

COVID-19 LEAVE OBLIGATIONS FOR NEW YORK EMPLOYERS: UNDERSTANDING THE INTERSECTION OF STATE AND FEDERAL LAW

Insights
Apr 15, 2020

Both New York and the federal government passed laws providing leave for employees impacted by COVID-19, leaving employers in New York grappling to understand how the two laws intersect. New York employers are required to comply with both the [New York Emergency Paid Sick Leave Law](#) ("NY EPSL") and [the Families First Coronavirus Response Act](#) (FFCRA). After April 1, 2020, the effective date of FFCRA, employees in the state are eligible for benefits under the NY EPSL when the benefits provided by that law are in excess of those provided by FFCRA. In those instances, the employee is entitled to the federal benefits, plus the difference in benefits available under the FFCRA and the NY EPSL. The below chart summarizes the benefits under NY EPSL and FFCRA to help New York employers understand their obligations.

Related People



Melissa Camire

Partner

212.899.9965



Michael R. Marra

Co-Regional Managing
Partner

212.899.9969

	NY EPSL	FFCRA Emergency Paid Sick Leave	FFCRA Emergency FMLA leave
Covered Employers	All employers in NY; benefits vary based on size and net income of employer.	Private sector employers with fewer than 500 employees in the U.S.	Private sector employers with fewer than 500 employees.
Leave for what Purposes	Employee is subject to a mandatory or precautionary quarantine or isolation order issued by the state of New York, the Department of Health, the local board of health, or any governmental entity duly authorized to make such an order due to COVID-19. Employee can now also use statutory Paid Family Leave (PFL) to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation.	Employee is unable to work (or telework) due to a need for leave because: (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 due to 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 of self-quarantine as described above; (5) The employee is caring for a son or daughter if school or child care is closed/unavailable; or (6) The employee is experiencing any other substantially similar condition specified by HHS.	The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. "Public Health Emergency" is defined to mean an emergency with respect to COVID-19 declared by a Federal, State or local authority.
Eligible employees	All employees eligible for emergency sick leave. For PFL to care for a child subject to an order of quarantine or isolation order: • FT employees (20+ hours per week) are eligible after 26 consecutive weeks of employment; and • PT employees (<20 hours per week) are eligible after working 175 days.	All employees.	Employees who have been employed for at least 30 days.
Duration	For employee subject to quarantine or isolation order: • 10 or fewer employees and less than \$1 million in net income: No paid leave; employer must provide unpaid leave for duration of quarantine or isolation and employee is eligible for NY short term disability (DBL) and PFL benefits. • 10 or fewer employees and more than \$1 million in net income: Five days of employer paid sick leave; employee must get unpaid leave for the duration of the quarantine or isolation and is eligible for DBL and PFL benefits. • Between 11 and 99 employees: Five days of employer paid sick leave; employee must get unpaid leave for the duration of the quarantine or isolation and is eligible for DBL and PFL benefits. • 100 or more employees: 14 days of employer paid sick leave	Two weeks (80 hours for full-time employees and typical number of hours over two weeks for part-time employees).	Up to 12 weeks (the first 10 days of which are unpaid). The employee may elect to substitute any accrued paid leave (including emergency paid sick leave) during this 10-day period. The employer may not require the employee to substitute paid leave.
Exemptions	Not eligible for paid benefits if employee is subject to an order of quarantine or isolation because (i) the employee has returned to the US after traveling to a country for which the CDC has a level two or three travel health notice; (ii) the travel as not part of employment or at the direction of employer; and (iii) employee was provided notice of the travel health notice and the limitations of this law prior to such travel. In this case, employee can use accrued leave, or to the extent the employee does not have sufficient accrued leave, unpaid sick leave. Not eligible if employee as asymptomatic or has not yet been diagnosed with a medical condition and is physically able to work while under order of quarantine or isolation, whether through remote access or other similar means.	An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees' from the application of this section. The Secretary of Labor has the authority for good cause to issue regulations: • To exclude certain health care providers and emergency responders from the definition of "eligible employee." • To exempt small businesses' with fewer than 50 employees from leave to for a son or daughter if school or child care is closed/unavailable when the imposition of such requirement would jeopardize the viability of the business as a going concern. • "As necessary" (catch-all).	An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees' from the application of this section. The Secretary of Labor has the authority for good cause to issue regulations: • To exclude certain health care providers and emergency responders from the definition of "eligible employee." • To exempt small businesses' with fewer than 50 employees from the new law when the imposition of such requirements would jeopardize the viability of the business as a going concern.
Rate of Pay	For employer paid sick leave: Employees are entitled to their full, normal rate of pay they would have otherwise received had they been continuing to work for that period based upon the amount that the employee was scheduled or would have been scheduled in the normal course. Employees who work a fixed schedule or are paid a salary should continue to receive pay for the applicable period. For hourly, part-time, commissions salespeople, and other employees who are not paid a fixed wage, employers will have to	• The higher of their regular rate of pay, the federal minimum wage, or the local minimum wage for qualifying reasons (1), (2) and (3), above. This is capped at \$511 per day and \$5,110 in the aggregate per person. • Two-thirds that rate of pay for qualifying reasons (4), (5) and (6), above. This is capped at \$200 per day and \$2,000 in the aggregate per person.	After 10 days, employees are compensated at 2/3 of their regular rate of pay. This is capped at \$200 per day and \$10,000 in the aggregate per person.

