ✓ After 14 days, the employer must provide **paid** leave, calculated based on two-thirds the employee’s regular rate of pay.

Leave and Accommodations

H.R. 6201 – Paid Sick Leave

- ❖ The Emergency Paid Sick Leave Act requires covered employers to provide employees with **two weeks** of paid sick time.
- ❖ Covered employers are (a) private entities or individuals with fewer than 500 employees and (b) public agencies or other non-private entities with one or more employees.
- ❖ Takes effect “not later than 15 days after the date of enactment of this Act” and expires on December 31, 2020.

Leave and Accommodations

H.R. 6201 – Paid Sick Leave

- ❖ Paid sick time under the Act is available for the following reasons:
 - ✓ To self-isolate because the employee is diagnosed with coronavirus;
 - ✓ To obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus;
 - ✓ To comply with the a recommendation or order by a public official or health care provider on the basis that the employee’s physical presence on the job would jeopardize the health of others because of the employee’s exposure to or exhibition of symptoms of coronavirus;
 - ✓ To care for or assist a family member:
 - Who is self-isolating because he or she has been diagnosed with coronavirus;
 - Who is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care;
 - With respect to whom a public official or health care provider makes a determination that his or her presence in the community would jeopardize the health of others in the community because of exposure to or exhibition of symptoms of coronavirus; or
 - ✓ To care for his or her child if the child’s school or place of care has been closed, or if the child’s child care provider is unavailable, due to coronavirus.

Leave and Accommodations

H.R. 6201 – Paid Sick Leave

- ❖ Paid sick leave is paid at the greater of the employee's regular rate of pay or the applicable federal, state, or local minimum wage.
 - ✓ Except, paid sick time taken to care for a family member (including child based on school, place of care closing, etc.) is paid at **two-thirds** of the greater of the employee's regular rate of pay or the applicable federal, state, or local minimum wage.
- ❖ Employers who already provide paid leave must provide this paid sick leave on top of that it already provides, and cannot change their paid leave policy after the Act takes effect to avoid providing additional paid sick leave.
- ❖ Employers also may not require an employee to use other paid leave before the paid sick leave under the Act.
- ❖ Unused paid sick leave under the Act does not carry over from year to year.

Discrimination Concerns

- ❖ COVID-19 may present discrimination and harassment concerns.
 - ✓ Stigma when employee returns from quarantine may lead to complaints of harassment or discrimination based on perceived disability.
 - ✓ Treatment of Asians or individuals from other countries because of perception of COVID-19 risks may lead to complaints of race and/or national origin-based harassment or discrimination.
- ❖ Reports of these kinds of behaviors should be treated as any other harassment or discrimination complaint.
 - ✓ Investigate
 - ✓ Take corrective action

Union and CBA Impacts

- ❖ Employers with unionized workforces should check their CBAs for provisions regarding office closure, paid time off, leave, etc.
- ❖ Such employers may have bargaining obligations that arise when implementing measures to address a COVID-19 outbreak (e.g., use of accruals and compensation during quarantine or business closure).

Unemployment Insurance

- ❖ On March 12, 2020, Governor Cuomo suspended New York Labor Law Section 590(7), which provides for a 7-day waiting period for unemployment insurance benefits.
- ❖ Applies to claimants whose claim arises directly out of the closing of schools or other workplaces in which claimants were employed or out of a claimant's isolation or quarantine in connection with COVID-19.

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QUESTIONS?

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