

New York Enacts Law Providing Leave Benefits to Employees Affected by COVID-19

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New York Governor Andrew Cuomo has signed into law [S8091](#) (“Sick Leave Law” or “Law”), requiring employers to provide certain employees under COVID-19-related quarantine or isolation with either paid or unpaid sick leave, depending on an employer’s size and net income. The Law, which took effect on March 18, 2020, also provides for disability and paid family leave benefits for eligible workers.¹

Notably, the Sick Leave Law became effective on the same date as the enactment of the federal [Families First Coronavirus Response Act](#) (“Federal Law”), which provides some similar benefits to workers whose employment is affected by the COVID-19 pandemic. Unlike the Federal Law, however, the Sick Leave Law does not have a sunset provision, whereby benefits end on a date certain (i.e., December 31, 2020). Accordingly, as discussed below, employers covered by both laws will need to assess their obligations under each statute.

Covered Employers and Employees

The Sick Leave Law applies to all private employers in New York State, regardless of the size of their workforce. The Law requires employers to provide sick leave to employees who are subject to a mandatory or precautionary order of COVID-19 quarantine or isolation issued by the State, the Department of Health, a local board of health, or any other governmental entity duly authorized to issue such an order (“Quarantine Order” or “QO”).

New York State has issued a set of [Frequently Asked Questions](#) (“FAQs”) to clarify that benefits under the Sick Leave Law are not available to an employee who decides to self-quarantine, or where an employer temporarily closes or goes out of business. Thus, Governor Cuomo’s recent [Executive Order](#) requiring non-essential businesses to limit 100 percent of in-person activity would not be a qualifying reason under the Law.

¹ The Law was part of [a three-way deal](#) between Governor Cuomo and the New York State Legislature that includes enacting a permanent statewide sick leave law and the Governor’s fiscal year 2021 executive budget proposal. An *Act Now* Advisory covering the statewide sick leave law will be published shortly.

The Law does not apply to an employee who is:

- (i) asymptomatic or has not yet been diagnosed with any medical condition, and**
- (ii) physically able to work remotely while under quarantine.**

Additionally, the paid benefits provided by the Law do not apply to employees who are subject to a Quarantine Order due to returning to the United States after traveling to a country with a level 2 or 3 designation from the Centers for Disease Control and Prevention (“CDC”), when (i) travel was not taken pursuant to the employee’s employment, and (ii) prior to the trip, the employee had notice of (a) the CDC travel health announcement, and (b) this statutory exception. However, employers must allow such employees to use any accrued leave available under a company policy. Employees with insufficient accrued paid or unpaid sick leave benefits must be permitted to take job-protected unpaid leave for the duration of the Quarantine Order.

The FAQs also clarify that the leave may be available as of March 18, 2020, even if the QO was issued prior to March 18, 2020.

Sick Leave Benefits

Amount of Sick Leave

The Sick Leave Law provides different benefits to eligible employees based on their employer’s size and net income:

- **Employers with 10 or fewer employees** as of January 1, 2020, must provide eligible employees with job-protected unpaid sick leave for the duration of the QO. Employees who do not receive paid sick time may be eligible for paid family leave (“PFL”) benefits and/or short-term disability insurance (“STD”) benefits (discussed below).
- **Employers with 10 or fewer employees as of January 1, 2020, but with a net income greater than \$1 million in the previous year, and employers with between 11 and 99 employees (regardless of their net income)** must provide eligible employees with at least five days of job-protected paid sick leave, as well as job-protected unpaid leave for the duration of the QO. As discussed below, after employees have exhausted their employer-provided paid sick leave benefits, they may be eligible for PFL and STD benefits for the remaining duration of the Quarantine Order.
- **Employers with more than 100 employees as of January 1, 2020** must provide eligible employees with at least 14 days of job-protected paid sick leave “during” the QO.

The newly issued FAQs make clear that covered employers “must provide ... [paid sick] leave separate from any accruals” of paid time off due an employee under company policies.

Short-Term Disability and Paid Family Leave Benefits

In addition to the sick leave benefits provided by the Law, an employee may be eligible for both STD and PFL benefits, for which they may apply through their employer's insurance carrier. (Note: Normally, employees would not be entitled to PFL benefits under New York's Paid Family Leave Act for their own illness; however, the Law creates an exception for workers who are subject to a QO.²) There is no waiting period for either benefit when an employee either is not entitled to paid sick leave or has exhausted the paid sick leave benefits provided for under the Law.

Short-Term Disability Benefits

Under the Sick Leave Law, employees are eligible for STD when they are (i) under a QO, (ii) not able to telework (at their current job or another position the employer offers), and (iii) not eligible for employer-provided paid sick leave benefits or have exhausted those benefits. Eligible employees who do not receive employer-provided paid sick leave are entitled to STD as of the first full day of the QO. Eligible employees who have used up their employer-provided paid sick leave may begin collecting STD immediately upon exhaustion of that sick leave benefit. Employees may be entitled to receive up to \$2,043.92 in STD benefits per week.³ Further, STD benefits may be payable *concurrently* with PFL benefits.

Paid Family Leave Benefits

PFL benefits will be available for employees who are unable to telework and who either (i) are under a Quarantine Order, or (ii) must care for a minor dependent child who is subject to a QO.⁴ Employees may collect up to \$840.70 per week in PFL benefits. Again, STD and PFL benefits may run concurrently. If, however, an employee is unable to work due to the need to care for a quarantined child, PFL benefits are the only benefits available to the employee under the Law.

Accordingly, employees eligible to receive both STD and PFL benefits may be entitled to a combined total weekly payment of up to \$2,884.62.

