

Critical Labor & Employment Updates on Coronavirus

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New York Executive Orders and “Essential Businesses”

Executive Orders Mandating In-Person Workforce Reduction

- Effective March 22, 2020 at 8:00 p.m. – 100% in-person workforce reduction for non-essential businesses
 - State and local governments are not subject to the 100% workforce reduction requirement
- Tiered progression from 50% in-person reduction to 100% in-person reduction
- Directive is currently in effect through April 19, 2020

What are “Essential Businesses”?

- Empire State Development Corporation (ESDC) released guidance and FAQs
 - Provides a detailed list of “essential businesses or entities” that are not subject to the reduction requirement
- Employers not listed in the guidance but who believe business is essential may request to be designated as an essential business by ESDC
- If business is “essential,” there are still restrictions
 - Only essential employees are permitted to work at the business location
 - Required to utilize telecommuting or work from home arrangements to the maximum extent possible

New York Paid Sick Leave for Order of Quarantine/Isolation

NY Paid Leave for COVID-19

- The New York State Paid Sick Leave Act creates two leave programs:
 - a new “paid sick leave” program for quarantined employees, and
 - an expansion of existing N.Y. Paid Family Leave (PFL) and Disability Benefit Leave (DBL, or commonly called “short-term disability” leave) for quarantined employees
- It only applies to qualifying orders to quarantine or isolate by New York State, the Department of Health, a local health board, or another government entity authorized to issue a quarantine or isolation order
- The Act will not apply to quarantined employees who are asymptomatic and able to perform their job functions remotely

NY Paid Leave for COVID-19

- Paid Sick Leave
 - Depending on the employer's size and revenue, the Act requires up to 14 days of paid sick leave for an employee who has been quarantined or isolated
 - The sick leave must be provided "without loss" to employees who already have employer-provided accrued "sick leave" time
- NY Paid Family Leave and Disability Leave
 - Employees will be able to take PFL if they are subject to a quarantine order or if their minor child is subject to a quarantine order
 - Employees will also be able to utilize disability leave if quarantined
 - A quarantine order issued by an appropriate governmental agency will constitute sufficient proof of the need for DBL or PFL

NY Paid Leave for COVID-19

| <u>Employer Size</u> | <u>Amount of Leave</u> |
|---|---|
| 10 or fewer employees | No paid sick leave requirement, but employees may apply for PFL/DBL benefits. |
| 10 or fewer employees, but company's net income is over \$1 Million | 5 days of paid sick leave, and the remaining leave is eligible for PFL/DBL until quarantine period ends. |
| 11 to 99 Employees | 5 days of paid sick leave, and the remaining leave is eligible for PFL/DBL until quarantine period ends. |
| 100+ employees | 14 days of paid sick leave. Presumably, further leave will not be necessary after the 14-day period, as most quarantine periods extend for 14 days. |

Federal Leave Legislation

The Emergency Family & Medical Leave Act (FMLA)
Expansion Act

and

The Emergency Paid Sick Leave Act

Federal Leave: The Emergency FMLA Expansion

- Covers private employers with fewer than 500 employees and all public agencies
- Length of leave: up to 12 weeks
- Qualifying reason for leave: employee unable to work or “telework” (work from home) because their child’s school or child care provider has closed due to COVID-19
- Breakdown of benefits:
 - First 10 days of leave are unpaid (but as we will see on the next slide, employees will receive pay under the *other* Federal leave program)
 - Employees entitled to 2/3rds of their usual pay for the remaining length of leave, subject to a cap of \$200 per day and \$10,000 in total.
- **Critical updates:**
 - **IRS and U.S. DOL expected to release guidance that may exempt employers with fewer than 50 employees from some requirements if it would threaten the viability of the business**
 - **IRS and U.S. DOL announced late last week that employers will be reimbursed “dollar for dollar” for paid leave to employees.**

Federal Leave: The Emergency Paid Sick Leave Act

- Covers private employers with fewer than 500 employees, and “public agencies” with at least 1 employee
- Length of leave: up to 80 hours for full-time employees. Part-time employees may take leave up to average number of hours worked in a 2-week span.
- Qualifying reasons for leave:
 - (1) Employee subject to Federal, State, or local quarantine or isolation order
 - (2) Employee advised by a health care provider to self-quarantine
 - (3) Employee experiencing symptoms of COVID-19 and seeks a medical diagnosis
 - (4) Employee caring for an individual who is subject to a government quarantine order or a health care provider has advised to quarantine
 - (5) Employee caring for their child because their school or child care provider has closed due to COVID-19
 - (6) Employee is experiencing a “substantially similar condition” to the 5 reasons listed above, as specified by the Department of Health & Human Services (HHS), the Treasury, and the U.S. DOL

Federal Leave: The Emergency Paid Sick Leave Act (cont'd)

- Breakdown of benefits:
 - If employee is on leave for reasons (1)-(3) (their “own” reasons):
 - The employee’s usual rate of pay, subject to a cap of \$511 per day, and \$5,110 in total
 - If the employee is on leave for reasons (4)-(6) (the “caregiver” reasons):
 - 2/3rds of the employee’s usual rate of pay, subject to a cap of \$200 per day and \$2,000 in total
- **Critical updates:**
 - **U.S. DOL may issue regulations to exempt businesses with fewer than 50 employees from pay requirements if employee takes leave due to a school closure, and possibly other requirements.**
 - **IRS and U.S. DOL announced late last week that employers will be reimbursed “dollar for dollar” for paid leave to employees**

FAQs

- My business manufactures parts for subway cars and farm equipment. Is my business “essential” under the Governor’s Executive Orders? If so, how are my office staff affected by the Orders?

