



Employee Leave Laws - Update

EMINA PORICANIN, ESQ.
PORICANIN LAW, P.C.

E@PORICANIN.COM

C: 315.269.1125

O: 518.676.0192

Today's Agenda

1. Overview of the federal, New York State, and local laws
2. New York Unemployment insurance criteria
3. Common questions and scenarios

Families First Coronavirus Response Act

- 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, the FMLA expansion, and the Emergency Paid Sick Leave, are effective April 1, 2020
- For ease of the presentation, I will keep referring to these paid COVID sick leave benefits that are provided under the Families First Coronavirus Response Act as the “federal paid COVID sick leave benefits.”

Coverage under the Federal Paid COVID Sick Leave Benefits

COVERED EMPLOYER:

- An employer with **fewer than 500 employees**
 - Do you count the personal assistants?
- 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

COVERED EMPLOYEE:

- Any full-time or part-time employee that has been on the employer's payroll for 30 calendar days.
- An employer of a health care provider or an emergency responder may elect to exclude such employee from federal paid COVID sick leave benefits.
 - Home care workers are health care providers
 - Personal Assistants working in the CDPAP – likely covered as a healthcare worker
 - Companion Agency – some uncertainty
 - Office staff working for home care providers are also considered to be a healthcare provider

Reasons for Leave under the Federal Paid COVID Sick Leave Benefits

- The employee is ordered into quarantine or isolation by a public official (up to 80 hours of leave, at 100% of pay, subject to a maximum of \$511 per day, or \$5,110 in the aggregate).
- The employee has been advised to self-quarantine or isolate by a health care provider (up to 80 hours of leave, at 100% of pay, subject to a maximum of \$511 per day, or \$5,110 in the aggregate).
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis (up to 80 hours of leave, at 100% of pay, subject to a maximum of \$511 per day, or \$5,110 in the aggregate).
- 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 (up to 80 hours of leave, at 2/3 of pay, subject to a maximum of \$200 per day, or \$2,000 in the aggregate).
- The employee is caring for a child because their school or daycare has been closed (total of 12 weeks of leave, paid at 2/3 of the employee's regular rate of pay, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period)).
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (HHS) (up to 80 hours of leave at 2/3 pay, subject to a maximum of \$200 per day, or \$2,000 in the aggregate).

Tax Credits for Providing Federal Paid COVID Sick Leave Benefits

- The Families First Coronavirus Response Act provides businesses with tax credits to cover certain costs of providing employees with required paid sick leave and expanded family and medical leave for reasons related to COVID-19, from April 1, 2020, through December 31, 2020.
- Eligible employers will claim the credits on their federal employment tax returns (e.g., Form 941, Employer's Quarterly Federal Tax Return), but they can benefit more quickly from the credits by reducing their federal employment tax deposits.
 - If there are insufficient federal employment taxes to cover the amount of the credits, an Eligible Employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19.
 - An Eligible Employer may claim **a fully refundable tax credit equal to 100 percent** of the qualified family leave wages it pays.

New York Paid COVID Sick Leave

- 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
 - Any employee (regardless of how long they have worked for an employer) appears to be covered so long as they work for a covered employer
 - Inactive employees
 - Personal assistants

Pay for New York Paid COVID Sick Leave

Maximum Pay for employees on Leave:

- 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.
- 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 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 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.

New York State Guidance on Quarantine Orders

To get an order of precautionary or mandatory order of quarantine or isolation due to COVID-19, employees are required to contact their Local Health Department (LHD). LHDs should provide written orders in a timely manner.

If your LHD is unable to immediately provide you with an order:

1. Submit documentation from a licensed medical provider that has treated you, attesting (as described below under "DOCUMENTATION GUIDANCE") that you qualify for the order; AND
2. Follow up with your LHD to obtain the order and submit it to your insurance carrier as soon as it is available. **LHDs must provide requested orders within 30 days.**

"What Employers Need to Know"

If you send employees home on a precautionary quarantine, they are entitled to job protection, COVID-19 sick leave and/or paid benefits through your Paid Family Leave, and disability benefits insurance provider for the duration of their quarantine, provided they follow the process noted above.



