



**bolaños lowe**

# COVID-19 PAID FAMILY LEAVE BENEFITS



**Building Industry Employers of New York State**

**March 8, 2021**

**[www.bolanoslowe.com](http://www.bolanoslowe.com)**

**attorneys on your terms**

# always on your team

Founding partners Karlee S. Bolaños and William Q. Lowe both have relatively rare and exceptionally well-earned experience. Veterans in the areas of Labor, Employment, and Corporate law, these top-notch attorneys will work with you, for you, and beside you — always on your team.

Karlee S. Bolaños  
kbolanos@bolanoslowe.com



William Q. Lowe  
wlowe@bolanoslowe.com

# Agenda

- Federal Families First Coronavirus Response Act (FFCRA)
  - Emergency Paid Sick Leave
  - Emergency Family and Medical Leave Act
  - Impact of Tax Credit Extension / American Rescue Plan
- New York Coronavirus Paid Sick Leave Legislation
  - 2021 Guidance Updates

# Federal Coronavirus Legislation

- Families First Coronavirus Response Act
  - Passed on March 18, 2020.
  - Effective April 1, 2020 and expired December 31, 2020.
  - Applied to employers with fewer than 500 employees and all public employers.
  - There are two key components of the FFCRA:
    - **Emergency Paid Sick Leave Act (EPSL); and**
    - **Emergency Family and Medical Leave Expansion Act (EFMLA).**

# The Emergency Paid Sick Leave Act (EPSLA)

- The EPSLA requires employers to provide up to 80 hours of paid sick leave to employees who are unable to work or telework for reasons related to COVID-19.
- **Two weeks** is the intent of the benefit.
  - For example, if a FT employee regularly works 70 hours during a 2-week period, the employee will receive the normal two weeks of pay (totaling 70 hours). Not an additional 10 hours off with pay into a third week.
- Part-time employees are not entitled to 80 hours of paid sick leave, but rather, receive time off and pay based on the average number of hours they normally work in a two-week period.

# Reasons for Emergency Paid Sick Leave

- There are 6 qualifying reasons for EPSL:
  1. Employee is subject to a COVID-19 governmental order of quarantine or isolation.
  2. Employee is advised by a health care provider to self-quarantine.
  3. Employee is experiencing symptoms of COVID-19 and seeking a diagnosis.
  4. Employee is caring for an individual subject to a governmental order of quarantine/isolation or a health care provider has advised the individual to self-quarantine.
  5. Employee is caring for his or her son or daughter whose school/place of childcare is closed, or the childcare provider is unavailable, due to COVID-19.
  6. Employee is experiencing substantially similar condition as specified by Secretary of Health and Human Services.

# Emergency Paid Sick Leave Cap on Wages Paid

- Rate of Pay and Cap on Paid Sick Leave Wages
  - Employees utilizing sick leave for reasons 1 – 3
    - Leave paid at employee's regular rate.
    - Limited to \$511 per day, up to \$5,110 total per employee.
  - Employees utilizing sick leave for reasons 4 – 5
    - Leave paid at two-thirds of the employee's regular rate.
    - Limited to \$200 per day, up to \$2,000 total per employee.

# Emergency Family and Medical Leave Expansion Act (EFMLA)

The basic rule is:

- An employee is entitled to take **up to 12 weeks** of EFMLA after 4/1/20 because he or she is unable to work due to a need to care for his or her son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19.

# EFMLA Qualification

- Very different from standard FMLA.
- For EFMLA, the employee must be employed for at least 30 calendar days prior to the start of the leave.
- Full-time, temporary assignments count toward the 30-day requirement.
- Rehired employees are eligible if they were laid off on or after 3/1/20 and worked 30 of 60 calendar days prior to the layoff.
- **THIS 30-DAY REQUIREMENT IS FOR EFMLA ONLY, NOT EPSL!**
- **THERE IS NO PRIOR SERVICE REQUIREMENT FOR EPSL!**

# EFMLA Pay and Rate

- The first 10-day period (two weeks) of the emergency FMLA leave may be unpaid.
  - Employees may elect to substitute any accrued paid leave during this time.
  - Employers cannot require this.
- After 10 days (two weeks), employees are paid at ***two-thirds of their regular rate***.
  - Payment is capped at \$200 per day and \$10,000 in the aggregate.

# Recap/Summary: Calculating Rate of Pay for EPSL and EFMLA

## • EPSL

- Leave categories 1-3 are paid at the employee's regular rate.
  - Capped at **\$511 per day** and \$5110 in total.
- Categories 4 and 5 (the “caring for” reasons) are paid at two-thirds of the employee's regular rate.
  - Capped at **\$200 per day** and \$2000 in total.

## • EFMLA

- The first two weeks are unpaid, but employees may apply EPSL or other accrued sick leave to the first two weeks.
- After two weeks, the remaining EFMLA days are paid at two-thirds the employee's regular rate.
- Pay is capped at **\$200 per day** and \$10,000 in total.

# FFCRA Reminders

- Employees must be unable to work or telework due to a qualifying reason to be eligible for benefits.
- Intermittent leave is not required.
- Benefit continuation and job protection.
- Accrual usage in connection with EFMLA.

# Tax Credits for Paid Sick Leave and EFMLA Leave

- The FFCRA also included refundable tax credits for Emergency Paid Sick Leave and Emergency FMLA.
- Available to all private sector employers with fewer than 500 employees who pay qualified sick leave or EFMLA wages
- Employers are entitled to a tax credit equal to 100% of qualified sick leave/EFMLA wages paid, the employer share of Medicare tax, and the employer share of health insurance coverage.