FAQs

- Can an employer take employees' temperatures? How about non-employees?

FAQs

- If an employee exhibits symptoms of COVID-19, can the employer require a doctor's note before letting the employee return to work?

FAQs

- One of our employees just learned that they came into contact with an individual who tested positive 6 days ago. Since that time they have been coming to work. What should we do?
- (Also: same question, but the individual with whom our employee came into contact showed symptoms and is now under medical or self quarantine, but has not yet tested positive.)

FAQs

- An individual from another company located in our building tested positive. Our companies share common areas, including the elevators and restrooms. What do we do?

FAQs

- One of our unionized employees was exhibiting COVID-19 symptoms at work. We mandated that he leave work for the recommended period of time. The employee is insisting he is not sick and that he is ready and willing to return to work. Our Collective Bargaining Agreement does not address this situation. What should we do?

FAQs

- Our employee was directed to quarantine by her personal physician because she exhibited COVID-19 symptoms. Is the employee entitled to paid sick leave under New York law? How about the new federal law?

FAQs

- Can you address HIPAA or ADA confidentiality issues an employer faces when an employee has a suspected case of COVID-19 or is confirmed positive by a test?

FAQs

- Can employers screen applicants for COVID-19?

FAQs

- Can employers withdraw a job offer if an applicant exhibits symptoms of COVID-19?

FAQs

- Do small businesses have to comply with the new federal laws? What exceptions exist for small businesses?

FAQs

- Our health care system is made up of numerous facilities and locations. Some of these locations employ fewer than 500 employees, while some employ more than 500 employees. Are we subject to the new federal emergency sick leave provisions and/or the expanded FMLA provisions?

FAQs

- What are the differences between how the recent NY and federal legislation applies to private versus public sector employers?

FAQs

- If we want to terminate or furlough employees, should we do that before April 2 (when the new federal laws go into effect)?

FAQs

- Can an employee's position be eliminated while the employee is on Emergency FMLA leave?

FAQs

- Does the WARN Act apply to my furlough or reduction-in-force?

FAQs

- Can I change or reduce my employees' pay (for both non-exempt and exempt employees)?

FAQs

- The union that represents our employees is proposing to change certain CBA provisions in light of the current pandemic. For example, the union asked that we pay employees in higher-risk positions an increased wage despite what is called for by the CBA. Do we have an obligation to agree to this?

FAQs

- With the expansion of the FMLA, is the total annual cap of 12 weeks still in effect?

FAQs

- We have been negotiating a successor Collective Bargaining Agreement for several weeks with the union that represents our employees. In light of the pandemic and state of emergency, finding the time and resources to engage in collective bargaining is extremely difficult. What obligation do we have to continue negotiations during the pandemic? Can we postpone this process?

FAQs

- The Governor has repeatedly talked about Matilda's Law and the need to protect those age 70 and over. What action should we take with respect to those employees who are age 70 or older? Can we let them work? Must we prohibit them from working?

FAQs

- No employee has tested positive or shown symptoms in the workplace. However, one of our employees lives with a family member who has a medical condition and is afraid to come to work for fear of contracting the virus (and conveying it to their family member). What should we do?

FAQs

- Our company has foreign national employees on H-1B visas. Are H-1B employees allowed to work from home, or at another offsite location? If so, what steps need to be taken?

FAQs

- Our organization has shifted to a telework/remote work arrangement. How do we satisfy the physical inspection requirements under the I-9 regulations?

FAQs

- Our company has foreign national employees traveling to the U.S. What is the current state of restrictions at the U.S. Consulates and Ports of Entry into the U.S.?

FAQs

- Our HR team is working remotely. What can we do to make sure that our visa and immigration filings are not interrupted?

FAQs

- We are a seasonal business that participates in the H-2 visa program. COVID-19 has caused a severe downturn in our business and we can no longer support seasonal workers. Are we still obligated to pay the workers under the $\frac{3}{4}$ guarantee, or even bring the workers into the U.S.?

FAQs

- If employees in H-1B status take an FMLA leave related to COVID-19, how does that impact their maintenance of status? Does this include leaves of absence under the Emergency FMLA Expansion Act and/or Emergency Paid Sick Leave Act?

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Thank you!

Questions?