



EMPLOYMENT LAW ALERT

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COVID-19 and WORKPLACE IMPACT FAQs

The COVID-19 pandemic has had an unprecedented impact on employers of all sizes in New York and nationwide. This FAQ addresses common workforce-related questions raised by the changing employment law landscape resulting from COVID-19. Of course, issues that your company may face will depend on many factors, including the nature of your work, operational concerns, size, regulatory requirements and other factors specific to your company and industry.

Workforce Reductions

1. Under Executive Order 202.6, what businesses are considered essential businesses and not required to reduce 100% of their workforce from working onsite?

The Empire State Development Corporation has issued guidance regarding what fields are considered essential businesses at <https://esd.ny.gov/guidance-executive-order-2026>. If your company does not fit into one of the fields listed in the guidance, you can request an essential business designation by submitting the following form: <https://esd.ny.gov/content/request-designation-essential-business-purposes-executive-order-2026>. Please note, we have been advised that there is a long wait period prior to receiving a decision regarding essential business designations.

2. What is the difference between a layoff and a furlough?

A furlough is a temporary, unpaid leave, or may include a reduction in hours or working days. While an employee is on a full time furlough they will remain on the payroll but will not receive wages and are not permitted to perform any work. Employers need to be sure that furloughed employees do not perform any “off the clock” work. Employees must be appropriately compensated for any such work. Also, subject to certain exceptions, exempt employees must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Many insurance carriers are being more flexible in permitting employees to stay on the employer’s health insurance while furloughed. Employers should check with the carriers for more details.

A layoff is a full separation from the company, including removing an employee from payroll and generally requires the employee to go on COBRA. Health insurance questions should be addressed to the employer’s carrier, as there may be alternatives available.

3. Are employees eligible for unemployment benefits if they are laid off or furloughed?

Employee can apply for unemployment benefits if they have been laid off or furloughed due to the Coronavirus. New York has recently passed legislation that removed the one-week waiting period before an employee is eligible for benefits. Therefore, employees can apply for benefits starting on the first day of being furloughed or laid off.

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4. What kind of notice must be provided when a company is temporarily suspending operations due to COVID-19?

The federal Worker Adjustment and Retraining Notification Act contains 60-day notice requirements for employers with 100 or more employees. The New York Worker Adjustment and Retraining Notification Act (“WARN Act”) is more onerous and requires employers of 50 or more employees to provide certain notices to employees, employee representatives, New York Department of Labor, and the Local Workforce Investment Board.

The WARN Act requires businesses to provide at least 90 days’ notice prior to a plant closing, mass layoff, relocation, or other covered reduction in work hours:

- Plant closings affecting 25 or more workers
- Mass layoffs involving 25 or more full-time workers (if the 25 or more workers make up at least 33% of all the workers at the site)
- Mass layoffs involving 250 or more full-time workers
- Certain other relocations and covered reductions in work hours

If a company does not fall under the WARN Act, but is going to reduce its workforce, there may be other obligations it must fulfill prior to initiating a layoff.

Sick Employees in the Workplace

1. Can a company ask an employee to stay home or leave work if they exhibit symptoms of COVID-19?

Yes, the Center for Disease Control (“CDC”) advises that employees who show symptoms of influenza-like illness at work during a pandemic should leave the workplace. The Equal Employment Opportunity Commission (“EEOC”) has confirmed that advising employees to go home is permissible and not considered disability-related if the symptoms presented are similar to COVID-19.

2. Can a company take an employee's temperature at work?

Yes, the EEOC has recently released guidance stating that while measuring an employee’s body temperature would usually be considered a medical examination, that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.



3. What should a company do if an employee tests positive for COVID-19?

If an employee tests positive, the CDC recommends that employers inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the ADA. The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath). The company should also follow the CDC cleaning and disinfection recommendations.

4. Can a company require a positive COVID-19 test result or healthcare provider's note to validate an employee's illness?

According to the CDC, (notwithstanding many employers' usual policies to the contrary) employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.

5. How can a company implement social distancing policies and practices in the workplace?

If your company is an essential business and is still having employees report to the workplace, the CDC recommends the following strategies for social distancing:

- Implementing flexible worksites (e.g., telework);
- Implementing flexible work hours (e.g., staggered shifts);
- Increasing physical space between employees at the worksite;
- Increasing physical space between employees and customers (e.g., drive through, partitions);
- Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events);
- Downsizing operations;
- Delivering services remotely (e.g. phone, video, or web); and/or
- Delivering products through curbside pick-up or delivery.

