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Questions Clients Are Asking About The Families First Coronavirus Response Act

Employment Law Questions for Employers Amid Coronavirus Outbreak

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As more states implement mandatory business closures and quarantine orders as a result of the spread of the novel coronavirus (COVID-19), employers and HR departments are looking for guidance on how to comply with the Families First Coronavirus Response Act, passed by the United States Congress and signed into law by President Donald J. Trump on March 18, 2020. This update addresses common questions employers are asking Quinn Emanuel lawyers about the Families First Coronavirus Response Act and a recent New York state law, both of which expand existing family and sick leave laws.

1) What is The Families First Coronavirus Response Act? And How Does It Differ From Existing Laws?

The Families First Coronavirus Response Act (the "Act") requires certain employers to provide employees with paid sick or family leave for specified reasons related to COVID-19. The Act becomes effective on April 1, 2020, and will remain in effect through December 31, 2020.[1] Any leave taken before the Act's effective date does not count towards the Act's leave requirements and the Department of Labor ("DOL") has stated that it will observe a 30-day grace period (ending April 17, 2020) during which it will not pursue any enforcement action, so long as employers act reasonably and in good faith (discussed *infra*).

The Act contains two separate subsidiary acts, the *Federal Emergency Family and Medical Leave Expansion Act* ("Emergency FMLA") and the *Federal Emergency Paid Sick Leave Act* ("Emergency Paid Sick Leave"). These two acts vary significantly and should be analyzed separately.

Federal Emergency Family and Medical Leave Expansion Act

Covered Employers

The FMLA ordinarily covers most state and local public employers regardless of size, a minority of federal employees, and all private employers with 50 or more employees during each of 20 or more calendar workweeks in the current or preceding calendar year. The Emergency FMLA expands the definition of employer to include all private employers with **fewer than 500 employees** and removes the "20 or more calendar workweeks" requirement.[2]

Eligible Employees

Under the FMLA, eligible employees must (i) be employed for at least 12 months by the employer, (ii) have worked for at least 1,250 hours during the previous 12 months; and (iii) work at a location where at least 50 employees are employed by the employer within 75 miles. The Emergency FMLA expands eligibility to include any employee who has been employed by the employer for at least 30 days, regardless of the number of hours worked.[3] The Emergency FMLA also eliminates the requirement that to be eligible, employees work at a location where at least 50 employees are employed by the employer within 75 miles.

Employers of health care providers and emergency responders, however, may elect to exclude employees from the public health emergency leave requirements.[4] A "health care provider" is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes employees of any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.[5]

An "emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility, and any individual that the highest official of a state or territory determines is an emergency responder necessary for the response to COVID-19.[6]

Qualifying Reasons for Emergency FMLA Leave

The Emergency FMLA creates a new category of protected leave for employees with a "qualifying need related to a public health emergency."[7] Under this category, an employee may take FMLA leave if he or she is unable to work (or telework) due to a need to care for a son or daughter under 18 years of age if, because of a COVID-19 public health emergency, the child's:

- School or place of care has been closed; or
- Child-care provider is unavailable.[8]

The DOL has indicated that employees seeking family medical leave are required to provide employers with proof of school or daycare closure or child-care provider unavailability—for example, a school's notice of closure (including a notice posted on a website or published in a newspaper) or an e-mail from a childcare provider.[9]

Paid Leave

Traditionally, the FMLA provides up to 12 weeks of unpaid job-protected leave for eligible employees. Under the Emergency FMLA, the first ten days of leave is unpaid.[10] An employee, however, may elect to substitute accrued paid vacation, sick leave, or personal time off during that time period. **Leave after the first ten days must be paid at a rate of at least two-thirds the employee's regular rate of pay based on the employee's regular schedule**.[11] For each employee, paid leave shall not exceed:

- $200 per day, and
- $10,000 in total.[12]

In the case of an employee whose schedule varies from week-to-week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked, the employer is instructed to make the calculation based on the average number of hours that the employee was scheduled per day over the 6-month period ending on the date the employee takes FMLA leave.[13] If the employee did not work over such period, the employer should base the calculation on the reasonable expected hours the employee would have worked at the time of hiring.

