

Resources for Employers and Employees Impacted by COVID-19

(MARCH 30, 2020) The economic damage caused by the COVID-19 pandemic has reached era-defining levels. In response, both federal and state governments have implemented measures to provide financial relief for employers and their employees. For employers, this means that they have access to new government programs designed to help them shoulder a variety of enhanced obligations to protect and maintain their workforce. The laws we discuss here are New York’s Quarantine Leave Law, the Federal Families First Coronavirus Response Act (“FFCRA”), and the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”).

As we learn more about the spread of COVID-19, and as governments tailor and refine their responses to the pandemic, it is inevitable that the conditions facing businesses and their workers will change quickly and sometimes dramatically. We are tracking these developments as they occur.

I. EMPLOYEE ENTITLEMENTS

This chart, as qualified by the information which follows, provides a summary of the leave employees are entitled to under New York and Federal laws designed to protect them during this uncertain time.

Number of Employees at the Business	Number of NY Sick Days (as of March 18, 2020)	Number of Federal Covid Sick Days (After April 1, 2020)	Federal Emergency Family Leave (if qualified)
Fewer than ten and under \$1 million net income	<i>Unpaid</i> leave until order removal	10 days paid	10 weeks (2/3 pay)
Fewer than ten and more than \$1 million net income	5 days <i>paid</i> and unpaid leave until order removal	10 days paid	10 weeks (2/3 pay)
11 to 99	5 days <i>paid</i> and unpaid leave until order removal	10 days paid	10 weeks (2/3 pay)
Over 100	14 days <i>paid</i> and unpaid leave until order removal	10 days paid (<i>employer with up to 500 employees</i>)	10 weeks (2/3 pay) (<i>employer with up to 500 employees</i>)

A. Federal Sick and Family Leave

Federal Paid Sick Leave Guarantees

The FFCRA, signed into law on March 18, 2020, is the federal government's second measure to assist those impacted by the pandemic, after \$8.3 billion in virus response funding was approved on March 4, 2020. The FFCRA applies to certain public employers and private employers with fewer than 500 employees.¹ After April 1st, these employers **must provide ten workdays (or a total of 80 hours)** of paid sick leave if the full-time employee² is unable to work or telework due to one of the following reasons:

- 1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- 2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- 3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 4) The employee is caring for an individual under 1 or 2 above;
- 5) The employee is caring for a child if the school or place of care has been closed or the childcare provider is unavailable; or
- 6) The employee is experiencing substantially similar conditions specified by the Secretary of Health and Human Services with the Secretary of the Treasury and Secretary of Labor.

If an employee takes leave based on reasons 1 through 3 above, they receive full pay capped at \$511 per day. If they take leave based on reasons 4 through 6 above, they receive two-thirds of their regular pay capped at \$200 per day.

Importantly, the FFCRA gives the Department of Labor ("DOL") authority to let small businesses with fewer than 50 employees opt out of paid sick leave if such a requirement "would jeopardize the viability of the business".

The FFCRA will go into effect on April 1, 2020. It does not apply retroactively. Leave occurring prior to President Trump signing the FFCRA into law and leave occurring between the FFCRA's signing and the enactment date of April 1st is not subject to the FFCRA's provisions.

¹ The following types of employees must be taken into account when calculating the 500-employee threshold: (1) both full-time and part-time employees; (2) employees currently on leave; (3) temporary employees who are jointly employed by two or more employers; and (4) day laborers supplied by temporary agencies. This calculation does not include independent contractors. Employees must have been employed for at least 30 days.

² For part-time employees, they are entitled to their average weekly hours over a two-week period.

Federal Emergency Family Leave

Following the 10 days of paid leave at the employee's regular rate, employers must also provide employees who have taken leave as the result of reason 5 above with Federal Emergency Family Leave payments. Such payments must be paid at a rate of not less than two-thirds of the employee's current rate of pay for the number of hours the employee would otherwise be scheduled to work, up to a maximum of \$200 per day or an aggregate of \$10,000 for up to 12 weeks (ten weeks after the two-week full paid sick period) in the benefit year. Employees must be allowed to use any available paid time off during this leave but are not required to do so. The paid sick leave benefit discussed above is intended to provide pay for the first 10-day period before Federal Emergency Family Leave payments are available, but these days are counted toward the total 12 weeks of available leave. In sum, after April 1st, qualifying employers must provide 10 days of paid leave at the employee's regular rate of pay followed by 10 weeks of Federal Emergency Family Leave payments.

B. New York Sick and Family Leave

State Paid Sick Leave Guarantees

New York State's Quarantine Leave Law³ went into effect immediately when passed on March 18, 2020. It provides emergency paid sick leave to employees subject to mandatory or precautionary orders of quarantine or isolation issued by the State of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19. The Quarantine Leave Law does not appear to have monetary caps on paid leave and guarantees the number of days provided in the chart above.

