

## ***Paid Sick and Family Leave in the COVID-19 Era: Guide to Federal and New York Emergency Legislation***

April 2020

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On March 18, 2020, the federal government enacted The Families First Coronavirus Response Act (the “**FFCRA**”), a stimulus plan aimed at addressing the COVID-19 pandemic’s economic impact on the American workforce. The FFCRA expanded the scope of The Family Medical Leave Act of 1993 (“**FMLA**”) and introduced a temporary new federal paid sick leave law. The FFCRA imposes obligations on all employers with fewer than 500 employees to provide temporary paid family and sick leave to employees impacted by the pandemic. It also provides a payroll tax credit for 100% of the wages and compensation paid by covered employers with respect to FFCRA leave. In contrast, New York State’s recently-enacted emergency paid family and sick leave regulations apply to all employers regardless of size.

Both the FFCRA and New York regulations contain sunset provisions: the paid sick leave and family leave benefits under the FFCRA will expire on December 31, 2020, and the New York regulations will expire upon the termination of any mandatory or precautionary order of quarantine or isolation due to the COVID-19 crisis.

### **I. The Emergency Family and Medical Leave Expansion Act (Emergency FMLA Expansion)**

The Emergency Family and Medical Leave Expansion Act (the “**EFMLEA**”) obligates employers with fewer than 500 employees to provide eligible employees with up to 12 weeks of leave for a qualifying need related to a public health emergency such as the COVID-19 pandemic. EFMLEA benefits expire December 31, 2020.

**Covered Employees.** The EFMLEA defines an “**eligible employee**” as any employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested<sup>1</sup>. The EFMLEA applies to eligible employees who are unable to work (or telework) due to a need for leave to care for the employee’s child under 18 years of age if the school or place of care has been closed (or the child’s childcare provider is unavailable, due to a public health emergency). The EFMLEA defines a “**public health emergency**” as a COVID-19 emergency as declared by a federal, state or local authority. Employers of health care providers or emergency responders may elect to exclude such employees from the EFMLEA’s application.

**EFMLEA-Covered Employers and Exemptions.** An EFMLEA-covered employer is an employer with fewer than 500 employees. The EFMLEA exempts employers with 500 or

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<sup>1</sup> Prior to the definitional change (which expanded the number of qualified employees), the FMLA defined an eligible employee as one who has been employed for at least 12 months with at least 1,250 hours of service with the employer during the prior 12-month period. The change significantly increased the number of part-time and hourly wage employees who became eligible for paid family leave due to the pandemic.

more employees from its coverage. Additionally, there is a narrow exemption for small business with fewer than 50 employees on the grounds that EFMLEA compliance would threaten such employers' ability to stay in business. This exemption applies only if (a) the employee requests leave to care for a dependent affected by a COVID-19-related school or childcare closure and (b) the requested leave would jeopardize the employer's business viability. To demonstrate the latter element, an authorized officer of the employer must determine that:

- allowing such leave would cause the employer's expenses to exceed available revenue and force the employer to cease operations;
- the employee's absence would create a substantial risk to the employer's financial health or operations due to the employee's specialized skills, responsibilities or knowledge of the business; or
- insufficient replacement employees exist to keep the employer in operation at a minimal capacity.

Employers seeking to elect this exemption must document that such a determination has been made (and should document why and how their business meets the DOL criteria).

**Required Benefits.** Under EFMLEA, an employee is entitled to up to 12 weeks of COVID-19-related family leave (capped at \$200 per day and \$10,000 in the aggregate). An employee's first 10 business days of EFMLEA leave may be unpaid; and an employee may elect to substitute any accrued vacation leave, personal leave or medical or sick leave for unpaid leave during that initial 10-day period (including up to two weeks of paid sick leave under the FFCRA's Emergency Paid Sick Leave Act (EPSLA), discussed below). Employers must provide paid leave for each subsequent day of leave that an eligible employee takes after the initial 10-day period. Once the two-week period of paid sick leave or unpaid family leave expires, the employee is entitled to up to an additional 10 weeks of paid family leave under the EFMLEA. Employers may require employees to substitute accrued paid leave for COVID-19-related leave in accordance with applicable employer childcare leave policies that would be available to the employee (i.e., vacation time, personal leave or PTO). If an employee has already exhausted his or her FMLA leave entitlement, the maximum EFMLEA leave amount (i.e., 12 weeks) will then be reduced by the FMLA leave taken by the employee during 2020.