Part-time employees are entitled to paid leave based on the average number of hours worked in a two-week period. Employers should thus calculate hours of leave based on the number of hours the part-time employee is normally scheduled to work. Where a part-time employee's schedule varies, employers may use a six-month average to calculate average daily hours. For part-time employees who have not been employed for at least six months, employers should use the number of hours the employer agreed the part-time employee would work upon hiring or calculate the number of hours of paid family medical leave based on the average hours per day the employee was scheduled to work over the entire term of employment.[14]

Leave Amount and Usage

As explained above, the Emergency FMLA adds another category of qualifying need to the FMLA—to care for a child whose school closed or whose child-care provider is unavailable due to the COVID-19 virus. The total amount of available leave is the same as under the FMLA (12 weeks in a 12-month period). However, under the Emergency FMLA, the first 10 days of leave are unpaid and the remaining ten weeks are paid leave. Employees must provide notice to their employers as soon as practicable when the need for leave is foreseeable.[15] The employer and employee can agree that Emergency FMLA Leave be taken intermittently.[16]

Job Protection

Employees returning from FMLA leave generally have the right to return to the same or an equivalent position. The Emergency FMLA contains an exception to the job-restoration right for employers with fewer than 25 employees when their employees take public health emergency leave if all the following conditions are met:

- The employee's position no longer exists because of economic or other operating conditions affecting employment and caused by a public health emergency.
- The employer makes reasonable efforts to return the employee to an equivalent position.

- If unable to return the employee to an equivalent position, the employer makes reasonable efforts to contact the employee about available equivalent positions for one year, beginning on the earlier of:
    - the end of the employee's qualifying need due to a public health emergency; or
    - 12 weeks after the employee's leave began.[17]

Thus, under the Emergency FMLA, an employer with fewer than 25 employees need not return an employee to the same or equivalent position if the employee's position no longer exists due to conditions caused by the public health emergency, but the employer must make reasonable efforts to contact the employee for one year regarding available equivalent positions.

Exemption for Employers with Fewer than 50 Employees

Small businesses, including religious and nonprofit organizations, with fewer than 50 employees may be exempt from providing leave due to school closings or child-care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.[18] A small business may claim this exemption if an authorized officer of the business has determined that:

> (1) The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
>
> (2) The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
>
> (3) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.[19]

Federal Emergency Paid Sick Leave Act

Coverage

The Emergency Paid Sick Leave Act covers private employers with **fewer than 500 employees** and all public employers.[20] Paid sick leave under the law is available for immediate use, regardless of how long the individual has been employed by the employer.[21]

Qualified Leave

Under the Emergency Paid Sick Leave law, employers must provide paid sick leave if the employee is unable to work or telework because of any of the following conditions:

> (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
>
> (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child-care provider of such son or daughter is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.[22]

Employees taking Emergency Paid Sick Leave are required to provide documentation—for example, a copy of the quarantine or isolation order or written documentation from a healthcare provider—to their employer.[23]

Leave Amount

Covered full-time employees are entitled to 80 hours of Emergency Paid Sick Leave.[24] Part-time employees are entitled to paid sick leave totaling the average number of hours the employee works during a two-week period.[25]

How sick pay is computed depends on the employee's reason for taking sick leave. For employees taking sick leave due to the employee's own health condition or quarantine (leave qualifications 1, 2, or 3 above), paid sick leave is paid at the employee's regular rate of pay, the federal minimum wage or the state and local minimum wage, whichever is greater.[26] However, sick pay is capped at $511 per day and $5,110 in total[27] Sick pay is paid at two-thirds the employee's regular rate of pay, the federal minimum wage, or the state and local minimum wage, whichever is greater, if the employee is taking leave to care for another individual (leave qualifications 4, 5, and 6 above), with a cap of $200 per day and $2,000 in total.[28]

Restrictions

Employers cannot require that employees:

- Use other available paid or unpaid leave before allowing Emergency Paid Sick Leave.[29]
- Find a replacement to cover the employee's hours or shift before allowing paid leave.[30]

In addition, unless an employee is teleworking, Emergency Paid Sick Leave must be taken in full-day increments and cannot be taken intermittently if:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(3) If the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(4) If the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or

(5) If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.[31]

Once an employee begins taking Emergency Paid Sick Leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave.[32] This limit is imposed because the intent of the Act is to provide paid sick leave as necessary to keep an employee from spreading the virus to others.[33]

