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Coronavirus in the Workplace: An Employer's Guide to Key Leave Entitlements

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About Jackson Lewis P.C.

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Coronavirus/COVID-19

Jackson Lewis' Coronavirus Task Force is monitoring the developing situation surrounding Coronavirus/COVID-19 in order to provide clients with practical, efficient risk management advice.

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Leave Laws at Play

- Federal Families First Coronavirus Response Act
- New York State Quarantine Leave
- New York City Safe and Sick Leave

The background of this slide is a photograph of a modern building facade with a grid of windows, overlaid with a semi-transparent purple color. The text 'Leave Laws at Play' is written in large white font on the left side. A white box on the right side contains a bulleted list of three items.

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Families First Coronavirus Response Act (“FFCRA”)

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Who’s Covered?

- Only private employers with ***fewer than 500 employees*** and certain public employers.
- Allows an employer of an employee who is a healthcare provider or an emergency responder to elect to exclude the employee.
- Allows U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.

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What Benefits Are Available?

- Expanded Family and Medical Leave Act (“FMLA”) benefits.
- Paid Sick Leave benefits.

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Expanded FMLA Leave

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FMLA Employee Eligibility – Usual Rules Do Not Apply

- To be eligible for this expanded FMLA leave, employees must have been employed for at least 30 calendar days.
- The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius **do not apply**.
- This means, small businesses (less than 50 employees) will be required to provide FMLA leave for this new limited purpose, unless they satisfy the small business exemption.

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New Reason for FMLA Leave

- An employee who is unable to work (or telework) may take FMLA leave due to a need to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency."
- A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.

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FMLA Leave Entitlement

- 10 days of FMLA leave unpaid.
 - This equals 2 weeks of unpaid FMLA leave.
- Subsequent absences (up to the 12 week FMLA cap) must be paid at 2/3 the employee's regular rate of pay.
- Paid FMLA leave is capped at \$200 a day and \$10,000 in aggregate per employee.
 - This equals 10 weeks of paid FMLA leave.
- If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave.
 - **Beware:** employers cannot force use of accrued paid leave!
- The law does not provide a new 12 week entitlement period, it simply adds another reason for leave and specifies payment.

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Notice Requirements

- **Employee Notice:** Employees must provide the employer with "notice of leave as is practicable."
- **Employer Notice:** A mandatory poster has been issued by the United States Department of Labor and is available on its website.
 - https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- To the extent anyone still has employees reporting to their worksite the poster should be posted. Otherwise, it may be distributed to remote employees by email.

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FMLA Job Protection

- Normal FMLA leave's job protection rules apply in most cases.
- **Exception to job protection rule:** For employers with fewer than 25 employees, if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave:
 - The employer must make reasonable efforts to restore the employee to the same or an equivalent position.
 - If the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period from:
 - the date on which the qualifying need related to a public health emergency concludes, or
 - the date that is 12 weeks after the date the employee's leave started.

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Emergency Paid Sick Leave Act

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Who's Covered?

- **Employer Coverage for PSL:**
 - Employers with fewer than 500 employees.
- **Eligible Employees for PSL:**
 - The paid sick leave requirements apply to all employees under a covered employer. Employees are eligible immediately (i.e. no 30 day waiting period).

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Paid Sick Leave Entitlement

- 80 hours of paid sick leave for full-time employees.
- The equivalent of the average number of hours over two weeks for part time employees.
- **In addition to** any paid sick leave or other paid time off already provided by the employer.

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Reasons for Paid Sick Leave

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 healthcare 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 who needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
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 the Secretary of Labor.

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Paid Sick Leave Benefits

- The amount of pay received for paid sick leave depends on the employee's reason for taking the leave.
- For absences related to the employee's own care (reasons 1, 2, 3):
 - Greater of the employee's regular rate of pay or the applicable minimum wage.
 - Capped: \$511 per day and \$5,110 in total.
- For absences to care for others (reasons 4, 5, 6):
 - Two-thirds of the employee's regular rate or the applicable minimum wage,
 - Capped: \$200 per day or \$2,000 in total.

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Notice Requirements

- **Employee Notice:** After the first sick day, an employer may require an employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.
- **Employer Notice:** A mandatory poster has been issued by United States Department of Labor on March 25, 2020.
 - Again, to the extent anyone still has employees reporting to their worksite it must be posted. Employers who have employees working remotely can distribute the notice by e-mail.

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Effective Date

- Both the paid FMLA and the Paid Sick Leave provisions went into effect April 1, 2020.
- They will remain in place until the end of 2020.

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Prohibited Acts

- An employer may not discipline, discharge or discriminate in any other manner against an employee who utilizes leave under the FFCRA.
- Failure to provide this paid leave could subject the employer to requirements to pay both back pay and statutory damages equal to the amount of back pay.

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Non-Enforcement Period

- The U.S. Department of Labor will issue a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the FFCRA.
- Under this policy, the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted **reasonably** and in **good faith** to comply with the act.
- The DOL will instead focus on compliance assistance during the 30-day period.

