

Urgent for Employers: New COVID-19-Related Leave Requirements under Federal and New York Law

As the coronavirus/COVID-19 pandemic continues to impact more and more Americans, federal, state, and local governments have moved quickly to propose, and in some cases have already enacted, legislation requiring employers to provide various forms of paid and unpaid leave for affected employees. At the federal level, on March 18, 2020, President Trump signed into law an economic stimulus package – the Families First Coronavirus Response Act (the “Act”), which includes provisions for paid sick leave, expanded unemployment benefits, and additional protections for health care workers, as well as free coronavirus testing and expanded food assistance. At the NY state level, also on March 18, 2020, Governor Cuomo signed into law legislation which provides even broader paid leave benefits than does the Act.

This alert summarizes key provisions affecting employers under the Act and the new legislation in New York.

Key Provisions of the Families First Coronavirus Response Act

Two provisions in the Families First Coronavirus Response Act¹ grant certain employees affected by COVID-19 with paid and unpaid leave:

Emergency Paid Sick Leave Under the Act: Effective April 2, 2020, government employers and private employers with fewer than 500 employees² must provide all employees, regardless of their length of employment at the company, with paid sick leave if the employee is:

1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. experiencing COVID-19 symptoms and seeking medical diagnosis;
4. caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency³; or
6. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

¹ A copy of the bill can be obtained from: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

² Employers of health care providers or emergency responders may opt out of the paid sick leave or paid leave under the FMLA described herein.

³ The Secretary of Labor may issue regulations to exclude small businesses with fewer than 50 employees from the requirements to provide leave to employees due to school closures if the leave would jeopardize the viability of the business as a going concern.

If the employee falls within one of these 6 categories, the employer must provide:

- For each full-time employee, at least 80 hours of paid sick leave; and
- For part-time employees, paid sick leave for the number of hours the employees work in a typical two week period.

Entitlement to the leave expires on December 31, 2020.

The leave is to be paid at the employee's regular rate (capped at \$511/day) for leave due to any of qualifying reasons described in Nos. 1-3 above. The leave is to be paid at two-thirds the employee's regular rate (capped at \$200/day) for leave due to any of the qualifying reasons described in Nos. 4-6 above.

Employers may be eligible for a refundable tax credit to cover the costs of such leave in each quarter. The credit will not be available for employers receiving a credit for paid family and medical leave under the Tax Cut and Jobs Act.

Employers must post a notice regarding employee rights under the Act. The Department of Labor will release a model notice by March 25, 2020.⁴

Expansion of the Family Medical Leave Act:

Effective April 2, 2020, the Family Medical Leave Act ("FMLA") is expanded to provide up to 12 weeks of job-protected leave to allow an employee who is unable to work or telework to care for the employee's child if the child's school or place of care is closed or if a childcare provider is unavailable due to a public health emergency ("the Emergency Leave").⁵ The Act also changes the eligibility requirements for employees seeking to take the Emergency Leave. Employees are entitled to the Emergency Leave if they worked for an employer with fewer than 500 employees for at least 30 days. For all other qualifying reasons for leave under the FMLA, the eligibility requirements remain unchanged: employees are only eligible if they worked for an employer with more than 50 employees for at least 6 months.

Under the new law, the first 10 days of the Emergency Leave may be unpaid, and employees may elect to use their accrued paid leave to cover some or all of this period. After the 10-day period, employers generally must pay the employee at two-thirds of the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. Payments for the leave are capped at \$200/day.

For employers with 25 or more employees, employees who have taken Emergency Leave are entitled to their same or equivalent positions upon their return to work. Employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer

⁴ Employers should refer to the Department of Labor's website for a copy of this notice. See <https://www.dol.gov/coronavirus>.

⁵ A public health emergency is defined as an emergency with respect to COVID-19 declared by a federal, state, or local authority.

exists due to an economic downturn or other circumstance caused by a public health emergency during the period of the leave.⁶

New York State Emergency Leave:

On March 18, 2020, Governor Cuomo signed legislation into law to provide additional paid sick leave and unpaid leave to certain employees who are “subject to mandatory or precautionary orders of quarantine or isolation” related to COVID-19. Unlike the new federal legislation, which as noted above, does not apply to employers with more than 500 employees, the New York law requires employers *with more than 100 employees* to provide paid leave to employees affected by COVID-19.

Under the New York law, effective immediately:

- Employers with 10 or fewer employees and net income of \$1 million or less in the prior tax year must provide unpaid sick leave for the entire period of quarantine or isolation.
- Employers with 10 or fewer employees and net income greater than \$1 million in the prior tax year and Employers with 11-99 employees (regardless of net income) must provide 5 days of paid sick leave and unpaid leave for the remainder of the quarantine or isolation.
- Employers with 100 or more employees and all public employers must provide at least 14 days of paid sick leave.

The bill also expands the definitions of “family leave” under New York’s Paid Family Leave Law (“PFL”) and “disability” under New York’s Disability Benefits Law (“DBL”)⁷ to include leave taken by an employee due to a quarantine or isolation order, or to provide care for a minor dependent child who is subject to a quarantine or isolation order. Payments in connection with such leave are capped at \$840.70/week under the PFL and \$2,043.92/week under the DBL.

The New York law also provides that employees who are “deemed asymptomatic or have not yet been diagnosed with any medical condition and are physically able to work while” under a quarantine or isolation order are not eligible for paid sick leave or additional PFL or disability benefits. However, the law does not specify how a determination will be made that an employee is asymptomatic.

⁶ Larger employers are protected in other regulations against having to reinstate an employee to a position which has been eliminated for legitimate reasons. See, e.g., 29 C.F.R. § 825.216(a) (“An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.”).

⁷ Under the existing PFL, employees are entitled to up to 10 weeks, in 2020, of paid leave (capped at \$840.70/week) to bond with a newly born, adopted or fostered child, care for a family member with a serious health condition, or assist loved ones when a spouse, domestic partner, child or parent is deployed abroad on active military service. Under the existing DBL, employees may be eligible for wage replacement benefits if they are unable to work due to a non-work-related injury or illness.

REQUIRED AND BEST PRACTICES:

1. Given the rapid changes in the law, employers must closely monitor pending federal, state, and local legislation and enactments. Employers should consult with experienced and up-to-date employment counsel to review their increased obligations under new legislation and implement plans to revise their policies.
2. Employers with 500 or fewer employees must immediately update their policies to provide for paid leave for employees affected by COVID-19 in accordance with federal law – the deadline to implement such policies is April 2, 2020.
3. Employers with 500 or fewer employees must educate management about the new requirements for paid sick leave under federal law and the expansion of the FMLA.
4. New York State employers with *any* number of employees must immediately revise their sick leave policies to provide for paid and unpaid leave in accordance with the state's newly enacted legislation.

We will continue to track COVID-19-related legislation and report any further developments.

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Kasowitz Benson Torres LLP's Employment Practices and Litigation Group has been named the 2019 Litigation Department of the Year for Labor and Employment by *New York Law Journal*. We represent companies in connection with employment policies and practices. Our lawyers are well-versed in existing and new laws covering this fast-moving situation, as well as with layoffs, plant closings, reductions in force, and of course the litigation of all types of statutory and contractual employment-related claims. If you would like to discuss these issues, please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789).