Service Focus

Employee Leaves and Accommodations

Workplace Safety

Related Offices

New York

	<p>determine the employee's pay by looking at a representative period of time to set the employee's average daily pay rate.</p> <p>PFL & DBL: After using employer-paid sick leave, employees may be eligible for compensation for the remainder of their quarantine through PFL and DBL benefits. If eligible, employees are entitled to PFL benefits of 60% of their average weekly wage, up to a maximum PFL benefit of \$840.70, and DBL up to \$2,043.92.</p> <p>PFL for care of a child subject to order of quarantine or isolation: 60% of the employee's average weekly wage, up to a maximum benefit of \$840.70.</p>		
Funding	<p>For employer paid sick leave, the employer pays (with no tax credit).</p> <p>PFL and DBL benefits are paid out of PFL and DBL insurance policies.</p>	<p>Each quarter, private sector employers subject to the requirement are entitled to a tax credit² equal to the amount of qualified sick leave wages paid by the employer (subject to the same caps as apply to the leave amount paid).</p>	<p>Each quarter, private sector employers subject to the requirement are entitled to a tax credit² equal to the amount of qualified sick leave wages paid by the employer (subject to the same caps as apply to the leave amount paid).</p>
Relationship to Other Laws/Policies	<ul style="list-style-type: none"> • Employer-paid sick leave must be provided without loss to employee's accrued sick leave. • Time taken as DBL/PFL leave reduces the remaining benefit duration available under employee's regular DBL and PFL coverage. • State law benefits not available to worker eligible for federal benefits; however, if state law would provide greater benefits, employee will receive the difference between the two. 	<ul style="list-style-type: none"> • The law states that it shall not be construed in any way to diminish the rights or benefits that an employee is entitled to under any other federal, state or local law, or employer policy. This means that the leave is in addition to any rights or benefits under any other law or policy. • The DOL guidance states that paid sick leave under the FFCRA is in addition to employees' preexisting leave entitlements. 	<p>The DOL guidance³ states that employees may take a total of 12 weeks for FMLA and EFMLA during a 12-month period.</p>
Effective Date and Sunset	<p>March 18, 2020.</p> <p>No sunset date.</p>	<p>April 1, 2020.</p> <p>Sunset December 31, 2020.</p>	<p>April 1, 2020.</p> <p>Sunset December 31, 2020.</p>

¹ <https://www.fisherphillips.com/resources-alerts-top-10-things-employers-need-to-know-about>

² <https://www.fisherphillips.com/resources-alerts-an-employers-step-by-step-guide-to>

³ <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

CONCLUSION

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in [our New York office](#), or any member of our [COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#), put together by the Taskforce.