

## **Employee Leave Related to COVID-19 Pandemic**

Public employees are now entitled to paid leave benefits pursuant to newly enacted Federal and State laws. To further confuse matters, Governor Andrew Cuomo has issued Executive Order No. 202.4 which may affect an employee's entitlement to leave. We have fielded numerous questions related to all of this activity. Therefore, this Q&A addresses the frequently asked questions that we have received and is intended clarify what you need to know as a public employer.

Please note that a further breakdown of the applicable laws/Executive Orders related to employee leave has been included with this Q&A as Attachment "A".

### **1. What is the difference between an "essential" and "non-essential" employee?**

- **Essential:** "Anyone whose job function is essential to the effective operation of their agency or authority, or who must be physically present to perform their job, or who is involved in the COVID-19 emergency response."
- **Non-Essential:** "Anyone who does not need to be physically present to perform job functions, or they are not required to meet the core function and programs of their agency during this emergency response." <sup>1</sup>

### **2. Why is this distinction important?**

As previously alluded to, Governor Cuomo issued Executive Order No. 202.4, which calls for a reduction in the workforce for certain public entities. The Executive Order is effective through April 15, 2020 and it states, in relevant part:

Any local government or political subdivision shall . . . allow non-essential personnel as determined by the local government, to be able to work from home or take leave without charging accruals, except for those personnel essential to the locality's response to the COVID-19 emergency. Such non-essential personnel shall total no less than fifty-percent (50%) of the total number of employees across the entire workforce of such local government or political subdivision.

This Executive Order authorizes the local government to make the determination as to who is an "essential" employee. Please note that the order does not expressly state that the leave must be "paid". However, given the fact that the employee must be provided the option to work remotely, the language suggests that the employee must receive leave at their regular rate of pay. Therefore, this distinction is important in that "non-essential" employees who are subject to the 50% reduction are placed on leave without a deduction in accruals.

<sup>1</sup> These terms were defined in a directive issued by the Director of State Operations and Infrastructure requiring all "non-essential" State employees to report to home. Although the definitions apply specifically to such directive, public employers could utilize these definitions for guidance. See <http://www.nysed.gov/common/nysed/files/programs/main/covid19-non-essential-employee.pdf>.

### **3. How should we treat the employees who are subject to the 50% reduction?**

It is recommended that employers document the employees who are deemed “non-essential” pursuant to this order. If a “non-essential” employee’s duties make it impracticable for him or her to work remotely, it is recommended that they remain “on call”. The reason for this is that the employee may be subject to a reduced rate of pay if leave is necessitated under the newly implemented Federal law (Families First Coronavirus Response Act).<sup>2</sup> The specific circumstances in which an employee may be entitled to leave under Federal law is set forth in further detail in Attachment “A”.

One situation that may arise is where a “non-essential” employee may need to take leave pursuant to the Emergency Family and Medical Leave Expansion Act (“EFMLEA”).<sup>3</sup> Under the EFMLEA, the first ten days of such leave may be unpaid, but the employee may choose to use his or her accrued time during such ten-day period. Thus, if an employee is incapable of working remote or remaining “on call” due to a qualifying leave, payment may be withheld for the first ten days and they may be compensated at a reduced rate thereafter.

### **4. What about Executive Order No. 202.8 which required a 100% reduction in the workforce for a “non-essential business”?**

This Executive Order expressly references “businesses and not-for-profit entities”. Therefore, it would not apply to public entities that fall within the definition of a “local government or political subdivision” pursuant to Executive Order No. 202.4. Although we are still awaiting guidance as to whether a school district or library constitutes a “political subdivision,” please note that school districts/libraries have fallen within the definition of “political subdivision” in other contexts. Thus, the 50% reduction set forth in Executive Order No. 202.4 likely remains applicable to school districts and public libraries.

