

# COVID-19: Labor and Employment Guidance

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Moderated by John M. Godwin, Partner

Elizabeth D. McPhail  
Partner

Kinsey A. O'Brien  
Senior Associate

Roopa R. Chakkappan  
Senior Associate

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# Agenda

- ❖ NYS workforce restrictions – Including 100% reduction EO
- ❖ Background and status of outbreak
- ❖ CDC and DOH recommendations
- ❖ Proactive measures and workplace safety
- ❖ Medical inquiries and examinations of employees
- ❖ Wage and hour concerns
- ❖ WARN Act issues
- ❖ Leave and accommodation
- ❖ Discrimination issues
- ❖ Union and CBA impacts
- ❖ Unemployment insurance

# NYS Workforce Restrictions – Private Employer

- ❖ Executive Order 202.6 (March 18<sup>th</sup>) and 202.7 (March 19):
  - ✓ “All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize.”
  - ✓ “Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m.”
  - ✓ During a press conference on March 19<sup>th</sup>, Governor Cuomo announced that this restriction would be expanded to require 75% reduction in the in-person workforce.
  - ✓ UPDATE: During the Governor’s press conference this morning, he announced that the restriction would be expanded to require a **100% reduction of the in-person workforce, effective Sunday, March 22, 2020 at 8 p.m.** The only exclusion is for “**essential business or entity providing essential services or functions**”

# NYS Workforce Restrictions – Private Employers

- ❖ Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes:
  - ✓ 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; and
  - ✓ 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.”

# NYS Workforce Restrictions – Private Employers

- ❖ Empire State Development Corporation (“ESDC”) guidance as to which businesses are essential: <https://esd.ny.gov/guidance-executive-order-2026>.
- ❖ According to this guidance, the 75% (soon to be 100%) reduction requirement does not apply to state and local governments and authorities.
  - ✓ These entities continue to be subject to 50% reduction per Executive Order 202.4.
- ❖ Businesses not included in the EO and ESDC “essential businesses” lists may request an opinion from the ESDC. Request will be granted if it is in the best interests of the state to have the business’s workforce continue at full capacity “in order to properly respond to this disaster.”

# NYS Workforce Restrictions – Private Employer

## ❖ Executive Order 202.4 (March 16):

- ✓ “Any **local government or political subdivision** shall, effective March 17, 2020, **allow non-essential personnel** as determined by the local government, to be able **to work from home or take leave without charging accruals**, except for those personnel essential to the locality’s response to the COVID-19 emergency.”
- ✓ “Such non-essential personnel shall total no less than fifty-percent (50%) of the total number of employees across the entire workforce of such local government or political subdivision.”

# Background and Status of Outbreak

- ❖ The Centers for Disease Control and Prevention (“CDC”) is responding to an outbreak of respiratory disease caused by a novel (new) coronavirus.
- ❖ The virus has been named “SARS-CoV-2” and the disease it caused has been named “coronavirus disease 2019” (“COVID-19”).
- ❖ COVID-19 was first detected in Wuhan City, Hubei Province, China in December 2019.
- ❖ There are a total of 237,996 cases of COVID-19 in more than 160 locations internationally, including in the United States.
- ❖ The first U.S. patient was identified on January 21, 2020 and had recently traveled from Wuhan, China.
- ❖ Since that time 10,442 cases have been confirmed in the United States.

# Background and Status of Outbreak

- ❖ On January 30, 2020, the World Health Organization (WHO) declared the outbreak to be a public health emergency of international concern.
- ❖ On January 31, 2020, the U.S. Secretary of Health and Human Services, Alex Azar, declared the outbreak a public health emergency in the U.S.
- ❖ On January 31, 2020, President Trump signed a Presidential Proclamation to temporarily suspend the entry of foreign nationals from countries that pose a risk of transmitting COVID-19.
  - ✓ For updated information on affected countries visit: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>;
  - ✓ CDC recommends that travelers avoid any nonessential travel to these destinations;
  - ✓ Upon return, U.S. citizens, and personal residents will be screened and advised whether to stay home for 14 days and practice social-distancing, or comply with mandatory or precautionary isolation or quarantine.



