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The Federal Government and New York State Pass Paid Sick Leave and Job Protection Laws in Response to COVID-19

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In the wake of the rapidly expanding COVID-19 epidemic, New York State and federal legislators have recently enacted statutes to expand and protect paid and unpaid sick leave. The federal legislation applies to companies with fewer than 500 employees. The New York legislation applies to all companies, irrespective of the number of employees, though with different requirements depending on that number. The highlights of the new laws are as follows.

Federal Legislation

On March 18, 2020, the President signed into federal law the Families First Coronavirus Response Act (“FFCRA”). The FFCRA includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Both sets of laws must take effect no later than 15 days from March 18, 2020, thus by April 2, 2020. They will terminate on December 31, 2020, unless extended by subsequent legislation.

The **Emergency Paid Sick Leave Act** requires all employers with **fewer than 500 employees** to provide paid sick leave to all employees (full-time or part-time and regardless of length of employment) where the employee is unable to work (or telework) due to a need for leave because:

- the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19, or is caring for someone subject to such an order;
- the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or is caring for someone advised to do so;
- the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

- the employee is caring for his/her child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; or
- the employee is experiencing any other “substantially similar condition,” as specified by the Secretary of Health and Human Services.

Full-time, eligible employees must be provided 80 hours (2 weeks) of paid sick leave. Part-time, eligible employees must be provided the average number of hours that they work over a two-week period.

During the paid sick leave provided for under this act, employees are entitled to their regular rate of pay, but with caps. The cap is \$511 per day (\$5,110 in total), except for employees who are eligible for the paid sick leave (1) to care for someone as described above, or (2) because of “substantially similar conditions.” The cap for such employees is \$200 per day (\$2,000 in total).

An employer cannot terminate or take any other adverse action against an employee on the grounds that he/she takes the paid sick leave provided for above.

The **Emergency Family and Medical Leave Expansion Act** provides certain **additional** paid leave under the FMLA. It also applies to all employers with **fewer than 500 employees**. To be eligible for benefits under this act, the employee (1) must have been **employed for at least 30 days** and (2) is unable to work (or telework) due to a **need to care for his/her child** whose school or place of care has been closed, or whose child care provider is unavailable, due to a “public health emergency,” i.e., an emergency declared by a federal, state or local authority due to COVID-19. Such an employee is eligible for **12 weeks of job-protected leave**. The first **10 days of this leave** might be unpaid leave (though the employee may elect to use, for instance, accrued vacation time or unpaid sick leave under the Emergency Paid Sick Leave Act during this time). For the balance of the 12 weeks, the employee is entitled to not less than two-thirds of his/her regular rate of pay, provided that it does not exceed \$200/day (\$10,000 in total).

At the end of the 12 weeks, the employee is entitled to be restored to the position the employee held at the start of the leave (or an equivalent position) as provided for in the FMLA. There are exceptions to this requirement for employers with fewer than 25 employees if certain conditions are met, e.g., the employee’s old position no longer exists due to the economic impact of the COVID-19 pandemic on the employer and the employer makes reasonable efforts, but fails, to restore the employee to an equivalent position.

New York State Legislation

On March 18, 2020, Governor Andrew Cuomo signed a New York law (the “Act”) that also provides paid sick leave and other benefits to certain employees impacted by the coronavirus pandemic.

The law took effect immediately. It covers public and private employees who are subject, due to COVID-19, to a mandatory or precautionary order of quarantine or isolation issued by New York State, the department of health, a local board of health, or another governmental entity authorized to issue such an order (an “Order”).

The law provides the following:

- Employers with ten or fewer employees as of January 1, 2020, and a net income of **\$1 million or less** in the past tax year, must provide unpaid sick leave to all employees subject to an Order until the Order terminates. During the period of quarantine or isolation, employees shall be eligible for expanded paid family leave and disability benefits under the Workers Compensation Law (as described below).
- Employers with ten or fewer employees as of January 1, 2020, and a net income of more than \$1 million in the past tax year, must provide each employee subject to an Order at least five days of paid sick leave until the

Order terminates. After the five days, such employees shall be eligible for expanded paid family leave and disability benefits under the Workers Compensation Law. Employers with **more than ten employees but less than one hundred employees** will be subject to the same requirements regardless of net income.

- Employers with one hundred or more employees as of January 1, 2020 shall provide each employee subject to an Order at least fourteen days of paid sick leave during the time that the Order is in effect. For public employers, each officer or employee subject to an Order is entitled to at least **fourteen days** of paid sick leave during the time that the Order is in effect.
- The Act expands the definitions of “disability” and “family leave” under the Workers Compensation Law to include an employee’s inability to work as the result of an Order and the need for an employee to take leave because the employee is subject to an Order or has to care for a dependent child who is subject to an Order.

Upon return to work, each employee must be restored to the position he or she held prior to leave taken pursuant to an Order. No employer can “discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has taken leave pursuant to this act.”

The leave provided pursuant to the Act does not affect an employee’s already-accrued sick leave.

The Act does not apply to certain employees:

- Employees subject to an Order because they returned to the United States after making a personal visit to a country for which the CDC issued a level two or three travel health notice and the employee was provided such notice.
- Employees who are “deemed asymptomatic” or have not been diagnosed with any medical condition, and are physically able to work while under an Order, whether via remote access or other similar means.

The Act also provides that if the federal government mandates sick leave or employee benefits related to COVID-19 at any point while the Act is in effect, the benefits under the Act will not be available to covered employees. However, if the sick leave and/or employee benefits under the Act are greater than those mandated by the federal government, an eligible employee will be entitled to the difference. As a result, some employees who would have been eligible for paid sick leave under the Act, may instead be entitled to a greater amount of paid sick leave, as provided by the federal legislation discussed above. On the other hand, the New York law covers certain employers not covered by the federal law at all, e.g., employers with 500 or more employees.

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