The law expressly states that it does not diminish any employee rights under an existing law, employer policy, or CBA.[34] As a result, Emergency Paid Sick Leave is in addition to any other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or an employer's existing company policy.[35]

Other Requirements

The Emergency Paid Sick Leave law prohibits discrimination or retaliation against employees who take leave under the law or complain about violations of the law.[36]

Requirement Common To Both The Emergency FMLA And Emergency Paid Sick Leave Act

Posting Requirement

Employers who are covered by the Emergency FMLA and the Emergency Paid Sick Leave law must post a notice regarding employees' rights under the emergency law. Posters are available on the DOL's website, https://www.dol.gov/agencies/whd/pandemic.

Under recent DOL guidance, employers can comply with this requirement in one of three ways: (i) post the required notice in a conspicuous space on its premises; (ii) email or direct mail the notice to its employees; or (iii) post the notice on an employee information internal or external website. Although employers are not required to post the notice in languages other than English, the DOL is working on translating the notice to other languages. Employers are not required to share the notice with job applicants or employees who were recently laid off. However, covered employers do need to provide the notice to all new hires.

2) Which Employees Should Be Counted When Determining If An Employer Has 500 Employees?

Both part-time and full-time employees count towards the 500-employee threshold. In addition, employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether they are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency count towards the 500-employee threshold.[37]

When discussing employees who are jointly employed, the DOL guidelines refer to the FLSA, and the criteria it uses to determine joint employer. The DOL issued a new rule, effective March 16, 2020, to clarify the test for joint employment under the FLSA[38] Under the new rule, there are two scenarios in which an employee may be considered jointly employed by two employers. The first scenario involves an employee who is employed by one employer, but the work performed by the

employee simultaneously benefits another person or entity.[39] The other person or entity will be considered a joint employer only if that person or entity is acting directly or indirectly in the interest of the employer in relation to the employee.[40] In making that determination, four factors are considered—whether the other person or entity: (i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records.[41] No single factor is dispositive and whether a person is a joint employer under the Act will depend on all the facts in a particular case. Courts have found temporary work agencies to satisfy these criteria under certain circumstances.[42]

In the second scenario, an employee is employed by one employer for a certain set of hours in a workweek, and by another employer for a separate set of hours in the same workweek.[43] Under this scenario, each employer may "disregard all work performed by the employee for the other employer in determining its own responsibilities under the Act," unless the employers are "sufficiently affiliated."[44] Employers are "sufficiently affiliated" and thus "joint employers" where: (i) there is an arrangement between them to share the employee's services; (ii) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (iii) the employers share common control of the employee because one employer controls the other or the employers are under common control.[45]

Independent contractors under the FLSA are not considered employees for purposes of the 500-employee threshold.[46]

The DOL has not issued any guidance regarding counting furloughed employees. However, it is possible that the DOL will allow furloughed employees—particularly those who still receive benefits from the employer and have defined conditions to return to work—to be counted toward the 500-employee threshold.

3) <u>Are All Employees Of Affiliated Companies Counted Towards The 500 Employee Threshold?</u>

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees would be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA (see above),[47] in which case all of their common employees would be counted in determining whether the employer meets the 500-employee threshold.

In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA.[48] If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of the 500-employee threshold. Whether two entities constitute an "integrated employer" under the FMLA turns on a multi-factor test. The factors to be considered include (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control.[49]

4) <u>What Are The Consequences Of Violating The Act?</u>

Violations of the Emergency FMLA are treated as violations of the FMLA, and violations of the Emergency Paid Sick Leave Law are treated as violations of the FLSA. Accordingly, violating the

Act may subject employers to private lawsuits for the remedies available under those laws—back pay, liquidated damages, and attorney's fees—or potentially criminal proceedings under the FLSA.[50]

In a field bulletin released March 26, 2020 (but dated March 24, 2020), the DOL stated it will observe a 30-day grace period—from March 18 through April 17—during which time it will not bring enforcement actions under the Act, provided employers make reasonable, good-faith efforts to comply with the Act.[51] The field bulletin explains that an employer acts "reasonably" and "in good faith" where: (1) the employer remedies any violation by making "employees whole as soon as practicable,"; (2) the employer's violations were not "willful"; and (3) the employer confirms in writing to the DOL that it will comply with the Act in the future.[52]

5) Can I Lay Off Or Furlough Employees After The Act Takes Effect?

