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New Laws Require NY Employers to Provide Additional Paid Sick Leave to Employees Affected by COVID-19

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New federal and state laws were enacted on March 18 that will require New York employers to provide paid sick leave to employees affected by COVID-19. Outlined below are key paid sick leave provisions affecting employers of various sizes.

Businesses should take immediate, proactive measures to comply with the recently enacted New York law and superseding federal law.

New York State Law Requires Paid Leave for Quarantined Employees

New York employers must now provide sick leave for any “employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.” *This law goes into effect immediately.*

The amount and type of leave that must be provided depends on the number of employees an employer had as of January 1, 2020 and, for small employers, their 2019 net income:

- Employers who had **10 or fewer employees as of January 1**, and a **2019 net income of less than \$1,000,000** must provide **unpaid** sick leave and any other benefit as provided by any other provision

of law to an employee under quarantine or isolation until the termination of any order of quarantine or isolation. During quarantine or isolation, employees will be eligible for New York State Paid Family Leave (PFL) and short-term disability benefits.

- Employers who had **10 or fewer employees as of January 1**, and a **2019 net income greater than \$1,000,000**, must provide at least **five days of paid sick leave**, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers who had **between 11 and 99 employees as of January 1**, must provide at least **five days of paid sick leave**, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers with **100 or more employees as of January 1**, must provide at least **14 days of paid sick leave**.

Sick leave required by this new law must be provided **without** loss of an employee’s accrued sick leave. That is, this leave required for

quarantined employees must be provided on top of any other sick leave already provided by an employer.

Employees returning from a leave covered by this law must be restored to the position they held prior to taking the leave with the same pay and other terms of employment. Discrimination or retaliation based on any employee's taking of or requesting a leave is prohibited.

The provisions of the law do not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory quarantine through remote access or other means.

Employees are also not eligible for leave under the law if the employee is subject to quarantine because: (1) the employee returned to the United States after traveling to a country for which the CDC has issued a level two or three health notice; (2) travel to that country was not taken as part of the employee's employment or at the direction of the employer; and (3) the employee was provided notice of the travel health notice and the limitations of the law prior to travel. However, such employee will still be eligible to use other accrued leave available under an employer's policy or unpaid sick leave for the duration of the quarantine or isolation.

The state's short-term disability and PFL laws are expanded to provide coverage for COVID-19 quarantine-related absences. "Disability" under the state workers' compensation law now includes "any inability of an employee to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity

duly authorized to issue such order due to COVID-19 and when the employee has exhausted all paid sick leave provided by the employee's employer under this act." PFL now covers "(a) any leave taken by an employee from work when an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19; or (b) to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19."

Disability and family leave benefits may be payable concurrently, except an employee may not collect any benefits that would exceed \$840.70 in paid family leave and \$2,043.92 in disability payments per week. The maximum total benefits an employee will receive for disability benefits is the difference between the maximum weekly family leave benefit and such employee's total average weekly wage from each covered employer up to a maximum benefit due pursuant to disability of \$2,043.92 per week.

To the extent any provisions of the New York law overlap with any federal law, the federal law shall apply, provided that if the provisions of New York law provide benefits in excess of federal law then employees will be able to claim such additional sick leave or benefits in the amount of such difference.

Federal Law to Mandate Paid Sick Leave, Enhanced Unemployment for Workers Affected by Pandemic

Congress passed the Families First Coronavirus Response Act on March 18, 2020. Most portions of the new law that impact employers will become effective on April 2.

The new law responds to the pandemic by providing free coronavirus diagnostic testing and additional food and nutrition assistance. Of particular interest to employers, it mandates paid sick leave, paid family and medical leave and enhanced unemployment compensation benefits.

Paid Sick Leave

The Act requires private employers with fewer than 500 employees and all public employers to provide employees with paid sick time for qualifying reasons related to the COVID-19 outbreak. Larger employers with 500 or more employees are excluded from this component of the new law.

Qualifying Reasons

Covered employers must provide all eligible employees with paid sick time to the extent employees are unable to work (or telework) because:

- The employee is subject to a federal, state, or local quarantine order related to COVID-19 or is caring for an individual subject to such a quarantine order.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 or is caring for an individual who has been so advised.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- The employee is caring for a child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Employers may not require employees to use other paid leave prior to using paid sick time, as long as a qualifying reason to take paid sick time is present. In addition, employers may not require employees to search for a replacement to cover their hours as a condition of using paid sick time.

After the first workday taking paid sick time, employers may require employees to use reasonable notice procedures to continue using paid sick time.

Paid Sick Time Allotment

Covered employers must provide 80 hours of paid sick time to full-time employees. Part-time employees must receive an amount of paid sick time equal to the number of hours the employee works on average over a two-week period.

Paid sick time must be available for immediate use as long as a qualifying reason is present. Paid sick time does not carry over from one calendar year to the next, and employers are not required to pay out unused time at an employee's termination.

Employers who are party to multiemployer collective bargaining agreements may meet their obligations by contributing to a multiemployer fund, plan, or program based on the hours its employees are entitled to under the Act while working under the collective bargaining agreement—as long as employees

may secure pay from the fund, plan, or program for qualifying uses under the Act.

Rate of Pay for Paid Sick Time

Generally, paid sick time must be paid at the highest of the employee's regular rate, the federal minimum wage, or the applicable state/local minimum wage, to a maximum of \$511 per day (and \$5,110 in the aggregate).

The daily and aggregate benefit cap is lower for employees who use paid sick time to care for a sick family member, a child unable to attend school, or who meet the "substantially similar conditions" criteria. For these qualifying reasons, an employee must be paid at 2/3 of their regular rate, to a maximum of \$200 per day (and \$2,000 in the aggregate).