Families First Coronavirus Response Act

1. What does the Families First Coronavirus Response Act ("FFCRA") generally cover regarding the workplace?

The FFCRA established the Emergency Family and Medical Leave Expansion Act ("EFMLEA") which expands and provides for paid leave under the Family Medical Leave Act for limited reasons relating to the coronavirus. FFCRA also established the Emergency Paid Sick Leave Act ("EPSLA") that provides for paid sick leave for limited qualifying reasons relating to the coronavirus.



2. When does EFMLEA and EPSLA take effect?

EFMLEA and EPSLA are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

3. Are the EFMLEA and EPSLA paid leave provisions retroactive?

No.

4. Which employers are impacted by the FFCRA's EFMLEA and EPSLA?

EFMLEA and EPSLA impact employers with fewer than 500 employees. The bill authorizes the Secretary of the Department of Labor to issue regulations to: (1) exclude certain healthcare providers and emergency responders from the definition of eligible employee; and (2) exempt small businesses with fewer than 50 employees when it would jeopardize the viability of the business.

The Department of Labor states that if you want to seek a small business exemption, that a company should document why the business meets the criteria that will be set forth by the Department in future regulations.

5. Are tax credits available for employers to offset the cost of the paid leaves available under the FFCRA?

Employers are responsible to pay for the paid time covered under the FFCRA; however, the Act provides for refundable tax credits to offset the cost of compliance. Employers should keep accurate records of all such payments to employees.

6. If an employee is home caring for a child due to the child's school being closed or childcare provider being unavailable due to a public health emergency, are they eligible for EFMLEA and EPSLA?

Yes, the employee would be eligible for both types of leave, but the leave would be capped for a total of 12 weeks of paid time. EPSLA would provide paid time for the initial two week period of leave (covering the unpaid period of EFMLEA), and the remaining ten weeks would be covered by EFMLEA. The amount of compensation available to employees is address below.

Please note that an employee can only receive the additional ten weeks of expanded family and medical leave under the EFMLEA for leave to care for a child whose school or place of care is closed or unavailable, due to COVID-19 related reasons.



7. Are overtime hours included in an employee's regular rate of pay under EFMLEA and EPSLA?

The EFMLEA requires a company to pay an employee for hours the employee would have been normally scheduled to work, even if that were more than 40 hours in a week.

However, EPSLA requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under EPSLA is capped at 80.

If the employee's schedule varies from week to week, please see the answer to FAQs 12 and 19, because the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

Please note that pay does not need to include a premium for overtime hours under either EPSLA or EFMLEA.

8. Are there posting requirements for the FFCRA?

Yes, each covered employer must post a notice of the FFCRA requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

The required poster can be found at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Emergency Family and Medical Leave Expansion Act

9. How does an employee qualify for EFMLEA?

An employee must be employed for at least 30 days to be eligible for leave. The Department of Labor has issued regulations explaining that an employee is considered to be employed for at least 30 calendar days if the employee has been on the payroll for the 30 calendar days immediately prior to the day leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee would need to have been on payroll as of March 2, 2020.

10. What is a qualifying event for eligibility under the EFMLEA?

Paid leave is available under the EFMLEA when employees are unable to work (or telework) because of a need to care for a child due to the child's school being closed or childcare provider being unavailable due to a public health emergency. A public health emergency is defined in the Act as an emergency with respect to COVID-19 declared by a federal, state, or local authority.



11. Is leave paid under the EFMLEA?

The first 10 days of an employee's leave may be unpaid, but an employee may elect to use any vacation, personal or sick leave during this period. If the need for leave continues beyond the initial 10 day period, then the leave must be paid at a rate of two-thirds (2/3) of the employee's regular rate of pay, to a capped amount of \$200 per day and \$10,000 in total. Additionally, if the employee qualifies, the initial unpaid 10 day period could also be covered under the EPSLA.

12. How does an employer count hours worked by part-time employees for EFMLEA?

A part-time employee is entitled to leave for the employee's number of work hours in a two-week period. Therefore, a company calculates hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, a company may use a six-month average to calculate the average daily hours.

13. Are all leaves covered under the Family Medical Leave Act now paid?

No. See FAQ number 10 for eligibility requirements.

14. Are furloughed employees eligible for paid leave under EFMLEA?

At this time, it is unclear if furloughed employees qualify. We are hopeful that the Department of Labor will issue guidance clarifying eligibility.

Emergency Paid Sick Leave Act

15. How does an employee qualify for paid sick leave under EPSLA?

Unlike the EFMLEA, all employees are eligible to take paid sick leave under the EPSLA regardless of how long they have been employed, so long as they also have a qualifying event.