Yes. The Act does not require that employers provide Emergency FMLA or Emergency Paid Sick Leave to laid off or furloughed employees.[53] This is true whether an employer closes its worksite or furloughs employees for lack of business or because it is required to close pursuant to a Federal, State, or local directive.[54] If an employer closes or furloughs employees while an employee is on Emergency FMLA Leave or Emergency Paid Sick Leave, the employer must pay for any leave used before the closure or furlough takes effect.[55] But, as of the date of the closure or furlough, an employee is no longer entitled to Emergency FMLA Leave or Emergency Paid Sick Leave.[56]

The law, however, makes it unlawful for any "employer to discharge, discipline, or in any other manner discriminate against any employee who takes leave in accordance with this Act." In addition, layoffs could bring an employer within the scope of the Act, if after the layoffs the employer has fewer than 500 employees.

Employers laying off more than 50 employees may still be subject to the Federal Warn Act ("WARN")[57] and analogous state laws. The WARN Act requires employers to provide 60-days' notice to employees of mass layoffs—defined as employment loss for 50 or more full-time employees or 500 or more full-time and part-time employees.[58] Violation of the WARN Act may give rise to a civil action for back pay for each day of the violation, and attorney's fees.[59]

6) Does "Regular Rate Of Pay" Include Overtime Hours?

Yes. The Emergency FMLA requires that employers pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

Under the Emergency Paid Sick Leave law, an employee is only entitled to paid leave up to 80 hours over a two-week period. For example, an employee who is scheduled to work 45 hours a week would be entitled to 45 hours of paid sick leave in the first week and 35 hours of paid sick leave in the second week.

Importantly, under both the Emergency FMLA and Emergency Paid Sick Leave, while an employer must provide paid leave for the hours an employee would normally work, including overtime, the employer does not need to include a premium—i.e., does not need to pay time-and-a-half—for overtime hours.

7) How Do I Calculate An Employee's "Regular Rate Of Pay" If The Employee's Pay Has Changed Over Time?

The regular rate of pay is calculated by taking the average rate of pay the employee has received over a period up to six months from the date on which leave is taken. If the employee has not worked for the employer for six months, the regular rate of pay is calculated based on the average rate of pay for each week the employee has worked for the current employer. Employers may also calculate an employee's "regular rate of pay" by dividing all compensation that is part of the employee's regular rate over the relevant six-month period and dividing that number by the number of hours actually worked in that period.[60]

Commissions, tips, or piece rates are all incorporated into the above calculation.

8) Can An Employee Elect To Stay Home Under Emergency FMLA Leave To Avoid Getting Exposed To COVID-19?

No. Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the Emergency FMLA. But if the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, they could claim benefits under the Emergency Paid Sick Leave Act. In addition, the DOL has advised employers to encourage employees who are sick or are exposed to sick family members to stay home and to consider flexible leave policies for their employees in these circumstances.

9) Can An Employee Take 80 Hours Of Emergency Paid Sick Leave For Self-Quarantine, And Then Take Additional Emergency Paid Sick Leave To Care For Another Individual?

No. A full time employee can only take a maximum of 80-hours of Emergency Paid Sick Leave (for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period). Once that maximum is reached, an employee cannot request additional leave under the Emergency Paid Sick Leave Act for any other reason. However, leave under the Emergency FMLA is available for up to 12 weeks, if the employee has to take care of his or her son or daughter due to a school closure or unavailability of child care.

10) Do "Shelter-At-Home" Orders Constitute A "Federal, State, Or Local Quarantine Or Isolation Order Related To COVID-19," Giving Rise To A Paid Leave Claim?

It is unclear whether government "Shelter-at-Home" orders constitute a quarantine or isolation order for purposes of the Act and the DOL has yet to issue any guidance. As noted above, an employer must provide leave under the Emergency Paid Sick Leave Act to an "employee [] subject to a Federal, State, or local quarantine or isolation order related to COVID–19." The current "Shelter-at-Home" orders issued by state governments require non-essential employees to stay home from non-essential work and thus potentially constitute "quarantine or isolation orders." But because non-essential businesses are also ordered closed, and thus employees of non-essential businesses would be unable to work even if they were not directed to stay home by the order, there is some ambiguity. In the absence of further clarification from the DOL, employers who do not treat a "Shelter-at-Home" order as a qualifying event potentially risk violating the Emergency Paid Sick Leave Act. As noted, a violation of the Emergency Paid Sick Leave Act constitutes a violation of the FLSA, subjecting the employer to civil action for back pay, liquidated damages, and attorney's fees.[61]

11) Are Employers Entitled To Tax Credits To Offset The Cost Of The Act?

