



*Presents*

## **Employee Leave in the COVID-19 Era**

July 9, 2020  
12:00 pm - 1:30 pm

Presenters: Kim Berg, Esq.  
Laura Wong-Pan, Esq.

## Course Agenda 12:00-1:30

- **Families First Coronavirus Response Act**
- **Family Medical Leave Act**
- **New York State Quarantine Law**
- **New York State Paid Family Leave Law**
- **Potential claims by employees re: Covid-19**

## Families First Coronavirus Response Act (FFCRA)

- requires employers to provide job protected paid sick leave or family and medical leave for reasons stemming from Covid-19
- modifies the Family Medical Leave Act expanding the definition of covered employers and providing for paid leave
- Covers some public employers
- Covers private employers with fewer than 500 employees
- All employees get up to two weeks of paid sick time for specified reasons related to COVID-19
- Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.
- An employee may elect to substitute accrued paid time off for the first two weeks of partial paid leave to earn higher amount
- In effect through December 31, 2020

Reason	Length of Leave	\$ Amount
<b>(1) EE is subject to a Federal, State, or local quarantine or isolation order related to COVID-19</b>	FT is eligible for 80 hours of leave PT is eligible for the number of hours of leave that the employee works on average over a two-week period	regular rate of pay or minimum wage (whichever is higher) up to \$511 per day/\$5,110 in the aggregate (over a 2-week period)
<b>(2) EE has been advised by a health care provider to self-quarantine related to COVID-19</b>	FT is eligible for 80 hours of leave PT is eligible for the number of hours of leave that the employee works on average over a two-week period	regular rate of pay or minimum wage (whichever is higher) up to \$511 per day/\$5,110 in the aggregate (over a 2-week period)
<b>(3) EE is experiencing COVID-19 symptoms and is seeking a medical diagnosis</b>	FT is eligible for 80 hours of leave PT is eligible for the number of hours of leave that the employee works on average over a two-week period	regular rate of pay or minimum wage (whichever is higher) up to \$511 per day/\$5,110 in the aggregate (over a 2-week period)
<b>(4) EE is caring for an individual subject to an order described in (1) or self-quarantine described in (2)</b>	FT is eligible for 80 hours of leave PT is eligible for the number of hours of leave that the employee works on average over a two-week period	2/3 regular rate or 2/3 applicable minimum wage (whichever is higher) up to \$200 per day/\$2,000 in the aggregate (over a 2-week period)
<b>(5) EE is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19</b>	FT is eligible for 12 weeks of leave (2 weeks paid sick leave + 10 weeks of paid family/medical leave) at 40 hours a week PT is eligible for the number of hours the employee is normally scheduled to work over same period	2/3 regular rate or minimum wage (whichever is higher) up to \$200 per day and \$12,000 in the aggregate (over 12-week period)
<b>(6) is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services</b>	FT is eligible for 80 hours of leave PT is eligible for the number of hours of leave that the employee works on average over a two-week period	2/3 of regular rate or minimum wage (whichever is higher) up to \$200 per day/\$2,000 in the aggregate (over 2-week period)

## Family Medical Leave Act (FMLA)

- The FMLA provides for up to 12 weeks of job protected unpaid leave in any 12 month period
- Leave is due to employee's own serious health condition or to care for an employee's family member who has a serious health condition

### Covered Employers

- 1) public employer or
- 2) private employer at a location with 50+ employees

Note: if there are multiple locations the number of employees can be combined if locations are within 75 miles

### Employee Eligibility

- 1) Worked for employer at least 12 months in total (with no break in service longer than 7 years)
- 2) Worked at least 1,250 hours of service over the previous 12 months (prior to taking the FMLA leave)

# Leave Qualifying Events

- Due to Employee' own serious health condition that renders Employee unable to work
- To care for employee's spouse, parent, or child (who is under 18) who has a serious health condition
- To care of a covered military service member who has a serious health condition (for this event up to 26 weeks may be taken)
- Due to the birth of a child and to bond with the newborn child, or for the placement of a child for adoption or foster care and to bond with that child (leave to bond with their child must be taken within one year of the child's birth or placement and must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave (for example, a part-time schedule))

## Important FMLA Provisions

### Job Protection

- Must reinstate employee after the leave ends
- to same or nearly identical position with identical pay and benefits
- same or nearby work locations, similar duties, hours and work schedule
- FMLA leave may not be held against an employee (i.e. promotions, disciplinary actions, or terminations)

### Continuous versus Intermittent Leave

- Employee may take leave over a 12 month period
- continuous or intermittent basis
- exception for bonding with child which requires leave to be continuous

### Health Insurance coverage

- Employer must continue the group health insurance under the same terms and conditions that existed prior to the employee taking FMLA leave
- Employee may therefore be required to make normal employee contributions toward the cost of insurance.