Reinstatement Mandate and Retaliation Prohibition

Upon returning to work from COVID-19-related leave taken pursuant to the Sick Leave Law, employees must be restored to their previous positions with the same pay and other terms and conditions of employment. There are no exceptions to this reinstatement mandate in the Law. However, the Law does not preclude employers "from taking any personnel action they would otherwise have taken had the leave not been requested or taken." To be clear, it seems that employers are permitted to

² See [New Paid Leave for COVID-19](#).

³ The maximum weekly STD benefit can only be the difference between the maximum weekly PFL benefit and the employee's total average weekly wage from each covered employer, up to a maximum benefit due to disability of \$2,043.92 per week.

⁴ The FAQs clarify that a minor child's school itself may be closed due to a Quarantine Order, in which case, the employee may apply for PFL benefits.

furlough employees subject to mandatory or precautionary quarantine or isolation orders if that decision is unrelated to the employee requesting or needing to request leave; however, the State may issue regulations addressing this point.

An employer may not retaliate against an employee for using any of the benefits authorized under the Sick Leave Law.

Regulations

The Law authorizes the New York State Department of Labor to issue regulations, which may address reasons for use, pay, eligibility issues, and likely other relevant matters, such as notice requirements and postings (the Law does not contain a notice requirement; however, the State has issued a [document](#) that employers, if they so choose, may use to advise employees of their rights under the Law).

Interaction with Employer Policies and Collective Bargaining Agreements

Sick leave taken under the Law does not count against any sick leave accrued under an employer's policy. Similarly, the Law does not diminish any benefits to which an employee is entitled pursuant to a collective bargaining agreement.

Interaction with Other Laws

The Law states that, if the federal government enacts a law or regulation providing sick leave or employee benefits for employees related to COVID-19, employees eligible for such benefits will be *unable* to secure the benefits of the Law, except that they can obtain the difference between the benefits provided by the Sick Leave Law and the Federal Law if the Sick Leave Law provides greater benefits. As we have [reported](#), the Federal Law providing paid sick and paid family leave benefits will become effective by April 2, 2020. Accordingly, employers will need to assess their obligations under each law to determine the precise benefits their employees are entitled to receive, as follows:

Assessing an Employer's Obligations Under Both Federal and New York COVID-19-Related Leave Laws

New York Employers' Obligations Prior to the Effectiveness of the Federal Law

New York employers must provide leave benefits solely in accordance with the state's Sick Leave Law until the Federal Law becomes effective (by April 2). Once the Federal Law goes into effect, it is possible that employees who already received and/or are receiving sick leave benefits under the Sick Leave Law may also be entitled for some additional sick leave benefits under the Federal Law's Emergency Paid Sick Leave Act ("EPSLA"). As of this writing, the state and federal Departments of Labor have yet to provide guidance as to how to address any potential overlap of benefits.

Employers' Leave Obligations After the Federal Law Becomes Effective

New York employers with 500 or more employees are exempt from the Federal Law.⁵ For New York State private employers with fewer than 500 employees, the application of benefits under the two laws will depend on the reasons for the leave, the size of the employer, the employer's income, and the employee's earnings.

Federal Law Overview

The Sick Leave Law only guarantees paid sick leave to employees who are subject to a QO (and cannot telework), though employees may be eligible for PFL benefits if they must care for a child under a QO (and cannot telework). Under the Federal Law, employees may be eligible for EPSLA benefits for additional reasons, but the first reason under the law permits an employee to receive two weeks of paid leave if the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. (For a detailed discussion of employers' obligations under the Federal Law, please see the Epstein Becker Green *Act Now* Advisory titled "[Families First Coronavirus Response Act: Employers' New Paid Family and Sick Leave Obligations Take Effect by April 2.](#)")

Leave Benefits Under Sick Leave Law and Federal Law Due to QO

For employers that are covered by the Sick Leave Law and the Federal Law, where an employee is subject to a QO (and cannot telework), the following benefits must be provided:

- **Employers with 10 or fewer employees with a net income less than \$1 million in the previous year:** The first two weeks will be paid leave under EPSLA, capped at \$511/day. If the QO is longer than two weeks, employees may be eligible for PFL and/or STD benefits.
- **Employers with 10 or fewer employees as of January 1, 2020, but with a net income greater than \$1 million in the previous year, and employers with between 11 and 99 employees (regardless of their net income):** The first five days are paid at an employee's full daily rate of pay (this time will run concurrently with EPSLA, for which the employer may claim a tax credit).⁶ For the remainder of a two-week period, the employee will be paid under EPSLA, capped at \$511/day. If the QO lasts longer than two weeks, employees may be eligible for PFL and/or STD benefits under the Sick Leave Law.
- **Employers with more than 100 employees as of January 1, 2020:** The first 14 days are paid at an employee's full daily rate of pay (80 hours will run

⁵ The Federal Law also provides for exemptions for certain health care providers and emergency responders, and allows employers with fewer than 50 employees to apply for an exemption if compliance with the Federal Law's mandates "would jeopardize the viability of the business as a going concern."

⁶ For employees earning more than \$511/day, the Sick Leave Law will supersede the Federal Law because the Sick Leave Law requires that employers with more than 11 employees pay a qualifying employee for the eligible sick leave at the employee's regular daily rate of pay.

concurrently with EPSLA, for which the employee may claim a tax credit). If the QO lasts longer than 14 days, employees may be eligible for PFL and/or STD benefits.

What New York Employers Should Do Now

- Determine your paid and unpaid leave obligations under both the Sick Leave Law and the new Federal Law. In the present environment, prudence warrants conducting such an assessment promptly, even if neither law currently affects any of your employees.
- Assess the potential impact of compliance with both laws on your operations, and consider how you will address those effects.
- Continue to monitor federal, state, and local legislative, regulatory, and Executive Branch developments (and Epstein Becker Green's [Coronavirus Resource Center](#)).

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