# Background and Status of Outbreak

- ❖ On March 11, 2020, the WHO publicly characterized COVID-19 as a pandemic.
- ❖ On March 13, 2020, President Trump signed a Presidential Proclamation declaring a national emergency concerning COVID-19.
- ❖ On March 18, 2020, President Trump signed into law H.R. 6201, the Families First Coronavirus Response Act.

# Total Cases – New York State

County	Positive Cases	County	Positive Cases
Albany County	43 (7 new)	Oneida County	2 (2 new)
Allegany County	2	Onondaga County	5 (3 new)
Broome County	2 (1 new)	Ontario County	1
Chenango County	2 (1 new)	Orange County	51 (19 new)
Clinton County	2 (1 new)	Putnam County	5 (3 new)
Delaware County	1	Rensselaer County	6 (2 new)
Dutchess County	31 (11 new)	Rockland County	53 (23 new)
Erie County	28 (21 new)	Saratoga County	18 (4 new)
Essex County	1	Schenectady County	18 (4 new)
Fulton County	1 (1 new)	Schoharie County	1 (1 new)
Genesee County	1 (1 new)	Suffolk County	178 (62 new)
Greene County	2	Sullivan County	3 (2 new)
Hamilton County	2 (1 new)	Tioga County	1
Herkimer County	1	Tompkins County	6 (3 new)
Jefferson County	1 (1 new)	Ulster County	10 (1 new)
Monroe County	27 (13 new)	Warren County	1
Montgomery County	2	Washington County	1
Nassau County	372 (189 new)	Wayne County	1 (1 new)
Niagara County	1 (1 new)	Westchester County	798 (260 new)
New York City	2469 (1129 new)	Wyoming County	2 (1 new)
Albany County	43 (7 new)	Oneida County	2 (2 new)
Allegany County	2	Onondaga County	5 (3 new)
Broome County	2 (1 new)	Ontario County	1
New York State (Outside of NYC)		1683	
New York City:		2469	
Total Positive Cases (Statewide)		<b>4,152</b>	

# CDC Guidance – Severity and Symptoms

- ❖ The nature of the spread of COVID-19 in the United States is rapidly evolving.
- ❖ The complete clinical criteria with regard to COVID-19 is not known.
- ❖ Reported illnesses have ranged from very mild or no symptoms, to severe illnesses resulting in death.
- ❖ Common symptoms include:
  - ✓ Fever;
  - ✓ Cough; and
  - ✓ Shortness of breath
- ❖ High risk populations include:
  - ✓ Older adults; and
  - ✓ People with chronic conditions such as heart or lung disease and diabetes.

# CDC Guidance – Vaccine and Testing

- ❖ There is no known vaccine or specific treatment for COVID-19.
  
- ❖ In accordance with guidance from the CDC:
  - ✓ Health Care providers should encourage all personnel who believe that they have been exposed to COVID-19 or develop symptoms to contact their primary care doctor or clinician for assessment, monitoring, and potential testing; and
  - ✓ Anyone who believes that they have been exposed to COVID-19 and develops a fever and symptoms should immediately contact their health care provider for testing.

# DOH Guidance – Testing

- ❖ COVID-19 testing is conducted at the CDC, the NYS Wadsworth center, and the NYC and Erie County Public Health laboratory.
- ❖ On March 13, 2020 the Department obtained authority from the FDA to authorize 28 public and private additional laboratories to conduct testing.
- ❖ New York's first drive-through mobile testing center is in New Rochelle.
- ❖ Pursuant to the DOH, local and state public health officials, in consultation with clinicians, will determine if a patient is a person under investigation for COVID-19, and if the patient meets the CDC's most recent criteria for testing.
- ❖ CDC's criteria for evaluation and testing is available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html>.
- ❖ Under the Families First Coronavirus Response Act, all private plans and government payors must provide free testing for COVID-19 and free physician, clinic, and emergency visits for patients when the purpose is testing for COVID-19.

