

Documentation Requirements for COVID-19-Related Leave

As employees begin requesting leave under the [recently-passed New York legislation](#) providing COVID-19-related sick leave (the “New York Act”) and the [Families First Coronavirus Response Act](#) (the “FFCRA”), employers should familiarize themselves with federal and state guidance on what documentation may be required, as well as additional guidance from the federal Department of Labor (“DOL”) on the scope of the FFCRA.

Documentation for Leave Requests under FFCRA. The FFCRA, which took effect April 1, 2020 and applies to employers with fewer than 500 employees, creates COVID-19 leave rights under the Emergency Paid Sick Leave Act and the Family and Medical Leave Act (“FMLA”). Employers should obtain the following information from employees requesting FFCRA leave:

- the employee’s name;
- the employee’s qualifying reason for requesting leave;
- a statement by the employee that they are unable to work (including telework) for that qualifying reason;
- the date(s) for which leave is requested; and
- additional documentation supporting the reason for leave, such as: (i) the name of the government entity that issued the relevant quarantine or isolation order; (ii) the name of the health care provider who has advised the employee or the employee’s family member to self-quarantine (e.g., a copy of the written confirmation from the medical provider advising a self-quarantine); or, (iii) for childcare-related leave, the name of the child, the name of the child’s school or place of care, and a statement that no other suitable person is available to care for the child.

Employers should retain copies of this documentation—and any other records relating to a request for leave, regardless of whether the leave was granted or denied—for four years.

Other FFCRA Documentation Guidance:

Employers that intend to claim a small business exemption from the requirements of the FFCRA, as discussed in our [prior alert](#), should retain documentation concerning the support for the exemption.

Employers that provide leave and intend to claim an FFCRA-related tax credit should retain the following records:

- documents sufficient to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible, including records of work, telework, and paid sick leave and expanded family and medical leave taken;
- documents sufficient to show how the employer determined the amount of qualified health plan expenses allocated to employees’ wages;

- copies of any completed IRS forms 7200 that the employer filed;
- copies of any completed IRS forms 941 that the employer filed, or records of any information provided to a third-party tax payer regarding such forms; and
- any other documents needed to claim a tax credit pursuant to applicable IRS forms, instructions and information.

Employers are also encouraged to consult the [IRS website on COVID-19](#) for additional information and guidance. Note that employers are not entitled to a tax credit for any paid sick leave that is not required to be paid or that exceeds the limits set forth under the FFCRA (i.e., to the extent employers allow employees to “top up” their FFCRA leave with accrued sick or vacation days, they may not claim a tax credit with respect to the “top up”).

Documentation for Leave Requests Under the New York Act. The New York Act, which was passed and took effect on March 18, 2020, provides that any New York employee who obtains “a mandatory or precautionary order of quarantine or isolation issued by” a governmental agency—which, according to subsequent guidance, generally requires documentation from a local health department—is entitled to a defined period of sick leave depending upon the size and net income of his or her employer. The New York Act also expands Paid Family Leave (“PFL”) and short-term disability leave to cover situations where an employee is caring for a dependent child subject to an official quarantine order.

The New York Department of Labor has published a [fact sheet](#)¹ with instructions for obtaining orders of quarantine or isolation satisfying the requirements on the new law. The New York Department of Labor guidance advises that employees who are unable to immediately obtain a quarantine or isolation order from their local health department should obtain documentation from a licensed medical provider who has treated the employee (or their minor dependent child), attesting that the employer (or their child) qualifies for the order, which may be submitted to the PFL insurance carrier with the employee’s quarantine leave request package.

Notifying Employees of Their Rights under the FFCRA and the New York Act.

As a reminder, the DOL has published a [poster](#), which employers may use to meet the FFCRA’s notice requirement. Employers that have not already done so should immediately provide the poster to their employees.

While the New York Act itself does not expressly require notice to employees of the new sick leave options, both the New York Department of Labor’s [COVID-19 PFL/short-term disability guidance](#) and [COVID-19 sick leave fact sheet for employers](#)² indicate that employers should inform employees of the new benefits that may be available to them. To do so, employers should consider distributing the newly-released [fact sheet for employees](#)³, which describes employee rights under the New York Act. They should also consider distributing updated policy documents or handbook addenda explaining COVID-19-related benefits to employees (including clarifications about the interaction between the new types of COVID-19 paid leaves of absence, and their interaction with other existing leave policies).

