

# Labor & Employment Law Alert: New York State and Federal COVID-19 Paid Leave Requirements

In response to the COVID-19 pandemic, several laws have been passed to ensure paid leave for workers. New York enacted paid leave requirements effective March 21, 2020 at 8:00 p.m. Congress passed the Federal Families First Coronavirus Response Act, which amends the Family and Medical Leave Act (“FMLA”) by providing job protected leave that is necessary as a result of COVID-19 and also creates the Emergency Paid Sick Leave Act, both of which will become effective by **April 2, 2020 at the latest**, but could take effect earlier. Employees are entitled to only the greater protections offered by either New York State or federal law.

## New York State Paid Leave

The amount of paid leave and its duration varies, based on employer size and/or net income, with regard to businesses:

1. Employers with 10 or less employees and a net income of less than \$1,000,000 must provide unpaid leave, job protection and access to Paid Family Leave/Short-Term Disability for the duration of an employee’s quarantine. Please note that while such small businesses are not required to provide paid leave under New York State law, as detailed below, they are subject to federal paid leave requirements unless given an exemption by the United States Department of Labor (“DOL”).
2. Employers with a net income greater than \$1,000,000 or between 11–99 employees must provide at least five days of paid leave, job protection and Paid Family Leave/Short-Term Disability after the expiration of this five-day period.
3. Employers with 100 or more employees must provide at least 14 days of paid leave and job protection and Paid Family Leave and Short-Term Disability after the expiration of this 14-day period.
4. For public employers, public officers or employees must be provided at least 14 days of paid leave at the officer’s or employee’s regular rate of pay. Although unclear, it appears that public employers do not have to provide the Paid Family Leave and Short-Term Disability benefits, unless they have previously opted-in to these programs which are voluntary in the public sector.

Paid leave is triggered under New York State law when an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the New York State Department of Health, a local board of health or any governmental entity duly authorized to issue a quarantine or isolation order as a result of the COVID-19 virus. Employers are not required to extend paid leave if: (1) an employee is asymptomatic or not diagnosed and able to work remotely; or (b) an employee recently traveled to a CDC-designated Level 2 or Level 3 country for non-business purposes and the employee was given notice of this limitation prior to the employee’s travel. Thus, employers should notify employees in writing that they will be ineligible for such paid leave if they travel to these countries outside of work. Importantly, an employee’s emergency paid leave as a result of COVID-19

under New York State law must be offered in addition to an employee's accrued sick leave.

Employers should keep in mind that the emergency COVID-19 paid leave is in addition to existing benefits available under New York Paid Family Leave ("PFL") and Short-Term Disability, as applicable. Employees may be able to collect under these benefits independent of their eligibility for COVID-19 paid leave, with the added entitlement that after an employee's paid leave as a result of COVID-19 expires, they may collect PFL and Short-Term Disability concurrently. Short-Term Disability can be paid concurrently for the limited purpose of supplementing PFL benefits so employees can receive their average weekly wage during the leave period. Concurrent benefits may not exceed the employee's average weekly wage and are capped at \$840.70 per week for PFL and \$2,043.92 per week for supplemental Short-Term Disability benefits. As mentioned above, and although unclear, it appears that public employers do not have to provide the Paid Family Leave and Short-Term Disability benefits, unless they have previously opted-in to these programs which are voluntary in the public sector.

#### Federal Emergency FMLA Expansion Act

The Emergency FMLA Expansion Act ("Act") provides up to 12 weeks of job protected leave to an employee who is unable to work in-person, or work remotely, in order to care for their child under the age of 18 if the child's school or daycare is either closed or unavailable due to the COVID-19 virus.

The first ten days of an employee's emergency FMLA leave are unpaid, but an employee may use accrued leave during this time or request to use Emergency Paid Sick Leave, as discussed below. After the first ten days of an employee's emergency FMLA leave, an employer generally must pay full-time employees at two-thirds of the employee's regular rate of pay, capped at \$200 per day or \$10,000 in the aggregate per employee.

The Act generally applies to all employers (including public employers) with less than 500 employees. Also, unlike typical FMLA eligibility, an employee is eligible for job protection under the Act after 30 days of employment. However, the Act authorizes health care providers and emergency responders to exclude their employees from emergency FMLA leave. Further, employers with less than 50 employees may apply to the DOL for an exemption if complying with the Act would jeopardize the viability of the employer's business. The DOL is expected to issue regulations advising employers regarding such an exemption before April 2, 2020.

Employers with 25 or more employees must restore employees to their same position or one substantially similar, with the same pay and benefits, after they return from leave under the Act. Employers with less than 25 employees are excluded from this requirement if an employee's position no longer exists due to economic downturn or a public health emergency, but they still must make reasonable efforts for up to a year following the employee's leave to reinstate the employee.

#### Federal Emergency Paid Sick Leave Act

The federal Emergency Paid Sick Leave Act also generally applies to all employers (including public employers) with less than 500 employees and authorizes health care providers and emergency responders to exclude their employees from its requirements. As with emergency FMLA leave, employers with less than 50 employees may apply to the DOL for an exemption if complying with its requirements would jeopardize the viability of the employer's business. Applications will be subject to DOL regulations which, as stated, we anticipate will be issued very soon.

The federal Emergency Paid Sick Leave Act permits eligible employees to take paid 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 to provide services due to a public health emergency; or (6) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Eligible employers must provide eligible employees with 80 hours of paid sick leave at the employee's regular rate of pay, which is capped at \$511/day or \$5,100 total per employee for the employee's personal use of the leave and \$200/day or total \$2,000/employee as a result of an employee's inability to work as a result of caring for others.

Labor and employment issues surrounding the COVID-19 pandemic are rapidly evolving and, as both the New York State and federal governments offer further guidance on these issues, we will update clients accordingly.

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As employers navigate these issues, our Firm's labor and employment attorneys are standing by to provide legal advice.