### **5. What about the memorandum issued by the New York State Education Department (“NYSED”) which declared that the provision of school meals, child care, and the continuity of learning are “essential services or functions”?**<sup>4</sup>

This memorandum was issued in response to the language in Executive Order No. 202.4 which called for a 50% reduction in the workforce, “except for those personnel essential to the locality’s response to the COVID-19 emergency.” Therefore, the 50% reduction is no longer applicable to schools that need personnel to distribute meals, provide childcare or ensure the continuity of learning. Please note that it remains unclear whether this workforce restriction may be lifted district-wide or just in the context of staffing for those particular services/functions.

<sup>2</sup> This Act takes effect on April 1, 2020

<sup>3</sup> As explained in Attachment “A”, the EFMLEA makes up part of the entire Families First Coronavirus Response Act.

<sup>4</sup> See <http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/coronavirus/nysed-covid-19-essential-services-3-23-20.pdf>.

**6. How does our collective bargaining agreement apply in situations related to COVID-19 leave?**

This will depend on the specific contractual provisions set forth in the collective bargaining agreement that you have with each unit. New York's paid leave legislation provides that the law shall not impair the rights of a public employer or employee under any collectively negotiated agreement. More information related to New York's legislation is set forth in Attachment "A". Please feel free to contact us if you believe the laws summarized herein pose any contractual issues.

## **ATTACHMENT A**

At the Federal level, the Families First Coronavirus Response Act provides paid leave under both the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family Medical Leave Expansion Act (“EFMLEA”). At the State level, the New York Paid Sick Leave Bill provides paid sick leave to employees under limited circumstances. Executive Order No. 202.4 also comes into play in that it requires a “local government or political subdivision” to reduce its non-essential staff and allow such employees to work remotely or take leave without a deduction in accrued time. A breakdown of each of these laws/orders is set forth below

### **Who Is Eligible?**

#### **Federal Sick Leave – EPSLA**

- Any employee.

#### **Federal - EFMLEA**

- Must be employed for 30 calendar days.

#### **New York – Paid Sick Leave**

- Any employee.

#### **New York – Executive Order No. 202.4**

- Any employee who was subject to a reduction in non-essential staff.

### **What would qualify an eligible employee for leave?**

#### **Federal Sick Leave - EPSLA**

- Employers must provide paid sick leave for employees who are unable to work or telework<sup>5</sup> for 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 COVID-19 related concerns
  - (3) The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis
  - (4) The employee is caring for an individual subject who is subject to a Federal/State/local order of quarantine or isolation related to COVID-19, or who has been advised by a health care provider to self-quarantine due to COVID-19 related concerns
  - (5) The employee is caring for his/her child if the school or place of care has closed, or the child care provider is unavailable due to COVID-19 precautions

<sup>5</sup> Because the Act only applies for employees who are unable to work or telework due to one of the enumerated COVID-19-related reasons, this provision is inapplicable where an employer is closed and work is not available.

- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor

#### Federal - EFMLEA

- This leave may only be taken by an eligible employee who is unable to work or telework because they need leave to care for a son or daughter, who is less than 18-years-old, either because the child's school or place of care has been closed or the child care provider is unavailable due to COVID-19.

#### New York - Paid Sick Leave

- Employee must be absent due to a mandatory or precautionary order of quarantine or isolation which has been issued by the state, the department of health, a local board of health, or an authorized government entity.
- *Exceptions*
  - This leave is not available to asymptomatic employees, or employees who have not yet been diagnosed with any medical condition, and who are physically able to work remotely or through other similar means during the period of quarantine or isolation.
  - This leave may not be taken by an employee who recently traveled to a country that the CDC has issued a level 2 or 3 health notice for, as long as such travel was not a part of employment or taken at the employer's direction, and the employee was provided notice of the CDC's health notice.

#### Executive Order No. 202.4

- Employees subject to this reduction who are incapable of working remotely must be placed on leave without any charge to their accruals.

#### **How much leave is an eligible employee entitled to?**

#### Federal Sick Leave - EPSL

- Full-time employees are eligible for 80 hours of new paid sick leave
- Part-time employees are eligible for the hourly amount equal to their 2-week average
  - If a part-time employee's schedule varies excessively, base the average on the prior 6-month period, including hours in which the employee took leave. If the past 6-month period cannot be used, use the average amount you reasonably expected the employee to work at the time of hiring.