**Pay Calculation.** The EFMLEA calculates paid leave based on at least two-thirds (2/3) of an employee's regular pay rate and the number of hours the employee would otherwise normally be scheduled to work. To the extent that an employer cannot determine with certainty the number of hours the employee would have worked if the employee had not taken leave, the employer must use the following calculations:

- two-thirds (2/3) of the employee's regular pay rate for the average number of hours the employee was scheduled daily over the six-month period ending on start date of the leave (including any hours for which the employee previously took maternity leave, sick leave or the like); or
- for employees who did not work for at least six months before the leave, two-thirds (2/3) of the employee's regular pay rate for the number of daily hours that the

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employee would normally be scheduled to work, based upon reasonable expectations of the employee at hiring time (employer should review applicable job postings and initial assignments for week-to-week employees whose employment commenced less than six months before the leave).

**Eligible Employees Must Provide Leave Notice.** An employee who takes leave for a qualifying need must provide the employer with notice of leave, to the extent practicable<sup>2</sup>. An eligible employee may commence EFMLEA leave immediately upon providing notice to an employer. The EFMLEA does not specify the form of notice, so that phone, email or text notice would likely constitute sufficient notice. An employee also must provide to their employer EFMLEA leave documentation (including at minimum a signed statement containing (1) the employee's name; (2) the requested leave date(s); (3) the qualifying reason for COVID-19 leave; and (4) a representation that the employee cannot work or telework because of the qualifying reason). Additional documentation may be required depending on the leave's reason; for example, an employee requesting childcare leave must provide: (1) the child's name; (2) the name of the school, place of care or childcare provider that closed or became unavailable; and (3) a statement representing that no other suitable person is available to care for the child. Following the first day of EFMLEA leave, an employer may require an employee to give reasonable notice or comply with the employer's usual notice procedures and requirements.

For leave taken for an employee's own serious health condition related to COVID-19 (or to care for a family member with a serious health condition), FMLA certification requirements also apply. Under those circumstances, an employer may require an employee to obtain a medical certification from a healthcare provider that sets forth:

- the medical provider's contact information and type of practice;
- the condition's approximate commencement date and probable duration;
- a statement or description of appropriate medical facts regarding the condition, sufficient to support the need for the leave; and
- information sufficient to establish that the employee cannot perform the job's essential functions (or that the family member is in need of care), together with an estimate as to the required leave's frequency and duration.

**Employers May Need to Restore Pre-Leave Position.** The FMLA restoration requirements remain applicable to employers. Under the FMLA and EFMLEA, an eligible employee who takes leave to care for a minor child during the pandemic will be entitled on return to be restored to either (a) the employment position held when the leave started or (b) an equivalent position with equivalent benefits, pay and other employment terms and conditions. Employers may not withhold or reduce any employment benefits that accrued before the leave start date. Upon restoration, an employee is not entitled to accrual of seniority or any employment right, benefit or position to which he or she was not entitled pre-leave. An employer may require an employee on leave to periodically report on status and intention to return to work.

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<sup>2</sup> The FMLA requires an employee to provide an employer with at least 30 days' notice of a foreseeable need for leave, as practicable; the EFMLEA waived the 30-day notice requirement.

The FMLA and EFMLEA exempt certain highly compensated employees from the restoration requirements. An employer may deny restoration to the highest-paid 10% of employees at its New York offices if (a) restoration would cause substantial and grievous economic injury to the employer, (b) the employer notifies the employee of the intent to deny restoration at the time the employer determines such economic injury would occur and (c) the employee elects not to return after receiving the notice.

The EFMLEA also exempts employers with fewer than 25 employees from the FMLA's restoration requirements, so that such a smaller employer may deny restoration to employees who take leave under the EFMLEA if:

- the employee takes leave for a COVID-19-related qualifying need;
- the employee's position when the leave commenced no longer exists due to economic conditions caused by COVID-19 during the leave period;
- the employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent benefits, pay and other employment terms and conditions; and
- if the reasonable efforts described above fail, the employer makes reasonable efforts during the relevant period to contact the employee if an equivalent position-becomes available, with the relevant period being one year beginning on the earlier of 12 weeks after the EFMLEA leave starts and the date on which the COVID-19-related qualifying need ends.