# DOH Guidance – Health Advisories

- ❖ The New York State Department of Health (DOH) issued health advisories for health care providers, facilities, laboratories, and local health departments.
- ❖ The first health advisory was issued in January and the department has made intermittent updates to these advisories in February and March.
- ❖ The health care advisories include important information including:
  - ✓ Infection Control
  - ✓ Reporting requirements
  - ✓ Management of Healthcare Personnel with Exposure in a Healthcare Setting
  - ✓ Personal Protective Equipment Conservation Strategies
  - ✓ Laboratory Reporting and Testing
- ❖ All Health Advisories are available at:  
[https://coronavirus.health.ny.gov/information-providers?f%5B0%5D=filter\\_term%3A36](https://coronavirus.health.ny.gov/information-providers?f%5B0%5D=filter_term%3A36)

# CDC Guidance- Workplaces, Schools, Homes, and Commercial Establishments

- ❖ Practice good hand hygiene
  - ✓ Stop handshaking;
  - ✓ Wash hands at the door; and
  - ✓ Disinfect surfaces like doorknobs, desks, tables, and handrails.
- ❖ Meetings and Travel
  - ✓ Use videoconferencing when possible;
  - ✓ When not possible, hold meetings in well ventilated rooms; and
  - ✓ Adjust or Postpone all large meetings or gatherings.
- ❖ Food Handling
  - ✓ Limit food sharing; and
  - ✓ Ensure strict hand hygiene for cafeteria staff.
- ❖ Stay Home
  - ✓ If feeling sick; and
  - ✓ If you have a sick family member in your home.
- ❖ Guidance is available at : <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>

# CDC Guidance- Workplaces, Schools, Homes, and Commercial Establishments

- ❖ Practice good hand hygiene
  - ✓ Remind students to stop touching faces, and cover coughs and sneezes;
  - ✓ Clean hands at the door; and
  - ✓ Disinfect surfaces like doorknobs, desks, tables, and handrails.
- ❖ Large Activities and Gatherings
  - ✓ Adjust or postpone gatherings that mix students between classes and grades;
  - ✓ Adjust or postpone any gatherings, or after-school activities to avoid mixing between classes and grades; and
  - ✓ Hold classes outdoors, or in open, well-ventilated spaces.
- ❖ Food Handling
  - ✓ Limit food sharing; and
  - ✓ Ensure strict hand hygiene for cafeteria staff.
- ❖ Stay Home
  - ✓ If feeling sick; and
  - ✓ If you have a sick family member in your home.

- ❖ Guidance is available at : <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>



# CDC Guidance- Workplaces, Schools, Homes, and Commercial Establishments

- ❖ Practice good hand hygiene
  - ✓ Wash hands at door and at regular intervals
  - ✓ Disinfect surfaces like doorknobs, desks, tables, and handrails
  - ✓ Increase ventilation by opening windows, or adjusting air-conditioning
- ❖ Households with vulnerable seniors or persons with underlying conditions
  - ✓ Healthy family members should be vigilant about mitigating risk;
  - ✓ Wash hands before and after feeding or caring for vulnerable family members;
  - ✓ If possible, provide a protected space for vulnerable family members; and
  - ✓ Ensure all utensils and surfaces are cleaned effectively.
- ❖ Households with sick family members
  - ✓ Give family members their own room and keep doors closed;
  - ✓ Have only one family member care for sick family members; and
  - ✓ Provide extra care for those sick family members who are over 65 or who have underlying conditions.
- ❖ Guidance is available at : <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>

# CDC Guidance- Workplaces, Schools, Homes, and Commercial Establishments

- ❖ Practice good hand hygiene
  - ✓ Stop handshaking;
  - ✓ Promote “tap and pay” options to limit handling of cash;
  - ✓ Disinfect surfaces like doorknobs, desks, tables, and handrails.
- ❖ Avoid crowding
  - ✓ Use booking and scheduling to stagger customer flow;
  - ✓ Use online transactions when possible;
  - ✓ Adjust or Postpone all large meetings or gatherings.
- ❖ For Transportation businesses, taxis, and ride shares
  - ✓ Keep windows open,
  - ✓ Increase ventilation; and
  - ✓ Disinfect surfaces regularly.
- ❖ Guidance is available at : <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>

