

CLIENT ALERT: New York State and Federal Governments Enact and Modify Paid and Unpaid Leave Laws as Part of COVID-19 Response

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On March 18, President Trump and Governor Cuomo signed into law federal and state laws, respectively, providing enhanced leave and protection to workers affected directly or indirectly by COVID-19.

PRACTICE AREAS

Employment Practices

Families First Coronavirus Response Act (Federal):

The federal law takes effect on April 2 and applies only to employers with fewer than 500 employees (certain healthcare and emergency response employers may be exempt regardless of size). It expires on December 31, 2020 (with no carryover or payout of unused leave at that point) and will require employers to post notices and update their policies to advise employees of their rights. Final notices for posting are not yet available.

Enhanced FMLA Protection

Covered employers must provide FMLA protection (i.e., up to 12 weeks of job protected leave) to any employee employed for longer than 30 days if the employee is unable to work (or telework) due to a need to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency. The law does not provide additional leave time, simply expands the reasons for which an employee can use leave. If an employee has already used his or her FMLA entitlement, they are not entitled to additional time under this provision.

The first 10 working days of such FMLA leave are unpaid, although an employee may (but is not required to) substitute sick, vacation, or PTO leave during this time. After 10 working days, the remaining 10 working weeks of leave must be paid at the lower of a) 2/3 of the employee's regular rate of pay for the hours such employees would have worked during that time or b) \$200 per day.

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Companies with fewer than 50 employees may be exempt from the leave requirements if it would jeopardize the viability of their business. Employers with fewer than 25 employees may be exempt from the reinstatement requirement of the employee (as is required for those on FMLA leave) if the employee's position no longer exists following leave due to operational changes necessitated by a downturn in business because of COVID-19.

Paid Leave

In addition to the protected and partially paid FMLA leave, employers with fewer 500 employees must provide 80 hours (or for part-timers, the amount typically scheduled to work in a two-week period) of paid sick leave to employees (including new hires) if (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 health care provider to self-quarantine because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual subject or advised to quarantine or self-isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. Pay is capped at \$511 per day where leave is taken for personal reasons (i.e., reasons (1), (2), and (3) above) and \$200 per day where leave is taken to care for others (i.e., reasons (4), (5), or (6) above). The two weeks of required paid leave may be used to cover the unpaid portion of the enhanced FMLA leave.

The paid leave required under this federal law is in addition to the leave already provided to employees under their employer's leave policies in place prior to the effective date of the Act, which may not be reduced because of these new rights.

New York Emergency Paid Sick Leave

The New York law, which takes effect immediately, provides the following benefits, depending on the size of the employer:

- **Employers with 10 or fewer employees, with net income of \$1 million or less:** Unpaid sick leave for the entire period of quarantine or isolation. Such employees will be eligible for New York State paid family leave ("NYS PFL") and disability benefits.
- **Employers with 10 or fewer employees, with net income greater than \$1 million or Employers with 11–99 employees:** Five days of paid sick leave, and unpaid leave for the remainder of the quarantine or isolation. After the paid leave, employees are eligible for NYS PFL and disability benefits.
- **Employers with 100 or more employees and all public employers:** 14 days of paid sick leave.

The New York law specifically states that an employee who is "deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while" under a quarantine or isolation order (e.g., through remote work) is not eligible for paid sick or additional PFL or disability benefits under the COVID-19 provisions of the law and that eligible employees shall only receive such benefits to the extent they exceed any benefit available under federal law passed with the intent to provide leave to employees.

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For guidance on the federal and NY laws, the interplay with current laws and your employment policies, and other employment questions related to COVID-19, please contact the Olshan attorney with whom you regularly work or Michael Passarella.

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