

LABOR AND EMPLOYMENT

ALERT

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U.S. and New York Legislation Gives Workers Covid-19 Paid Sick Leave, with Other States Considering Related Bills

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On March 18, 2020, the U.S. Congress passed and the President signed the sweeping Families First Coronavirus Response Act to be effective from April 2, 2020 until December 31, 2020. It effectively requires employers with 50-500 employees to provide up to two weeks of paid sick time and amends the Family and Medical Leave Act of 1993 to provide paid family and medical leave at partial pay after the first two weeks of paid leave. The legislation also provides employers with tax credits to offset the costs arising from the two types of paid leave. In addition to the employment-related provisions, the bill provides all individuals access to free coronavirus testing.

The “Families First Coronavirus Response Act” has been sharply criticized because it does not apply to employers with more than 500 employees, so-called large employers, and has numerous exemptions for employers with fewer than 50 employees. Perhaps in response, on March 18 New York state also passed and the Governor immediately signed legislation that requires COVID-19 paid sick leave for employers having far fewer than 50 employees. In addition, New York’s law includes provisions establishing generalized paid sick leave for workers. Several other states are also considering legislation which would provide workers COVID-19 related paid sick leave. We are following these developments closely and will publish updates as appropriate.

Important features of the Families First Coronavirus Response Act include:

Paid Sick Leave

- Until December 31, 2020, employees who have worked for any duration at an employer with fewer than 500 employees will receive up to 80 hours of paid sick leave; part-time employees will receive the number of hours equal to the average hours worked over a two week period. There are special formulas for employees who have fluctuating work weeks.
- Paid sick time applies to the quarantine of the employee or a family-member, care of a child under 18 whose school or child care facility closed, or diagnosis or care for symptoms of COVID-19.
- Employees using paid sick time for their own quarantine, diagnosis or care will be paid the greater of the employee’s wage rate, the federal minimum wage, or the applicable state and local minimum wage up to a cap of \$511 per day. Employees using paid sick leave for a family member’s covered reason will only be entitled to two-thirds of their wages up to a cap of \$200 per day.
- The paid sick leave supplements any existing paid sick leave of an employer. Employers may not require an employee to exhaust paid leave furnished by the employer as a precondition to using the COVID-19 paid time off or change existing paid time off plans in response to the law.

- Employers with fewer than 50 employees can seek a hardship exemption from the Secretary of Labor if the costs will threaten the business.
- Employers subject to a multi-employer Collective Bargaining Agreement can make contributions to a union fund, which will make the distribution, instead of providing the paid sick leave directly to employees.
- Employers will be required to post a notice regarding the paid sick leave requirements. The Secretary of Labor will publish the notice by March 25, 2020.

Emergency Family and Medical Leave Act Amendment (“Emergency FMLA”)

- Until December 31, 2020, employees who have worked for an employer for 30 days will be eligible for paid Emergency FMLA leave arising from COVID-19.
- Because there are significant exemptions which may apply to small businesses with fewer than 50 employees, only employers with 50 to 500 employees during each of 20 or more calendar weeks in the current or preceding year are certainly bound by the Emergency FMLA requirements.
- The first 10 work days of Emergency FMLA leave are unpaid. After the initial 10 work day leave period, the employer must provide paid leave at a rate equal to two-thirds of the pay the employee would have earned if working. There are special formulas for employees who have fluctuating work weeks. Each employee is subject to a cap of paid Emergency FMLA leave of \$200 per day or \$10,000 in the aggregate.
- Emergency FMLA leave applies to the care of a child under 18 whose school or child care facility closed due to a COVID-19 public health emergency. The employee must be unable to telecommute, in order to claim Emergency FMLA leave.

- Employers subject to a multi-employer Collective Bargaining Agreement may make contributions to a fund to provide employees paid Emergency FMLA leave in lieu of paying sick leave directly.

Employer Tax Credit

- Employers will receive a tax credit for providing paid sick leave to employees of 100% of any paid sick leave up to a maximum per employee of \$511 per day, and \$200 per day for employees’ leaves to care for family members. Self-employed individuals will be eligible to receive a similar credit.
- Employers will receive a credit for Emergency FMLA leave equal to 100% of any paid family leave subject to certain limitations. Employers will be limited to \$200 per day per employee and \$10,000 in the aggregate. Self-employed individuals also are eligible for a similar credit.

States Poised to Provide Paid Sick Leave and Covid-19 Benefits

New York state has enacted a paid sick leave statute which includes COVID-19 specific paid leave. Meanwhile, other states are considering enacting laws to require employers to provide paid sick leave to employees, some tied directly to COVID-19.

The important features of the New York law include:

- Provides job protection for employees who take a leave of absence “during a [governmental] mandatory or precautionary order of quarantine or isolation” to slow the spread of COVID-19.
- Requires five days of *unpaid* emergency sick leave for employees of businesses with fewer than 10 employees. Employers with 10 or fewer employees and more than \$1 million of net income during the prior tax year are required to provide employees with five *paid* sick days. Employers with 11 to 99 employees are also required to provide employees with five *paid* sick days. Employers with more than 100 employees are required to provide 14 days of *paid* sick leave.

- Expands the coverage of existing short term disability under the workers compensation statute and the existing paid family leave to employees impacted by COVID-19.
- Provides paid sick leave, unrelated to COVID-19, to workers of up to 40-56 hours per year, depending on the size of the employer. The general paid sick leave provisions go into effect 180 days after the law is effective or September 14, 2020. Employees will not be eligible to use accrued leave until January 1, 2021. New York is the fourteenth state to require mandatory paid sick leave to employees.
- Expressly addresses the federal Families First Coronavirus Response Act by guaranteeing to workers at all but the smallest businesses the difference between the richer benefits granted under the New York law and any lesser benefits provided under federal law.

The New York law covers more workers than the new federal statute. Namely, it covers employers with fewer than 50 employees as well as large employers with more than 500 employees.

New Jersey's legislature is considering two bills to protect workers impacted by COVID-19. One bill, A3848, would provide job-protected leaves to employees who request time off due to concerns that they have or are likely to have COVID-19 and thus could spread it to others. The other bill, A3846, creates a temporary unemployment fund which will pay workers actual lost wages if they need to take time off (1) to care for a family member who has COVID-19, (2) due to their own illness, (3) due to a child's school or childcare facility closing because of COVID-19, or (4) for other reasons determined by the Commissioner of Labor. Employees will only receive lost wages for that period which are not covered by other available paid leave. Employers will also be able to receive compensation from the fund to the extent they pay employees who are ordered under quarantine by a healthcare provider. The above proposal notwithstanding, employees in New Jersey can use paid sick leave for public health emergencies,

including the COVID-19 outbreak, per the existing New Jersey Earned Sick Leave Law.

Other states considering enhancing workers' sick leave benefits include California, Kentucky, Maryland, Hawaii, Minnesota, and Washington State.

We are watching this legislation closely and, if any other states enact laws similar to the new statute in New York, we will report on their features and the interplay with the federal Families First Coronavirus Response Act.

This Alert was based on information available at the time of publishing. It is subject to change. You should consult government websites and publications for the most up-to-date information. ♦

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