



Federal COVID-19 Leave Laws to Expire December 31, 2020; New York State Paid Sick Leave Laws Will Not

December 29, 2020

Earlier this year, in response to the COVID-19 pandemic, the federal government and many state and local governments enacted paid COVID-19 related leave laws to assist employees affected by the pandemic. Some of these laws are set to expire at the close of the year.

After December 31, 2020, employers will not be required to provide leave benefits under the Families First Coronavirus Response Act (“FFCRA”), according to a [new stimulus bill](#) signed into law by President Trump on December 27, 2020. New York State law, however, continues to provide paid leave for New Yorkers who are subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19.

This alert provides general guidance on both the federal law and New York State law. Employers should also consider other COVID-19 potential leave issues, such as FMLA, existing employment policies, collective bargaining agreements, and/or leave as a potential accommodation under federal, state and/or local law.

Federal Law

The FFCRA requires covered employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. Covered employers are private employers with fewer than 500 employees and public employers.

Generally, the FFCRA consists of two relevant portions:

- Emergency Paid Sick Leave Act (EPSLA): requires covered employers to provide all employees up to 80 hours of paid leave at the employer’s regular rate of pay or two-thirds pay, subject to caps, depending on the reason for which the employee qualifies. There are six different circumstances that trigger this leave if the employee is unable to work or telework:
 - the employee is subject to a COVID-19 isolation or quarantine order by federal, state, or local government order;
 - the employee has been advised by a health care provider to quarantine because of COVID-19;
 - the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

- the employee is caring for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider);
 - the employee is caring for a child (under 18 years of age) whose school or childcare provider is closed or unavailable for COVID-19 reasons;
 - the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.
- Emergency Family and Medical Leave Expansion Act (EFMLEA): where a covered employer has employed an individual for at least 30 days and that employee is unable to work or telework due to “a qualifying need related to a public health emergency”, which is defined as the need to care for a child whose school or childcare provider is closed or unavailable for COVID-19 reasons, that employer must provide up to an additional 10 weeks of paid EFMLEA leave at two-thirds the employee’s regular rate of pay.

A more detailed summary of the FFCRA can be found [here](#).

Mandated FFCRA leave ends on December 31, 2020 according to the bill signed by the President. As of January 1, 2021, private employers with fewer than 500 employees will not be required to provide leave as mandated by the FFCRA. Instead, employers may *voluntarily* provide COVID-19 related leave benefits to employees who had not previously exhausted their FFCRA entitlement **and** obtain the tax credit associated with this leave. The tax credit may only be taken for leave through March 31, 2021. (Only employees who have not already used their available leave are eligible.) Public employers who choose to extend these benefits after December 31, 2020 are not eligible for the tax credit. It is unknown at this time whether the Biden administration will seek to revive the leave provisions of the FFCRA.

New York State Law

New York COVID-19 Paid Sick Leave Law

Effective April 3, 2020, New York State enacted [legislation](#), referred to as the COVID-19 Paid Sick Leave Law, that guarantees job-protected paid leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19 (“eligible employees”). Such orders may be issued by the State of New York, the Department of Health, local board of health, or any government entity authorized to issue such orders.

This benefit is not available if an individual is able to work through remote access or other means and does not cover employees who simply believe they may be sick or are apprehensive about contracting COVID-19, or employees whose personal physicians have simply recommended quarantine. It also does not apply to: (i) employees who were forced to quarantine or isolate because they traveled to countries with Level 2 or Level 3 CDC warnings; and/or (ii) New Yorkers who take non-work-related trips to any state other than a contiguous state for more than 24 hours.

The amount of paid sick leave an employer is required to provide to an individual on a mandatory or precautionary quarantine order due to COVID-19 depends on the size of the employer as of January 1, 2020 and the employer’s net annual income in 2019.

- **Employers with 1 - 10 employees and a net income of \$1 million or less** are not required to provide paid sick leave. Employers must provide each eligible employee with unpaid sick leave until any quarantine or

isolation period is over. Employees may use Paid Family Leave and disability benefits for the remainder of their quarantine or isolation period.

- **Employers with 1 - 10 employees and a net income over \$1 million** must provide each eligible employee with five days of paid sick leave. Additionally, employers must provide each eligible employee with unpaid sick leave until any quarantine or isolation period is over. Employees may use Paid Family Leave and disability benefits for the remainder of their quarantine or isolation period.
- **Employers with 11 - 99 employees** must provide each eligible employee with five days of paid sick leave. Additionally, employers must provide each eligible employee with unpaid sick leave until any quarantine or isolation period is over. Employees may use Paid Family Leave and disability benefits for the remainder of their quarantine or isolation period.
- **Employers with 100 or more employees** must provide each eligible employee with paid sick leave based on the number of work days which they otherwise would have worked in a 14 day period.
- **Public employers** must provide each eligible employee with paid sick leave based on the number of work days which they otherwise would have worked in a 14 day period.

