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**Public Employer Update on  
NYS COVID-19 Executive Orders,  
NYS Paid Leave, the Federal FFCRA, and  
Other Labor and Employment Issues**



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**March 26, 2020**

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# always on your team

Founding partners Karlee S. Bolaños and William Q. Lowe both have relatively rare and exceptionally well-earned experience. Veterans in the areas of Labor, Employment, and Corporate law, these top-notch attorneys will work with you, for you, and beside you — always on your team.

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# Agenda

- NYS Executive Orders and the ESD Guidance
- Overview of Other Applicable Laws
- New York and Federal Coronavirus Paid Sick Leave Legislation
- Emergency Family and Medical Leave Act
- Emergency Unemployment Insurance Stabilization and Access Act of 2020
- Tax Credits for Emergency Paid Sick Leave and Emergency FMLA
- Other COVID-19 Labor and Employment Law Issues

# Executive Order 202

- Governor Cuomo declares a State disaster emergency for the entire State of New York due to COVID-19.
- This begins a series of additional Executive Orders.

# Executive Order 202.4

- Effective March 17, 2020, **local governments** must allow non-essential personnel to work from home or take leave without charging accruals, except for personnel essential to the locality's response to the COVID-19 emergency.
- Non-essential personnel must total no less than fifty-percent (50%) of the total number of employees across the entire workforce of the local government.
- Non-essential personnel is “as determined by the local government”.
- Every school in the state of New York was directed to close by Wednesday, March 18, 2020, for a period of two weeks, ending April 1, 2020. The state will thereafter reassess whether to extend the school closures. The 180 day instructional requirement is suspended. School districts are required to develop alternative instructional options.
- Any village election to be held March 17, 2020 was postponed and any elected official holding such position shall remain in office until such time as a new election is held.

# Executive Order 202.8

- 100% of non-essential workers are prohibited from in-person work effective March 22 at 8 p.m.
- Only essential businesses and entities providing essential services or functions are exempt and may operate at the level necessary to provide such service or function.
- Violating businesses will be subject to enforcement as if this were a violation of \$2000 to \$10,000.
- FAQ #5 from the ESD guidance states that 202.8 is not applicable to state and local governments  
[https://esd.ny.gov/sites/default/files/ESD\\_EssentialEmployerFAQ\\_032220.pdf](https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf)

# Essential Business

- Go to the Bolaños Lowe website at [www.bolanoslowe.com](http://www.bolanoslowe.com) and click on our COVID-19 Alert link for a comprehensive legal alert detailing the ESD guidance on “essential businesses” and “essential services”.
  - [https://bolanoslowe.com/wp-content/uploads/2020/03/BLAlert\\_March\\_24\\_NYS\\_On\\_Pause.pdf](https://bolanoslowe.com/wp-content/uploads/2020/03/BLAlert_March_24_NYS_On_Pause.pdf)

# Notable Points from ESD Guidance

- ESD has created a form for employers to use to request designation as an essential business or entity.
- This form should be used if a business/entity believes it is essential but was not listed as essential in the ESD guidance. After reviewing the submission, ESD will notify the business whether the request for designation as an essential business is approved or disapproved.
- The form is available at:  
[https://esd.ny.gov/sites/default/files/Request%20for%20Designation%20Form\\_0.pdf](https://esd.ny.gov/sites/default/files/Request%20for%20Designation%20Form_0.pdf)
- Municipalities probably should probably not use this form.

# Other Applicable Laws

In addition to the new NYS COVID-19 Paid Sick Leave, Emergency FMLA Expansion, the federal Emergency Paid Sick Leave laws we reviewed today, there are other laws and rules to consider:

- FMLA
- ADA/NYSHRL
- NYS Unemployment Insurance
- Employers should check employee handbooks, policies, and applicable CBAs for rules related to emergency closure, compensation when the business is closed, and leave of absence language

# New York Coronavirus Legislation

- Signed into law by Governor Cuomo on March 18, 2020.
- Applies to **public** and private employers.
- The essence of this law is that all New York State employers, including public employers, must now provide **paid sick leave** and **job protection** to employees who have been subjected to mandatory or precautionary orders of quarantine or isolation due to COVID-19 (those issued by New York State, a local health board, or any other governmental entity authorized to issue such order).
- The law does 3 main things:
  - (1) Expands the coverage of “disability” under current PFL to apply to public employers for the specific COVID-19 benefit (PFL in general still does not apply to public employers);
  - (2) Expressly expands PFL to cover an employee’s inability to work as a result of a quarantine or isolation order (even when not sick); and
  - (3) Covers not only an employee’s leave from work due to such an order, but also, covers the circumstance of an employee’s dependent child requiring care due to a quarantine or isolation order.

# New York Coronavirus Legislation: Public Employers

- Public officers and employees are entitled to:
  - At least 14 days of *paid*, job-protected sick leave during the period of the order.
  - The legislation is silent regarding any additional unpaid leave or eligibility for PFL or disability benefits.
- Leave is paid at the officer or employee's regular rate of pay for regular work hours he/she is absent during the order.

# Applications Forms Are Already Available

 **Paid Family Leave** Request for COVID-19 Quarantine PFL – Child (Form CCOVID19)

**Instructions for taking Paid Family Leave for a Minor Dependent Child due to COVID-19 Quarantine/Isolation**

- Complete Sections 1 – 3 of this form and Part A of the *Request for Paid Family Leave (Form PFL-1)*.
  - Leave Questions 11 and 12 blank on *Form PFL-1*.
- Give completed forms to your employer.
  - Employer completes Section 4 of this form and Part B of *Form PFL-1*, within 3 business days.
- Attach mandatory or precautionary order of quarantine or isolation.
- Submit all forms and order of quarantine/isolation to your employer's PFL insurance carrier listed on Part B of *Form PFL-1*. For further guidance, visit the PFL website at [PaidFamilyLeave.ny.gov](http://PaidFamilyLeave.ny.gov).

**SECTION 1 - PAID FAMILY LEAVE (PFL) REQUEST** (to be completed by the employee)

Reason for PFL request:  Care for minor dependent child subject to COVID-19 Quarantine/Isolation

**SECTION 2 - MINOR CHILD INFORMATION** (to be completed by the employee)

- Minor dependent child's name (first name, middle initial, last name)
- Minor child's date of birth (MM/DD/YYYY)
- Minor child's mailing address  
Street address  
  
City  State  Zip Code  Country (if not U.S.)

**SECTION 3 - EMPLOYEE ATTESTATION** (to be completed by the employee)

My signature affirms that I am not physically able to perform work for my employer through remote access or similar means during my minor child's mandatory or precautionary order of quarantine or isolation.

Employee Signature:  Date:   
Print Employee Name:

**SECTION 4 - EMPLOYER ATTESTATION** (to be completed by the employer)

My signature affirms that this employee is not physically able to perform their work through remote access or similar means during their minor child's mandatory or precautionary order of quarantine or isolation.

Employer Signature:  Date:   
Print Employer Name/Entity:

The insurance carrier must pay or deny benefits within 18 calendar days of receiving your completed request. Your request cannot be considered incomplete solely because your employer failed to fill out Section 4 above or Part B of *Form PFL-1*.  
If you disagree with the insurance carrier's decision, or if payment is untimely, you may request arbitration with NAM (National Arbitration and Mediation) at [nyspfla.com](http://nyspfla.com).

CCOVID19 (3-20) Page 1 of 1 If you need assistance, please call (844) 337-6303 [PaidFamilyLeave.ny.gov](http://PaidFamilyLeave.ny.gov)



- **Employee Quarantine**
  - Request for COVID-19 Quarantine DB/PFL - Self (Forms PFL-1 & SCOVID19)
    - <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>
- **Child Quarantine**
  - Request for COVID-19 Quarantine PFL - Child (Forms PFL-1 & CCOVID19)
    - <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/ccovid19.pdf>

# New York Coronavirus Legislation: Additional Considerations

- Sick leave must be provided without loss of accrued leave. Consequently, this leave will be in addition to any other employer-provided sick leave.
- Prohibition on discriminating/retaliating against employees for taking such leave.
- Upon returning from leave, employees must be restored to the same position with same pay and other terms and conditions.

# New York Coronavirus Legislation: Additional Considerations

- Employees are not eligible if asymptomatic or have not been diagnosed with a medical condition and are physically able to work while under a quarantine or isolation order.
- Legislation does not impede, infringe, diminish, or impair the rights of employees and employers under any CBA, or the right to engage in collective bargaining.
- Leave is not provided in addition to similar federal leave.
  - Employees are only entitled to coverage under the New York legislation to the extent its benefits exceed the benefits under the federal Emergency Paid Sick Leave Act.

# Federal Coronavirus Legislation

- Families First Coronavirus Response Act
  - Passed on March 18, 2020.
    - Effective April 1, 2020, and expires December 31, 2020
    - April 1 date just made clear via USDOL guidance published on March 24<sup>th</sup>
    - <https://www.dol.gov/agencies/whd/pandemic>
  - Key components of the FFCRA:
    - Emergency Paid Sick Leave Act
    - Emergency Family and Medical Leave Expansion Act
    - Emergency Unemployment Insurance Stabilization and Access Act of 2020
    - Tax Credits for Emergency Paid Sick Leave and Emergency FMLA

# Federal Coronavirus Legislation: Emergency Paid Sick Leave Act

- Applies to private employers with *fewer* than 500 employees and covered public employers.
- Requires covered employers to provide 80 hours of paid sick leave to employees who are unable to work or telework for reasons related to COVID-19.
  - Part-time employees are entitled to paid sick leave based on the average number of hours worked during the prior 6 months.