To Whom It May Concern:

Based on New York City Health Department's guidance, please excuse _____ from work. They have fever, cough, shortness of breath, or sore throat, which started on _____ (date symptoms started)

They haven't had a fever since _____ (first day without fever).

Given the widespread presence of coronavirus disease 2019 (COVID-19) in New York City, we are asking that all people with the above symptoms stay home for at least seven days since their symptoms started or for three days after their fever goes away without the use of fever-reducing drugs plus symptom improvement, whichever is longer. Number of days excused from work _____ (seven days minimum).

This is meant to help prevent the spread of COVID-19.

Not every person who has been exposed to the novel coronavirus needs to be tested. Most will develop mild to moderate symptoms that will get better without medical help. A positive test is not needed to prove they had COVID-19 and a negative test is not needed for them to return to work. They should stay out of work for at least seven days after their symptoms started or three days after their fever has gone away and their symptoms have improved, whichever is longer.

Please excuse this person from work so that they may comply with this guidance.

Background:

There is widespread community transmission of COVID-19 happening in New York City. COVID-19 is a respiratory illness (which affects breathing) caused by a new coronavirus. Symptoms can range from mild, such as a sore throat, to severe, such as pneumonia. Most people will not need medical attention for their symptoms. Visit nyc.gov/coronavirus for more information.

Sincerely,

Demetre C. Daskalakis, MD, MPH
Deputy Commissioner
Division of Disease Control
NYC Department of Health and Mental Hygiene

The NYC Health Department will not be responsible for confirming the accuracy of this letter.

3.24.2020

Putting the federal and New York paid COVID sick leave together

- First, determine if your Company is covered by the federal paid COVID sick leave?
 - You may be excluded if you have 500 or more employees. In that case, you “only” have to be concerned about complying with the New York State paid COVID sick leave, and any local law.
 - If you have less than 500 employees, you may still be relieved of complying with the federal paid COVID sick leave if you choose to “opt out” as a health care employer. **BUT**, in that case, you would have to provide your employees paid COVID sick leave per New York paid COVID sick leave law (and any local law).
 - If you have exempted yourself from the federal paid COVID sick leave, you cannot claim a tax credit for providing New York paid COVID sick leave.
- Second, if you have less than 500 employees AND you do not exempt yourself as a healthcare provider, you are covered by the federal paid COVID sick leave, **plus** the New York paid COVID sick leave. In most cases, the two laws work together side-by-side, but there are some significant differences.
 - Employees who have worked for a Company for less than 30 days are covered by the New York paid COVID sick leave, but not the federal paid COVID sick leave. So, you would have to provide them leave in accordance with the New York paid COVID sick leave requirements and there is no tax credit for doing so.
 - The federal COVID sick leave benefits are broader; they allow employees to take up to 80 hours of paid COVID sick leave to care for someone else who is sick with COVID and they allow paid COVID sick leave for childcare. Under the New York paid COVID sick leave, however, the New York Paid Family Leave Law benefits would have to be invoked and approved by a paid family leave insurance carrier before an employee could receive pay for such time off.

Unemployment Insurance

The federal government created three new programs related to unemployment insurance compensation and COVID-19:

1. Pandemic Unemployment Assistance ("PUA");
2. Pandemic Unemployment Compensation (additional \$600/week of benefits); and
3. Pandemic Emergency Unemployment Compensation (additional 13 weeks of benefits for claimants who have exhausted benefits).

PUA Categories

The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Examples may include:

1. An individual who has to quit his or her job as a direct result of COVID-19 because the individual has tested positive for the coronavirus or has been diagnosed with COVID-19 by a qualified medical professional, and continuing work activities, such as through telework, is not possible by virtue of such diagnosis or condition;
2. An individual who has to quit his or her job due to coming in direct contact with someone who has tested positive for the coronavirus or has been diagnosed by a medical professional as having COVID-19, and, on the advice of a qualified medical health professional is required to resign from his or her position in order to quarantine.