16. What events qualify employees for paid sick leave?

Paid sick leave will be available to employees under the following situations when they are unable to work (or telework):

- a) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- b) The employee has been advised by a healthcare provider to self-quarantine because of concerns related to COVID-19.
- c) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- d) The employee is caring for an individual who is subject to an order as described in subparagraph (a) or has been advised as described in subparagraph (b).
- e) The employee is caring for the employee's child because the child's school or childcare provider is closed or unavailable due to COVID-19 precautions.
- f) The employee 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.

17. How much paid sick leave are eligible employees entitled to take?

If an employee qualifies for EPSLA, the employee would be entitled to up to 80 hours of paid sick leave, and a part-time employee would be entitled to time equal to the number of hours the employee works over a two-week period.

18. How much will employees be paid during the paid sick leave period?

Employees taking paid sick leave are entitled to be paid at their regular rate of pay, capped at \$511 per day and \$5,110 in total, for uses described in paragraphs (a), (b), or (c); and \$200 per day and \$2,000 in the aggregate for uses described in paragraphs (d), (e), or (f).

19. How does an employer count hours worked by part-time employees for EPSLA?

A part-time employee is entitled to leave for the employee's number of work hours in a two-week period. Therefore, a company calculates hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, a company may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period.

20. Are furloughed employees eligible for paid leave under EPSLA?

At this time, it is unclear if furloughed employees qualify. We are hopeful that the Department of Labor will issue guidance clarifying eligibility.



New York State Emergency Sick Leave

1. What is the NYS Emergency Sick Leave?

On March 18, 2020, New York Governor Andrew Cuomo signed emergency legislation guaranteeing certain job protection and pay for New York employees who are quarantined as a result of coronavirus (COVID-19).

2. When did the NYS Emergency Sick Leave take effect?

The law took effect immediately upon being signed on March 18, 2020.

3. What does the NYS Emergency Sick Leave cover?

The law covers employees subject to mandatory or precautionary orders of quarantine or isolation issued by the New York Department of Health, local board of health, or any other government entity duly authorized to make such an order relating to COVID-19.

4. Is the leave paid?

Yes, but how much paid sick time an employee is entitled to depends on an employer's size and annual income. The breakdown of pay is as follows:

- Employers with 10 or fewer employees (as of Jan. 1, 2020) and a net income of less than \$1 million must provide unpaid sick leave until the termination of any quarantine or isolation. During this period, an employee may be eligible for Paid Family Leave benefits and/or disability benefits.
- Employers with 11-99 employees (as of Jan. 1, 2020) and those with 10 or fewer employees and a net income greater than \$1 million, must provide at least 5 days of paid sick leave, and then unpaid sick leave until the termination of any quarantine or isolation. After the five days of paid sick leave, an employee shall be eligible for Paid Family Leave benefits and disability benefits, subject to a cap of \$2,884.62 per week.
- Employers with 100 or more employees (as of Jan. 1, 2020) and all public employers must provide at least 14 days of paid sick leave during any order of quarantine or isolation.



5. What if an employee independently decides to quarantine, are they eligible for benefits?

No. This new law provides benefits in cases where an individual is under an order of quarantine – either mandatory or precautionary. Entities that may issue an “order” include the State of New York, New York State Department of Health, local Board of Health or any government entity authorized to issue such order.

6. If an employee is able to work from home, but is under a mandatory or precautionary quarantine, are they eligible for benefits under this law?

No, if an employee is not showing symptoms and is physically able to work through remote access or similar means then the employee is not eligible for quarantine leave.

7. How does an employee apply for paid family leave benefits if the employee is self-quarantining?

New York State has created a website to explain how to apply for family benefits, including the necessary documentation and forms, here: <https://paidfamilyleave.ny.gov/if-you-are-quarantined-yourself>. Go to the “How to Apply” section for more information.

8. If an employee is subject to a quarantine or isolation order as a result of non-business travel, are they eligible under the NYS Emergency Sick Leave?

No, employees who are subject to quarantine or isolation as a result of non-business travel to a country identified as level 2 or 3 risk by the Center for Disease Control are excluded from this law. Employees excluded due to non-business travel would be eligible to use accrued leave provided by the employer, if any; or if the employee does not have sufficient accrued leave, the employee can use unpaid sick leave for the duration of the mandatory or precautionary quarantine or isolation.

9. Is the NYS Emergency Sick Leave in addition to the benefits provided under the FFCRA?

The New York State law states that it shall supplement, but not be in addition to, the benefits provided to employees under the under the federal legislation.

For more information please contact

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