

COVID-19: HOW TO COMPLY WITH THE VARIOUS LEAVE LAWS IN TIME OF AN UNPRECEDENTED PANDEMIC

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AGENDA

▶ Federal Leave Laws

- ▶ Family and Medical Leave Act, and Expansions to that Act (“Emergency FMLA”)
- ▶ Emergency Paid Sick Leave (“Emergency Sick Leave”)
- ▶ Americans with Disabilities Act

▶ New York State Leave Laws

- ▶ Recently Enacted, New York State Paid Leave Law
- ▶ Paid Family Leave
- ▶ Workers’ Compensation
- ▶ Short-Term Disability Leave
- ▶ Leave for disabled individuals under the New York Human Rights Law

▶ Local Leave Laws

- ▶ New York City Safe and Sick Leave
- ▶ Westchester County Sick Leave
- ▶ Leave for disabled individuals under the New York City Human Rights Law

THE FEDERAL EMERGENCY FMLA LEAVE AND PAID SICK LEAVE

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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.

FEDERAL FMLA, CONT.

- ▶ “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.

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 are effective April 2, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY FMLA

▶ COVERED EMPLOYER:

- ▶ An employer with fewer than 500 employees.
 - ▶ The law is silent on how the 500 employee threshold is calculated. At this point, however, it is reasonable to believe the Department of Labor would borrow the integrated employer test from the FLSA and/or FMLA.
- ▶ Public agencies (of any size) also are covered, as they have been under the original FMLA. Keep this in mind because it may reduce staffing and response levels from government agencies, such as the Department of Health.
- ▶ 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.
- ▶ The Secretary of Labor is empowered to issue regulations to exclude "certain health care providers" from the definition of "eligible employee."
- ▶ However, the emergency FMLA **already** contains a "Special Rule for Health Care Providers," which allows "an employer of a health care provider or an emergency responder [to] elect to exclude such employee from the application of the provisions" of the emergency FMLA.
 - ▶ Are home care workers "health care providers" ?
 - ▶ Under the Executive Order, "home health care workers or aides for the elderly" are essential health care operations.
 - ▶ What about office staff that work for home care providers or fiscal intermediaries?

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.
 - ▶ In New York, while schools have been closed across the State (with the closure duration varying from school district to school district), “child care services” have been deemed “essential” businesses under Governor Cuomo’s Executive Order and, thus, should be open/operating.
 - ▶ The law specifies that the law applies if the child’s own child care provider is “unavailable” or closed. So, it seems that if a replacement childcare provider is available, this will not suffice for avoiding the obligations of this law.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY FMLA

▶ PAY FOR EMPLOYEES DURING EMERGENCY FMLA:

- ▶ The first **10 days** of leave are unpaid, but an employee can substitute accrued paid leave, *including emergency paid sick leave*.
 - ▶ It is unclear whether an employer can *require* the employee to use accrued paid leave during the 10-day period. The law is silent on this latter issue, but it cites a provision of the FMLA that allows the employer to require the use of accrued paid leave.
- ▶ The remaining 10 weeks are paid at 2/3 of a **full-time** employee's regular rate, for the number of hours the employee would otherwise be scheduled to work (with a maximum payment of \$200 per day and \$10,000 total)
- ▶ Employees who work a **part-time** or **irregular** schedule are entitled to be paid based on the average number of hours the employee worked for the 6 months prior to taking the emergency FMLA.
 - ▶ Employees who have worked for less than six months prior to leave are entitled to pay at this 2/3 threshold based on the employee's "reasonable expectation" at the time of hiring of the average number of hours the employee would normally be scheduled to work.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY PAID SICK LEAVE

▶ Covered Employers:

- ▶ A private employer with fewer than 500 employees
- ▶ A public agency (federal/state governments, political subdivisions, schools)
- ▶ 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)
- ▶ Employers who are healthcare providers or emergency responders may elect to exclude employees “at their election.”