PUA Categories

1. A member of the individual's household has been diagnosed with COVID-19.
 - For example: A member of the individual's household has been diagnosed as having COVID-19 by a qualified medical professional or a member of the individual's household has tested positive for COVID-19 and the individual is unable to work as a result.
2. The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19.
 - For example: An individual is "providing care" for a family member or a member of the individual's household if the provision of care requires such ongoing and constant attention that the individual's ability to perform other work functions is severely limited. An individual who is assisting a family member who is able to adequately care for him or herself is not "providing care" under this category

PUA Categories

1. A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work.
 - For example: An individual has “primary caregiving responsibility” for a child or other person in the household if he or she is required to remain at home to care for the child or other person. This includes an individual whose job allows for telework, but for whom the provision of care to the child or other person with a closed school or other

PUA Categories

1. The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency.
2. The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19.
4. The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.
5. The individual has to quit his or her job as a **direct result of COVID-19**.
 1. For example: An individual was diagnosed with COVID-19 by a qualified medical professional, and although the individual no longer has COVID-19, the illness caused health complications that render the individual objectively unable to perform his or her essential job functions, with or without a reasonable accommodation.

Common Questions

1. Employee chooses to independently quarantine and/or not take cases due to fear of going to work.
 1. Not eligible for federal or New York paid COVID sick leave
 2. Probably not eligible for unemployment, unless they can provide a justifiable reason
 3. Recommendations
2. Employee who has been furloughed refuses to return to work
 1. The employee is insubordinate, unless they provide a justifiable reason (e.g., I have a compromised immune system and cannot return to work yet). Employer can terminate for insubordination, but then employee will seek unemployment benefits and there is no guarantee that employer will prevail.
 2. Recommendations

Common Questions

3. Employee has COVID-19. The employee has provided a doctor's note. What leave do we provide to this employee?

- Are you covered by the federal paid COVID sick leave?
- If not, will you insist on obtaining an official order of quarantine?
- If not, and you do provide leave, how many hours will you pay?

4. If an employee develops complications from COVID-19 and needs to be out for 30 days, what leave rights do they have beyond the initial paid COVID sick leave?

- Again, first determine if you are covered by the federal law, and make sure to pay the first tier of benefits properly.
- After that, New York Paid Family Leave Law may apply for the employee for his/her own serious health condition. The insurance carrier, however, will make a determination of coverage on this.

Common Questions

1. We have employees whose children's school is closed and they are the primary breadwinner. They do not want to work. Are they entitled to paid leave?
 - If the federal paid sick leave law applies to the business, two weeks of paid leave may have to be provided.
 - If the federal paid sick leave law does not apply, New York State paid sick leave law does not apply either, where an employee wishes to care for a healthy child who is home from school. However, the employee may be eligible for unemployment insurance benefits if the employee is the "primary caregiver" for a child whose school or care facility is closed due to COVID-19.
 - Per US DOL:

The CARES Act does provide PUA to an individual who is the "primary caregiver" of a child who is at home due to a forced school closure that directly results from the COVID-19 public health emergency. However, to qualify as a primary caregiver, your provision of care to the child must require such ongoing and constant attention that it is not possible for you to perform your customary work functions at home. For example, if your employer allows you to telework and you are caring for a more mature child who is able to care for him or herself for much of the day, you likely would not qualify for PUA because you are still able to work. In addition, you should bear in mind that the CARES Act provides PUA only when a child is home because of a school closure that is a direct result of the COVID-19 public health emergency. A school is not closed as a direct result of the COVID-19 public health emergency, for purposes of 2102(a)(3)(A)(ii)(1)(dd), after the date the school year was originally scheduled to end.



Questions and Answers

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