

COVID-19 Leave Legislation Update

With the likelihood of a new federal COVID-19 relief package passing Congress in the coming weeks, now is a good time for employers to review the impact of the expiration of the Family First Coronavirus Response Act (“FFCRA”) and the recent updated guidance from the New York State Department of Labor on New York’s COVID-19 Paid Family Leave Benefits. Because New York’s COVID-19 paid leave provisions are still in effect, and for the time being employers may voluntarily continue offering FFCRA leave benefits, it remains critical to understand the interplay between the federal and New York legislation.

Expiration of FFCRA Benefits

Upon its enactment on March 18, 2020, the FFCRA established two new emergency paid leave entitlements employers were required to offer their employees: (1) Emergency paid Sick Leave (“EPSL”), and (2) Emergency Family and Medical Leave Act (“EFMLA”). As explained in detail in our prior guidance, these leave entitlements established in response to the COVID-19 pandemic required employers with less than 500 employees to provide eligible employees with up to 80 hours of EPSL and up to 12 weeks of EFMLA. Although these leave provisions expired on December 31, 2020, the refundable payroll tax credit for both EPSL and EFMA were extended until March 31, 2021. Accordingly, employers may elect to

voluntarily provide FFCRA leave and receive a refundable tax credit for any employee leave taken through the end of March.

While employers may voluntarily allow employees to continue to access such benefits, the applicable caps on employee leave entitlements are not altered. Thus, if an employee exhausted all FFCRA sick leave as of December 31, 2020, he or she is not eligible to receive any additional FFCRA leave into 2021. For employees who utilized a portion of the leave entitlement under the FFCRA, employers may allow leave to be utilized up to the relevant cap until March 31, 2021 and receive reimbursement through a payroll tax credit.

While voluntarily continuing to provide FFCRA leave into 2021 has certain benefits and drawbacks for employers, for employers in New York it can have the clear benefit of offsetting the cost of leave under New York’s parallel COVID-19 paid leave provisions, which remain in effect. For example, assume an employee who did not utilize any EPSL leave during 2020 tests positive for COVID-19 on March 1, 2021 and becomes subject to a quarantine order. Under New York’s COVID-19 paid leave requirements, this employee would be eligible for paid leave for the duration of his or her quarantine order. If voluntarily continuing to provide FFCRA benefits, the employer would be able to receive a refundable tax credit for up to 80 hours of leave.

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Updated NYS COVID-19 Leave Guidance

Under the COVID-19 leave legislation enacted by New York State (“NYS”) in March 2020, employees are eligible for paid or unpaid sick leave benefits depending on the size of the employer, with some employers, being required to provide eligible employees with up to 14 days (two weeks) of paid leave in connection with a precautionary or mandatory order of isolation or quarantine due to COVID-19. In addition to understanding the potential coordination or these leave benefits with FFCRA benefits, recent updates to guidance regarding New York’s COVID-19 sick leave benefits warrant close consideration by employers.

First, the NYS Department of Labor (“NYSDOL”) recently updated its COVID-19 paid sick leave Frequently Asked Questions (“FAQs”), to include one potentially significant change. Specifically, the guidance now states the definition of “wages” under Article 6 of the Labor Law now applies for purposes of calculating the amount an employee must be paid during his or her period of leave. Under this new definition, employers must pay wages, as well as any benefits or wage supplements, including items such as reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Previously, consistent with the express statutory language, it was understood that employees eligible to leave were only entitled to

compensation at their regular rate of pay for the applicable leave period. This update to the FAQs suggests a significant expansion in the scope of the benefit employers must pay eligible employees, and it does so in contrast to the statutory language. Until clarification or further guidance is made available, employers failing to follow this new guidance, may be at risk for noncompliance.

Second, the NYSDOL recently published a document titled “Guidance on Use of COVID Sick Leave,” which requires employers to provide NYS COVID-19 paid leave benefits beyond what most employers in the State had understood was a maximum 14-day leave benefit. The guidance also provides that NYS COVID-19 paid leave must be provided in certain circumstances even *without* a mandatory order of quarantine or isolation, which is expressly required by the statute. The guidance can also be found at https://dol.ny.gov/system/files/documents/2021/01/covid-19-sick-leave-guidance_1.pdf

Aspects of this guidance are unclear, and in many ways, it appears to have to have created more questions than answers. Specifically, the guidance establishes significant apparent modifications to the underlying statute related to three potential scenarios, which are as follows:

Scenario #1: An employee who returns to work following a period of mandatory quarantine or isolation and who subsequently receives a positive diagnostic test result for COVID-19

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shall be deemed to be subject to a mandatory order of quarantine or isolation and shall be entitled to sick leave under New York's COVID-19 sick leave law, whether or not the employee already has received sick leave as required by the law for the first period of quarantine or isolation. This employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has tested positive for COVID-19.