Yes. Eligible employers who provide qualifying paid leave under the Emergency FMLA or Emergency Paid Sick Leave Act can retain employee payroll taxes (including federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes) equal to the amount of paid leave, rather than deposit these taxes with the IRS.[62] If there are not sufficient payroll taxes to cover the cost of the paid leave, employers can file a request for an accelerated payment from the IRS for the difference between the amount of emergency leave paid and the amount of payroll tax retained . The IRS expects to process these requests in two weeks or less.

Employers may pay employees in excess of FFCRA requirements but will not receive tax credit for amounts exceeding the FFCRA's statutory limits.[63]

12) Can I Require Employees To Use Accrued Vacation Time, Sick Leave, Or PTO?

No. Under the Emergency FMLA, an employee may elect to substitute accrued paid leave during the first ten days of unpaid leave. The employer, however, cannot require the employee to use accrued vacation, sick days, or other paid time off under the Emergency FMLA or Emergency Paid Sick Leave Act.[64]

Moreover, paid sick leave and expanded family medical leave under the Act is in addition to any preexisting leave provided by the employer under its policies. Employees may not take leave under the Act and leave from a preexisting employer policy simultaneously, but the employee may choose to use existing paid vacation, personal, medical, or sick leave from any paid leave policy to supplement paid sick leave or expanded family and medical leave under the Act. Employers will not receive tax credit for any such supplemental amount paid pursuant to a preexisting paid leave policy.[65]

13) Has New York Passed An Emergency Paid Leave Law?

Yes. On March 18, 2020, New York enacted a new law ("New York Act") providing sick leave and other employee benefits for New York employees affected by the COVID-19 pandemic. The New York Act only applies to employees who are "subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19."[66] Depending on the size and gross income of the employer, the New York Act entitles such employees to paid or unpaid sick leave, and in some cases paid family leave or disability benefits.

What Employers Are Covered Under The New York Act?

The New York Act applies to all New York employers.[67] Separate provisions of the New York Act govern employers with ten or fewer employees, employers with between eleven and 99 employees, employers with 100 or more employees, and public employers.

Are All Employees Covered By The New York Act?

No. Only employees who are "subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19" are covered under the New York Act.[68] The New York Act defines such orders to include only those "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."[69]

The New York Act does not apply to employees who 1) are subject to a quarantine or isolation order due to personal travel to a country "for which the Centers for Disease Control and Prevention

has a level two or three travel health notice"; or 2) are deemed asymptomatic or have not been diagnosed with any medical condition *and* are physically able to work while under a quarantine order—i.e., remotely.[70] Employees who have no symptoms or COVID-19 diagnosis that are able to work remotely are thus not entitled to benefits under the New York Act.

What Are The New York Act's Sick Leave Requirements?

Sick leave benefits under the New York Act vary depending on the size and gross income of the employer.

(1) Employers with ten or fewer employees and gross income up to $1 million—covered employees are entitled to unpaid sick leave until termination of the quarantine order. Employees are also eligible for paid family leave and disability benefits under New York law.[71]

(2) Employers with ten or fewer employees and gross income over $1 million—covered employees are entitled to five days of paid sick leave and unpaid leave until expiration of the quarantine order. After five days of paid sick leave, employees are eligible for paid family leave under New York law.[72]

(3) Employers with between eleven and 99 employees—covered employees are entitled to five days of paid sick leave and unpaid leave until expiration of the quarantine order. After five days of paid sick leave, employees are eligible for paid family leave under New York law.[73]

(4) Employers with 100 or more employees—covered employees are entitled to fourteen days of paid sick leave.[74]

Public employers of any size must likewise provide fourteen days of paid sick leave.[75]

What Are The New York Act's Family Leave Requirements?