FAMILIES FIRST CORONAVIRUS RESPONSE ACT, EMERGENCY PAID SICK LEAVE

- ▶ Reasons for Leave under the federal Emergency Paid Sick Leave Act:
 - ▶ 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.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

▶ HOW WILL COVERED EMPLOYERS PAY FOR THIS?

- ▶ The Family First Coronavirus Response Act states that employers will receive tax credits for employers providing Paid Emergency Sick Leave and/or Emergency FMLA. Specifically:
 - ▶ For the Expanded FMLA Leave: covered employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. (Recall, the qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter).
 - ▶ For the Emergency Paid Sick Leave: Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. (Recall, qualified sick leave wages are capped at \$511 per day [\$200 per day if the leave is for caring for a family member or child] for up to 10 days per employee in each calendar quarter).

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

▶ HOW WILL COVERED EMPLOYERS PAY FOR THIS?

▶ Late on Friday, the US DOL and IRS issued guidance stating:

“When employers pay their employees, they are required to withhold from their employees’ paychecks federal income taxes and the employees’ share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Under guidance that will be released next week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.”

OTHER FEDERAL (PRE-EXISTING) LEAVE LAWS



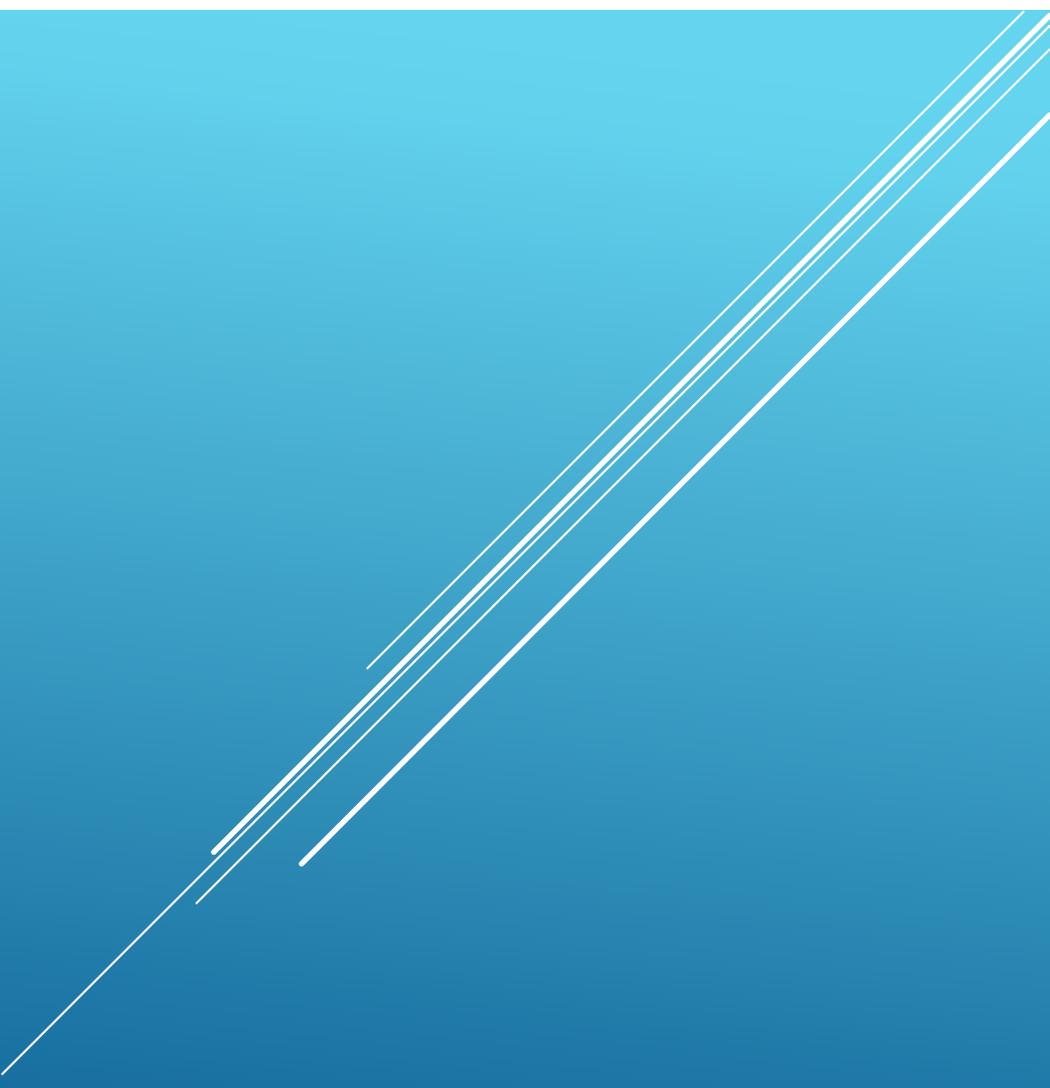
AMERICANS WITH DISABILITIES ACT

- ▶ 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.
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NEW YORK STATE LEAVE LAWS



NEW YORK STATE PAID FAMILY LEAVE

- ▶ Effective January 1, 2018
- ▶ Covers most private employers who have at least one or more employees
- ▶ Employees are eligible after 26 consecutive weeks of employment, if they are regularly working 20 or more hours per week. But if the employee works less than 20 hours/week then coverage is obtained after 175 days of work.
- ▶ Reasons for leave are:
