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NY Employers' Leave Obligations for COVID-19 Absences Under Federal, State and Local Law

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If you are a New York employer and trying to make sense of how new and old paid leave laws apply to your employees affected by COVID-19, you are not alone. Below is a general overview of these laws as well as answers to some frequently asked questions about how the federal, state and local laws interact with each other and the related obligations of New York employers.

Considering the complexity of the issues discussed in this alert, the reality that courts have not yet interpreted the new laws, and the fact that administrative guidance continues to be issued and, in some cases, amended, employers are encouraged contact counsel prior to taking any employment actions due to COVID-19.

What leave laws may apply to my employees as a result of the COVID-19 pandemic?

Families First Coronavirus Response Act

The federal Families First Coronavirus Response Act (FFCRA) has been in effect since April 1, 2020, and applies to all employers in the United States with *less than 500 employees*. The FFCRA currently provides for paid sick leave and paid family and medical leave through Dec. 31, 2020.

Under the FFCRA, covered employers must provide two weeks (up to 80 hours) of paid sick leave to employees who are unable to work or telework for the following reasons:

- 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 child care provider is closed or unavailable due to COVID-19.
- The employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Generally, if an employee is taking paid sick leave because the employee is quarantined and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, then the employee must be paid at the employee's regular rate of pay (or the minimum wage, if higher) up to a maximum of \$511 per day (\$5,110 in the aggregate). However, if an employee is taking paid sick leave to care for someone else, or the employee is experiencing a "substantially similar condition" (yet to be defined), then the employee only is required to be paid at two-thirds of the employee's regular rate of pay (or two-thirds of the minimum wage, if higher) up to a maximum of \$200 per day (\$2,000 in the aggregate).

The U.S. Department of Labor (USDOL) has provided guidance for determining the regular rate of pay and hours of leave available to individual employees. The regular rate of pay is determined by the average of the employee's regular rate over the six-month period (or the average for each week worked if less than six months) prior to the date that the employee takes leave. Commissions, tips and piece rates should be incorporated in the calculation to the

same extent that they are included when determining the regular rate under the Fair Labor Standards Act. In other words, employers can add all compensation that is part of the regular rate over the applicable time period, and divide that amount by all hours worked.

The amount of paid leave that an employee is eligible to receive depends upon the number of hours an employee normally works each week. For employees who are normally scheduled to work less than 40 hours per work, such employees are entitled to paid leave for their average number of hours worked over a two-week period. If the employee's schedule varies, then employers should review a six-month period to calculate the employee's average daily hours. If the employee has not been employed for six months, the employer may calculate the average hours per day that the employee was scheduled to work over the course of the employee's employment.

The average daily hours should be used to determine the amount of pay owed over the two-week paid sick leave period (as well as for paid FMLA leave, as discussed below). Overtime hours should be included in the calculations; however, employers are not obligated to pay employees more than the daily and aggregate amounts provided in the statute.

In addition to paid sick leave, the FFCRA provides for additional paid leave under the Family and Medical Leave Act (FMLA). If employees are unable to work (or telework) due to their need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19, then employees must be paid for up to 10 weeks of job-protected leave (in addition to possibly receiving two weeks of paid sick leave for this same reason). This expanded FMLA leave must be paid at two-thirds of the employee's regular rate of pay rate (or two-thirds of the minimum wage, if higher) up to a maximum of \$200 per day (\$10,000 in the aggregate). Employers may qualify for an exemption from the requirement to provide paid leave due to school closings or child care unavailability if they have *fewer than 50 employees* and providing such leave would jeopardize the viability of the business as a going concern. However, employers should

consult with counsel prior to taking advantage of this exemption as it is narrowly interpreted.

Paid sick leave and paid FMLA leave under the FFCRA may be taken intermittently or by reduced schedule under certain circumstances and by agreement of the employer and employee. Employers should review the USDOL's guidance and consult with counsel in response to requests for intermittent leave.

Aside from the newly established paid FMLA leave under the FFCRA, employees may be eligible for traditional unpaid FMLA leave if they are ill or caring for an ill family member. Generally, employers who have employed 50 or more employees for at least 20 workweeks in the current or preceding calendar year are required to provide a qualifying employee with such leave if the employee has been employed for at least 12 months and worked at least 1,250 hours during the past 12 months.

For further details on the FFCRA and on the USDOL's guidance and rules interpreting the law, including additional employer obligations, please see our prior alerts:

- [Federal Law to Mandate Paid Sick Leave, Enhanced Unemployment for Workers Affected by Pandemic](#)
- [Temporary FFCRA Regulations Clarify Leave, Small Business Exemption](#)
- [This Is How the FFCRA Paid Leave Tax Credits Work](#)
- [Employers Must Post Notice of Employee Rights Under the Families First Coronavirus Response Act](#)

New York State's COVID-19 Leave

New York's COVID-19 leave law (NYS COVID Leave) went into effect on March 18, 2020. It provides for paid sick leave and, additionally, makes available paid family leave and disability benefits under certain circumstances. Unlike the FFCRA, NYS COVID Leave applies to employers of all sizes and is not scheduled to sunset at the end of this year. However, employees are eligible for NYS COVID Leave only if they are "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" and showing symptoms or physically unable to work remotely. The current "New York State on PAUSE" executive order issued by Gov. Andrew Cuomo and any "shelter-in-place" orders that may be issued by local officials that apply to the general public do not qualify as a "a mandatory or precautionary order of quarantine or isolation." The amount and type of job-protected "quarantine" leave that must be provided to such employees depends on the size of the employer as of Jan.1, 2020:

- Employers who had **10 or fewer employees** as of Jan. 1, 2020, and a 2019 net income of less than \$1,000,000 must provide **unpaid** sick leave until the termination of any order of quarantine or isolation. During quarantine or isolation, employees may be eligible for New York State Paid Family Leave (PFL) and short-term disability benefits.
- Employers who had **10 or fewer employees** as of Jan. 1, 2020, 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 employees may be eligible for PFL and short-term disability benefits.
- Employers who had **between 11 and 99 employees** as of Jan.1, 2020, 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 employees may be eligible for PFL and short-term disability benefits.
- Employers with **100 or more employees** as of Jan. 1, 2020, must provide at least 14 days of **paid** sick leave. The statute does not provide for PFL and short-term disability benefits for employees subject to an order of quarantine or isolation who work for employers of this size.

Employers must restore their employees returning from NYS COVID Leave to the same position held by the employee prior to the leave with the same pay and terms and conditions of employment.

Unlike the FFCRA, there are no maximum amounts that employers are required to pay eligible employees for paid sick leave (although there are caps on PFL and disability benefits). Additionally, the NYDOL has advised that the number of paid days is calendar days, and, accordingly, an employer should pay the employee the amount of money that the employee would have otherwise received for the five- or 14-day period of sick leave. While this amount may be calculated easily for employees who work a fixed schedule or are paid a salary, it can be more involved for employees who are not paid a fixed wage, such as hourly employees, part-time employees and commissioned salespersons. For such individuals, employers must consider a representative period of time when determining the employee's average daily pay rate.

Neither the statute nor any guidance issued to date by the New York State Department of Labor (NYSDOL) specifically addresses whether employees may be eligible for multiple leaves of absence pursuant to NYS COVID Leave if they are subject to multiple orders of quarantine or isolation over time. Accordingly, employers are advised to consult with counsel if employees are quarantined more than once.

As noted above, an employee of an employer with less than 100 employees also may be eligible for PFL and disability benefits if the employee is subject to a mandatory or precautionary order of quarantine or isolation and showing symptoms or physically unable to work remotely. Such benefits run concurrently, and employees eligible for PFL and disability benefits may receive up to a maximum of \$2,884.62 per week in total. Employees would receive up to 60% of their average weekly wage as PFL (with a cap of \$840.70 per week), and then receive the remainder of their average weekly wage as disability benefits (with a cap of \$2,043.92 per week).

While employees only are eligible for sick leave under NYS COVID Leave if they are subject to a qualifying order of quarantine or isolation, all New York-based employees may be eligible for PFL if the employee's dependent minor child is under a precautionary or mandatory order of quarantine or isolation (or the child's school is closed by government order). In this case, the employee would

receive up to 60% of their average weekly wage as PFL (with a cap of \$840.70 per week) during the quarantine period.

Employers should be aware that, in addition to the new requirements for PFL in response to mandatory or precautionary orders of quarantine or isolation, employees may be entitled to up to 10 weeks of PFL to care for a family member with a “serious health condition.” The NYSDOL has taken the position COVID-19 can qualify as such a condition. Employers should consult with counsel and their insurance carriers regarding any questions that they may have regarding the application for and payment of PFL or disability benefits.

For further details on NYS COVID Leave, including additional employer obligations, please see our prior alert, [New Laws Require NY Employers to Provide Additional Paid Sick Leave to Employees Affected by COVID-19](#).

**Please note this alert does not address the new sick leave requirements passed by New York State on April 2, 2020, as part of the state budget that provide additional sick leave for New York employees to begin using on January 1, 2021. For information about this leave requirement, please see our prior alert, [New York State Enacts Paid Sick Leave Requirements](#).*

New York City Earned Safe and Sick Time Act and Westchester County Earned Sick Leave Law

Neither New York City nor Westchester County has enacted any new leave requirements directly relating to COVID-19. However, employees affected by COVID-19 may be eligible to take paid leave under New York City’s existing Earned Safe and Sick Time Act (NYC ESSTA) and Westchester County’s existing Earned Sick Leave Law (WC ESLL). Under NYC ESSTA and WC ESLL, employers in New York City and Westchester County with five or more employees are required to provide employees with up to 40 hours of paid leave time per year (the time is unpaid if the employer has fewer than five employees) for a variety of reasons including, but not limited to, when:

- They have a mental or physical illness, injury or health condition; they need to get a medical

diagnosis, care or treatment of a mental or physical illness, injury or health condition; or they need to get preventive medical care.

- They must care for a family member who needs to get a medical diagnosis, care or treatment of a mental or physical illness, injury or health condition, or who needs preventive medical care.
- Their employer’s business closes due to a public health emergency or they need to care for a child whose school or child care provider closes due to a public health emergency.

Additionally, under WC ESLL, Westchester County employees are entitled to such leave to care for themselves or a family member if they or a family member has been exposed to a communicable disease and the applicable public health authority has determined that the employee’s or family member’s presence in the community may jeopardize the health of others.

For further details on NYC ESSTA and WC ESLL, including additional employer obligations, please see our prior alert, [Key Reminders About Paid Sick Leave Laws for NYC and Westchester Employers](#).

Other Legal Considerations

Although the statutes discussed above provide finite periods for employees to take sick or family leave, an employee who is ill due to COVID-19 may be entitled to an additional unpaid leave of absence under the Americans with Disabilities Act, the New York State Human Rights Law and/or local anti-discrimination laws such as the New York City Human Rights Law. As the determination is fact-specific, employers are strongly encouraged to consult with counsel before taking any action if an employee is unable to return to work due to the employee’s illness after exhausting any leave entitlements.

In addition to paid sick or family leave pursuant to the laws discussed above, an employee who is ill due to COVID-19 may be entitled to workers’ compensation benefits if the employee contracted the virus on the job or has suffered mental injuries as a result of possible employment-related exposure to COVID-19. However, an employee may face challenges in establishing that the employee contracted COVID-19 in the course of employment

or suffered a compensable mental injury, particularly given the contagious nature and widespread outbreak of COVID-19. Such claims are fact-specific and should be evaluated on a case-by-case basis in consultation with counsel.

What should I do if an employee is eligible for leave under multiple laws?

COVID-19 may create a number of situations where an employee could be entitled to leave under federal, state and/or local law. Employers must take care to understand how these laws potentially interact with one another to avoid inadvertently violating any or all of the laws. Here, we focus on the interaction between the applicable paid sick leave laws.

FFCRA and NYC ESSTA or WC ESLL

If an employee is eligible for leave under both the FFCRA and NYC ESSTA or WC ESLL, the employee's leaves under both laws must run *consecutively*. The FFCRA provides that an employee's entitlement to leave under the FFCRA shall not in any way reduce, diminish, or eliminate any other right or benefit, to which the employee is entitled under any federal, state or local law or employer policy. Thus, an employer cannot require an employee to use NYC ESSTA or WC ESLL at the same time the employee uses FFCRA leave, even if an absence would qualify as covered under both laws.

NYS COVID Leave and NYC ESSTA or WC ESLL

If an employee is eligible for leave under both NYS COVID Leave and NYC ESSTA or WC ESLL, the employee's leaves under both laws must run *consecutively*. NYS COVID Leave states that use of leave available under the law "shall be provided without loss of an officer or employee's accrued sick leave." Thus, an employee cannot be required to use NYC ESSTA or WC ESLL leave at the same time the employee uses NYS COVID Leave, even if an absence would qualify as covered under both laws.

FFCRA and NYS COVID Leave

If an employee initially is eligible for leave under both the FFCRA and NYS COVID Leave at the same time, the employee's leaves under both laws should run *concurrently*. In this scenario, the employee

would not be entitled to two separate leaves under these laws. Rather, the employee generally would receive leave under the FFCRA, but if NYS COVID Leave provides more generous benefits than the FFCRA, then the employee would be entitled to those additional benefits. In other words, in this case, the employee cannot "double-dip," but is entitled to whichever law provides the employee with greater benefits.

For example, NYS COVID Leave arguably provides more generous benefits than the FFCRA for employees who regularly earn more than \$511 per day. The reason is that such employees would be entitled to their full wages under NYS COVID Leave, but only would be entitled to \$511 per day under the FFCRA if they were subject to a quarantine or isolation order.

Notwithstanding the above, an employee may be eligible for separate leaves of absence under the FFCRA and NYS COVID Leave if the employee initially is eligible for leave under the FFCRA, but not NYS COVID Leave. In this case, the leaves under both laws may run *consecutively*. For example, an employee of an employer with less than 500 employees may be entitled to sick leave under the FFCRA if the employee is ill and seeking a medical diagnosis for COVID-19, but is not under an order of quarantine or isolation. Accordingly, the employee initially would be eligible for leave under the FFCRA, but not NYS COVID Leave. If the employee subsequently tests positive for COVID-19 and is placed under a qualifying order of quarantine or isolation, then the employee may be entitled to additional sick leave under NYS COVID Leave.

Significantly, the NYSDOL has not yet provided any guidance regarding the relationship between NYS COVID Leave and the FFCRA, including the circumstances under which NYS COVID Leave provides benefits in excess of the FFCRA. Accordingly, employers should consult with counsel if they have any questions about how they should treat an individual employee who qualifies for leave under both laws.

FFCRA, NYS COVID Leave, and NYC ESSTA or WC ESLL

In the event that the applicable federal, state and local laws apply, an employer should follow the guidance above with respect to FFCRA and NYS COVID Leave, and allow the employee to take NYC ESSTA leave or WC ESLL leave *consecutively* with any leave provided pursuant to the FFCRA and NYS COVID Leave. The employee cannot be required to use NYC ESSTA or WC ESLL leave at the same time the employee uses leave under FFCRA and/or NYS COVID Leave, even if an absence would qualify as covered under all three laws.

Do I owe my employees for leave if I have closed my business?

Federal: Under the FFCRA, you do not owe your employees for FFCRA leave if your business is closed, according to the current guidance and rules established by the USDOL. This proposition holds whether the business closed before or after the law went into effect on April 1, 2020.

State: New York State's current guidance on NYS COVID Leave does not directly answer this question, but instead states that, if a business is closed, employees are eligible to collect unemployment insurance. As such, it is reasonable to conclude that employees of a business that has closed are not eligible for NYS COVID Leave.

Local: If an employer's business has closed due to a public health emergency, an employee may use paid leave under NYC ESSTA or WC ESLL. The employee may use such leave for any hours the employee was scheduled to work prior to the closure. The employee must request to use such leave as soon as practicable.

Are employees who are placed on a furlough (an involuntary, unpaid leave of absence) entitled to leave?

Federal: Under the FFCRA, employees placed on a furlough are not entitled to take leave based on the guidance and rules issued by the USDOL. According to the USDOL, furloughed employees are not unable to work because of a reason protected by the law, but rather because their employer has no work for

them to perform. As such, they are ineligible for FFCRA leave.

State: The NYSDOL has not directly addressed this issue in its guidance on NYS COVID Leave to date. Absent such guidance, the conservative approach would be to assume that an employee is eligible to use NYS COVID Leave while on a furlough since the employment relationship has not been terminated. There is an argument that the NYDOL's guidance regarding closed businesses (discussed above) may apply where an employee is furloughed but the business is not closed. However, this interpretation is risky and not advisable absent further guidance from the NYSDOL.

Local: Under NYC ESSTA and WC ESLL, if an employee is furloughed because the employer's business has closed due to a public health emergency, the employee may request to use accrued paid leave under NYC ESSTA or WC ESLL for hours the employee was scheduled to work prior to the furlough.

Can an employee take leave because of a "stay at home" or "shelter in place" order?

Federal: The short answer is that it depends. The guidance and rules issued by the USDOL have stated that "stay at home," "shelter in place" or similar orders *are* considered an order of quarantine or isolation that potentially could trigger the use of leave under the FFCRA. However, the guidance and rules also provide for a number of exceptions that drastically limit the applicability of this rule.

For example, an employee subject to such a "stay at home," "shelter in place," or similar order is not entitled to FFCRA leave if the employer does not have work for the employee, such as if the employee works for a coffee shop and the coffee shop closes temporarily or indefinitely due to COVID-19. The reasoning is that the employee would be unable to work even if the employee was not subject to the "stay at home" or "shelter in place" order.

On the other hand, an employee would be eligible for FFCRA leave because of a "stay at home" order if the employer allows the employee to work from home, but the employee is unable to telework due

to a power outage or similar extenuating circumstance that prevents the employee from being able to work remotely. The employee would be eligible for FFCRA leave during the period of the power outage or extenuating circumstance.

Although not provided as a specific example in either the guidance or rules issued by the USDOL, another potential situation where an employee subject to a “stay at home” order would be able to take FFCRA leave is when that employee’s place of residence is subject to such an order, but the employee’s place of employment was not. In such a situation, the employer would have work for the employee to perform, but the employee would be unable to perform such work (assuming the employee could not work from home) because the employee was prohibited from commuting to the workplace due to a “stay at home” order.

State: The prevailing view is that Governor Cuomo’s “New York State on PAUSE” executive order as well as any “stay at home” or “shelter in place” orders that may be issued by local officials that apply to the general public do not qualify as a “a mandatory or precautionary order of quarantine or isolation.” Accordingly, employees subject to such orders would not be entitled to NYS COVID Leave as a result of such orders. While the NYSDOL has not yet provided specific written guidance on this issue, the NYDOL has provided instructions on how employees can obtain an order of quarantine or isolation.

Local: Under NYC ESSTA and WC ESLL, if an employee’s business or an employee’s child’s school or child care provider has closed due to a public health emergency (which may entail a “stay at home” or “shelter in place” order), an employee may use accrued paid leave under NYC ESSTA or WC ESLL. The employee may request to use such leave for hours the employee was scheduled to work prior to the closure.

What documentation can I require from employees?

Federal: Employers may request that employees seeking to take FFCRA leave provide a signed

statement that contains the following information: (1) the employee’s name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. An employee may also be required to provide additional documentation depending on the COVID-19 qualifying reason for leave. For example:

- An employee requesting paid sick leave because the employee is subject to an order of quarantine or isolation must provide the name of the government entity that issued the order.
- An employee requesting paid sick leave because the employee has been advised to self-quarantine must provide the name of the health care provider who provided the advice.
- An employee requesting paid sick leave to care for an individual must provide either (1) the name of the government entity that issued the quarantine or isolation order applicable to the individual or (2) the name of the health care provider who advised the individual to self-quarantine.
- An employee requesting to take paid sick leave or expanded FMLA leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave (note that for leave taken under the FMLA for a serious health condition related to COVID-19, the normal FMLA certification requirements still apply).

State: NYS COVID Leave guidance issued by the NYDOL is silent on what documentation may be required for an employee to take NYS COVID Leave. However, to be eligible for disability benefits or Paid Family Leave benefits under NYS COVID Leave, employees are required to complete a Paid Family Leave application and submit with it a mandatory or precautionary order of quarantine or isolation issued by the State, department of health, local board of health or other authorized government entity.

Local: Employees taking leave under NYC ESSTA or WC ESLL may not be required to provide documentation from a health care provider until they have missed more than three consecutive work days. Employers may only require that the employee provide documentation from a health care provider attesting to the employee's need for sick leave and the amount of sick leave taken. Under NYC ESSTA, the employee must be provided at least seven days to provide the documentation after the employee returns to work.

What happens when I recall or rehire my employees?

For employers who have furloughed or terminated employees, if they recall or rehire those employees during 2020, the returning employees may immediately have the right to take leave under the FFCRA, NYS COVID Leave, NYC ESSTA and/or WC ESLL.

Federal: Under the FFCRA, employees are eligible for paid sick leave upon their date of hire — there is no waiting period. Employees are eligible for expanded FMLA leave under FFCRA if they have been employed for at least 30 calendar days. Employees are considered to have been employed for 30 calendar days if they were laid off or terminated by the employer on or after March 1, 2020, and recalled or rehired by the employer on or before Dec. 31, 2020. However, the employee must have been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated.

State: Employees are eligible for NYS COVID Leave immediately upon rehire.

Local: Under NYC ESSTA, if an employee is rehired within six months, the employer must reinstate any previously accrued leave, unless the employer paid the employee for unused NYC ESSTA leave upon the employee's separation of employment. Under WC ESLL, if an employee is rehired within nine months, the employer must reinstate any previously accrued leave, unless the employer paid the employee for unused WC ESLL leave upon the employee's separation of employment.

Conclusion

Please be advised that the answers to the questions above are based on the laws, regulations, rules and guidance issued as of the date of this alert. To date, no court has interpreted the laws, regulations, rules or guidance discussed herein, and some questions remain. As each employee situation is fact-specific and further administrative guidance may be forthcoming, including regulations implementing NYS COVID Leave, employers should discuss any specific questions they have concerning the applicability of these and other laws with counsel prior to taking any employment actions.

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