The New York Act brings COVID-19-related leave within the scope of New York's existing paid family leave law. Specifically, the New York Act expands the definition of "family leave" to include 1) any leave resulting from a quarantine or isolation order, as defined above; and 2) any leave taken to care for a minor dependent child of an employee subject to a quarantine or isolation order.[76] An overview of New York's existing paid family leave framework—paid family leave under New York law is paid by insurance—is available on the New York state website: https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave_EmployeeFactSheet.pdf

Does The New York Act Impact Disability Benefits?

Yes, the New York Act expands New York's disability benefits. The New York Act defines "disability"—as used in the New York State Workers' Compensation Law—to include an employee's inability to perform employment duties as a result of a quarantine order after exhaustion of paid sick leave.[77] Accordingly, once an employee has exhausted paid sick leave under the New York Act, the employee is eligible for disability benefits under New York law.

Are Family Leave And Disability Benefits Under The New York Act Capped?

Yes. Family leave and disability benefits are "payable concurrently to an eligible employee upon the first full day of an unpaid period" of quarantine or isolation.[78] The New York Act specifies that eligible employees may not collect more than $840.70 in paid family leave and $2,043.92 in disability benefits per week.[79] Disability benefits are independently capped at the difference between

the maximum weekly family leave benefit ($840.70) and the employee's average weekly wage, up to $2,043.92.[80]

Are Employers Required To Pay Benefits Under The New York Act If They Have Already Paid COVID-19-Related Benefits Under Federal Law?

Employers are only responsible for the difference between benefits provided by federal law and benefits required under the New York Act. The New York Act expressly provides that COVID-19-related benefits are only available "in excess of the benefits provided by the federal government by law or regulation."[81] Because the federal government has enacted the Families First Coronavirus Response Act, which also provides COVID-19-related sick and medical leave benefits, covered employees in New York are only entitled to "the difference between the benefits available under [the Act] and the benefits available to such employee, if any, as provided by … federal law or regulation."[82]

Are Leaves Under The New York Act Job-Protected?

Yes. Under the New York Act, "[u]pon return to work following leave taken pursuant to [the Act], an employee shall be restored by his or her employer to the position of employment held by the employee prior to any leave taken pursuant to [the Act] with the same pay and other terms and conditions of employment."[83]

14) <u>Has California Enacted A Corresponding Law?</u>

No. The State of California has not yet enacted any new law addressing sick leave or family leave related to COVID-19.[84] However, the State's Labor & Workforce Development Agency has indicated that employees affected by COVID-19 would be entitled to paid sick leave under the existing framework.[85] The California Labor Commissioner has also specified that preventative care may include self-quarantine as a result of exposure to COVID-19, and that employees may use paid sick leave after having been exposed to COVID-19, or after travel to a high-risk area.[86]

Under the existing framework, employers in California must provide eligible employees with a minimum of 24 hours or three days of paid sick leave per year. Certain city ordinances provide for more generous paid sick leave. California's paid sick leave law applies to all employees—including part-time, seasonal, and temporary employees—who work in California for 30 or more days in a calendar year. The 30 days of employment in California need not be continuous.

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[1] Families First Coronavirus Response Act ("FFCRA") §§ 3102(a)(1), 5108.
[2] FFCRA § 3102(b).
[3] *Id.*
[4] *Id.* § 3105.
[5] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[6] *Id.*
[7] FFCRA § 3102(b).
[8] *Id.*
[9] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[10] FFCRA § 3102(b).
[11] *Id.*
[12] *Id.*
[13] *Id.*