Paid sick time is calculated based on the number of hours an employee would otherwise normally be scheduled to work. For part-time employees with variable schedules where employers cannot determine with certainty the number of hours the employee would have worked, employers may use the average number of hours scheduled per day over the preceding six-month period (including leaves) or, if the employee did not work during that period, the reasonable expectation at hiring of the average number of hours the employee would have normally been scheduled per day.

By April 2, 2020, the U.S. Department of Labor (DOL) must issue guidelines for employers to use to calculate the amount of paid sick for which an employee may be entitled.

Non-Discrimination/No Retaliation

Employers are prohibited from discharging, disciplining, or otherwise discriminating against anyone who takes paid sick time, or takes action to enforce rights under the Act or who cooperates with any proceeding to enforce such rights.

Other Requirements

Employers must conspicuously post a notice of employee rights in a form to be prepared by DOL and DOL must make a model notice available by next week.

The Act does not diminish employees' rights under any otherwise applicable federal, state, or local law; collective bargaining agreement; or existing employer policy.

The Act also empowers the Secretary of Labor to issue regulations to exclude certain employees employed by health care providers or emergency responders from entitlement to paid sick leave and also to exempt small businesses with fewer than 50 employees.

Employers who fail to provide paid sick time or who take prohibited discriminatory action are subject to the remedies of the Fair Labor Standards Act. The paid sick leave requirements take effect 15 days after enactment and they expire on December 31, 2020.

New and Additional Family and Medical Leave Act Obligations

The law mandates additional Family and Medical Leave Act obligations and also extends coverage for this component to all public employers and all private employers with fewer than 500 employees (even those with fewer than 50 employees).

The emergency FMLA expansion provides up to 12 weeks of job-protected leave to employees who are unable to work (or telework) due to need to care for a minor child whose school or place of care has been closed or if the child's care provider is unavailable or due to an emergency with respect to COVID-19 declared by a federal, state or local authority. Under the expansion, employees need only be employed for 30 calendar days to access this leave, with no minimum hours threshold.

While the first ten days of this expanded leave may be unpaid (during which an employee may utilize otherwise accrued paid leave or paid sick leave also mandated by the Act), employers must provide paid leave after the tenth day of such leave. Leave must be paid at a rate of at least two-thirds of the employee's regular pay rate according to the number of hours the employee is otherwise scheduled to work, up to a maximum of \$200 per day (\$10,000 in the aggregate).

Where need to use this leave is foreseeable, employees must provide employers with notice of the need to use leave as practicable.

Generally, the FMLA requires that employees who take qualifying leave be restored to the same or an equivalent position upon returning from leave. However, employers of fewer than 25 employees are not required to provide restoration rights for the expanded qualifying reasons for leave if: (1) the position the employee held at the beginning of leave does not exist due to conditions that affect employment and are caused by a public health emergency during the leave period, (2) the employer makes reasonable efforts to restore the employee to an equivalent position, (3) those reasonable efforts fail and the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year after the earlier of 12 weeks after the employee's leave commences or the date on which the qualifying need to use leave concludes.

The Secretary of Labor is empowered to issue regulations to exclude certain health care providers and emergency responders from the expanded FMLA requirement. DOL also is tasked with issuing regulations to exempt small businesses (employers with fewer than 50 employees) where the provision of leave would jeopardize the viability of the business as a going concern.

This emergency FMLA expansion takes effect 15 days after enactment (April 2, 2020) and lasts until December 31, 2020.

Tax Credits for Paid Sick Leave

In order to lessen the financial burden of additional leave benefits (at least for those employers who survive to file taxes), the Act provides for a refundable payroll tax credit equal to 100 percent of qualified sick leave paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security and Medicare taxes.

But there is a cap for sick leave paid with respect to employees who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation. For paid sick leave for these reasons, the amount of the credit is capped at \$511 per day. For amounts paid to employees caring for a family member or for a child whose school or place of care has been closed, the amount of the credit is capped at \$200 per day. The aggregate number of days taken into account per employee may not exceed the excess of 10 over the aggregate number of days taken into account for all preceding calendar quarters.

Self-employed individuals also are entitled to a refundable income tax credit if the taxpayer must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, the refundable income tax credit also is capped. For self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, the income tax credit also is capped.

The tax credits are in place starting with a date to be set by the U.S. Treasury Department and ending on December 31, 2020.

Tax Credits for Paid Family and Medical Leave

The Act also provides for a refundable payroll tax credit equal to 100 percent of qualified family leave paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security taxes. The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters.

Self-employed individuals also are entitled to a refundable income tax credit.

These tax credits also are in place starting with a date to be set by the U.S. Treasury Department and ending on December 31, 2020.

Enhanced Unemployment Compensation Benefits

The Act provides \$1 billion in aid to state unemployment compensation programs so long as a state: (1) waives any waiting period; (2) waives the work search requirements for employees directly impacted by COVID-19 on account of an illness in the workplace or direction from a public health official to isolate or self-quarantine; and (3) does not charge employer accounts for these COVID-19 related benefits.

The Act also requires each state to improve access to benefits, including ensuring at least two methods of application (phone, internet, and in person). At a time where social distancing is encouraged, if not mandated, it is unlikely that "in person" will be the preferred method. Phone access theoretically might be particularly helpful to applicants with limited English proficiency or limited digital access. No word about a "Plan B" when websites are overloaded and crash, phone lines are jammed or when state workers are afflicted themselves.

The Act directs that DOL provide technical assistance to States to operate and expand

worksharing programs which currently exist in 28 states. These programs provide wage loss compensation where there is a reduction in hours, rather than a total employment loss.

At the time of separation from employment, employers now will be required to provide notification of the availability of unemployment compensation utilizing a model notice to be developed by DOL.

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