New York Disability and Paid Family Leave

In New York, for employers with less than 100 employees, if an employee has exhausted all sick time available through other programs, they may also be entitled to NYS Paid Family Leave and disability benefits. In addition, all employees who are otherwise eligible for NYS Paid Family Leave in the normal course may also apply for benefits if they require leave to provide care for a minor dependent child of the employee who is subject to a qualifying quarantine or isolation order. Such PFL benefits would be available at the same rate as PFL taken for other covered reasons (in 2020, the PFL benefit is 60% of an employee's average weekly wage, up to a maximum weekly benefit of \$840.70).

Employees may apply for this benefit by submitting a standard form to their employer.⁴ As the FFCRA represents the first time that the federal government has mandated paid family leave, it is currently unclear if NYS Paid Family Leave and disability benefits are available while a qualifying employee is receiving paid family leave to address decreased wages. However, as, under normal circumstance, employers who continue to pay employees on leave their full wages

³ Our firm previously published an in-depth breakdown of this bill under the title "Mandatory Sick Leave for New York Employees Impacted by COVID-19" which can be read at https://www.linkedin.com/posts/harris-st-laurent-llp_2020-mandatory-sick-leave-for-new-york-employees-activity-6646839811602726912-gQyc.

⁴ See <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>.

are entitled to certain tax rebates representing the amount that would have been paid through the NYS Paid Family Leave program, we anticipate similar credits to be enacted for payments made pursuant to the FFCRA's Emergency Family Leave requirements.

Paid Family Leave is insurance coverage that provides up to 60% of an employees' pay, up to a maximum weekly benefit of \$840.70. After receiving the full Paid Family Leave benefit, the employee will receive disability benefits to match their full wages up to a maximum weekly disability benefit of \$2,043.92, for a total of \$2,884.62 per week.

C. Other Important Considerations

It is important to note that those employees whose offices closed prior to April 1, 2020 and who were not being paid are not entitled to take advantage of the benefits provided for under the FFCRA. Accordingly, employees who began leave prior to April 1 under the Quarantine Leave Law do not appear to be eligible to take leave under the FFCRA. For those employees who seek to take leave after April 1, 2020, we believe that state and federal leave would be concurrent – in other words, the employee could not take state leave, and then follow it with an additional full complement of leave days otherwise guaranteed by the FFCRA.

For employees who do qualify, employers must permit them to use this emergency paid sick time before any other leave accrued by the employee, such as company sick days or vacation, Paid Family Leave, and temporary disability. Employers may not discriminate or retaliate against employees for taking paid sick leave under these laws.

The Quarantine Leave Law guarantees employees full job protection, including when returning from a quarantine or isolation order, restoration to the employee's position held before the order, at the employee's prior pay level, and under the same conditions of employment. This applies equally to public and private employees.

The Department of Labor has provided helpful responses to frequently asked questions regarding FFCRA: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

New York State has provided helpful responses to frequently asked questions regarding the Quarantine Leave Law: <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>

II. ASSISTANCE PROGRAMS FOR EMPLOYERS

Below is a brief summary of the key assistance programs implemented at federal and state levels to help employers meet their enhanced obligations:

A. Coronavirus Aid, Relief and Economic Security Act ("CARES Act")

This sweeping legislation was passed on Friday, March 27, 2020 and is the federal government's third-phase effort to stem the spread of COVID-19 and its economic impact. The passage of this

legislation comes as unemployment claims surge to 3.28 million. The bill provides multiple avenues for businesses to obtain relief:

Paycheck Protection Program (“PPP”)

The CARES Act amends the Small Business Act to create a new program that provides loans to small employers, including those that are self-employed, workers in the “gig economy”, and certain nonprofits. It does not provide relief for portfolio companies owned by private equity or venture capital firms. These loans would provide eight weeks of cash flow assistance through 100% guaranteed, no-fee loans to employers with 500 or fewer employees that maintain their payroll during the pandemic. If an employer does not lay off employees from February 15, 2020 through June 30, 2020 and continues to pay them, the loan would be forgiven (or reduced for any employee cuts or reductions in wages).

The loans would be available immediately, and the size of the loans are tied to an applicant’s average monthly payroll, mortgage, rent, utility payments, and other debt obligations in 2019. The maximum loan amount is capped at \$10 million and is the lesser of either (i) 2.5 times the average total monthly payroll costs incurred in the one-year period before the loan is made or (ii) 2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020 for those business not in existence last year. The interest rate on the loan cannot exceed 4%.

Loan proceeds can be used for payroll support, employee salaries, mortgage interest or rent payments, utility payments, and interest on existing debt obligations.

Employee Retention Credit

The CARES Act also provides eligible private employers a refundable credit against payroll tax liability equal to 50% of the first \$10,000 in wages per employee. Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests:

- 1) Have business operations fully or partially suspended due to orders from a governmental entity limiting commerce, travel, or group meetings; or
- 2) Experience a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50%.

For employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit. The employee retention credit is effective for wages paid March 13, 2020 to December 31, 2020.

Delay of Employer Payroll Taxes

The CARES Act also postpones the due date for employer payroll taxes, as well as for 50% of self-employment taxes related to Social Security and attributable to wages paid during 2020. The deferred amounts would be payable over the next two years, with half due December 31, 2021, and half due December 31, 2022.

Treatment of Tax Losses

The CARES Act also suspends a handful of changes made by the Tax Cuts and Jobs Act (“TCJA”) that limit how business can get credit for tax losses. Specifically:

- 1) It suspends the TCJA’s limit on net operating loss (“NOL”) carryovers for three years, so that the limit (set at 80% of taxable income) would not apply to tax years beginning in 2018, 2019, and 2020;
- 2) It slows NOLs arising in 2018, 2019, and 2020 to be carried back five years; and
- 3) It suspends the limits on excess farm losses and on the use of a pass-through business’ losses against non-business income for three years, so that the limits would not apply to tax years beginning in 2018, 2019, and 2020.

B. Families First Coronavirus Response Act – Division G

Under the FFCRA, employers are eligible to receive refundable tax credits if they offer paid sick leave and paid family leave to employees. This tax credit is capped at either \$511 or \$200 per employee per day depending on the reason the employee takes leave, which is outlined in the table below. If credit exceeds the employer’s total liability in any calendar quarter, the excess is refundable to the employer. The law also provides for tax credits related to health insurance payments and payroll tax filings.

Eligibility	Monetary Amount Per Employee Per Day
1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19	\$511 per day
2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19	\$511 per day
3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis	\$511 per day
4) The employee is caring for an individual under 1 or 2	\$200 per day
5) The employee is caring for a child if the school or place of care has been closed or the childcare provider is unavailable	\$200 per day
6) The employee is experiencing substantially similar conditions specified by the Secretary of Health and Human Services with the Secretary of the Treasury and Secretary of Labor.	\$200 per day

C. U.S. Small Business Administration (SBA) Economic Injury Disaster Loan (EIDL)

The federal SBA has expanded its EIDL program to cover coronavirus-related economic injuries. The deadline for filing for the EIDL loan is December 21, 2020. The interest rate on these loans is 3.75% for small businesses and 2.75% for nonprofits. The maximum loan amount is \$2 million. Requirements include:

- Acceptable credit history
- Demonstrated ability to repay the loan
- Collateral for loans over \$25,000

EIDL loans can be used for working capital, paying fixed debts, payroll, accounts payable, and other bills; however, these loans are not intended to replace lost sales or profits, or to finance expansion. EIDL loans can be applied for at: <https://disasterloan.sba.gov/ela/>.

D. Employee Retention Grant Program

Under New York City's Employee Retention Grant Program, businesses with fewer than five employees are eligible for a grant that covers 40% of their payroll costs for two months to help retain employees. This grant is capped at \$27,000. The eligibility requirements for the grant program include:

- The business is located within the five boroughs of New York City
- It can demonstrate that COVID-19 caused a 25% or more reduction in revenue, with revenue loss to be calculated by comparing the average revenue for two months in 2020 (after the COVID-19 impact) to (i) the average revenue for the same two months in 2019 (unless the business was not yet operational), and (ii) the total 2019 average monthly revenue.
- It must employ one to four employees in total
- It must have been in operation for at least six months
- It cannot have outstanding tax liens or legal judgments

Businesses can apply at <https://www1.nyc.gov/nycbusiness/article/nyc-employee-retention-grant-program>.

E. NYC Small Business Continuity Loan Fund

Under the New York City Business Continuity Loan Fund, businesses with fewer than 100 employees who have seen revenue decreases by 25% or more are eligible for zero interest loans up to \$75,000 to help retain employees and ensure business continuity. Businesses may specify the loan amount they are applying for. The eligibility requirements for the loan are:

- The business must be located within the five boroughs of New York City
- It can demonstrate that COVID-19 caused a 25% or more reduction in revenue (via, for example, point-of-sales reports, bank statements, quarterly sales tax filings, 2019 tax returns, or CPA-certified profit and loss statements)
- It must employ less than 100 employees in total
- It must have been in operation for at least two years
- It cannot have outstanding tax liens or legal judgments
- It must demonstrate an ability to repay the loan

The loan can be used for working capital, inventory, or other investments. New York City has set up a survey to review eligibility for this fund at <https://www.surveymonkey.com/r/ZL5N8XL>.

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Harris St. Laurent will continue to update this information as more becomes available. Please do not hesitate to contact your Harris St. Laurent attorney or Evan W. Bolla at ewbolla@hs-law.com if you have any questions about these obligations and assistance programs.