[14] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[15] FFCRA § 3102(b).
[16] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[17] FFCRA § 3102(b).
[18] *Id.*
[19] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[20] FFCRA § 5110(2)(B)(i)(I)(aa), (bb).
[21] *Id.* § 5102(e)(1).
[22] *Id.* § 5102(a)(1)-(6).
[23] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[24] FFCRA § 5102(b)(2)(A).
[25] *Id.* § 5102(b)(2)(B).
[26] *Id.* § 5110(5)(B)(i)(I)-(III).
[27] *Id.* § 5110(5)(A)(ii)(I)-(II).
[28] *Id.* § 5110(5)(B)(ii).
[29] *Id.* § 5102(e)(2)(B).
[30] *Id.* § 5102(d).
[31] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[32] *Id.*
[33] *Id.*
[34] FFCRA § 5107(1)(A)-(C).
[35] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[36] FFCRA § 5104(1)-(2).
[37] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
[38] *See* 29 C.F.R. § 791.2.
[39] *See* 29 C.F.R. § 791.2(a)(1).
[40] *Id.*
[41] *Id.* § 791.2(a)(1)(i)-(iv).
[42] *See, e.g.*, *Preston v. Settle Down Enterp., Inc.*, 90 F. Supp.2d 1267, 1274-76 (N.D. Ga. 2000).
[43] 29 C.F.R. § 791.2(e)(1).
[44] *Id.* § 791.2(e)(2).
[45] *Id.* § 791.2(e)(2)(i)-(iii). Examples of this scenario include "where a waitress works for two separate restaurants that are operated by the same entity and the question is whether the two restaurants are sufficiently associated with respect to the waitress such that they jointly employ the waitress or where a farmworker picks produce at two separate orchards and the orchards have an arrangement to share farmworkers." *Murphy v. Heartshare Human Servs. of N.Y.*, 254 F. Supp.3d 392, 397-98 (E.D.N.Y 2017) (internal quotation marks omitted).
[46] Courts apply a multi-part "economic reality" test to determine whether an individual is an employee or independent contractor under the FLSA. *See, e.g.*, *Flores v. Velocity Express, LLC*, 250 F. Supp.3d 468, 478-94 (N.D. Cal. 2017). The United States Supreme Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are: "1) the degree of the alleged employer's right to control the manner in which the work is performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is

an integral part of the alleged employer's business." *Id.* at 478. There are also certain factors that are immaterial to determining whether there is an employment relationship, such as the place where work is performed, the absence of a formal employment agreement, whether an alleged independent contractor is licensed by State/local government, and the time or mode of pay. *See* https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

[47] Whether an employer is a "joint employer" under the FLSA depends on several factors. *See* 29 C.F.R. § 791.2.

[48] *See* 29 C.F.R. § 825.104(c)(1), (2).

[49] *Id.*

[50] *See* 29 U.S.C. § 216(a),(b); *id.* § 260; *id.* § 2617(a)(1), (3).

[51] U.S. Department of Labor, *Field Bulletin No. 2020-1* (March 24, 2020), *available at* https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1.

[52] *Id.*

[53] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 29 U.S.C. §§ 2101, *et seq.*

[58] 29 U.S.C. §§ 2101(a)(3)(B), 2102(a).

[59] 29 U.S.C. § 2104(a)(1), (6).

[60] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[61] FFCRA § 5105(a); 29 U.S.C. § 216(a),(b); *id.* § 260.

[62] FFCRA §§ 7001. 7003.

[63] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[64] FFCRA § 5102(e)(2)(B).

[65] *See* Department of Labor, *Families First Coronavirus Response Act: Questions & Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[66] New York Act ("NYA) § 1.1.(a).

[67] *See id.* § 1.1.(a)-(d).

[68] *Id.* § 1.1.(a)-(d).

[69] *Id.*

[70] *Id.* §§ 1.4, 1.13.

[71] *Id.* § 1.1.(a).

[72] *Id.*

[73] *Id.* § 1.1.(b).

[74] *Id.* § 1.1.(c).

[75] *Id.* § 1.1.(d).

[76] *Id.* § 1.8.

[77] *Id.* § 1.6.

[78] *Id.* § 1.9.

[79] *Id.*

[80] *Id.* § 1.10.

[81] *Id.* § 1.17.

[82] *Id.*

[83] *Id.* § 1.4.

[84] On March 27, 2020, the Los Angeles City Council passed an ordinance requiring employers with 500 or more employees nationwide to provide employees with 80 hours of Supplemental Paid Sick Leave for COVID-19-related time off. The Mayor's Office is expected to approve the ordinance. A draft of the ordinance is available at http://clkrep.lacity.org/onlinedocs/2020/20-0147-s39_ord_draft_03-27-20.pdf.

[85] *See generally* California Labor & Workforce Agency, Summary Chart of Benefits For Workers Impacted By COVID-19, https://www.labor.ca.gov/coronavirus2019/#chart.
[86] California Labor Commission, *Coronavirus Disease (COVID-19)—FAQs On Laws Enforced by the California Labor Commissioner's Office* (March 2020), https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm.