

Impact of the Coronavirus on Employers Part II

Frank Kerbein SPHR
Director, Center for Human Resources
The Business Council of New York State
frank.kerbein@bcnys.org
800.332.2117

Working to create economic growth, good jobs and strong communities across New York State.



Materials are presented as informational only and not intended to provide legal, business or tax advice. The Business Council of New York State, Inc. does not provide legal, business or tax advice. The accuracy, completeness, adequacy or currency of the content is not warranted or guaranteed. Our presentations are not substitutes for the advices or services of an attorney. We recommend you consult a lawyer or other appropriate professional if you want legal, business or tax advice.



What is the Coronavirus?

- A respiratory disease caused by a novel (new) coronavirus that was first detected in China and which has now been detected in almost 70 locations internationally, including in the United States.
- The virus has been named “SARS-CoV-2” and the disease it causes has been named “coronavirus disease 2019” (abbreviated “COVID-19”).
- Reported illnesses have ranged from mild symptoms to severe illness and death for confirmed coronavirus disease 2019 (COVID-19) cases.
- Symptoms may appear 2-14 days after exposure:
 - Fever
 - Cough
 - Shortness of breath

How is the Virus Transmitted?

- People can catch COVID-19 from others who have the virus.
- The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales.
- These droplets also land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth.
- The CDC recommends to stay more as much as 6 feet away from a person who is sick. It is possible to catch the virus from someone even before they have symptoms.



Recommended Strategies for Employers

- Actively encourage sick employees to stay home
- Separate sick employees
- Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees
- Perform routine environmental cleaning
- Advise employees before traveling to take certain steps

OSHA General Duty Clause

- Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker **“employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”**
- Inform Employees
- Hazard Identification/ prevention – Essential jobs
- Cleaning of contaminated work areas
 - Chemicals used

OSHA Considerations

- Employees are only entitled to refuse to work if they believe they are in imminent danger.
- OSHA defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.
- Masks/respirators (N95)



Executive Order 202.6

- All businesses and not-for-profit entities in New York State, shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize.
- It is directed that, no later than March 20, 2020 at 8 p.m., each for-profit or not-for profit employer (excluding state and local governments and authorities) shall reduce the in-person workforce at each business/work location by 100% from pre-state of emergency declaration employment levels.



Executive Order 202.6

- **ESSENTIAL BUSINESSES OR ENTITIES**, including any for profit or non-profit, regardless of the nature of the service, the function they perform, or its corporate or entity structure, are not subject to the in-person restriction. (*Essential Businesses must continue to comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health*).
- Guidance issued by Empire State Development

<https://esd.ny.gov/guidance-executive-order-2026>



Executive Order 202.6

1. Essential health care operations
2. Essential infrastructure
3. Essential manufacturing
4. Essential retail
5. Essential services
6. News media
7. Financial Institutions
8. Providers of basic necessities to economically disadvantaged
9. Construction
10. Defense
11. Services to maintain safety, sanitation, etc.
12. Vendors that provide essential services to government



Workers' Compensation

- Arising out of and in the course of employment
- Income replacement and related health care costs

NYS Short Term Disability

- Off-the-job Illness or injury
- 50% of AWW to max of \$170/wk



New York State Paid Family Leave

- Up to 10 weeks of leave at 60% of the employees average weekly wage to a maximum of 60% of the state's average weekly wage
- Care for a family member with a serious health condition
- Family Member:
 - Spouse, child, parent (in-laws), grandparent, grandchild, or domestic partner

New York City/Westchester Paid Safe and Sick Leave

- Definition of Family
- Acceptable reasons for use



Family and Medical Leave Act

- Employer and employee eligibility requirements – Employers of 50 or more
- 12 Weeks of unpaid leave in 12-month period
- Care for a serious health condition of employee or qualified family member
- Job protected leave

Americans with Disabilities Act (ADA)

- Qualified individual with a disability protected from discrimination
- Coronavirus could create a disability or aggravate a previous disability
- May be entitled to an “accommodation”
 - Work from home
 - Leave
 - Reduced work schedule
 - Travel restrictions
- Unless an “undue hardship” or “direct threat”



New York State Emergency Paid Sick Leave

- Signed March 18, 2020
- Effective immediately
- Combination of new sick time allowance and insurance products
 - “Enhanced” Paid Family Leave (PFL) and NYS Short Term Disability (DBL)
- Limited to individuals Quarantined/Isolated by Public Health Official



New York State Emergency Paid Sick Leave

Under a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such an order due to COVID-19



NYS Emergency Paid Sick Leave (PSL)

Sick Leave Requirements

- Employers of 10 or fewer as of January 1, 2020 must provide unpaid, job protected sick time during an employee's period of ordered quarantine or isolation, except those employers with net income of more than \$1 million, which must provide five days of paid sick leave
- Employers of 11 to 99 must provide five days of paid sick leave
- Employers of 100 or more must provide up to fourteen days of paid sick leave
- Public employers must provide at least fourteen days of paid sick leave
- Provided separate of any other accruals



NYS Emergency Paid Sick Leave (PSL)

Then...for the duration of the quarantine/isolation:

- Combination of PFL and DBL to 100% of pay to a maximum of \$2,884.62 (\$150,000 annually)

Example:

- An employee making \$150,000 per year (\$2,884.62 per week) may be eligible for:
 - \$840.70 payment from PFL (60% of average weekly wage to the 2020 maximum benefit amount), and
 - \$2,043.92 payment from DBL (a significant – temporary increase over the current maximum of \$170/wk.)



NYS Emergency Paid Sick Leave (PSL)

- Benefits would not be available to employees deemed asymptomatic or not yet diagnosed with any medical condition and is physically able to work, through remote access or other means
- NOTE: Such sick leave shall be provided without loss of an employee's accrued sick leave. That is, this leave is in addition to whatever leave is already provided by the employer and is to be used first.

NYS Emergency Paid Sick Leave (PSL)

- Employee not eligible for this benefit if quarantined/isolated after returning from personal travel to one of the destinations on the CDC travel advisory list
- If the employee was provided notice about this limitation
- Unpaid leave would be available

NYS Emergency Paid Sick Leave (PSL)

Major temporary changes to long-standing laws

- Disability:
 - Waiting period waived;
 - Maximum benefit increased to @2,043.92 per week (up from \$170)
 - Definition: Quarantine/Isolation = Disability
- Paid Family Leave
 - Employee's own quarantine/isolation
 - To provide care of a minor dependent child under quarantine/isolation
- DBL/PFL can run concurrently



NYS Emergency Paid Sick Leave (PSL)

- Protections against retaliation and discrimination.
- Risk Adjustment Pool
- No Permanent paid sick leave law



If the federal government by law or regulation provides sick leave and/or employee benefits for employees related to COVID-19, then the provisions of this section, including, but not limited to, paid sick leave, paid family leave, and benefits due to disability, shall not be available to any employee otherwise subject to the provisions of this section; provided, however, that if the provisions of this section would have provided sick leave and/or employee benefits in excess of the benefits provided by the federal government by law or regulation, then such employee shall be able to claim such additional sick leave and/or employee benefits pursuant to the provisions of this section in an amount that shall be the difference between the benefits available under this section and the benefits available to such employee, if any, as provided by such federal law or regulation.



Family First Coronavirus Response Act

- Emergency Paid Sick Leave Act
- Emergency Family and Medical Leave Expansion Act
- Emergency Unemployment Insurance Stabilization And Access Act Of 2020
- Tax Credits For Paid Sick And Paid Family And Medical Leave



Emergency Paid Sick Leave Act

1. Subject to a federal, state or local 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 COVID-19 symptoms and seeking medical diagnosis
4. Caring for an individual subject to a federal, state or local 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 place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. 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.



Emergency Paid Sick Leave Act

- This provision requires employers with fewer than 500 employees to provide full-time employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave at the employee's regular rate (or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed above)
- Provides an exception for employers who are healthcare providers or emergency responders
- Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition
- This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers
- This act takes effect April 2, 2020 and remains in effect until December 31, 2020.



Emergency Family and Medical Leave Expansion Act

Expanded Coverage and Eligibility

- Amends and expands FMLA on a *temporary* basis
- Current employee threshold for FMLA coverage would change from employers with 50 or more employees covering those employers with fewer than 500 employees
- Lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave
- Many employers not previously subject to the FMLA may be required to provide job-protected leave to employees for a COVID-19 coronavirus-designated reason.



Emergency Family and Medical Leave Expansion Act

- Includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business.



Emergency Family and Medical Leave Expansion Act

- Businesses with less than 500 employees and all public employers will be covered by the FMLA's coronavirus-related reason for leave.
- Under the amended FMLA, an employee may take FMLA leave if their child's school has closed due to the pandemic. The first 10 days of leave under the FMLA will be unpaid, but, employees may elect to use their accrued vacation and/or PTO leave during this time.
- After the first 10 days of leave, employees would be entitled to two-thirds of their usual weekly rate of pay. Pay would be capped at \$200 per day, and \$10,000 in total.
- Like the existing FMLA, employees taking leave under the FMLA due to the closure of their child's school will be entitled to job restoration at the conclusion of the leave.



Emergency Unemployment Insurance Stabilization And Access Act Of 2020

- The Act will provide states that meet specific requirements with 100 percent federal funding to provide extended unemployment benefits, up to an additional 26 weeks after the initial 26 weeks (i.e. up to 52 weeks of benefits). Previously, states were required to pay 50% of extended unemployment benefits. This provision will also remain in effect until December 31, 2020.



Tax Credits For Paid Sick And Paid Family And Medical Leave

- Provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave
- Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.



Tax Credits For Paid Sick And Paid Family And Medical Leave

- Employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter
- Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.



What do we do next?

- Communicate with your employees!
- Notify employees of the availability of leave as described (no template for this notification has yet been provided)
- Provide job protected leave as described
- Provide forms required for employee to apply for Paid Family Leave (PFL) and New York State Short Term Disability (DBL)
- Watch for new developments.



Resources

- NY State Covid-19 Leave

<https://www.governor.ny.gov/programs/paid-sick-leave-covid-19-impacted-new-yorkers>

- Centers for Disease Control

<https://www.cdc.gov/>

- OSHA

<https://www.osha.gov/>

- EEOC

<https://www.eeoc.gov/>

- World Health Organization

<https://www.who.int/>

- New York Health Department

<https://www.health.ny.gov/>

- Business Council Coronavirus

<https://www.bcnys.org/managing-coronavirus>

- US Dept. of Labor

<https://www.dol.gov/>



Next Webinar

Leave Management

PFL/ADA/FMLA/Workers' Compensation/NYS Short-term disability – managing an employee's leave status while out sick, injured or caring for a family member is a challenge for businesses of all sizes. This program will provide examples and guidance based questions received through The Business Council's HR Hotline.

Thursday, March 26, 2020

11:00 am. – 12:00 pm

This program has been approved for HRCI certification



Frank Kerbein SPHR
Director, Center for Human Resources
The Business Council of New York State

frank.kerbein@bcnys.org

800.332.2117

Interested in Membership?

<https://www.bcnys.org/become-a-member>

