INTRODUCTION

The federal Families First Coronavirus Response Act ("FFCRA") was signed into law on March 18, 2020 and will go into effect on April 2, 2020. The bill contains 2 employment-related provisions that provide for 12 weeks of paid leave (Public Health Emergency Leave) and 80 hours of paid sick leave (Emergency Paid Sick Leave) related to the public health emergency caused by COVID-19. These 2 provisions are temporary and are due to sunset on December 31, 2020. The employment-related provisions apply to employers with less than 500 employees, although the Department of Labor has the authority to exempt small businesses with less than 50 employees if imposition would jeopardize the viability of the business as a going concern. The FFCRA also provides tax credits against the employer's portion of social security taxes for the wages paid by an employer under the Public Health Emergency Leave and Emergency Paid Sick Leave.

New York State also passed a legislation on March 18th, effective immediately, offering job protection and sick leave for workers quarantined or in isolation as a result of COVID-19 – New York COVID-19 Paid Sick Leave Law. This sick leave is in addition to any sick leave already offered by an employer, including paid sick leave under New York City law. However, the leave provided under NY’s COVID-19 Sick Leave Law is not in addition to any federal sick leave or benefits that may be provided to employees in response to COVID-19, but rather is an offset to such federal benefits. Thus, if an employer is also covered by the FFCRA, any FFCRA benefits apply first – and then NY employees would receive benefits under NY’s COVID-19 Paid Sick Leave Law for any difference.

Along with NY’s COVID-19 specific sick leave law, New York also passed legislation (although not effective until September 14, 2020) that will require private employers to provide sick leave (not specific to COVID-19) to all employees beginning January 1, 2021. The amount of sick leave that NY employers will need to provide annually depends on the size of the employer, with small employers (1-4 employees) with net income of $1 million or less/year required to provide up to 40 hours of unpaid sick leave; medium sized employers (5-99 employees) and
small employers (1-4 employees) with net income greater than $1 million/year required to provide up to 40 hours of paid sick leave; and large employers (100 or more employees) required to provide up to 56 hours of paid sick leave. Sick leave can be used for the employee’s or covered family member’s illness, need to seek a medical diagnosis or treatment or preventative care, or being a victim of domestic or sexual violence, stalking or human trafficking. We will provide additional information about this sick leave law at a later date.

Finally, many states and cities, including New York City and Westchester, New Jersey and California, already have laws requiring employers to provide sick leave to employees who need time off to care for themselves or covered family members who need to take time off due to illness or to seek medical care, or because their business or child’s school is closed due to a public health emergency. The newly enacted Federal and New York State COVID-19 leave programs are in addition to such state/local sick leaves.

**FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)**

1. **Emergency Family and Medical Leave Expansion Act – To Provide Public Health Emergency Leave (Division C of the Act)**

   • Employees who have been employed for at least 30 calendar days are eligible for Public Health Emergency Leave.

   • The Emergency Family and Medical Leave Expansion Act temporarily expands FMLA leave to allow public health emergency leave for an employee who is unable to work (or telework) because the employee needs time off to care for the employee’s son or daughter under 18 years old due to the closure of the child’s school or place of care or because the child care provider is unavailable due to an emergency with respect to COVID-19 declared by a Federal, State or local authority.

   • The Act appears to provide another reason for taking FMLA, but does not grant an additional 12 weeks of Public Health Emergency Leave in addition to any existing 12-week leave entitlement under the FMLA generally. Thus, employees who have already used some or all of their FMLA leave will not be able to take a full 12 weeks of Public Health Emergency Leave, until eligible for FMLA leave again.
• The FMLA’s job protection rules apply to Public Health Emergency Leave, except that there is a hardship exemption for employers with less than 25 employees if:
  o the position held by the employee no longer exists due to economic conditions or other changes in the operating conditions of the employer that are caused by COVID-19;
  o the employer makes reasonable efforts to restore the employee to an equivalent position; and
  o if the reasonable efforts fail, the employer makes reasonable efforts during the “contact period” to contact the employee if an equivalent position becomes available
    • the “contact period” is the 1-year period beginning on the earlier of (i) the date the employee’s qualifying need for leave related to COVID-19 ends and (ii) the date that is 12 weeks after the date the employee’s leave began.

• The first 10 days of Public Health Emergency Leave is unpaid; however, employees can choose to substitute paid leave (accrued vacation, personal or medical/sick leave) for this unpaid portion. After the first 10 days, the employer is required to pay employees an amount that is not less than 2/3 of the employee’s regular rate of pay, although this paid leave is capped at $200 per day and $10,000 in the aggregate.

• Where the need for Public Health Emergency Leave is foreseeable, employees should provide employers with notice as is practicable.

• As noted above, this emergency expansion of FMLA applies to employers with less than 500 employees and covers employees who have been employed for at least 30 days – which is different from FMLA coverage and eligibility generally.

2. Emergency Paid Sick Leave Act (Division E of the Act)

• Full time and part-time employees are eligible for Emergency Paid Sick Leave.
  o Full-time employees are entitled to 80 hours of paid sick leave
  o Part-time employees are entitled to paid sick leave in an amount equal to the amount of hours they would normally be scheduled to work during a 2-week period.