An employer must maintain coverage under any group health plan for the leave's duration at the level and on conditions under which coverage would have been provided if the employee did not take leave. The employer may recover the premium paid for maintaining coverage under the group health plan during the leave period if the employee fails to return from leave after the leave period has expired, for a reason other than the continuation, recurrence or onset of the COVID-19-related qualifying need (or other circumstances beyond the employee's control).

**Penalties for Non-Compliance.** The FMLA enforcement provisions remain applicable to employers who do not comply with the EFMLEA and FMLA regulations. Employers who interfere with, restrain or deny the exercise (or attempt to exercise) any EFMLEA or FMLA right may be subject to civil actions by eligible employees<sup>3</sup> or by the DOL for damages<sup>4</sup>. Employers in violation may be liable for consequential damages, liquidated damages, reasonable attorney's fees and costs. Most FMLA and EFMLEA complaints carry a two-year statute of limitations

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<sup>3</sup> An eligible employee may file a complaint with the DOL's Wage and Hour division, Employment Standards Administration, within a reasonable time after discovering the alleged EFMLEA or FMLA violation (and in no event more than two years thereafter). The complaint must include a "full" statement of acts or omissions (with pertinent dates); no particular complaint form is required.

<sup>4</sup> An employee may claim wages, salary, employment benefits or other compensation denied or lost due to the violation (or if compensation was not denied or lost, actual monetary losses sustained as a direct result of the violation (e.g., childcare costs), up to 12 weeks' worth of the employee's wages or salary.

period, commencing on the date of the last event constituting an alleged violation (with a three-year statute of limitations for alleged willful violations, and no statute of limitations for DOL-commenced actions)<sup>5</sup>.

## **II. The Emergency Paid Sick Leave Act**

**Overview.** The Emergency Paid Sick Leave Act (“EPSLA”) obligates an employer with fewer than 500 employees to provide up to two weeks of paid sick leave to an employee who is unable to work (or telework) due to a need for leave because:

1. the employee is subject to a COVID-19-related federal, state or local quarantine or isolation order;
2. the employee has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;
3. the employee is symptomatic and seeking a medical diagnosis;
4. the employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;
5. the employee is caring for a minor child if the child’s school or childcare facility has been closed (or such child’s childcare provider is unavailable) due to COVID-19 precautions; or
6. the employee is experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services in consultation with the U.S. Secretary of the Treasury and the U.S. Secretary of Labor.

The EPSLA paid sick leave benefits expire on December 31, 2020. An employer need not reimburse an employee upon the employee’s termination, resignation, retirement or other separation from employment for unused EPSLA sick time.

**Covered Employees and Employers.** All employees of companies with fewer than 500 employees are potentially eligible for paid sick leave under the EPSLA. All employers with fewer than 500 employees are subject to the EPSLA, and all employers with 500 or more employees are exempt. In addition, employers of healthcare provider<sup>6</sup> or emergency responders<sup>7</sup>

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<sup>5</sup> New York State indefinitely suspended the accrual of statutes of limitations in its recent Executive Order; further guidance is expected.

<sup>6</sup> The U.S. Department of Labor defines a “healthcare provider” as anyone employed at a doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, a facility that performs laboratory or medical testing, pharmacy or similar institution.

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may elect to exclude such employees from EPSLA application to ensure that emergency and medical services are not interrupted during the pandemic.

**Duration.** Full-time employees are entitled to two weeks (80 hours) of paid sick time; and part-time employees are entitled to paid sick time equal to the number of average hours that such employee works over a two-week period. Paid EPSLA sick time will not carry over from year to year. An employer may terminate EPSLA paid sick time beginning with the employee's next scheduled work shift immediately after the need for paid sick time ends. An employee also may elect to substitute the two weeks of paid EPSLA sick leave for the initial two weeks of unpaid EFMLEA leave.

**Permitted Use.** Paid sick leave under the EPSLA is available for an employee's immediate use for the six enumerated reasons described above. An employer may not require an employee to use other accrued paid leave before the employee uses paid sick time under the EPSLA). Restaurant, bar and hospitality employers may not require their employees to find replacement employees to cover shifts for which employees are using paid sick time.