Scenario #2: An employee who is subject to an order of quarantine or isolation but continues to test positive for COVID-19 after the end of such quarantine or isolation period must not report to work. The employee shall be deemed to be subject to a second mandatory order of quarantine or isolation and shall be entitled to sick leave under New York's COVID-19 sick leave law for the second period of isolation. The employee must submit documentation from a licensed medical provider or testing facility attesting that he or she received a positive diagnostic test for COVID-19 after completing the initial period of isolation. This guidance specifically states that the State does not recommend that an employee be tested to discontinue isolation or quarantine.

Scenario #3: If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation remain out of work due to exposure or potential exposure to COVID-19, regardless of whether such exposure or potential exposure was in the workplace, the employer must continue to pay the employee at

the employee's regular rate of pay until such time as the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation (and is therefore otherwise eligible for sick leave as required by New York's COVID-19 sick leave law).

The guidance states that no employee may qualify for New York's COVID-19 sick leave benefits for more than three orders of quarantine or isolation and that the receipt of paid sick leave is only required for any second or third order of quarantine if the employee has received a positive COVID-19 test. The guidance also states that, except for health care workers, employees who are subject to a mandatory quarantine or isolation order are not required to provide an employer with a negative test result before returning to work. This seems to leave open to the employer the discretion to continue to require a negative test in these circumstances.

Further, this guidance supplements the NYSDOL's prior guidance on COVID-19 sick leave, and all prior guidance remains in effect. It is assumed that the guidance is to be prospective in its applicability, which is notable because most employers capped NYS COVID-19 sick leave benefits at a maximum of 14 days total since last year when the law was first enacted. A few additional areas that are not clear and may be subject to interpretation by employers, employees, unions include:

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- The timing associated with scenario #1, between the two periods of quarantine, is not specified. The open question is whether an employee who *subsequently* tests positive *after returning* to work following a quarantine or isolation order is only covered for a second or third leave if the positive test occurs immediately after the first quarantine period, or whether these events could be separated in time by many weeks, months, or longer. Does the additional paid quarantine leave benefit apply only to a situation where, for example, an employee's spouse is COVID-19 positive and the entire family, including the employee, is subject to a quarantine order for 10 days and the employee immediately thereafter (on the eleventh day) tests COVID-19 positive herself, and therefore must continue to be out of work for an additional period of quarantine? Or would this also apply where an employee was issued an order of quarantine or isolation in April 2020 due to her exposure to COVID-19, and now, in February of 2021, she tests positive for COVID-19, and such positive test is completely unrelated to the first quarantine period? Arguably, the guidance could be interpreted either way.
- Regarding scenario #3, it is unclear as to whether an employer's direction that the employee remain out of work could trigger an unlimited period of COVID-19 leave benefits, or whether the employee is capped at three paid COVID-19 leaves in total. It seems more likely that any employer-directed leave must be compensated

without any cap; however, the guidance is ambiguous, and it is not unreasonable to interpret this guidance as stating that under no circumstances, including fact pattern #3, may an employee receive more than three COVID-19 leave periods in total.

- Some employees and unions are arguing that if an employee receives 2 or 3 written orders of quarantine or isolation, as opposed to testing positive for COVID-19 after returning to work or following the expiration of the period of quarantine or isolation, that the employee is entitled to paid leave. On the other hand, the language of the guidance seems to make clear that a second and third paid leave period must be based on an employee himself or herself testing positive for COVID-19.

FFCRA May Be Reinstated and Expanded

The Biden Administration recently announced its proposed COVID-19 relief package (The American Rescue Plan), which includes a reinstatement and expansion of the FFCRA's leave benefits. Among other things, President Biden's proposed legislation includes the following points:

- Reinstatement of the FFCRA through September 30, 2021 with the requirement that all employers, regardless of size or number of employees, provide paid leave and expand coverage to all employees.
- Remove the exemption for healthcare workers and first responders.



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- Expand paid sick and emergency family medical leave to 14 weeks (previously EPSL was only available for up to 80 hours) for the same reasons included in the FFCRA as well as for time off to get the vaccine.
- Extend the weekly maximum paid leave benefit to \$1,400 per-week, which would require employers to pay full wage replacement to workers earning up to \$73,000 annually.
- Reimburse employers with less than 500 employees for the full cost of the leave by extending the payroll tax credits.
- The bill proposes to reimburse state and local governments for the cost of the leave.
- This plan does not address tax credits for employers with more than 500 employees.