# Industry Specific Guidance

- ❖ Manufacturing Industry
- ❖ National Association of Manufacturers
  - ✓ <https://www.nam.org/about/>
- ❖ Restaurant Industry
- ❖ National Restaurant Association
  - ✓ <https://restaurant.org/Home>
- ❖ Hotel and Lodging
- ❖ American Hotel and Lodging Association
  - ✓ <https://www.ahla.com/facts-about-coronavirus>

# Stay Informed

- ❖ CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- ❖ NYS DOH:  
<https://www.health.ny.gov/diseases/communicable/coronavirus.htm>
- ❖ NYSDOH COVID-19 HOTLINE: 1-888-364-3065
- ❖ NYDOH provider email: [covidproviderinfo@health.ny.gov](mailto:covidproviderinfo@health.ny.gov)

# Workplace Safety

- ❖ Under the Occupational Health and Safety Act, employers have a general obligation to maintain a workplace free from any recognized hazards that may cause death or serious injury to employees.
- ❖ The Occupational Health and Safety Administration (“OSHA”) recommends that employers adopt safe work practices and engineering and administrative controls.
- ❖ Safe work practices:
  - ✓ Maintain cleanliness of facilities;
  - ✓ Encourage employees to wash hands frequently;
  - ✓ Encourage “respiratory etiquette” such as covering coughs and sneezes;
  - ✓ Make soap, hand sanitizer, and disinfectant readily available
  - ✓ Provide appropriate PPE for personnel; and
  - ✓ Train employees on risk factors and protective behaviors.

# Workplace Safety

- ❖ Require employees to report to supervisor/HR if they:
  - ✓ Experience symptoms of COVID-19;
  - ✓ Have been in contact with anyone who has been infected with COVID-19 or appears to be ill; or
  - ✓ Have been in contact with anyone who has recently traveled to (the rapidly changing list of) locations with active outbreaks.
- ❖ Require employees to report recent and upcoming travel.
  - ✓ Business and personal travel.
  - ✓ Better approach is likely to require all travel to be reported, not just travel to specified locations with current active outbreaks,
- ❖ Social distancing and remote work
- ❖ Consider off-site communication strategy

# Workplace Safety

- ❖ Discontinue / strictly limit nonessential business travel.
  - ✓ Identify trips that are business critical.
  - ✓ Where travel is necessary, be cautious if employees express concern regarding or refuse to go on a trip.
- ❖ Employee “quarantine” following travel.
  - ✓ Employees returning from travel to highly impacted areas (China, Iran, Italy, cruise ships) should be required to stay away from the work site for 14 days post-return.
  - ✓ For travel to other locations, ask about layover locations, etc.
- ❖ According to OSHA, COVID-19 is subject to the agency’s injury and illness recordkeeping and reporting requirements.
  - ✓ Contrast with the common cold and the flu.

# Workplace Safety

- ❖ If there is a confirmed case among the workforce:
  - ✓ Contact the local health department and follow any guidance issued;
  - ✓ Consider short-term closure to disinfect the premises;
  - ✓ Advise co-workers who have close contact with the affected employee of the confirmed case, while also maintaining the confidentiality of the affected employee;
  - ✓ Require such co-workers to immediately report, and not come to the work site, if they experience COVID-19 symptoms; and
  - ✓ Consider sending co-workers who have close contact with the affected employee home for a 14-day quarantine period.



# Medical Inquiries and Examinations

- ❖ The Americans with Disabilities Act (“ADA”), New York State Human Rights Law (“NYSHRL”), and New York City Human Rights Law (“NYCHRL”) generally prohibit employers from making medical inquiries or requiring medical examinations of current employees, except:
  - ✓ In connection with an accommodation request, to confirm the existence of a disability and need for accommodation (except where obvious); or
  - ✓ Where job-related and consistent with business necessity.
- ❖ The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued guidance related to COVID-19, which states that the ADA “rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the coronavirus.”