**Calculation.** Paid sick leave is calculated based on the employee's required compensation and the number of hours the employee would otherwise be normally scheduled to work. Required compensation in this context means the greater of (a) the employee's regular rate of pay and (b) the \$7.25 per hour minimum wage rate (or if greater, the minimum wage rate in effect for such employee in the relevant state or locality of employment). For an employee whose schedule varies from week to week, to the extent that an employer cannot determine with certainty the number of hours the employees would have worked if the employee did not take leave, the employer must use the following calculations:

- the required compensation for the average number of hours the employee was scheduled to work each day over the six-month period ending on the date when the employee took leave; this number includes any hours for which the employee previously took leave (e.g., maternity leave or sick leave); and
- for an employee who did not work for at least six months prior to taking leave, the required compensation for the number of hours daily that the employee would normally be scheduled to work, based upon the employee's reasonable expectation at hiring time; an employer should review applicable job postings and initial assignments for week-to-week employees whose employment commenced less than six months prior to taking leave.

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<sup>7</sup> The DOL defines an "emergency responder" as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, including military, law enforcement officers, corrections officers and personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel and anyone who works for the facilities employing emergency responders, whose work is necessary to maintain facility operation.

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Paid sick leave compensation may not exceed \$511 per day (and \$5,110 in the aggregate) for leave taken for self-care and \$200 per day (and \$2,000 in the aggregate) for leave taken to care for a family member.

**Interplay with EPSLA and Legislation.** The EPSLA cannot be construed to diminish an employee's rights or benefits under any other law or existing employer policy. An employer may not require an employee to accept the lesser benefits under the EPSLA.

**Notices.** An employer must post and keep posted a notice to be prepared or approved by the U.S. Secretary of Labor. The notice should be posted in a conspicuous place on the premises in a location where employee notices are customarily posted. A model notice is located at the "Posters" section at the following link: [www.dol.gov/agencies/whd/pandemic](http://www.dol.gov/agencies/whd/pandemic). Given the number of employees currently working remotely, an employer also should disseminate the required notice by email to all employees. After the first workday on which an employee receives paid sick time under the EPSLA, an employer may require its employees to follow reasonable notice procedures in order to continue receiving paid sick time.

**Employer Restrictions.** An employer may not discharge, discipline or discriminate against any employee who takes EPSLA leave. An employer also may not retaliate against any employee who has filed a complaint or instituted an EPSLA-related proceeding.

**Penalties and Limitation Periods.** The Fair Labor Standards Act's ("FLSA") enforcement provisions apply to employers who do not comply with the EPSLA requirements. Employers who fail to provide paid sick leave in accordance with the EPSLA will be considered to have failed to pay minimum wages in FLSA violation and may be subject to a collective action by affected employees or a DOL civil action for consequential damages, an equal amount in liquidated damages, reasonable attorney's fees and costs of the action. An employer who discriminates or retaliates against an employee who brings an EPSLA complaint will be considered to have violated the FLSA's anti-discrimination and anti-retaliation provisions and may be subject to relief described above. The statute of limitations period is two years after accrual of the cause of action (i.e., the first date the employer failed to provide paid EPSLA sick leave) (or three years for claims arising out of a willful EPSLA violation)<sup>8</sup>. An employee's agreement to accept payment of the full amount of EPSLA unpaid sick leave will (on full payment) constitute the employee's waiver of any right to damages, attorney's fees and costs.

## **III. Payroll Tax Credits for Paid Leaves**

### **A. Paid EPSLA Sick Leave**

The EPSLA provides an employer with a refundable payroll tax credit for each calendar quarter, equal to 100% of qualified sick leave wages (i.e., wages and compensation paid, as

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<sup>8</sup> New York State Executive Order No. 202.8 (March 2020) indefinitely suspended the accrual of all statutes of limitations; later lifting or further guidance is expected.

required to be paid under the EPSLA) paid by such employer with respect to that quarter. The tax credit period expires December 31, 2020. An employer may elect NOT to receive the tax credit for any given calendar quarter. Qualified sick leave wages eligible for the payroll tax credit may not exceed (a) \$200 per day for employees who take sick leave to care for family members due to COVID-19 or (b) \$511 per day for employees who take sick leave to care for themselves. An employer may not consider more than the excess of 10 days over the aggregate number of EPSLA paid sick days for all preceding calendar quarters for each employee.

The payroll credit for qualified sick leave wages will be increased by the employer's qualified health plan expenses (i.e., amounts paid or incurred by the employer to provide and maintain a group health plan) as are properly allocable to employees who took paid sick leave under the EPSLA. Qualified health plan expenses are allocated on a pro rata basis among covered employees (and pro rata on the basis of the coverage periods), relative to periods of paid sick leave due to the COVID-19 pandemic. The employer's gross income for the taxable year (which includes the last day of any calendar quarter relating to the payroll tax credit) will be increased by the credit amount. EPSLA paid sick time taken into account for the payroll tax credit will not count toward the credit for paid sick or family leave unrelated to COVID-19.

