

## ALERTS

## Employer Concerns — Federal and New York Legislation Responding to COVID-19 (with Chart of Requirements)

March 19, 2020

### Families First Coronavirus Response Act

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act into law. The Act will become effective April 2, 2020 and will remain in effect until December 31, 2020. The Act does not apply to employers with 500 or more employees.

#### *FMLA Expansion for Public Health Emergency*

Section 102(a)(1) of the Family and Medical Leave Act (FMLA) is being temporarily amended to include a new entitlement to leave for employees with a “qualifying need related to a public health emergency.”

With respect to this addition, the FMLA will now apply to employers with fewer than 500 employees and cover any employee who worked for the employer for at least 30 days prior to the FMLA leave. Small businesses (fewer than 50 employees) are exempt from this provision if the leave would jeopardize the viability of their business.

Employers will be required to provide up to 12 weeks of leave to employees if they are unable to work (in person or remotely) due to a need to care for a child because the child’s school or child care is unavailable due to a public health emergency. The first 10 days of this emergency FMLA leave may be unpaid. Throughout this initial period, the employee can utilize accrued vacation or sick leave. Starting on the 11th day of the leave, employers generally must pay full-time employees at two-thirds of the

employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work. Payment is capped at \$200 a day (or \$10,000 total). Employees who work part-time or irregular schedules would be entitled to payment based on the average number of hours the employee worked for the six months prior to taking the leave.

Pursuant to this addition, employers with 25 or more employees are required to restore any employee taking leave under the Act to the same or substantially same position they held prior to the leave with equivalent pay and benefits. Employers with fewer than 25 employees do not have to restore an employee to the same position if the position no longer exists after the leave due to economic circumstances caused by a public health emergency and the employer made reasonable attempts to return the employee to an equivalent position.

#### *Paid Sick Leave*

Employers will be required to provide 80 hours of paid sick-leave benefits if the employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual (not limited to family members) subject to quarantine or isolation;
5. Caring for the employee's child if the school or child care is unavailable due to a public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

#### *COVID-19 Benefits Under Group Health Plans*

The Act also expands benefits under private health plans for COVID-19-related testing and treatment. As discussed in our prior *Alert*, New York State has already required insurance carriers for fully-insured health plans to waive cost sharing for COVID-19 testing as well any emergency room, urgent care and office visits associated therewith. Such protection,

however, applied only to fully-insured health plans. The Families First Coronavirus Response Act now extends these benefits to all private health plans, including self-insured plans. The Act specifically provides that group health plans, including grandfathered health plans under the Patient Protection and Affordable Care Act, and health insurance issuers offering coverage in the individual market, must, as of the date of enactment of the Act, cover FDA-approved testing for COVID-19 and any subsequent treatment thereof without cost sharing (i.e., without deductibles, copayments and coinsurance) or other requirements (e.g., preauthorization).

Plan sponsors of group health plans should review their plan documents to make sure they are drafted to permit this required coverage, and should notify participants and beneficiaries that any COVID-19-related testing and treatment is now covered under the terms of their plans.

#### *Tax Credits for Qualified Sick Wages*

The Act provides employers with credits against the taxes imposed on qualified sick wages. Qualified sick wages are wages and compensation paid by an employer as required to be paid by the Act. Qualified sick wages taken into account for purposes of the tax credit cannot exceed:

- \$200 per individual per day of qualified sick leave; or
- \$511 per individual per day of qualified sick leave for individuals who are under a federal, state or local-ordered quarantine related to COVID-19; individuals who have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or individuals who are experiencing symptoms of COVID-19 and are seeking medical diagnosis.

The Act also provides employers with credits against taxes imposed on qualified health plan expenses allocated to the qualified sick wages. Qualified health plan expenses are the amounts paid by an employer to maintain a group health plan, but only to the extent that the amounts are excluded from employees' gross income.

These tax credits apply to wages and health expenses paid from a date to be selected by the Secretary of the Treasury to Dec. 31, 2020.

Employers need to adhere to the above requirements within 15 days and provide notice to their employees.

This federal program will work in coordination with state or local paid leave laws and benefits. Many states are proposing similar emergency legislation in an effort to navigate this rapidly evolving situation.

## **New York Sick Leave Law**

In fact, on March 18, 2020, Governor Cuomo signed a bill into law implementing new requirements for New York employers to provide sick leave and other benefits for employees subject to a mandatory or precautionary quarantine or isolation order by a government agency due to COVID-19 (an “Order”).

### *COVID-19 Sick Leave*

This law requires that all New York employers must provide unpaid sick leave until the termination of an Order. Certain employers must also provide employees with paid sick leave based on the size of the employer as of Jan. 1, 2020, shown in the chart below. After five days of paid sick leave, or after having exhausted all sick leave provided by their employer pursuant to this law, employees are eligible for short-term disability benefits or paid family leave benefits.

Employers cannot discharge, threaten, penalize, discriminate or retaliate against employees for taking this sick leave. Employees have a right to return to their position held before the quarantine leave with the same pay and other terms of employment.

This law does not apply to employees who are asymptomatic or have not been diagnosed with any medical condition and are physically able to work remotely while subject to the Order.

### *General Sick Leave*

The law also requires employers to provide employees sick leave with full job protection due to the following for either the employee or the employee’s family member: (i) mental or physical illness; (ii) for the diagnosis, care, or treatment of the mental or physical illness, injury or health condition; and (iii) absence from work related to domestic violence, a sexual offense, stalking, or human trafficking. Employers cannot require disclosure of confidential information relating to the physical or mental illness of the employee or employee’s family member as a condition of sick leave.

The requirements for leave vary based on the size of the employer the prior calendar year, shown in the chart below. The employer can require that sick leave accrue, but the rate cannot be less than one hour per 30 hours worked. The law provides that unused sick leave be carried over to the following calendar year, although employers with fewer than 100 employees may limit use of sick time to 40 hours per calendar year and employers with 100 or more employees can limit use of sick leave to 56 hours per calendar year.

The sick leave requirements related to an Order go into effect immediately, whereas the general sick leave requirements go into effect September 14, 2020.

## New York Sick Leave Requirements

<b>Employer COVID-19 Size</b>	<b>Sick Leave Requirements</b>	<b>General Sick Leave Requirements (effective Sept. 14, 2020)</b>
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4 or fewer employees and net income less than \$1 million	-	40 hours unpaid sick leave per calendar year
4 or fewer employees and net income greater than \$1 million	-	40 hours paid sick leave per calendar year
10 or fewer employees and net income less than \$1 million	Unpaid sick leave until the termination of the Order	-
10 or fewer employees and net income greater than \$1 million	5 days paid sick days	-
5 to 99 employees	-	40 hours paid sick leave per calendar year
11 to 99	5 days paid sick days	-

employees

100 or more  
employees

14 paid sick days

56 hours paid sick leave per calendar  
year

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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