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COVID-19 Employer Guidance: Expanded Leave Under Federal, NJ, NY/NYC Laws and Layoffs



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OVERVIEW

- Federal Families First Coronavirus Response Act.
- New York State COVID-19 Paid Sick Leave.
- Coordination FFCRA with NY, NYC and NJ Leave Laws.
- WARN Acts: Federal, NY, NJ.

Families First Coronavirus Response Act (“FFCRA”)

- COVID-19 Related Leave taken 4/1/2020-12/31/2020
- Emergency Paid Sick Leave (“EPSL”): Capped at up to 80 hours paid leave for non-child-care COVID-19-related reasons.
- Expanded Family and Medical Leave (“EFMLA”): Additional ten weeks (12 total) paid leave for child-care.
- EFMLA counts against “normal” FMLA.
- Doesn’t apply to employees laid off.
- Applies to all private employers with less than 500 employees.

Eligibility for EPSL Under the FFCRA

Up to 80 hours of paid leave if unable to work because the employee is:

1. Subject to federal, state, or local isolation or quarantine order;
2. Advised by health care provider to self-quarantine;
3. Symptomatic and seeking a medical diagnosis;
4. Caring for an individual [*undefined*] subject to a quarantine order or been advised to quarantine by a health care provider;
5. Caring for a child whose school or place of care has been closed due to COVID-19 (*additional 10-week EFMLA benefit if employed 30 days*); or
6. Experiencing other substantially similar condition specified HHS in consultation with the Treasury Dep't and the DOL.

Amount of Pay for EPSL under FFCRA

1. Regular Rate of Pay (Full-Time)- Own Illness/Symptoms/Quarantine Order

Capped at an amount of \$511 per day and \$5,110 in the aggregate.

2. Two-Thirds Rate of Pay (Full-Time)- All Other Reasons (Child-Care/Care for Others/TBD by Gov't)

Capped at \$200 per day and \$2,000 in the aggregate.

For EFMLA, capped at \$200 per day and \$10,000 aggregate.

3. Part-time Employees

Average hours over two week period.

EFMLA under the FFCRA (Child-Care)

- FMLA expanded to provide leave if unable to work (or telecommute) if the child's school or place of care has been closed because of a declared emergency by a federal, state, or local government authority.
- Up to 12 weeks of leave. The first 10 days are unpaid leave under EFMLA, but would be covered under EPSL.
- The next 10 weeks at a two-thirds of "regular rate" at regular hours.
- Counts against normal FMLA leave.
- Employee may elect to use accrued leave/PTO to supplement payments upon mutual agreement.

What Does Unable to Work/Telecommute Mean?

- Employer has work and FFCRA covered reason prevents employee from working.
- No leave necessary if employee and employer can agree to adjust scheduled hours or employee can perform certain tasks or work a certain number of hours from home/remotely unless unable to perform because of FFCRA reasons.
- If unable to telework or work required hours because of child care needs, entitled to take EFMLA.

FMLA (Existing)

- Employers with 50 employees within a 75 mile radius.
- Employees must work 12 months and 1,250 hours in the last 12 months.
- Up to 12 weeks of unpaid leave (continuously or intermittently) for:
 - (1) employee's serious health condition;
 - (2) care for a child, spouse or parent with a serious health condition;
 - (3) the birth of a child and to care for the child after birth; or
 - (4) the placement of a child with the employee for adoption or foster care.

FFCRA (EPSL and EFMLA)

- Employers with fewer than 500 employees [***Existing DOL regs apply to lump related businesses; no 75 mile radius limit***].
- Full-time (40+ hours) or Part-time (less than 40 hours) employees get immediate EPSL and EFMLA after employed at least 30 days.

Other Provisions of FFCRA (EPSL & EFMLA)

- Health care providers/emergency responders may be exempted.
- Doesn't apply to employers who have closed.
- May be used intermittently while teleworking or for child care.
- In addition to any other accrued leave provided by employer.
 - Can't require employees to use or exhaust their accrued leave.
 - By mutual agreement, employee may supplement with existing leave; will not receive tax credit for this amount.