## **B. EPSLA Leave for Self-Employed Individuals**

The FFCRA provides eligible self-employed individuals with a refundable payroll tax credit for each taxable year in an amount equal to 100% of the "qualified sick leave equivalent amount" with respect to the individual (i.e., an amount equal to the number of days during the taxable year that the individual is unable to perform services or sell goods as a result of taking EPSLA sick leave, multiplied by the lesser of (1) \$200 if the individual misses work to care for family members or \$511 if the individual misses work to care for himself for reasons related to COVID-19; or (2) 67% (or 100% in the case of any day of paid sick time to care for oneself) of the person's "average daily self-employment income" for the taxable year (i.e., the net earnings from self-employment for the taxable year divided by 260)). An eligible self-employed individual is one who (a) regularly carries on any activity for production of income from selling goods or performing services; and (b) would be entitled to receive paid EPSLA leave during the taxable year if they were an employee. A self-employed individual should maintain documentation establishing the need for EPSLA leave (e.g. doctor's notes, prescriptions, test results and copies of orders), and the amount of EPSLA sick leave taken in a given year to qualify for the payroll tax credit. The tax credit period expires December 31, 2020.

## **C. EFMLEA Leave**

The FFCRA provides employers with a refundable payroll tax credit for each calendar quarter equal to 100% of the wages and compensation paid by the employer under the EFMLEA during the respective calendar quarter. The qualified family leave wages cannot exceed \$200 for any day for which the employee is paid EFMLEA family leave (and \$10,000 in the aggregate for each employee who takes EFMLEA leave). The payroll tax credit rules allow for a credit for health plan expenses related to COVID-19 and leave taken under the EFMLEA. The same rules

apply to the EFMLEA payroll tax credit as apply to the EPSLA payroll tax credit, as discussed above. The employer's gross income for the taxable year (which includes the last day of any calendar quarter relating to the payroll tax credit) will be increased by the credit amount. An employer may elect NOT to receive the credit for any given calendar quarter. Any EFMLEA leave wages taken into account for the payroll tax credit will not be taken into account for purposes of determining the credit allowed for paid family leave unrelated to the COVID-19 pandemic. The credit period expires December 31, 2020.

## **D. EFMLEA Leave for Self-Employed Individuals**

The FFCRA provides each eligible self-employed individual with a refundable payroll tax credit for each taxable year in an amount equal to 100% of the "qualified family leave equivalent amount" with respect to the individual (i.e., an amount equal to the number of days (not to exceed 50) during the taxable year that the individual takes paid EFMLEA family leave, multiplied by the lesser of (1) \$200 and (2) 67% of the person's "average daily self-employment income" for the taxable year). An eligible self-employed individual is a person who (a) regularly carries on any activity for the production of income from selling goods or performing services and (b) would be entitled to receive paid leave during the taxable year under the EFMLEA if he or she was an employee. "Average daily self-employment income" means an amount equal to the net self-employment earnings for the taxable year, divided by 260 (i.e., the average number of business days in a calendar year). A self-employed individual should maintain documentation establishing the need for EFMLEA leave (e.g., doctors' notes, prescriptions, test results and copies of orders) and otherwise document the amount of leave taken in order to qualify for the payroll tax credit. The credit period expires December 31, 2020.

## **IV. New York State / New York City Sick Leave Laws**

### **A. New York State Paid Sick Leave Act**

New York's paid sick leave law (Senate Bill S8091) (the "NYPSLA") was enacted March 18, 2020, requiring New York State employers to provide job-protected sick and family leave benefits to employees affected by the COVID-19 pandemic.

**Employee Eligibility.** Generally, the NYPSLA covers all officers and employees subject to a mandatory or precautionary quarantine or isolation order issued by New York State or another governmental entity due to COVID-19. The nature and scope of the benefits available to eligible employees depends on the employer's size and income. An employee becomes eligible for NYPSLA paid family leave—once he or she has met the requirements for paid family leave under New York State's workers' compensation law, which provides that:

- "full-time" employees (i.e., those who regularly work 20-plus hours weekly) become eligible after 26 consecutive weeks of employment with the same employer; and

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- “part-time” employees (i.e., those who work a regular schedule of less than 20 hours weekly) become eligible after working for the same employer for 175 days (which need not be consecutive).