# Medical Inquiries and Examinations

- ❖ In issuing its COVID-19 guidance, EEOC relied on earlier guidance from 2009 related to pandemic preparedness in the workplace, which provides:
  - ✓ If CDC or state or local health authorities determine that pandemic influenza is significantly more severe than seasonal influenza, it can pose a direct threat, thereby allowing the employer to “make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.”
  - ✓ Before influenza pandemic occurs, employer cannot ask employees to disclose if they have compromised immune systems or other chronic health condition that would make them more susceptible to influenza complications.
    - Can make inquiries designed to identify, through “yes” or “no” questions, potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on equal footing with medical reasons.

# Medical Inquiries and Examinations

- ❖ According to the EEOC, if state or local health officials or the CDC recommend that people who visit specified locations remain at home for a period of time until it is clear they do not have symptoms, employers may ask employees who return from travel (including personal travel) if they visited such locations.
- ❖ During a pandemic, employers may ask employees if they are experiencing influenza-like symptoms, but must maintain such information as a confidential medical record.
- ❖ Employers also may send employees home if they display influenza-like symptoms.

# Medical Inquiries and Examinations

- ❖ Another question that has been posed is whether employers may take its employees' temperatures to determine whether they have a fever?
  - ✓ According to the EEOC, measuring an employee's body temperature is generally a medical examination.
  - ✓ However, if pandemic influenza symptoms become more severe than the seasonal flu, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.
  - ✓ In further guidance issues on March 18, 2020, EEOC stated: "Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever."

# Medical Inquiries and Examinations

## ❖ Quarantine-return protocols

- ✓ Likely permissible to ask if employee experienced any COVID-19 symptoms.
- ✓ If employee reports no symptoms, should employer request medical confirmation?
- ✓ How to handle report that the employee experienced symptoms that have now abated?
- ✓ Other medical examination?

# Wage and Hour Issues

## ❖ Exempt employees

- ✓ Generally must be paid their full salary in any week in which they perform any work.
- ✓ If exempt employees are permitted or required to work from home, the employer can institute protocols to monitor productivity (e.g., work logs, timesheets) and discipline for lack of productivity.
- ✓ Employers generally may require exempt staff to use available PTO benefits (assuming there is a bona fide plan) in the case of an office closure or other COVID-19 related absence, whether full or partial day.
- ✓ Deductions may be made for absences of one or more full days due to sickness or disability, if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness.
- ✓ After an exempt employee exhausts PTO, partial-week absences occasioned by an office closure may not be deducted from salary.

# Wage and Hour Issues

## ❖ Non-exempt employees

- ✓ Must be paid at least the minimum wage for all hours worked, plus overtime for all hours worked in excess of 40, in a workweek.
- ✓ Employers should be particularly cautious about allowing non-exempt employees to work from home.
- ✓ If working from home, non-exempt employees must accurately track and report all hours worked.
- ✓ As with exempt employees, employers generally may require non-exempt staff to use available vacation or other PTO benefits during COVID-19 related absences.
- ✓ If a non-exempt employee takes time off related to COVID-19, does not work from home, and has exhausted all paid time off and paid leave, the time off can generally be unpaid.

# Wage and Hour Issues

- ❖ During closure or shortage, employers may be inclined to look for “volunteers” to help out.
  - ✓ Under New York law, private for-profit employers generally cannot have uncompensated volunteers.
  - ✓ Non-profits and public agencies can use bona-fide volunteers – but not to replace or augment paid staff to do the work of paid staff or do anything but tasks traditionally reserved for volunteers (among other restrictions).
  - ✓ Any “volunteers” will likely need to be compensated in accordance with federal and state law.