# Federal Coronavirus Legislation: Emergency Paid Sick Leave Act

- Employees are eligible for paid sick leave if they are:
  1. Subject to a government quarantine or isolation order related to COVID-19;
  2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
  3. Experiencing symptoms of COVID-19 and are seeking a medical diagnosis;
  4. Caring for an individual subject to a quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
  5. Caring for the employee's child if the child's school or daycare is closed or unavailable due to public health emergency; or
  6. Are experiencing any other substantially similar condition.

# Federal Coronavirus Legislation: Emergency Paid Sick Leave Act

- Rate of Pay and Cap on Paid Sick Leave Wages
  - Employees utilizing sick leave for reasons 1 – 3
    - Leave paid at employee's regular rate.
    - Limited to \$511 per day, up to \$5,110 total per employee.
  - Employees utilizing sick leave for reasons 4 – 6
    - Leave paid at two-thirds of the employee's regular rate.
    - Limited to \$200 per day, up to \$2,000 total per employee.

# Federal Coronavirus Legislation: Emergency Paid Sick Leave Act

- Additional Considerations
  - All employees, regardless of length of employment are eligible, except:
    - Health care providers and emergency responders are excluded.
  - Emergency paid sick leave allotment does not carryover to 2021.
  - Leave allotment is provided in addition to employers' existing leave offerings.
  - Employees cannot be required to use other paid leave before utilizing emergency paid sick leave.

# New York and Federal Coronavirus Sick Leave: Potential Scenarios

- Employee is home subject to mandatory order of quarantine issued by New York.
- Employee is home caring for a family member subject to a mandatory order of isolation issued by the county health department.
- Employee is home caring for a child with a stomach bug.
- Employee is not willing to come to work because of COVID-19 and is not in a position he or she may telework.

# Federal Coronavirus Legislation: Emergency Family and Medical Leave Expansion Act

- Applies to private employers with *fewer* than 500 employees and covered public employers.
- Any employee who was worked for at least 30 days before the designated leave may be eligible.
- Covered employers must provide up to 12 weeks of job-protected leave to employees, who are unable to work or telework, to care for a child if the child's school or childcare is closed or unavailable because of a public health emergency.

# Federal Coronavirus Legislation: Emergency Family and Medical Leave Expansion Act

- Rate of Pay
  - The first 10-day period of the emergency FMLA leave may be unpaid.
    - Employees may elect to substitute any accrued paid leave during this time.
    - Employers cannot require this.
  - After 10 days, employees are paid at two-thirds of their regular rate.
    - The Act caps payments to at \$200 per day, and \$10,000 in the aggregate.
- Exemptions
  - Healthcare providers and emergency responders.
  - Small businesses with fewer than 50 employees if the leave would jeopardize the viability of the business.

# Federal Coronavirus Legislation: Tax Credits for Paid Sick Leave and FMLA Leave

- The Families First Coronavirus Response Act also includes refundable tax credits for Emergency Paid Sick Leave and Emergency FMLA.
- Not available to government employers.
- Further guidance is expected in the next week.

# Other Labor and Employment Issues Related to COVID-19

- Sending Employees Home; Excluding Employees From Work; Requiring Employees to Work From Home; Returning Employees to Work
- Refusals to Work
- Difference Between Layoff, Furlough, and Termination and Impacts on Pension, FMLA, and Unemployment Benefits
- Accessing Retirement Plans
- Grievance Filing Deadlines
- Holding Section 72/73/75 Hearings
- Non-Exempt Employee Telecommuting Issues
- Handling Expenses for Employees Working From Home

# Other Labor and Employment Issues Related to COVID-19

- Disclosing Positive COVID-19 Cases to Co-Workers
- Workers' Compensation/207-c
- Measuring Body Temperature
- Requiring Employees to Report Personal Travel
- Health Coverage During Layoff
- Age 70+ Workers
- Whistleblower Issues

# Hot Topics Over The Past Few Weeks

- Hazard pay/paying time and a half
- Non-essential (or essential) employees perform duties outside their normal position
- Employees on sick leave before the outbreak
- Temperature taking
- Accrual use/Lost accruals
- Employees with pre-scheduled vacation

# thank you

For questions contact either Karlee or Bill

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Bolaños Lowe is a premier law firm in Rochester, NY providing senior-level experience in Labor, Employment, and Corporate law — powered by enthusiasm and driven by a partnership that's on your terms.