The NYPSLA does not apply to an employee who is (a) asymptomatic or undiagnosed, (b) physically able to work remotely under the quarantine or isolation order or (c) subject to a quarantine or isolation order because the employee returned to the U.S. after non-business travel to a country subject to a level 2 or 3 CDC travel health notice (with such employee only eligible to use employer-accrued leave (and unpaid sick leave) to the extent the employee has insufficient accrued leave to cover the entire quarantine or isolation period). Employers are not required to provide NYPSLA benefits to employees who are working from home or remotely.

**Covered Employers.** The NYPSLA applies to all public agencies and private employers with employees in New York State, including New York employers with 500 or more employees that are not subject to the EPSLA or EFMLEA. The NYPSLA (and subsequent interpretive guidance) does not indicate whether employee thresholds for smaller, mid-sized or larger employers (discussed below) are limited to employees located in New York state.

**Required Benefits.** Required benefits depend on employer size:

- **Smaller Employers (10 or Fewer Employees).** Smaller employers must provide unpaid sick leave until the termination of any COVID-19-related quarantine or isolation order. An employer must also guarantee access to paid family leave and (short-term) disability benefits for the quarantine or isolation period—including wage replacement for salaries up to \$150,000 (with no waiting period).
- **Mid-Sized Employers ((A) 11-99 Employees-or (B) 10 or Fewer Employees and Net Income Above \$1 Million).** Mid-sized employers must provide (a) at least five calendar days of paid sick leave, equal to the pay the employee would have otherwise received for the five-day period and (b) after the five paid days, unpaid sick leave until the termination of any COVID-19-related quarantine or isolation order. These employers also must guarantee access to paid family leave and (short-term) disability benefits for the quarantine or order period including wage replacement for salaries up to \$150,000 (with no waiting period).
- **Larger Employers (100 or More Employees and Public Agencies).** Larger employers must provide at least 14 calendar days of paid sick leave during any quarantine or isolation order, equal to the pay the employee would have otherwise received for the 14-day period (but are exempt from the smaller and mid-sized employer guaranteed access requirements, described above).

**Benefits Calculation.** Smaller and mid-sized employers described above must provide employees with paid family leave and disability benefits after any paid sick leave period, while the order is in effect. Such employer must provide (a) paid family leave in an amount up to 60% of the eligible employee’s pay, up to a maximum weekly benefit of \$840.70 and (b) disability

benefits to match the employee's full wages, up to a maximum weekly disability benefit of \$2,043.92, for a total of up to \$2,884.62 weekly (depending upon the employee's salary).

**Expansion of Leave and Disability Definitions.** The NYPSLA expanded the New York Paid Family Leave Law "family leave" definition so as to cover an employee work leave: (a) when the employee is subject to a mandatory or precautionary quarantine or isolation order; or (b) to provide care for a minor dependent child who is subject to the quarantine or order. The NYPLSA expanded the New York workers compensation law "disability" definition to include an employee's inability to perform regular employment duties or the duties of other employment that the employer offers as a result of a COVID-19 pandemic-driven quarantine or isolation order, and when the employee has exhausted all employer-provided NYPSLA paid sick leave.

**Eligibility Timing.** For employers with fewer than 100 employees, an employee becomes eligible for NYPSLA paid family leave and/or disability benefits when the employee exhausts quarantine-related sick leave or other accrued leave provided by the employer.

**Required Documentation.** An employee must produce documentation of an order of mandatory or precautionary quarantine or isolation issued by an authorized governmental entity (such as the local health department) to qualify for NYPSLA benefits. To obtain such a qualifying order, an employee must contact the local health department to procure an attestation (so that the New York State Governor's stay-at-home executive order restricting non-essential business is not a NYPSLA qualifying order). If the health department cannot immediately issue an order, the employee must submit documentation from a medical provider that has treated the employee, attesting that the employee qualifies for the order. The documentation must meet the following criteria:

- For a mandatory isolation order, that:
  - the employee has tested positive for COVID-19; or
  - testing is currently unavailable for the employee, but the employee is symptomatic and has had contact with a known COVID-19 patient.
- For a mandatory quarantine order, that the employee:
  - has been in close contact with someone who tested positive for COVID-19 (or is currently in mandatory isolation); or
  - is symptomatic and has returned within the past 14 days from a country designated with a level 2, 3 or 4 CDC COVID-19 advisory.
- For a precautionary quarantine order, that the employee:
  - is asymptomatic and has returned within the past 14 days from a country designated with a level 2, 3 or 4 CDC COVID-19 advisory; or
  - is determined to have had proximate exposure with someone who has tested positive for COVID-19.