# WARN Act – Basics

- ❖ As the COVID-19 situation evolves, employers may have to cease or significantly curtail operations. The New York Worker Adjustment and Retraining Notification (“WARN”) Act requires that **90 days’ notice** be given to employees before ordering a “**mass layoff**” or “**plant closing**”.
- ❖ A “**mass layoff**” is a reduction in force which is not the result of a plant closing and results in an **employment loss** at the single site of employment during any 90-day period for either:  
(a) at least **25 employees constituting 33% or more** of the site’s employees or (b) at least **250 employees**.
- ❖ A “**plant closing**” is the shutdown of a facility or operating unit at a single site of employment during any 90-day period that results in an **employment loss** for at least **25 employees**.
  - ✓ Employment loss includes a layoff that exceeds 6 months in duration.

# WARN Act – Potential Exceptions

## ❖ Unforeseeable Business Circumstances Exception

- ✓ To qualify, business circumstances must not have been reasonably foreseeable when notice would have been required. May be established by the occurrence of some **sudden, dramatic and unexpected action or condition outside the employer's control**
- ✓ The employer must exercise **commercially reasonable business judgment** in determining whether a business circumstance is reasonably foreseeable, and provide **as much notice as is practicable**.

## ❖ Natural Disaster Exception

- ✓ To qualify for this exception, the employer must establish that the reduction was a **direct result** of a natural disaster (e.g., floods, earthquakes, droughts, storms, tidal waves, tsunamis, or **similar effects of nature**).
- ✓ The employer must provide **as much notice as is practicable and available** under the circumstances.

# Leave and Accommodations

- ❖ Absences related to COVID-19 may be legally protected and/or may need to be compensated under the following laws:
  - ✓ Family and Medical Leave Act (“FMLA”), including as recently expanded by federal legislation;
  - ✓ Federal COVID-19 Paid Sick Leave;
  - ✓ New York State COVID-19 Paid Sick Leave;
  - ✓ New York Paid Family Leave Law (“NYPFL”);
  - ✓ New York City Earned Sick and Safe Time Act;
  - ✓ Other local paid sick leave laws;
  - ✓ ADA/NYSHRL/NYCHRL (reasonable accommodations); and
- ❖ Employers should also check their employee handbooks and other policies and applicable CBAs for any policies related to office closure protocols and the compensability of time off when the business is closed.

# Leave and Accommodations

## FMLA

- ❖ The FMLA allows eligible employees of covered employers to take up to 12 weeks of unpaid job-protected leave during a 52-week period for, among other reasons:
  - ✓ To care for his/her spouse, child, or parent who has a serious health condition;
  - ✓ For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- ❖ Applies to employers with “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”
- ❖ Eligible employees are those who:
  - ✓ Have been employed by the employer for at least 12 months;
  - ✓ Have worked at least 1,250 hours for the employer during the 12 month period preceding the leave; and
  - ✓ Work in a location where the employer has 50 or more employees in a 75 mile radius.

# Leave and Accommodations

## FMLA

- ❖ “Serious health condition” is an illness, injury, impairment, or physical or mental condition that involves:
  - ✓ *Inpatient care* in a hospital, hospice or residential care facility; or
    - Inpatient care” is defined as “an overnight stay in a hospital, hospice, or residential medical facility, including any period of incapacity... or subsequent treatment in connection with such inpatient care.”
  - ✓ *Continuing treatment* by a health care provider.
    - “Continuing treatment” is defined to include, among other things, “a period of incapacity... of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves... treatment two or more times by a health care provider... or by a provider of health care services under orders of, or on referral by, a health care provider”
    - The term “treatment” includes examinations to determine whether a serious health condition exists and evaluations of the condition, but excludes routine physical examinations.

