

New York State's New COVID-19 Sick Leave

On the same day the President signed the Families First Coronavirus Response Act that expanded Family Medical Leave Act ("FMLA") protections and provided emergency paid sick and child care leave to many workers (discussed in Thursday's [alert](#)), New York Governor Andrew Cuomo signed into law legislation (the "Act") providing all New York employees with COVID-19-related sick leave, as well as expanded access to New York Paid Family Leave ("PFL") and New York statutory short-term disability benefits.

New Mandatory Sick Leave. Under the Act, which went into effect immediately (i.e. on March 18, 2020), employees are entitled to sick leave when unable to work (or work remotely) due to a "mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such order due to COVID-19." The amount of available sick leave—perhaps better termed "quarantine leave"—available to an employee, and whether it is paid or unpaid, varies based upon the size (as of January 1, 2020) and profitability of their employer, as follows:

- **10 or fewer employees and net income of \$1 million or less in 2019:** *unpaid* sick leave until the termination of the quarantine or isolation order
- **10 or fewer employees and net income of greater than \$1 million in 2019:** five *paid* sick leave days and then *unpaid* sick leave until the termination of the quarantine or isolation order
- **Between 11 and 99 employees:** five *paid* sick leave days and then *unpaid* sick leave until the termination of the quarantine order
- **100 or more employees:** 14 days of *paid* sick leave during the pendency of the quarantine order.

All paid sick leave is to be paid at the employee's regular rate of pay.

Exclusions. Employees who are subject to a mandatory or precautionary order of quarantine or isolation because they traveled to a country subject to a [Centers for Disease Control \("CDC"\) Level 2 or Level 3 Travel Advisory](#) for non-business travel are not entitled to *paid* sick leave if their employers provided them notice of the travel health notices and the possible forfeiture of the right to *paid* sick leave prior to travel.¹ However, such employees are entitled to *unpaid* sick leave until the termination of the quarantine or isolation order. Additionally, asymptomatic employees subject to a quarantine or isolation order who are able to work remotely are not covered by the Act.

Interaction with Other Sick Leave. Although New York Department of Labor guidance is needed, it appears that sick leave under this Act may (at least when taken as a result of a quarantine or isolation order) be taken concurrently with the emergency paid sick leave provided under the federal Families First Coronavirus Response Act, with the employee receiving the greater benefit amount between the two laws. Assuming concurrent leave is permissible, since the amount of pay will often be greater from sick leave under the Act but the maximum amount of leave will often be greater under federal emergency paid sick time, one interpretation of the Act might suggest that employers who want to comply with the requirements of these laws may end up with a bifurcated approach (where sick days are initially paid at full pay under New York law but will ratchet down to \$511, or \$200, per day under federal law).

¹ To ensure compliance with the notice requirement, employers should email or otherwise contact all employees with instructions on how to monitor the CDC travel advisories, and inform them that personal travel to countries covered by Level 2 or 3 advisories could jeopardize their eligibility for paid sick leave under the Act.

In addition, employers may not deduct employer-provided sick leave that has accrued to an employee when an employee takes sick leave under this Act, which appears to include New York Sick/Safe Leave. In other words, sick (quarantine) leave under this Act is in addition to other sick leave to which an employee is already entitled.

Expansion of Disability and PFL. Once paid sick leave under the Act has been exhausted (or, where only unpaid sick leave under the Act is required to be provided, during the unpaid sick leave), employees (who work for employers that have between 1 to 99 employees)² may be eligible for partial wage replacement under expanded statutory short-term disability and PFL provisions.

With respect to short-term disability benefits, the Act:

- expands the definition of “Disability” to include those who, because of a quarantine or isolation order, cannot perform their job (including working remotely) or any other job their employer offers them *and* have exhausted their paid sick leave under the Act;
- makes employees immediately eligible for benefits when eligibility is due to a quarantine or isolation order (eliminating the one-week waiting period that is ordinarily applicable);
- allows employees to simultaneously receive short-term disability and PFL benefits taken due to a quarantine or isolation order, which is ordinarily prohibited;³ and
- increases the maximum weekly disability benefit—for purposes of “disability” due to a quarantine or isolation order only—to a maximum of \$2,043.92.⁴

The Act also expands PFL to cover employees who are unable to work (including working remotely) because:

- they are subject to a quarantine or isolation order; or
- a minor dependent child is subject to a quarantine or isolation order.

The expanded PFL for quarantine-related reasons appears to apply only after paid sick leave under the Act is exhausted. The maximum weekly PFL benefits remains capped at \$840.70, the generally-applicable 2020 PFL benefits cap.

No Retaliation / Reinstatement. Employers are also prohibited from discriminating or retaliating against employees who take leave under the Act, and employees must be restored to their previous position upon termination of leave.

² Initial guidance released by the New York State Department of Labor interprets the Act to not provide the expanded statutory disability and PFL benefits due to COVID-19 related reasons to employees who work for employers that have 100 or more employees. Instead, the guidance suggests that the 14 days of paid sick leave required to be provided by these larger employers under the Act “should cover the period of mandatory or precautionary quarantine or order of isolation.”

³ It appears that an employee who is eligible for short-term disability and PFL for reasons not covered under this Act (*e.g.*, birth of a child), would be prohibited from simultaneously receiving short-term disability and PFL benefits.

⁴ In the case of short-term disability benefits provided due to quarantine-related reasons, the Act modifies the maximum weekly disability benefit to be the difference between the maximum family leave benefit (*i.e.*, \$840.70 per week) and the employee’s total average weekly wage from each covered employer, subject to a maximum benefit of \$2,043.92 per week.

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Lisa E. Cleary

212.336.2159

lecleary@pbwt.com

Catherine A. Williams

212.336.2207

cawilliams@pbwt.com

Douglas L. Tang

212.336.2844

dtang@pbwt.com

Sara A. Arrow

212.336.2031

sarrow@pbwt.com

Hyatt M. Howard

212.336.2567

hhoward@pbwt.com

Ryan J. Kurtz

212.336.2405

rkurtz@pbwt.com

To subscribe to any of our publications, call us at 212.336.2813, email info@pbwt.com or sign up on our website, <https://www.pbwt.com/subscribe/>.

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