Job Protection

- No retaliation and job restoration (same/substantially similar position).
- Does not prevent employer from closing/layoff that would have occurred in any event.
- Highly compensated “key” employee under FMLA-exempt.
- Employers with < 25 employees exempt if:
 - (i) position does not exist due to coronavirus- related economic conditions;
 - (ii) reasonable efforts to restore to an equivalent position; and
 - (iii) equivalent position not available in the next year.

Exemptions

A business with less than 50 employees may claim exemption if an authorized officer of the business has determined that providing EPSL or EFMLA would:

- (1) exceed available business revenues and cause business to cease operating;
- (2) entail a substantial risk to the financial health/operational capabilities because of the absence of employees with specialized skills, knowledge of the business, or responsibilities; or
- (3) result in insufficient workers necessary to operate at a minimal capacity.

Required Postings

- Must post notice of FFCRA in conspicuous place-all locations by 4/1/2020.
- May send via e-mail or mail or post on intranet for employees teleworking.
- Does not go to laid-off employees/applicants.
- Does go to new hires.

Track Payments! You are Eligible for Tax Credits!

- Dollar-for-dollar refundable tax credit on FICA taxes for payments up to the caps of EPSL and EFMLA.
- May be able to obtain credit for employer-paid medical coverage.

What About Employers in Collective Bargaining Agreements?

- Equivalent benefits may be provided through multi-employer collective bargaining agreement.
- This requires bargaining with the Union regarding contributions.

NY COVID-19 Paid Sick Leave

- Effective immediately, available to employees subject to a quarantine order by a government entity or documentation from their healthcare provider that the person qualifies for an order.
- Not for voluntary self-isolation or self-quarantine.
- No retaliation- job protection (with exceptions).

Provisions of NY COVID-19 Paid Sick Leave

- **10 or less employees & net income less under \$1 million:**
 - Employer pays no leave.
 - Immediate access to Paid Family Leave and disability benefits (short-term disability) for the period of quarantine including wage replacement for their salaries up to \$150,000.
- **11-99 employees or 10 or less employees & net income over \$1 million:**
 - Employer pays 5 days of leave.
 - After exhausted, access to Paid Family Leave and disability benefits (short-term disability) for the period of quarantine including wage replacement for their salaries up to \$150,000.
- **100 or more employees, and all public employers:**
 - Employer pays 14 days of leave.
- **All Employers: If minor dependent child is subject to an order of mandatory or precautionary quarantine or isolation, must provide job protection; and employee may apply for New York Paid Family Leave benefits.**

Limitations of NY COVID-19 Paid Sick Leave

- Employees without symptoms/diagnosis who can work remotely cannot take leave.
- Employees who traveled to Level 2 or 3 CDC travel-advisory country (not for work) who had notice of advisory can't take leave. Health insurance must continue.
- No discrimination or retaliation.
- If an employer is closed, employees may immediately apply for Unemployment Insurance, not eligible.
- Does not apply to employees whose child's school closes for preventative social distancing, i.e. subject to the general closure of local schools.

NYS Paid Family Leave (Existing)

- Eligible if regularly scheduled to work 20+ hours/week after 26 consecutive weeks of employment OR if less than 20 hours/ week, after working 175 days.
- Payroll deduction.
- Can receive up to 60% of wages to cap for 10 weeks.
- Eligible reasons:
 - bonding with a child during the first 12 months;
 - care for a family member w/ a serious health condition; or
 - immediate family member on active or impending military duty abroad.

NYS Short Term Disability (Existing)

- Maximum of 26 weeks during any 52 week period.
- Typically cannot collect STD and PFL benefits at the same time.
- Usually 7 day waiting period.
- Payroll deduction.
- 50% of wages up to \$170 per week.
- For employees who:
 - have become disabled from injuries or illness away from work; and
 - disabilities from pregnancies.