If it has not done so already, we recommend that the employer also remind employees of the exceptions to eligibility under the New York Act. Provided they have been given notice, employees are not entitled to sick leave under the New York Act if they are subject to a quarantine order because of travel to a restricted country unrelated to

¹ <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/obtain-order-of-quarantine.pdf>

² <https://paidfamilyleave.ny.gov/system/files/documents/2020/03/covid-19-sick-leave-employers.pdf>

³ <https://paidfamilyleave.ny.gov/system/files/documents/2020/03/covid-19-sick-leave-employees.pdf>

employment, and were aware of the travel restriction before leaving. They also are not entitled to leave if they are subject to a quarantine order but are asymptomatic and able to work remotely.

Providing effective notice may be complicated by the fact that many workers are working remotely rather than coming into the office each day. Employers should consider the best ways to provide their employees with this notice, including in mail, e-mail, an emergency notification system that an employer may have established for the benefit of employees, or by posting the notice on an internal or external website that is linked or referenced in a communication to employees.

Additional FFCRA Guidance. The DOL has now issued an FFCRA temporary rule and accompanying interpretive guidance, which provides clarification on several important issues:

- **Eligibility:** Paid sick leave or expanded family and medical leave under the FFCRA is available only to the extent that the employer has work that the employee would be able to perform in the absence of the qualifying COVID-19-related reason. In other words, if the employer does not have work for the employee, the employee is not eligible for FFCRA leave. Similarly, an employee is eligible for leave only where the qualifying COVID-19-related reason actually prevents the employee from working. For example, an employee subject to self-quarantine is eligible for paid sick leave only to the extent that being quarantined actually prevents the employee from working.
- **Use of Accrued Paid Time Off During FFCRA Leave:**
 - o The employer may (but is not required to) permit an employee to use existing paid leave to supplement the amount they would otherwise receive during their two weeks of FFCRA paid sick leave. However, the employer may not require an employee to do so. Similarly, the employer may (but is not required to) permit an employee to use existing paid leave during the first two unpaid weeks of FFCRA FMLA leave, to the extent that leave does not run concurrently with FFCRA paid sick leave, but may not require an employee to do so.
 - o After the first two weeks of FFCRA FMLA leave, the employer may require an employee to take existing personal leave or paid time off concurrently with the FFCRA FMLA leave, to the extent that paid leave would otherwise have been available to the employee in that circumstance. This means that an employer may not require an employee to use paid sick leave if that leave is provided separately from vacation or other paid time off if they employee (or their covered family member) is not sick.
- The DOL guidance reiterates in even stronger terms that employers should be “highly flexible” in collaborating with employees on work arrangements.
- The DOL has provided clarification on several definitions, in particular:
 - o The definition of “son or daughter” for both types of FFCRA leave is the same as the generally-applicable FMLA definition, meaning that it includes a child over 18 who cannot care for himself or herself because of a mental or physical disability.
 - o The definition of “childcare provider” includes an unpaid and/or unlicensed provider, such as a family member or neighbor, who regularly cares for the child.

Next Steps:

- Employers should consider updating employee handbooks to address COVID-19-related benefits available to employees, and should distribute those updates or addenda to employees via email or whatever other means will most effectively reach them given the prevalence of remote working during this time.
- If they have not already done so, employers should distribute the DOL poster informing employees of their FFCRA rights and inform New York employees that they may be entitled to additional leave and benefits.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

<u>Lisa E. Cleary</u>	212.336.2159	<u>lecleary@pbwt.com</u>
<u>Catherine A. Williams</u>	212.336.2207	<u>cawilliams@pbwt.com</u>
<u>Maren J. Messing</u>	212.336.7645	<u>mmessing@pbwt.com</u>
<u>Douglas L. Tang</u>	212.336.2844	<u>dtang@pbwt.com</u>
<u>Sara A. Arrow</u>	212.336.2031	<u>sarrow@pbwt.com</u>
<u>Leigh E. Barnwell</u>	212.336.2176	<u>lbarnwell@pbwt.com</u>
<u>Dakotah M. Burns</u>	212.336.2532	<u>dburns@pbwt.com</u>
<u>Emma Ellman-Gollan</u>	212.336.2214	<u>eellmangolan@pbwt.com</u>
<u>Hyatt M. Howard</u>	212.336.2567	<u>hhoward@pbwt.com</u>
<u>Ryan J. Kurtz</u>	212.336.2405	<u>rkurtz@pbwt.com</u>
<u>Julia R. Livingston</u>	212.336.2579	<u>jlivingston@pbwt.com</u>
<u>Andrew M. Willinger</u>	212.336.2003	<u>awillinger@pbwt.com</u>

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/>.

This publication may constitute attorney advertising in some jurisdictions.

© 2020 Patterson Belknap Webb & Tyler LLP