

Paid Leave and New York's Workforce Reduction Mandates

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We have been anxiously waiting for the leave and workforce mandates that federal and New York State governments have been discussing in response to COVID-19. On Wednesday, the federal government enacted game-changing legislation for employers in response to the COVID-19 pandemic. Yesterday, President Trump signed into law the Families First Coronavirus Response Act (the "FFCRA"). In addition, the New York State Assembly and Senate passed paid sick leave legislation that Governor Cuomo signed today. Governor Cuomo has made several statements and issued an Executive Order late last night ordering non-essential businesses and all nonprofits to limit their in-office workforces. While last night's order required in-office workforces to be limited to no more than 50%, that has for now quickly evolved to a 75% reduction.

Each of the laws impose immediate, new obligations on employers. While we continue to review each measure and wait for regulations to better clarify their import, below is a summary of each legislative and executive action.

Families First Coronavirus Response Act

The FFCRA, which is effective no later than 15 days after signing and which expires at the end of 2020, requires employers to provide emergency paid leave under the FMLA in addition to emergency sick leave. The law provides refundable tax credits, which are allowed against the employer portion of Social Security taxes, for employers who are mandated to provide paid sick and family leave as described below.

The FFCRA provides that private employers with less than 500 employees must provide up to 12 weeks of job-protected FMLA leave to employees who are unable to work because their child's school or daycare is closed or unavailable because of a public health emergency. Most pertinently, the last 10 weeks of FMLA is required to be paid at a rate of not less than 2/3 of an employee's regular rate up to a cap of \$10,000. The FFCRA allows for the Secretary of Labor to promulgate regulations that could exempt employers with less than 50 employees from providing the leave if it would jeopardize the viability of the business. Additionally, employers with less than 50 employees are exempt from FMLA civil damages in an employee-initiated lawsuit.

The FFCRA also requires that private employers with fewer than 500 employees provide paid sick time to an employee who is unable to work because of various coronavirus-related circumstances: a quarantine or isolation order by a government or health care provider; experiencing symptoms and seeking a medical diagnosis; or caring for someone subject to a quarantine or isolation or for a child whose day care or school is unavailable because of COVID-19. Full-time employees are entitled to up to 80 hours of paid sick time with caps of \$2,000 and \$5,110 depending on the reason for leave. Like the FMLA amendments, the Secretary of Labor can promulgate regulations that could exempt employers with less than 50 employees from providing this benefit if it would jeopardize the viability of the business. Failure to provide paid sick leave will be a violation of the Fair Labor Standards Act.

New York State Paid Leave Legislation

The New York legislation requires employers to provide paid sick leave benefits to employees who are under mandatory or precautionary order of quarantine or isolation issued by the State of New York, the Department of Health, local board of health, or any government entity authorized to issue such an order due to COVID-19. The benefits mandated by this law depend on the size of the workforce and net income of the employer.

Employers with ten or fewer employees and a net income less than \$1 million must provide unpaid sick leave, job protection for the duration of the quarantine order, and guarantee their workers access to New York State Paid Family Leave ("PFL") and disability benefits (short-term disability) for the period of quarantine including wage replacement for their salaries up to \$150,000.

Under this legislation, PFL and disability benefits run concurrently, which is expressly prohibited in any other circumstance. There is no waiting period for disability benefits. PFL benefits are capped at \$840.70 per week and disability benefits are capped at \$2,043.92 per week, a significant increase from the current cap. Employees are eligible to receive benefits from both sources up to 100% of their average weekly wage for employees earning up to \$150,000 annually. PFL benefits can also be used to care for a dependent minor child under quarantine or isolation.

Employers with 10 or fewer employees and a net income greater than \$1 million and employers with 11-99 employees must provide at least 5 days of paid sick leave, job protection for the duration of the quarantine order, and guarantee their workers access to PFL and disability benefits. The same PFL and disability benefits are applicable for these workforces as described above.

Lastly, employers with 100 or more employees, as well as all public employers (regardless of number of employees), must provide at least 14 days of paid sick leave and guarantee job protection for the duration of the quarantine order. However, the PFL and disability benefits are not required to be provided.

The legislation includes job restoration provisions which require employers to return employees to their positions held prior to the leave with the same pay and other terms and conditions of employment.

There are some exceptions carved out in New York's legislation. These benefits are not mandated for employees who are asymptomatic or not diagnosed and are able to work remotely or through other means. In addition, employees who traveled for non-business reasons to one of the geographical locations on certain CDC travel advisory lists are not eligible for this leave. However, they are eligible to take any employer provided leave benefits or unpaid sick leave for the duration of the quarantine or isolation.

Importantly, the state legislation is only applicable if it provides benefits in excess of the benefits provided by federal legislation described above or any future federal laws providing sick leave and other employee benefits.

These mandates became effective today. Employers will need to provide notice of these benefits to their workforces immediately.

New York's original legislation included significantly broader paid sick leave amendments to New York Labor Law.

They were removed from the emergency measure that was passed. However, Governor Cuomo is expected to incorporate comparable changes in the state budget process. We will report on those changes in a future alert.

New York Executive Order Reducing In Person Workforce

Effective Friday, March 20th at 8:00 p.m., all businesses and not-for-profit entities in the state must utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize and each employer must reduce the in-person workforce at any work locations. The Executive Order issued last night mandated an in-person workforce reduction by 50%. However, the Governor has now increased the mandated in-person workforce reduction to 75%.

Any essential business or entity providing essential services or functions is exempt from these in-person restrictions. The Executive Order specifies the following essential services or functions:

essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public.

The Empire State Development Corporation ("ESDC") is required to issue guidance as to which businesses are determined to be essential by 5:00 p.m. today. Further, the Executive Order provides that any other business may be deemed essential after requesting an opinion from the ESDC.

We anticipate that federal and state governments will continue to enact legislation and issue executive orders to address the exigent circumstances that will continue to evolve, including subsequent changes that may be made to even the areas we are reporting on today. We will continue to update you on these changes.

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