# Leave and Accommodations

## FMLA Expansion

- ❖ FMLA has been expanded to be available when the employee needs leave to care for his or her minor child because the child's school or place of care has been closed, or the child's child care provider is unavailable, because an emergency has been declared by a federal, state, or local authority with respect to COVID-19.
- ❖ For this qualifying reason:
  - ✓ Covered employers are those with fewer than 500 employees, though the U.S. Department of Labor ("USDOL") may issue regulations to except employers with fewer than 50 employees when providing this leave "would jeopardize the viability of the business as a going concern."
  - ✓ Covered employees are those who have been employed by the employer for at least 30 days. However, employers of health care providers and emergency responders may elect to exclude such employees from the extension of FMLA.
  - ✓ The **first 10 days can be unpaid**. During this time, the employee may elect to use accrued vacation, personal, or medical/sick leave.
  - ✓ **After 10 days, the leave must be paid** by the employer at two-thirds the employee's regular rate of pay, with benefits **capped at \$200 per day and \$10,000 in the aggregate** for each employee.
- ❖ Effective April 2, 2020 and available until December 31, 2020.

# Leave and Accommodations

## Federal COVID-19 Paid Sick Leave

- ❖ Private employers with fewer than 500 employees and public agencies and other non-private entities of any size must provide **two weeks of paid sick leave** for the following reasons:
  - ✓ The employee is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19;
  - ✓ The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - ✓ The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
  - ✓ The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - ✓ The employee is caring for his or her son or daughter (as defined under the FMLA) if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
  - ✓ “The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”
- ❖ Effective April 2, 2020 and available until December 31, 2020.

# Leave and Accommodations

## Federal COVID-19 Paid Sick Leave

- ❖ This sick leave must be **paid** at the greater of the employee's regular rate of pay or the applicable minimum wage rate, **capped at \$511 per day and \$5,110 in the aggregate** per employee.
- ❖ However, where the leave is for the purposes described in the last three bullet points above, the sick leave is paid at two-thirds of the employee's regular rate of pay or the applicable minimum wage rate (whichever is greater), **capped at \$200 per day and \$2,000 in the aggregate** per employee.
- ❖ Employers may elect to exclude employees who are health care providers or emergency responders from the provisions of the paid sick leave law.
- ❖ Employers may not require an employee to use other paid leave before this paid sick leave.
- ❖ Unused paid sick time does not carry over from one year to the next.



# Leave and Accommodations

## NYPFL

- ❖ NYPFL applies to virtually all private employers in New York.
- ❖ Covered employees:
  - ✓ Employees whose regular schedule is 20 or more hours per week:  
Covered after having been in employment for at least 26 consecutive work weeks; and
  - ✓ Employees whose regular schedule is under 20 hours per week:  
Covered after having worked 175 days in such employment.
- ❖ Provides job-protected leave, with paid benefits through the employer's NYPFL insurance, to care for a covered family member with a serious health condition.
  - ✓ Covered family member is broader than under FMLA and applies to the employee's spouse, domestic partner, child (any age), parent, parent-in-law, parents or child of domestic partner, grandparent, or grandchild.

# Leave and Accommodations

## NYPFL

- ❖ Care includes necessary physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.
  - ✓ An employee must be in close and continuing proximity to the care recipient to be providing care. This means present at the same location as the family member during the majority of the employment period from which leave has been taken.
  - ✓ Travel necessitated to secure medication or to arrange care for the family member, or other such deviations reasonably related to providing care, also constitute “care.”
- ❖ Similar to the FMLA, “serious health condition” means an illness, injury, impairment or physical or mental condition that involves:
  - ✓ Inpatient care in a hospital, hospice, or residential health care facility; or
  - ✓ Continuing treatment or continuing supervision by a healthcare provider.
- ❖ NYPFL may not be taken for the employee’s own serious health condition.

# Leave and Accommodations

## State COVID-19 Sick Leave Law

- ❖ Guarantees leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.
  - ✓ Private employers with 10 or fewer employees and net income of one million dollars or less in the previous tax year must provide unpaid sick leave until the termination of the order.
  - ✓ Private employers with 10 or fewer employees and net income over one million dollars in the previous tax year and private employers with between 11 and 99 employees, regardless of income, must provide at least five (5) days of paid sick leave, followed by unpaid sick leave until the termination of the order.
  - ✓ Private employers with 100 or more employees must provide at least 14 days of paid sick leave, followed by unpaid sick leave until the termination of the order.
  - ✓ Public employers must provide at least at least 14 days of paid sick leave during the order.