 - ▶ Major difference with US FMLA: employees cannot use the leave for their own serious health condition. PFL can be used for a child of any age (FMLA is available only to care for a child if the child is under 18 years old or incapable of self-care due to a mental or physical disability).
- ▶ Leave can be taken only in full-day increments. For FMLA, one-hour increments can be used.
- ▶ Employers cannot require employees to use paid time off while on PFL. Conversely, while on FMLA, employers can require the employee to use his/her accrued PTO.

NEW YORK STATE PAID SICK LEAVE

- ▶ Overview:

- ▶ Effective immediately.

- ▶ Signed into law by Governor Cuomo on Wednesday, March 18

- ▶ 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.

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

➤ SCOPE OF LEAVE

1. 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.
2. Employers cannot require employees to use their other sick or paid time off or vacation benefits in order to be paid while they are on this leave.
3. Employees may take leave pursuant to a quarantine order which was put in place prior to the passage of the law, but it is unclear whether leave that was already taken must be paid retroactively.
4. Employees who have returned to the United States after *non-business-related* travel to a country which the Centers for Disease Control (CDC) had issued a level 2 or 3 travel health notice are *not* eligible for leave benefits, if the employee was provided notice of the travel advisory and chose to travel nonetheless. Employees falling under this category *are* entitled to use any accrued leave provided by the employer. If the employee does not have accrued leave, the employee may use unpaid leave for the duration of the quarantine or isolation.

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 take paid leave from work because (1) of 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.
- ▶ The maximum weekly benefit for disability is the difference between the maximum weekly family leave benefit and the employee’s total average weekly wage from each covered employer, up to the maximum of \$2,043.92.

