



Employment Law Alert

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UPDATED CORONAVIRUS LEGAL UPDATE

UPDATE TO NYS WORKFORCE REDUCTION ORDER

While many businesses have already made significant changes to their daily operations in light of the coronavirus (COVID-19) pandemic, New York State has now made additional changes mandatory with the most recent workforce reduction order. Today, March 20, 2020, Governor Cuomo updated his prior Executive Orders and has now directed that all non-essential businesses utilize telecommuting or other work from home procedures for 100% of their workforce (increased from yesterday's 75% workforce reduction Order). More information about exceptions to this Order can be found on the Empire State Development Corporation's website: <https://esd.ny.gov/guidance-executive-order-2026>.

Excluded from the mandatory workforce reduction are those businesses providing "essential services or functions." Among the excluded businesses are health care operations, essential infrastructure and manufacturing, including food processing and pharmaceuticals, essential retail including grocery stores and pharmacies, essential services such as trash collection, mail and shipping services, construction, child care, and services needed to ensure the continuing operation of government agencies and to provide for the health, safety and welfare of the public.

Businesses not already identified as essential that seek an exemption from the workforce reduction order may seek an opinion from the Empire State Development Corporation as to whether the business is deemed essential and therefore excluded from the reduction requirements. Governor Cuomo also indicated that the state will issue fines for those "non-essential" businesses that fail to abide by the State's decision.

FAMILIES FIRST- CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act was signed by the President on March 18, 2020 and will go into effect 15 days after signing. This new law is one of numerous pieces of legislation that are designed to deal with the unprecedented outbreak of coronavirus, COVID-19. Within the Families First Coronavirus Response Act, two provisions are meant to address critical employment issues raised by the pandemic: (1) Emergency Family Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA"). The Act is set to expire on December 31, 2020.

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EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

EFMLEA amends the federal Family Medical Leave Act of 1993 ("FMLA"). The EFMLEA modifies and expands the coverage of the FMLA in various ways. The revisions to the Act only cover employers with fewer than 500 employees (with limited exceptions), and employees who have been employed for at least 30 days. The EFMLEA provides qualified employees with paid family leave benefits when employees are unable to work (or telework) because of a need to care for a minor 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.

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 of the employee's regular rate of pay, to a capped amount of \$200 per day and \$10,000 in total.

As with other types of FMLA leave, the EFMLEA also contains employee reinstatement obligations. Note, employers of health care providers and emergency responders may elect to exclude such employees from the application of the EFMLEA.

At this time, employers are responsible for the paid time provided under this provision; however, covered employers that are required to offer EFMLEA will be eligible for refundable tax credits. The bill also provides that the Secretary of Labor may issue regulations excluding small businesses (fewer than 50 employees) from EFMLEA requirements, if the leave would jeopardize the viability of their business.

EMERGENCY PAID SICK LEAVE ACT

EPSLA also applies to employers with less than 500 employees, with limited exceptions. There is no minimum period of time an employee must be employed to be entitled to paid sick leave under EPSLA. Paid sick leave will be available to qualified employees under the following situations when they are unable to work (or telework):

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine because of concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2).
5. 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.
6. 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.

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. 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 (1), (2), or (3); and \$200 per day and \$2,000 in the aggregate for uses described in paragraphs (4), (5), or (6).

As of now, employers are responsible to pay for the paid time covered under this provision, however, covered employers that are required to offer paid sick leave will be eligible for refundable tax credits. The bill also provides that the Secretary of Labor may issue regulations excluding small businesses (fewer than 50 employees) from EPSLA's requirements if compliance would jeopardize the viability of their business. Additionally, as with the EFMLEA, employers of health care providers and emergency respondents may elect to exclude such employees from the application of the EPSLA.

New York Emergency Paid 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). Effective immediately, 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, are entitled to job protection and sick leave 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 will be eligible for Paid Family Leave benefits and disability benefits, subject to a cap of \$2,884.62 per week.
- 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.

Employees that 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; 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.

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

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