

# FEDERAL AND STATE LEGISLATION ENACTED TO ADDRESS PAID SICK TIME AND OTHER LEAVE RELATED TO COVID-19

*Hodgson Russ Labor & Employment Alert*  
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On Wednesday March 18, 2020, President Trump and New York Governor Cuomo both signed into law legislation aimed at providing workers paid sick time and other leave to address absences related to the Coronavirus pandemic and COVID-19.

## Federal Legislation

The Federal legislation expands the Family and Medical Leave Act (“FMLA”) and adopts an emergency paid sick leave act to address certain COVID-19 issues. This legislation takes effect on April 2, 2020.

The legislation makes FMLA leave 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 new qualifying need:

- Leave is available only until December 31, 2020.
- 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 of the leave 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. The calculation is to be based on the number of hours the employee would otherwise be normally scheduled to work. However, paid leave is **capped at \$200 per day and \$10,000 in the aggregate** for each employee.

## Attorneys

Luisa Bostick  
Joseph Braccio  
Glen Doherty  
Andrew Drilling  
Ryan Everhart  
Andrew Freedman  
Peter Godfrey  
John Godwin  
Charles H. Kaplan  
Christopher Massaroni  
Elizabeth McPhail  
Lindsay Menasco  
Kinsey O'Brien  
Jeffrey Swiatek  
Michael Zahler

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Employers should keep in mind that FMLA leave may also be available where the employee or a covered family member has a “serious health condition” related to COVID-19. However, under those circumstances, the normal FMLA rules, including the more restrictive definitions of covered employers and employees and the unpaid nature of the leave, apply.

The federal legislation also requires private employers with fewer than 500 employees and public agencies and other non-private entities of any size to provide **two weeks of paid sick leave** related to COVID-19. Specifically, sick leave is available when an employee is unable to work (or telework) because:

- The employee 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 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.”

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.

As under the FMLA expansion, 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.

Employers are prohibited from discharging, disciplining, or in any other manner discriminating against an employee who takes paid sick leave or files or testifies in a complaint or proceeding under the paid sick leave law.

Employers will be required to post a notice related to this paid sick leave, and the USDOL is required to issue a model notice no later than 7 days after the law’s enactment.

Finally, the legislation provides certain payroll tax credits for employers who pay sick leave as required by the federal law.

### New York State Legislation

The New York legislation, which took effect immediately upon Governor Cuomo’s signature, 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.

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Specifically, the law requires:

- Private employers with 10 or fewer employees and net income of one million dollars or less in the previous tax year to provide **unpaid** sick leave until the termination of the quarantine/isolation 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, to provide at least **five (5) days of paid sick leave**, followed by unpaid sick leave until the termination of the quarantine/isolation order.
- Private employers with 100 or more employees to provide at least **14 days of paid sick leave**, followed by unpaid sick leave until the termination of the quarantine/isolation order.
- Public employers, regardless of size, to provide at least at least **14 days of paid sick leave** during the quarantine/isolation order, paid at the employee/officer's "regular rate of pay for those regular hours during which [he or she] is absent from work" due to the order. For purposes of this provision, the term "public employer" includes, but is not limited to, the state, counties, cities, towns, villages, school districts and BOCES, government entities operating colleges or universities, public improvement or special districts, and public authorities, commissions, and benefit corporations.

The law states that the above leave must "be provided without loss of the officer or employee's accrued sick leave." It is unclear whether employers can rely on existing vacation, PTO, and other time off banks not designated as "sick leave" to satisfy their obligations under the new law. The New York State Department of Labor is authorized to issue regulations to implement the new law, and such regulations may provide clarity on this issue.

During the unpaid portions of these leaves, employees of private employers can apply for Disability Benefits ("DB") and Paid Family Leave Benefits ("PFL") from the employer's DB/PFL insurance carrier. Notably, PFL and DB are available **concurrently** and without any waiting period. This is a departure from the usual PFL and DB scheme, which does not allow both benefits to be collected at the same time. With respect to DB, the law increases the maximum benefits to the difference between the maximum PFL benefit: and the employee's total weekly wage, up to a maximum DB benefit of \$2,043.92. This rich benefit is available only for COVID-19 quarantine/isolation orders; the regular maximum DB of \$170.00 per week, as well as the normal one-week waiting period for DB, continues to apply to all other qualifying DB circumstances. Taken together with PFL, which is currently subject to an \$840.70 weekly maximum, the new law provides for a maximum weekly benefit of **\$2,884.62**.

The law also expands the qualifying circumstances for PFL to include leave taken to "care for a minor or dependent child of the employee who is 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." Employers are not required to provide any paid leave for this qualifying circumstances, and the normal maximum PFL benefit of \$840.70 per week applies.

The law contains three important exceptions and limitations:

- First, the law does not apply where the employee is deemed 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.

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- Second, an employee is not eligible for paid benefits under the law (including paid sick leave, PFL, or DB) if the employee is subject to a quarantine/isolation order after returning to the United States from travel to a country for which the Centers for Disease Control and Prevention (“CDC”) had issued a Level 2 or Level 3 travel notice, provided that (1) the travel was not taken as part of the employee’s employment or at the direction of the employer and (2) the employee was provided notice of the CDC’s travel notice and the unavailability of paid benefits following such travel prior to the travel. However, even under these circumstances, the employee must be permitted to use any accrued leave, followed by unpaid leave, for the absence.
- Finally, the law provides that if the federal government adopts law or regulation that provides sick leave and/or employee benefits for employees related to COVID-19, the employee’s maximum benefits under the law are equal to the difference between such federal benefits and the benefits that would otherwise be available under the state law. **This means that New York employers will not be able to take advantage of the caps set forth in the federal legislation for employees who are subject to a quarantine/isolation order, and will have to provide such employees with paid sick leave at the level set forth in the state law.**

Leave under the state law, whether paid or unpaid, is job-protected, meaning the employee must be restored to his or other position at the same rate of pay and other terms and conditions of employment at the conclusion of the leave. The law also contains a prohibition on discrimination or retaliation against an employee for taking such leave.

Hodgson Russ is closely monitoring all labor and employment issues related to the ongoing Coronavirus pandemic. If you have any questions, please contact a member of our Labor and Employment team.

Hodgson Russ remains on top of these circumstances as they develop. Our attorneys are working remotely, and ready, willing, and able to address the needs of our clients, so do not hesitate to contact us (attorney directory). **Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.**

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