New York City Earned Safe and Sick Time Act (Unchanged)

Employees can use sick leave for absence from work due to employee's:

- Mental or physical illness, injury, or health condition.
- Need for care.
- Need for preventive medical care.
- Elective surgery, including organ donations.
- Care of a family member who needs care.
- Care of a family member who has elective surgery, including organ donations.
- Closure of employee's workplace due to a public health emergency.
- Need to care for a child whose school or child care provider is closed due to a public health emergency.

Who May Take NYC Paid Sick Leave and How Much?

- Up to 40 hours of paid sick time.
- 1 hour for every 30 hours worked.
- Existing PTO policies can be used to fulfill this requirement.
- Can use 120 days after hire.
- Begin accruing right away.

Coordination with FFCRA and Other NY Accruals

- If the employee is subject to the FFCRA, not entitled to the NY COVID-19 Paid Sick Leave (except if NY law provides more, they are entitled to the difference).
- After leave under FFCRA or NY COVID-19 Paid Sick Leave is exhausted (or employee no longer qualifies) normal leave and disability rules apply and employees may be required to use their accrued leave. Under “normal” rules, an employee and employer may agree to use accrued leave during PFL to receive full salary.
- NYC example: If COVID-19 Paid Sick Leave no longer applies, employee may use NYC Earned Safe and Sick time.

FMLA (Before FFCRA)	Unpaid, up to 12 weeks, paid if company provides.
Caring for self, if ill	Covered
Caring for Sick Family Member	Covered
Child Care Unavailable	Not Covered
Quarantine	No Provision

FFCRA (EPSL and EFMLA)	Paid, or 2/3 pay Up to Cap
Employee Ill or Quarantined	Full pay up to 80 hours
Caring for Quarantined Person	2/3 Pay up to 80 hours
Child Care Unavailable	2/3 Pay for 80 hours (PSL) and 10 Additional weeks

NYSPFL (Existing)	Reduced Pay to a Cap
Caring for self, if ill	Not Covered
Caring for Sick Family Member	2/3 Pay up to 80 hours
Child Care Unavailable	No Provision

NYS COVID-19 Paid Sick Leave	Full Pay with high cap
Employee Quarantined	Full pay for Quarantine Period, high cap
Caring for Child Who is Quarantined	Already Covered by NYSPFL, cap
Child Care Unavailable	Not Covered

NYC Earned Sick Leave	Full Pay up to Accrued Leave Amount
Caring for self, if ill	Covered
Caring for Sick Family Member	Covered
Ordered closure of Employer	Covered
Closure of Child Care	Covered

NJ Earned Sick Leave (Unchanged)

One hour for every 30 hours worked, up to 40 hours. May be carried over to the next calendar year up to 40 hours. Sick leave may be taken for:

- Own mental or physical illness, injury, or health condition;
- Health condition of the employee's family member;
- Own or family member's doctor's appointment, including preventative care;
- Circumstances re: employee's or family member's domestic or sexual violence, including stalking;
- Attend school related-events for child;
- Employee's workplace or child's school or place of care closed due to a public health emergency; or
- If public health authority determined presence of employee or their family member would jeopardize the health of others.

NJ Earned Sick Leave and COVID-19

- Employee tests positive or has symptoms.
- Employee or relative employee cares for on self-quarantine.
- Child's school ordered closed by public health official.
- Place of business ordered closed.
- At risk due to pre-existing condition.

May be eligible for temporary disability or Family Leave for quarantine. If workplace closed or hours cut, unemployment.

Employers cannot discriminate against employees who take leave for quarantine-job protection.