For an applicable paid leave period, employers must pay the employee the amount that the employee would have otherwise received had they continued to work for that period. The work period is based upon the amount of time that the employee was scheduled or would have been scheduled to work. Employees who work a fixed schedule or are paid a salary can expect to continue to receive their regular pay for the applicable period. For hourly, part-time, commission-based salespeople, and other employees who are not paid a fixed wage, employers should determine the employee's pay by looking at a representative period of time to set the employee's average daily pay rate.

New York Paid Family Leave and Disability Benefits

Generally, **New York Paid Family Leave** ("PFL") may not be used to cover leave taken for an employee's own illness. However, as noted above, where an employer is not required to provide paid sick leave under the COVID-19 Sick Leave Law, employees impacted by COVID-19 may be able to use PFL and disability benefits for the duration of the quarantine or isolation order.

In addition, employees who have a minor dependent child subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19 may be eligible to take PFL to care for that child. Employees may also be eligible to take PFL to care for a close family member with a serious health condition. Again, this benefit is not available if an individual is able to work through remote access or other means.

In 2021, employees who take PFL will receive 67% of their average weekly wage (AWW), up to a cap of 67% of the New York State AWW of \$1,450.17. An employee's AWW is the average of their last eight weeks of pay prior to starting PFL. The maximum weekly benefit for 2021 is \$971.61.

Unlike the FFCRA, benefits under New York's COVID-19 related laws do not expire on December 31, 2020.

New York State Paid Sick Leave Law Amends Section 196-b of the New York Labor Law

New York enacted statewide paid sick leave requirements for employers under § 196-b of the New York Labor Law, referred to as the **New York State Paid Sick Leave Law** ("NYSPSL"). The NYSPSL requires employers to provide all employees with paid or unpaid sick leave. All private-sector employees in New York State are now covered

under the NYSPSL, regardless of industry, occupation, part-time status, overtime exempt status, and seasonal status. Federal, state, and local government employees are not covered, but employees of charter schools, private schools, and not-for-profit corporations are covered.

Unlike the NY COVID-19 Paid Sick Leave Law, which is expected to expire at the end of the pandemic, the NYSPSL is expected to be permanent and the covered reasons for leave are more expansive. NYSPSL may be used (1) to care for an employee or employee's family member's mental or physical illness, injury or mental health condition, whether it has been diagnosed, or requires medical care at the time the NYSPSL is requested, or (2) for the diagnosis, care or treatment of an employee's or employee's family member's mental or physical illness, injury, or health condition, or for preventative care. The law also permits leave for several qualifying reasons, which include when an employee or his/her family member has been a victim of domestic violence, a family offense, sexual offense, stalking or human trafficking. These qualifying reasons mirror the "safe time" protections afforded by the [New York City Earned Safe and Sick Time Act](#) ("ESSTA"), which was amended by the New York City Council on September 23, 2020 and went into effect on September 30, 2020.

The amount of paid sick and safe leave an employer is required to provide under the NYSPSL depends on the number of employees the employer had between January 1 to December 31.

- **Employers with 0 - 4 employees and a net income of \$1 million or less** in the previous tax year must provide up to 40 hours of unpaid sick leave per calendar year.
- **Employers with 0 - 4 employees and a net income over \$1 million** in the previous tax year must provide 40 hours of paid sick leave per calendar year.
- **Employers with 5 - 99 employees** must provide up to 40 hours of paid sick leave per calendar year.
- **Employers with 100 or more employees** must provide up to 56 hours of paid sick leave per calendar year.

Under the NYSPSL, employees began accruing leave on September 30, 2020 and are eligible to use this leave on January 1, 2021. This provision permits all employees, including part time seasonal workers, to accrue leave at the rate of one hour for every 30 hours worked **or** employers may opt to provide the full amount of sick leave required by this law at the beginning of each calendar year. Employees who telecommute are covered by the law only for the hours when they are physically working in New York State, even if the employer is physically located outside New York State.

Unused leave for the calendar year must be carried over to the next calendar year but an employer may limit employee use to the number of hours that the employee is entitled to use within any calendar year. The carried over leave is thus available for use right away in the following calendar year, without an employee having to wait to accrue leave. Unless required by another agreement or policy, including the employer's own written leave policy, employers are not required under the NYSPSL to pay employees for unused sick leave at the end of an employment relationship.

Local Laws

All employers are required to comply with local sick leave ordinances that exceed the requirements of the NYSPSL. For example, both the ESSTA and the Westchester County Paid Sick Leave law remain enforceable as to covered employees to the extent the requirements under those laws meet or exceed those of the NYSPSL. The

NYSPSL law “operates independently from other State and Federal leave requirements and must therefore be paid in addition to any other State or Federal leave entitlements.”

The interaction between the FFCRA, New York’s COVID-19 Paid Sick Leave Law, NYSPSL, and other leave laws and employer policies is highly fact-specific and complex. Employers are encouraged to consult with legal counsel to ensure compliance with the myriad of responsibilities and requirements as they apply to individual businesses and employees.

Please note that this is a general overview of the law and does not constitute legal advice.

Practices

- Labor and Employment