#### Federal - EFMLEA

- Employees would be able to take up to the maximum 12 weeks of FMLA leave.

#### New York Paid Sick Leave

- *At least* 14 days of paid sick leave.

#### Executive Order 202.4

- Employees subject to this reduction who are incapable of working remotely are entitled to take leave without charge to accruals through April 15, 2020.

### **How much do these employees get paid?<sup>6</sup>**

#### Federal - EPSLA

- Employees must be paid the greater of: (a) their regular rate of pay or (b) the minimum wage rate.
  - If the employee takes paid sick leave for himself/herself (under qualifying reasons (1) through (3) above), the amount is capped at \$511 per day, and \$5,110 total.
  - If the employee takes paid sick leave to care for a family member/child or is experiencing a substantially similar condition that may arise, as specified by the Secretary of HHS (qualifying reasons (4) through (6) above), the employer is required to pay two-thirds of such amount. This number is capped at \$200 per day, and \$2,000 total.

#### Federal - EFMLEA

- The first 10 days of this leave may be unpaid, but the employee can elect to substitute accrued paid time off during these 10 days.
- After the initial 10 day period, employees must be paid no less than two-thirds their regular rate of pay, multiplied by the number of hours the employee would normally be scheduled to work.
  - This leave is subject to an aggregate cap of \$200 per day, and \$10,000 total.
  - If an employee's schedule varies excessively, calculate the amount by using the average number of hours the employee was scheduled to work per day over the

<sup>6</sup> Since political subdivisions are exempt from the Families First Coronavirus Response Act tax credit provisions, tax credit reimbursement is likely not applicable to school districts and public libraries. In addition, the amounts paid to employees under the EPSL and EFMLA will not be considered wages or compensation, meaning that federal employment taxes will not be collected on these amounts.

prior 6-month period. If the past 6-month period cannot be used, use the average amount you reasonably expected the employee to work at the time of hiring.

#### New York - Paid Sick Leave

- The law requires eligible public employees to be paid their regular rate of pay for their regular work hours during the period of absence.
  - This leave must be provided without the loss of accrued time.

#### Executive Order No. 202.4

- Employees subject to the 50% reduction must “work from home or take leave without charging accruals.” Please note that the Executive Order does not expressly state that the leave must be paid. However, given the fact that the employee must be provided the option to work remotely, the language suggests that the employee must receive leave at their regular rate of pay.

### **Other Notable Provisions**

#### Federal - EPSLA

- This leave does not carry over to next year, and may only be used through December 31, 2020.
- Employees may use this leave immediately, regardless of how they have been employed.
- Employees may not be required to use other accrued leave before using this leave.
- Employees may not be required to find replacements to cover shifts as a condition of using this leave.
- All employers must keep a notice posted conspicuously which outlines these provisions. The Secretary of Labor is expected to upload a model notice sometime next week.

#### Federal - EFMLEA

- Employees are required to provide notice before taking this leave, as practicable, where the leave is foreseeable.
- If an employer has fewer than 25 employees, it may be excused from the typical requirement to restore employees taking FMLA leave to their position, provided the following conditions are met:
  - The FMLA leave is taken under this section
  - The position held by the employee no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by COVID-19 during the period of leave
  - The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment

- If these reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for a year

#### New York - Paid Sick Leave

- Employees must be restored to their positions upon returning to work, with the same terms and conditions of employment.
- Employers may not penalize, discharge, threaten, discriminate, or retaliate against an employee who takes this leave.

#### **INTERSECTION OF FEDERAL AND STATE PAID LEAVE LAWS**

There may be instances where an employee qualifies for sick leave under both of the new federal and state paid sick leave laws. In such an event, the employee is initially entitled to the amount of paid sick leave under Federal law, but may thereafter claim the additional sick leave amount differential under State law. Since the Federal law provides for fewer hours of paid leave, and imposes a monetary limit on the paid leave amounts, employees would be able to claim paid leave, as necessary, in excess of these limitations pursuant to State law.