COVID-19 SCENARIOS & BENEFITS AVAILABLE

COVID-19 SCENARIOS	EARNED SICK LEAVE	UNEMPLOYMENT INSURANCE	TEMPORARY DISABILITY/FAMILY LEAVE INSURANCE	WORKERS' COMPENSATION
1 A person who has COVID-19, or symptoms of COVID-19	✓	✗	✓	?
2 Worker was unable to work because of school or daycare closed for a public health reason	✓	✗	✗	✗
3 Worker was exposed and quarantined. Business remains open.	✓	✗	✓	?
4 A person who is out of work because employer voluntarily closed	✗	✓	✗	✗
5 A person who is out of work because employer was ordered closed	✓	✓	✗	✗
6 Worker has less hours available due to business slow down or lack of demand	✗	✓	✗	✗
7 Employer stays open in defiance of public health urging to close, and worker refuses to work	✓	?	✗	✗
8 Worker is afraid of gathering in a group and refuses to go to work (self-distancing)	✓	✗	?	✗
9 Worker is immune-compromised and advised by healthcare provider to self-quarantine	✓	✗	✓	✗
10 Health care worker exposed at work and self-quarantined	✓	✗	✓	✓
11 Worker is caring for a sick family member	✓	✗	✓	✗



NJ.GOV/LABOR

✓ YES | ✗ NO | ? MAYBE (CASE BY CASE)

The information on this flier is meant to give a general picture of benefits and rights available in certain COVID-19 work-related situations. Documentation may be required.

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WARN ACT (FEDERAL)

- 100 or more employees.
- Provide 60 days' advance notice where an "employment loss" occurs due to:
 - a plant closing (i.e., terminating at least 50 employees); or
 - a mass layoff (i.e., employment loss of 500 employees, or 1/3 of workforce, minimum of 50 employees).
- "Employment loss" incl. cutting hours more than 50% for 6+ months.
- # of job losses is based on a 30-day period but can be on a rolling 90-day period.
- If 60 days' notice not provided, employer required to pay 60 days' pay and benefits.

Exceptions to WARN 60-Day Notice Requirement

- natural disasters,
- unforeseeable business circumstances, and
- a faltering company (only applies in the context of closings)
- Fact-specific
- Not clear whether COVID-19 pandemic is a “natural disaster” or “unforeseeable business circumstance”.
- Doesn’t include layoffs less than 6 months.
- Where exceptions apply, provide notice ASAP with reason for delayed notice.

NY WARN ACT

- As few as 50 employees (can include part-time employees) and
 - plant closing affecting only 25 employees or
 - layoff affecting either 250 employees, or 25 or more employees if those employees are 1/3 of workforce.
- Includes cutting hours more than 50% for 6+ months.
- Under the New York WARN Act, 90 days' advance notice is required- if not provided, must pay back wages and benefits for up to 60 days; penalties.
- Excludes temporary layoffs of 6 months or less.
- Exceptions include: faltering company, unforeseeable business circumstances, natural disaster. Provide notice as soon as possible.

NJ WARN ACT (Current)

- If operating over 3 years; employ 100 or more FT employees, notice upon:
 - Termination of operations resulting in termination of 50+ employees, or
 - a mass layoff during any 30 day period for 500+ employees, or for 50+ employees if they are 1/3 or more of workforce.
- 60 days notice/ if less, severance must be provided to FT employees.
 - One week for each full year of employment in addition to any other severance paid.
 - Back pay for WARN period credited towards severance criteria.
- Period of 6 months or more; if extends beyond 6 months because circumstances not “reasonably foreseeable” at the time of initial layoff, provide notice ASAP.
- “Termination of operations” doesn’t include termination of operations because of a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs or license revocation.

NJ WARN ACT AMENDMENTS (EFFECTIVE JULY 19, 2020)

- 90 day advance written notice .
- Employer of 100 or more employees (including part-time employees).
 - Termination of 50 or more employees.
- Mandatory severance of one week/per year of service.
- Severance may not be waived w/o Court of NJDOL approval.
- If notice is not provided, employer must pay employee for the 90 days, AND provide additional severance of four weeks' pay.

Considerations for Providing Notice

- Businesses subject to closures or restrictions didn't have enough time to provide advance notice.
- Notice should be provided as soon as possible or when it becomes apparent closure or layoff may extend beyond 6 months.
- Economic impact on businesses after reopening.
- Job descriptions may change, as may business strategies.
- Take stock of economic situation, impact of an extended closure, financial viability, and whether future layoffs may be necessary to ensure the financial viability.

THANK YOU!

QUESTIONS?

Please check our website

www.pecklaw.com

for updates and additional information.

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