

COMPARING PAID SICK LEAVE UNDER U.S. AND NEW YORK STATE CORONAVIRUS RESPONSE LAWS

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The federal Families First Coronavirus Response Act (“FFCRA”), enacted March 18, 2020, and effective April 1, 2020, provides for two types of leave for employees of private employers with fewer than 500 employees: Paid Sick Leave (for six specified reasons related to COVID-19) and Emergency Family and Medical Leave Act (“EFMLA”) leave (to care for an employee’s son or daughter whose school or child-care facility is closed, or child care provider is unavailable, due to a public health emergency).

The New York State Paid Quarantine Leave Law (“NY Quarantine Law”), enacted and effective March 18, 2020, provides for sick leave when an employee is subject to a mandatory or precautionary governmental quarantine or isolation order due to COVID-19 (“Quarantine Order”). Under the NY Quarantine Law, employers with 1-10 employees and \$1,000,000 or less in net income in the previous tax year (Tier 1) must provide unpaid sick leave for the duration of the Quarantine Order; employers with 11-99 employees and employers with 1-10 employees and a net income greater than \$1 million in the previous tax year (Tier 2) must provide at least 5 days of paid sick leave plus unpaid sick leave for the duration of the Quarantine Order; and employers with 100 or more employees, as well as all public employers (regardless of number of employees) (Tier 3) must provide at least 14 days of paid sick leave. The legislative history of the law indicates that only employees who work in New York should be counted to determine employer obligations.

The NY Quarantine Law also amends the New York Paid Family Leave Law (“PFL”) and the Short Term Disability provisions of the New York Workers Compensation Law (“STD”) to provide benefits for employees who are subject to a Quarantine Order but are only eligible for unpaid sick leave or have exhausted paid sick leave.

Under both the federal and state laws, employees are only eligible for paid sick leave when they are scheduled to work but are unable to work (either on site or remotely via telework) for a statutorily specified reason. For example, an asymptomatic employee who is able to work from home is not eligible for paid sick leave based on being subject to a Quarantine Order. If employees have been terminated or furloughed, or their workplace has been closed (either as a result of a business decision or government closure order), they are ineligible for paid sick leave.

Both the federal and state laws protect employees who take sick leave pursuant to the laws from retaliation or discrimination.

The chart below summarizes key differences between the federal and New York paid sick leave laws (but does not address the EFMLA provisions of the FFCRA or the PFL and STD provisions of the NY Quarantine Law):

	FFCRA	NY Quarantine Law
Covered Private Employer	Employers with fewer than 500 U.S. employees (for counting purposes, keep in mind the “joint employer” concept under the Fair Labor Standards Act and the “integrated employer” concept under the Family and Medical Leave Act). However, an employer with fewer than 50 employees (small business) is exempt from providing	All employers that employ one or more employees in New York State
Which employees are eligible for Paid Sick Leave?	Childcare Paid Sick Leave when doing so would jeopardize the viability of the business as a going concern All employees regardless of length of leave; however, employers may exclude employees who are health care providers or emergency responders from taking Paid Sick Leave	Employees who work for Tier 2 or Tier 3 employers
Must provide Unpaid Leave	[Addressed by EFMLA]	For the duration of a Quarantine Order for Tier 1 and Tier 2 employers; statute silent for Tier 3 employers (but NYS guidance states it is required)
Must provide Paid Sick Leave	All Covered Employers	Tier 2 and Tier 3 Employers
What are the Qualifying Reasons	1. subject to a federal, state or local quarantine or isolation order (“Ordered Quarantine”);	subject to a Quarantine Order (except for an employee who is issued a Quarantine Order as a

for taking Paid Sick Leave?	2. advised by a health care provider to self-quarantine ("Quarantine Recommendation");	result of traveling to a CDC specified country for personal reasons after March 18 and notice of the CDC travel restriction)
Leave is available to employees who are unable to work because they are:	3. experiencing symptoms of COVID-19 and seeking medical advice;	
	4. caring for an individual subject to an Ordered Quarantine or Quarantine Recommendation;	
	5. caring for an employee's son or daughter whose school/child care facility is closed, or whose child care provider is unavailable, due to a public health emergency ("Childcare"); or	
	6. experiencing a substantially similar condition (specified by Department of HHS)	
	Reasons 1 -3: regular rate of pay up to \$511/day, or \$5,110 total over paid sick leave period;	
Calculation of Paid Sick Leave	Reasons 4 -6: 2/3 of regular rate of pay up to \$200/day or \$2,000 total over paid sick leave period Full time: Up to 80 hours	Tier 2 and 3 employees receive their regular rate of pay; no cap.
Duration of Paid Sick Leave	Part time: amount equal to the number of hours they work on average over a 2 week period (special rules may apply to part-time employees with varying schedules)	Up to 14 days (Tier 3) or 5 days (Tier 2)

Job Protection	Upon return to work, must be restored to same position or an equivalent position with (nearly) equivalent employment benefits, pay, and other terms and conditions of employment	Upon return to work following leave, must be restored to prior position with same pay and terms and conditions of employment
Coordination of Paid Sick Leave with other paid leave laws	Paid Sick Leave is in addition to other leave provided under Federal, State, or local law	If an employee is eligible for both federal and state paid sick leave, FFCRA leave is primary, except if the NY Quarantine Law provides sick leave in excess of FFCRA sick leave, then the excess amount must be paid
Coordination with other employer paid leave policies	Paid Sick Leave is in addition to other leave provided under an employer's existing company policy. Employee's choice whether to use FFCRA paid sick leave or accrued paid leave under another policy first. Employers may permit (but cannot require) employees to use accrued paid leave under company policy to make up any difference in pay between the pay available under the FFCRA and the employee's normal earnings for each hour of leave	NY Quarantine Law paid sick leave must be used before other paid leave may be used
Sunset	December 31, 2020	None

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers address the new changes in the law. If you or your organization would like more information on this or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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