### Use of paid time off

- Employer can require the employee to utilize all of the employee's available PTO
- Once PTO is exhausted, the employee would convert to unpaid status

## NY Covid-19 Quarantine Leave under NY Paid Sick Leave Law **Coronavirus Response Bill (S-8091) signed by Governor 3/18/20**

- Provides workers job protection and financial compensation in the event they, or their minor dependent child, are subject to a mandatory or precautionary order of quarantine \*\*
- Most employees will get financial compensation by using a combination of benefits, which may include new employer-provided paid sick leave (depending on the size of the employer), Paid Family Leave and disability benefits
- These benefits are not available to employees who are able to work through remote access or other means. This means the employee must be well enough to work from home and is able to do so through remote access or other means.

\*\*A mandatory or precautionary order of quarantine must be issued by a governmental entity, such as a department of health, and be applicable to the employee or the employee's minor dependent child

Guidance on how to obtain an order of quarantine can be found at:  
<https://paidfamilyleave.ny.gov/system/files/documents/2020/03/obtaining-order-of-quarantine.pdf>



# Sick Leave Pay

# Employees	Net Annual Income	Paid Sick Days	PFL*/disability covers rest of quarantine**
1 to 10	Less than \$1 million	0	Yes, employees can combine PFL and disability leave up to max of \$2,884.62
1 to 10	More than \$1 million	At least 5	Yes, employees can combine of PFL and disability leave up to max of \$2,884.62
11 to 99	N/A	At least 5	Yes, employees can combine PFL and disability leave up to max of \$2,884.62
100 + Public ER	N/A	At least 14	No

\*Paid Family Leave (PFL): This is insurance coverage that provides up to 60% of the employees average weekly wage. The maximum weekly benefit amount is \$840.70.

\*\*Disability: Disability benefits can be accessed to match employee's full weekly wages up to a maximum weekly disability benefit of \$2,043.92.

\*\*\*Thus the combined maximum amount any employee can obtain is \$2,884.62 per week.

# Important NY Quarantine Law Provisions

## Job Protection

- NY law provides job protection for the duration of the quarantine
- Any COVID-19 quarantine leave should not be counted as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.
- The employee should be returned to the same position with same pay and benefits after the leave is taken.

## Use of paid time off

- Employer cannot require the employee to utilize employee's available PTO
- This leave is in addition to any other employer provided paid time off.

## Enforcement

If an employer does not provide the required paid quarantine leave, either amount of days or the required amount of pay for each sick day, an employee may file a complaint directly to the NYS Department of Labor.

# New York Paid Family Leave

- NY Paid Family Leave is insurance coverage that makes available to employees paid leave for reasons which include those who need time off in order to care for an ill immediate family member (including Covid-19)
- Job Protected Leave: The Employer cannot discriminate or retaliate against an employee for requesting and/or taking PFL
- runs concurrently with FMLA leave
- Employer cannot require employee to utilize PTO
- Employee may request to use PTO to enhance amount paid while on leave (employer has discretion in whether to grant such request)

## Covered Employers

- 1) public employer who has opted in to PFL
- 2) Union workers whose union opted into PFL (usually through CBA))
- 3) private employer with at least one employee

# NY Paid Family Leave Benefits

<b>2020</b>	10 weeks	60% of employees weekly wage	\$840.70
<b>2021</b>	12 weeks	67% of employee's weekly wage	TBD based on NY AWW

## Covered Reasons for Leave related to Covid-19

1) To care for a close family member with a serious health condition, including family members outside of New York State

- Family members include: spouse, domestic partner, child/stepchild and anyone for whom you have legal custody, parent/stepparent, parent-in-law, grandparent, grandchild
- If family member is a child, the child can be any age (does not need to be under 18 as with FMLA leave)

2) This does not provide leave for the Employee's own illness or injury

# Potential Claims related to Covid-19

Covid-19 related complaints may be filed with the NYS Department of Labor or US Department of Labor

1. violation of NY Quarantine paid sick leave law
2. The employee is being forced to work at a non-essential business
3. The employee is being forced to work while sick
4. For essential businesses if an employee is required to report to work but
  - a. employee does not perform an essential function
  - b. employee can perform their job from home
  - c. employee is particularly frightened because they are over 70
  - d. employee is particularly frightened because has underlying illness
  - e. employer is not following health and safety mandates
5. The employer threatened to or took adverse employment action against employee for taking the leave

# Federal and State Discrimination Claims

- When making any workplace staffing decisions, all discrimination laws still apply
- Employment actions that are based on protected characteristics such as religion, race, color, national origin, ethnicity, gender, gender identity, sexual preference, age, and disability can subject the employer to claims.
- Employers need to make sure that decisions about layoffs, downsizing, reorganizations, salary increases (or decreases), performance reviews, or other business related decisions are not tied to any protected characteristic(s).
- In addition, reasonable accommodation requests under the Americans with Disabilities Act may be requested. Employer is required to engage in an interactive process.
- These laws similarly apply to retaliation claims that may be brought following an employee's complaint of harassment, hostile work environment, or discrimination based upon a protected characteristic