• There is no waiting period to use this paid sick leave. This paid sick leave does not carry over to the next year, and is not required to be paid at termination of employment.
• Paid sick leave can be taken for a variety of purposes, but is paid at 2 different rates depending on the need for the paid sick leave:
  o If an employee needs time off because the employee: (1) is subject to a Federal, State or local quarantine or isolation order related to COVID-19, (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
    • Sick leave for these reasons is paid at the employee’s full regular rate of pay, but capped at $511 per day and $5,110 in the aggregate.
  o If an employee needs time off because the employee: (1) needs to care for an individual who either is (a) subject to a Federal, State or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 quarantine or self-isolation, (2) needs to care for the employee’s child whose school or is closed or whose childcare provider closed or unavailable due to COVID-19 precautions, or (3) is “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.”
    • Sick pay for these reasons is paid at 2/3 of the employee’s regular rate, but capped at $200 per day and $2,000 in the aggregate.

• Employers are required to pay this sick time in addition to any other paid leave, and may not (1) require employees to use other paid leave before using this leave, (2) require employees to find another employee to cover their hours, or (3) change their paid leave policies now to provide less leave.

• After the first workday an employee receives this paid sick time, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

• The Department of Labor will be providing a model notice that employers must post in a conspicuous place with their other workplace notices. The notice is expected to be published no later than March 25th.
3. **Tax Credits (Division G of the Act)**

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes a qualifying Public Health Emergency Leave or Emergency Paid Sick Leave – up to the appropriate per diem and aggregate payment caps noted above (Public Health Emergency Leave capped at $200/day or up to $10,000 total; Emergency Paid Sick Leave for up to 10 days capped at either $511/day for the employee’s illness or $200/day for family member’s illness or child’s school/childcare provider closure). Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. The credit can be claimed each quarter. The credit would not be available for employers receiving a credit for paid family and medical leave under the Tax Cut and Jobs Act. Self-employed individuals are also eligible for a tax credit.

According to the Department of the Treasury’s website, eligible employers who pay for qualifying leave under the FFCRA will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. If there are not sufficient payroll taxes to cover the cost of qualified leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. More information is available at the Treasury Department’s website - [https://home.treasury.gov/coronavirus](https://home.treasury.gov/coronavirus)

**NEW YORK COVID-19 PAID SICK LEAVE LAW**

The New York COVID-19 Sick Leave Law provides benefits for employees who themselves or whose minor dependent children are subject to an order of mandatory or precautionary quarantine or isolation due to COVID-19 issued by the state of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order. The law took effect March 18, 2020.

Note, the law’s requirements do not apply:

- to employees of private employers that voluntarily close business operations due to health and safety concerns regarding COVID-19
- if a child’s school closes for preventative social distancing
- to employees who independently decide to self-quarantine
- to employees who are quarantined because they voluntarily travelled to a level 2 or 3 country if such travel was not at the direction of your employer and you had notice of the travel notice and this restriction in the law, or
- to employees who are able to work from home during any covered quarantine/isolation.
Employers should let quarantined employees know they may be entitled to COVID-19 Paid Sick Leave and help them apply for NY Paid Family Leave and NY State Disability Leave, as applicable.


1. **Leave for Quarantine/Isolation of the Employee**

Benefits are comprised of a combination of employer-provided paid sick leave and/or NY Paid Family Leave (PFL) and NY Disability Benefits (DB) – which combination varies depending on the size and annual income of the employer. NY Paid Family Leave and NY Disability Benefits are provided through the employer’s existing PFL and DB policy, and pay up to a maximum of $2,884.62/week for the period of quarantine. The maximum PFL benefit remains at $840.70/week, but if an employee’s weekly wage is higher than $840.70, the employee can also receive Disability Benefits up to a maximum of $2,043.92/week (a significant temporary increase over the current maximum DB benefit of $170/week) – for the total of $2,884.62/week. There is no waiting period before being eligible for the benefits.

- Employers with **10 or fewer employees** and a **net income less than $1 million last year** as of January 1, 2020 must provide:
  - job protection for the duration of the quarantine order, and
  - employees immediately qualify for and may use NY Paid Family Leave and NY Short-Term Disability benefits.

- Employers with **10 or fewer employees and a net income greater than $1 million last year** and employers with **11-99 employees** as of January 1, 2020 must provide:
  - job protection for the duration of the quarantine order
  - at least 5 days of paid sick leave, and
  - employees immediately qualify for and may use NY Paid Family Leave and NY Short-Term Disability benefits.

- Employers with **100 or more employees** as of January 1, 2020, as well as all public employers, must provide:
  - job protection for the duration of the quarantine order, and
  - at least 14 days of paid sick leave.

2. **Leave for Quarantine/Isolation of Employee’s Child**

Employees are eligible for NY Paid Family Leave (but not NY Short-Term Disability) if a minor dependent child is subject to an order of mandatory or precautionary quarantine or isolation. In addition to job protection, eligible employees may receive up to a maximum benefit of $840.70 per week for the duration of the quarantine.
Note – notwithstanding the job protection rights afforded by NY’s COVID-19 Paid Sick Leave Law, personnel decisions that would have made absent the leave should still be permissible, but employers should be cautious about making them to avoid a claim of retaliation or discrimination.

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