# Leave and Accommodations

## State COVID-19 Sick Leave Law

- ❖ Leave must “be provided without loss of the officer or employee’s accrued sick leave.”
  - ✓ What about vacation, PTO, and other time off banks not designated as “sick leave”?
- ❖ During unpaid portion of these leaves, employees of private employers can apply for increased Disability Benefits and Paid Family Leave Benefits from the employer’s insurance carrier, up to a maximum of **\$2,883.92** per week.

# Leave and Accommodations

## State COVID-19 Sick Leave Law

- ❖ Does not apply where the employee is asymptomatic or has not yet been diagnosed with any other medical condition and is physically able to work while under the quarantine/isolation order through remote access or other similar means.
- ❖ An employee is not eligible for paid benefits (from the employer or carrier) if quarantined after returning to the United States from non-work-related travel to a country for which the CDC had issued a Level 2 or Level 3 travel notice.
  - ✓ If the employee was notified of the CDC's travel notice and the unavailability of paid benefits following such travel prior to the travel.
  - ✓ Even under these circumstances, the employee must be permitted to use any accrued leave, followed by unpaid leave, for the absence.
- ❖ If the federal government adopts law that provides sick leave and/or benefits for employees related to COVID-19, the employee can only receive the difference between such federal benefits and the benefits that would otherwise be available under the state law.

# Leave and Accommodations

## Local Paid Sick Leave Laws

### ❖ Under NYC Paid Sick Leave:

- ✓ Employees who work more than 80 hours per calendar year in New York City are entitled to accrue up to 40 hours per year of paid sick and safe leave.
- ✓ Accrued sick leave may be used for, among other reasons:
  - The employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care;
  - Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or preventive medical care;
  - Closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

### ❖ Other localities, including Westchester County, have adopted paid sick leave laws that allow for similar accruals and time off.

# Leave and Accommodations

## ADA/NYSHRL/NYCHRL

- ❖ Obligation to provide reasonable accommodations for qualified individuals with disabilities, except where accommodation would result in undue hardship.
  - ✓ Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
  - ✓ NYSHRL standard is broader and includes “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or* is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
  - ✓ NYCHRL standard is also broad and includes “any physical, medical, mental or psychological impairment, or a history or record of such impairment.”

# Leave and Accommodations ADA/NYSHRL/NYCHRL

- ❖ Employees with underlying medical conditions that render them more susceptible to COVID-19 infection, or more likely to develop severe complications from such an infection, may request accommodations such as:
  - ✓ On-the-job modifications such as isolation or significant social distancing from co-workers and the public.
  - ✓ Telework.
  - ✓ Leave.
- ❖ Employees who become infected with COVID-19 may be entitled to job-protected time off, even if they are not eligible for or have exhausted leave under the laws described above.



# Discrimination Concerns

- ❖ COVID-19 may present discrimination and harassment concerns.
  - ✓ Stigma when employee returns from quarantine may lead to complaints of harassment or discrimination based on perceived disability.
  - ✓ Treatment of Asians or individuals from other countries because of perception of COVID-19 risks may lead to complaints of race and/or national origin-based harassment or discrimination.
- ❖ Reports of these kinds of behaviors should be treated as any other harassment or discrimination complaint.
  - ✓ Investigate
  - ✓ Take corrective action

# Union and CBA Impacts

- ❖ Employers with unionized workforces should check their CBAs for provisions regarding office closure, paid time off, leave, etc.
- ❖ Such employers may have bargaining obligations that arise when implementing measures to address a COVID-19 outbreak (e.g., use of accruals and compensation during quarantine or business closure).

# Unemployment Insurance

- ❖ On March 12, 2020, Governor Cuomo suspended New York Labor Law Section 590(7), which provides for a 7-day waiting period for unemployment insurance benefits.
- ❖ Applies to claimants whose claim arises directly out of the closing of schools or other workplaces in which claimants were employed or out of a claimant's isolation or quarantine in connection with COVID-19.

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QUESTIONS?

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