**Application Required.** An employee subject to a quarantine or isolation order must submit Forms PFL-1 and SCOVID19 to the employer. An employee who takes leave to care for

a minor dependent child must submit Forms PFL-1 and CCOVID19 to the employer<sup>9</sup>. In each case, the employer must return the forms to the employee within three business days. If the employer fails to return the forms timely, the employee must submit the forms (along with the quarantine/ isolation order) to the employer's insurance carrier within 30 days after the leave's start period.

**Exclusions.** NYPSLA does not apply to (a) a private employer that voluntarily closed business operations for COVID-19-related safety and health concerns or (b) an employee who has a doctor's note from a private healthcare provider advising the employee to self-quarantine or self-isolate.

**Employer Restrictions.** A covered employer may not deduct an employee's paid sick leave under the NYPSLA from the employee's accrued sick leave; and may not discharge, threaten, penalize or in any other manner discriminate or retaliate against an employee because the employee has taken NYPSLA leave. Upon return to work after NYPSLA-related leave, an employer must restore the employee to the employment position held by the employee before any NYPSLA-related leave, with the same pay and other employment terms and conditions. In addition, a covered employer may not pay the lesser of the EPSLA, EFMLEA and the NYPSLA. If the NYPSLA provides for benefits in excess of the benefits provided by the federal government, then eligible employees are entitled to claim the difference between the benefits available under the EPSLA/EFMLEA and the NYPSLA.

## **B. New York City Paid Sick Leave**

The New York City Department of Consumer Affairs recently issued updated guidance regarding the availability of sick leave under the New York City Earned Sick and Safe Time Act ("ESSTA") for purposes of the COVID-19 pandemic. All New York City employers are subject to the ESSTA, but smaller businesses (fewer than five employees) may provide unpaid sick leave. The ESSTA applies to all employees (full-time, part-time, temporary, per diem and undocumented) who have been employed for at least 120 days at any size New York City employer. The ESSTA provides employees with up to 40 hours (five days of sick leave per calendar year, which leave must be **paid leave** in the case of employers with five or more employees (and may be **unpaid leave** in the case of smaller employers). An employer may require documentation if the employee has been absent for more than three consecutive days. Employees may use accrued sick leave for themselves or a family member for diagnosis, care, treatment of COVID-19 (or another illness, injury or health condition) or preventive medical care (e.g., observing COVID-19 symptoms). Employees also may use ESSTA sick leave if they are in self-quarantine or self-isolation for preventive purposes (or caring for a family member under a quarantine or isolation order).

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<sup>9</sup> The form may be accessed at: (a) SCOVID19 and PFL-1: quarantine/order-related leave: <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf> and (b) CCOVID19 / PFL-1: dependent care leave: <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/ccovid19.pdf>.

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Robinson Brog is working with its clients to address various coronavirus-related matters in the employment, benefits, litigation, bankruptcy, estate planning, tax and corporate/commercial arenas. For advice regarding the impact of the coronavirus pandemic on you, your business or your matter, please do not hesitate to reach out to your primary Robinson Brog contact. If you have any questions regarding this alert, please contact one of the authors below or the other attorneys on the COVID-19 coronavirus response team or the Robinson Brog attorney with whom you regularly work.

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### Authors:

Zachary M. Seelenfreund (Litigation)  
(212) 603-6339  
zms@robinsonbrog.com

Jeanne R. Solomon (Corporate)  
(212) 603-6310  
jrs@robinsonbrog.com

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### COVID-19 Coronavirus Response Team:

The authors above and the following attorneys:

Stanley Bulua (Tax/ESOPs)  
(212) 603-6311  
sbulua@robinsonbrog.com

Nicholas R. Caputo (Litigation/Insurance)  
(212) 603-0491  
nrc@robinsonbrog.com

Adam J. Greene (Corporate)  
(212) 603-0496  
ajg@robinsonbrog.com

Fred Ringel (Bankruptcy)  
(212) 603-6301  
fbr@robinsonbrog.com

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