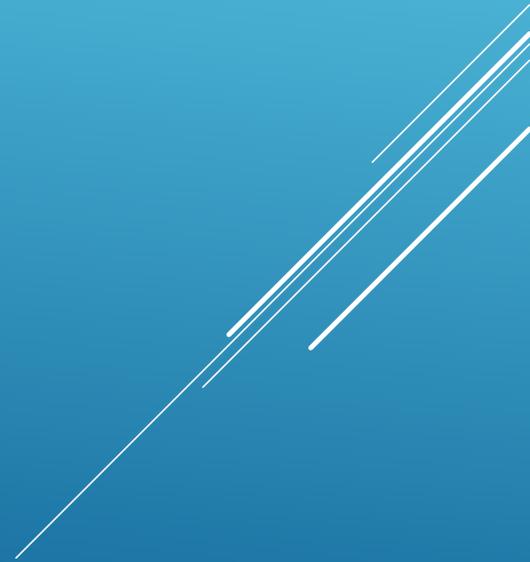
NEW YORK STATE PAID SICK LEAVE

- ▶ Interplay Between the New York State Law and the Federal Families First Coronavirus Response Act
 - ▶ The federal law states that, if a State law provides an employee greater benefits than the federal law, then the employee would be entitled to receive the greater of the two benefits.
 - ▶ Any New York State employers with 500+ employees are **not** covered by the federal law and, therefore, must **only** provide the benefits under New York State Paid Sick Leave Law (and any additional local leave laws).
 - ▶ Employers that have more than 100 employees but less than 500 employees must comply with both the federal Families First Coronavirus Response Act and the New York State Paid Sick Leave Law.
 - ▶ In that situation, the federal law calls for 80 **hours** of paid leave, while the New York law calls for 14 **days**. So, the federal law grants time off in hours, while the New York law grants time off in days. And, depending on the employee's regularly scheduled workday, a New York employee may be entitled to an additional 4 days of paid sick leave if he/she is quarantined.
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OTHER NEW YORK STATE LEAVE LAWS

- ▶ Leave for disabled employees pursuant to the New York Human Rights Law
 - ▶ Short-Term Disability Leave
 - ▶ Workers' Compensation Leave
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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."

WESTCHESTER COUNTY SICK LEAVE

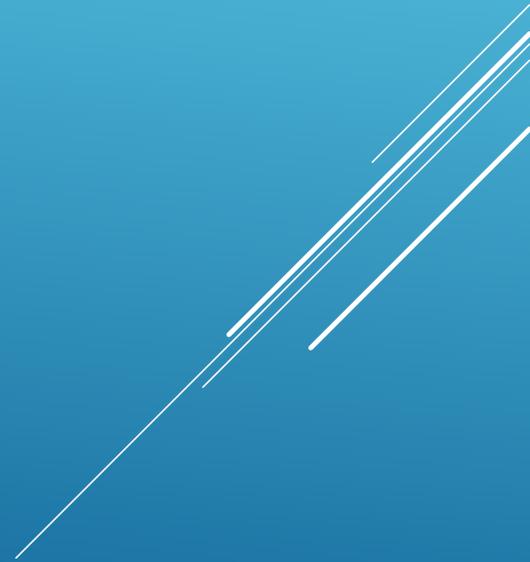
▶ Leave Accruals:

- ▶ Leave accrues at 1 hour for every 30 hours worked, up to 40 hours per year

▶ Carryover and Payout:

- ▶ Employees will be able to carry over unused earned sick time to the following year, however, an employer may limit an employee's use of earned sick leave to a maximum of 40 hours per year.
- ▶ Employers are not required to compensate an employee for unused accrued sick leave upon the employee's separation from the company, regardless of whether the termination of employment is voluntary or involuntary.

EXAMPLES



EXAMPLE 1

- ▶ Jody has been employed by ABC HOME CARE COMPANY for 3 months as a case coordinator. She is a full-time employee. Jody has children who are age 8 and 10. Jody works in New York City, On March 15, Jody's children's school was closed as a precautionary measure to control the outbreak of the coronavirus. Jody was laid off on March 18.
 1. What leave rights does Jody have?
 2. What if Jody was, instead, allowed and able to work from home as of March 18?
 3. What leave rights does Jody have if she is a home health aide?

EXAMPLE 2

- ▶ Jody has been employed by ABC HOME CARE COMPANY for 3 months as home health aide. ABC HOME CARE COMPANY employs 500 employees. Jody is a full-time employee. On March 21, Jody returns from a 3-month trip to China.
1. What leave rights does Jody have?
 2. What if Jody did not go to China but, instead, on March 21 reports that the patient for which she worked tested positive for COVID-19.
 3. What if Jody tested positive for COVID-19 on March 15?
 4. What if ABC HOME CARE COMPANY employs 250 people, and Jody's patient tests positive for COVID-19 on March 23?

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