# Voluntary Continuation of FFCRA Leave Provisions

- The final COVID-19 relief package of 2020 did not extend the FFCRA, but it did extend the FFCRA's employer tax credits through March 31, 2021.
  - Beginning January 1, 2021, private employers have been permitted to **voluntarily** offer FFCRA leave and obtain tax credits to cover the cost of benefits paid.
- Updates under the American Rescue Plan:
  - Tax credits extended through September 30, 2021.
  - Eligibility for leave extended to cover time spent obtaining a vaccination or recovering from an injury, disability, illness, or condition related to a vaccination.
- Considerations for determining whether to voluntarily continue FFCRA leave.

# New York Coronavirus Legislation

- Signed into law by Governor Cuomo on March 18, 2020.
- Requires all New York State employers, including public employers, to provide **sick leave** and **job protection** to employees who have been subjected to mandatory or precautionary orders of quarantine or isolation due to COVID-19.
- The law does 2 main things:
  1. Expressly expands PFL to cover an employee's inability to work as a result of a quarantine or isolation order (even when not sick); and
  2. Covers not only an employee's leave from work due to such an order, but also covers the circumstance of an employee's dependent child requiring care due to a quarantine or isolation order.

# New York Coronavirus Legislation: Employers with 10 or fewer employees

- If Employer's net income was \$1 million or less in 2019:
  - Employees are entitled to:
    - *Unpaid*, job-protected sick leave for the duration of the order.
    - PFL benefits and disability benefits for the duration of the order.
- If Employer's net income was greater than \$1 million in 2019:
  - Employees are entitled to:
    - At least 5 days of *paid*, job-protected sick leave, followed by *unpaid* sick leave for the duration of the order.
    - PFL and disability benefits for the duration of the order.

# New York Coronavirus Legislation: Employers with 11-99 employees

- Employees are entitled to:
  - At least 5 days of *paid*, job-protected sick leave, followed by *unpaid* sick leave for the duration of the order.
  - PFL and disability benefits for the duration of the order.

# New York Coronavirus Legislation: Employers with 100 or more employees

- Employees are entitled to:
  - At least 14 days of *paid*, job-protected sick leave during the period of the order.
  - The legislation is silent regarding any additional unpaid leave or eligibility for PFL or disability benefits.

# New York Coronavirus Legislation: Additional Considerations

- Sick leave must be provided without loss of accrued leave.
- Upon returning from leave, employees must be restored to the same position with same pay and other terms and conditions.
- Prohibition on discriminating/retaliating against employees for taking such leave.
- Employees are not eligible if asymptomatic or have not been diagnosed with a medical condition and are physically able to work while under a quarantine or isolation order.
- Legislation does not impede, infringe, diminish, or impair the rights of employees and employers under any CBA, or the right to engage in collective bargaining.

# New York Coronavirus Legislation: Additional Considerations

- Leave is not provided in addition to similar federal leave.
  - Employees are only entitled to coverage under the New York legislation to the extent its benefits exceed the benefits under the federal Emergency Paid Sick Leave Act.
- For employers required to provide 5 or 14 days of paid leave:
  - Eligible employees are entitled to pay at their regular rate
  - For full-time and part-time employees, the entitlement is amount of money the individual would have otherwise received during the 5 or 14-day period.

# 2021 New York Guidance Update: Scope of Benefit Entitlement

- It was previously understood that eligible employees were *only* entitled to compensation at their regular rate of pay for the relevant leave period.
- Update to New York Department of Labor’s COVID-19 FAQs potentially dramatically expands the benefit.
  - Now the guidance states the definition of “wages” in Article 6 of the Labor Law applies to the amount eligible employees must receive.
    - This includes wages, as well as any benefits or wage supplements, including items such as reimbursement for expenses; health, welfare and retirement benefits; and vacation separation or holiday pay.

# 2021 New York Guidance Update: Expanded Leave Entitlement

- New York Department of Labor January 20, 2021 guidance
  - Provides that employees may qualify for COVID-19 sick leave for up to **three** orders of quarantine or isolation.
- Two scenarios to consider:
  - An employee returns to work following a period of mandatory quarantine or isolation and subsequently receives a positive diagnostic test result for COVID-19; and
  - An employee who is subject to an order of quarantine or isolation continues to test positive for COVID-19 after the end of the initial quarantine or isolation period.

# 2021 New York Guidance Update: Expanded Leave Entitlement

- The guidance also addresses a third scenario:
  - If an employer mandates that an employee who is not otherwise subject to an order of quarantine or isolation due to exposure or potential exposure to COVID-19, the employer must continue to pay the employee at the employee's regular rate of pay until the employer permits the employee to return to work **or** the employee becomes subject to an order of quarantine or isolation.

Questions?

# thank you

For questions contact either Karlee or Bill

Karlee S. Bolaños at [kbolanos@bolanoslowe.com](mailto:kbolanos@bolanoslowe.com)

William Q. Lowe at [wlowe@bolanoslowe.com](mailto:wlowe@bolanoslowe.com)

11 Schoen Place, Fifth Floor, Pittsford, NY 14534 | (585) 643-8440

Bolaños Lowe is a premier law firm in Rochester, NY providing senior-level experience in Labor, Employment, and Corporate law — powered by enthusiasm and driven by a partnership that's on your terms.