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FFCRA FAQs

- **Who pays?** Employers must pay the benefits, but they will receive a tax credit for doing so.
- **Is carryover required?** No, unused paid sick leave does not carry over.
- **Can I make an employee find a replacement worker?** No, an employer may not require an employee to find a replacement worker when the employee takes paid sick leave.
- **Do I have to payout unused sick leave?** No, employers are not required to pay out unused sick leave upon separation.
- **Are employees entitled to these benefits if I'm forced to temporarily or permanently close my business?** No, employees are only entitled to these benefits for qualifying reasons. If a business closes and employees are laid off, they may be eligible for unemployment insurance benefits.

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CARES Act - Coronavirus Aid, Relief, and Economic Security Act

- Creates loans for small businesses (less than 500 employees)
- Provides enhanced unemployment insurance benefits
- Eliminates 10% excise tax on COVID-19 related early distributions up to \$100,000
- Provides greater loan flexibility by easing restrictions on loans from qualified plans to \$100,000 and 100% vested benefits for 180 days
- Relaxes rules on required minimum distributions on contribution plans and IRAs otherwise required for 2020
- Creates a tax credit equal to 50% qualified wages paid to employees 3/13/20-12/31/20 that would apply against employer portion of social security taxes payable on W-2 wages
- Creates tax credits for employers subject to full or partial suspension of business due to COVID-19
- Delays employer payment of social security taxes for all employers

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CARES and Unemployment Benefits

- Extends unemployment insurance by 13 weeks
- Provides a four-month enhancement of benefits at an additional \$600 per week to each recipient (expires July 31, 2020)
- Expands eligibility for unemployment to individuals not typically qualified, including:
 - Individuals diagnosed with COVID-19
 - individuals caring for family members with COVID-19
 - individuals who quit due to COVID-19
 - Individuals who were scheduled to start a job, but are now unable to because of COVID-19
- *New York unemployment lasts 26 weeks. With CARES, employees will be eligible to receive up to 39 weeks of unemployment benefits.*

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NYS Quarantine Leave Law

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New York Quarantine Leave Law

- Effective March 18, 2020
- Eligible employees will be entitled to unpaid, and in many cases paid leave
- Leave entitlements are triggered due to mandatory or precautionary orders of isolation or quarantine
- Law also provides job protection, prohibits discrimination and retaliation, and expands NYPFL and STD entitlements

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Which Employers are Covered by the NYS Quarantine Leave Law?

- The NYS Quarantine leave law applies to all employers, regardless of size
- The size of the employer does not impact coverage under the law, but affects the amount of paid leave entitlements employers must provide to eligible employees
- All employers will be required to provide eligible employees with leave, with job protection, job restoration, and are prohibited from discriminating against eligible employees or subjecting them to retaliation for requesting leave.

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New York Quarantine Leave Law: Amount of Benefits

<ul style="list-style-type: none"> • Employers with 100+ employees; • Public employers 	<p>Must provide at least 14 paid sick days during the applicable quarantine leave period. The law does not require unpaid sick days thereafter, likely because quarantines are presumed to end after 14 days.</p>
<ul style="list-style-type: none"> • Employers with 11 to 99 employees; • Employers with 10 or fewer employees (with 2019 net income \$1,000,000+) 	<p>Must provide at least 5 paid sick days during the applicable quarantine leave period, and then unpaid sick days until termination of order.</p>
<ul style="list-style-type: none"> • Employers with 10 or fewer employees (with 2019 net income under \$1,000,000) 	<p>Must provide unpaid sick days during the applicable quarantine leave period until termination of order.</p>

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Who is Eligible for NYS Quarantine Leave?

- The law does not distinguish between part-time and full-time employees – meaning **all employees may be eligible**
- Leave rights are triggered if an employee is **unable to work** because the employee:
 - is subject to a **mandatory or precautionary** order of **quarantine or isolation** due to COVID-19; and
 - the **order is issued** by the **State of New York, New York Department of Health, Local Board of Health**, or any governmental entity duly authorized to issue a mandatory or precautionary order.

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Orders of Mandatory or Precautionary Isolation or Quarantine

- While the law requires orders be procured from a governmental entity, such as a local health department, recent guidance supports that other documentation may be sufficient to establish entitlement at least until the order has been issued
 - Local Health Departments must provide requested orders within 30 days
- Documentation from a licensed healthcare provider that has treated the employee may provide an attestation to certain criteria that will support the issuance of an order, and entitle the employee to NYSQLL
- Criteria differs by type of order

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Orders of Mandatory or Precautionary Isolation or Quarantine

- Mandatory Isolation Order Attestation:
 - Employee tested positive OR
 - Testing is not available, but the employee has COVID-19 symptoms *AND* known contact with a COVID-19 case
- Mandatory Quarantine Order Attestation:
 - Employee has been in *close contact* with someone who tested positive or who is in mandatory isolation OR
 - Employee has symptoms and returned in the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19
- Precautionary Quarantine Order Attestation:
 - Employee is asymptomatic and returned in the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19 OR
 - Employee had *proximate exposure* with someone who tested positive for COVID-19 while that person was symptomatic
 - *Proximate exposure is not direct contact*

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Who is Not Eligible for NYS Quarantine Leave?

- **Asymptomatic employees** subject to quarantine or isolation orders who are **able to work remotely**.
- Employees who **elect to self-isolate** absent a mandatory or precautionary order from the government.
- Employees subjected to quarantine or isolation orders **due to certain foreign travel (CDC level 2, 3 or 4 warnings)** are not entitled to paid benefits
 - If the travel was unrelated to employment and
 - The employee was notified of **both** the travel health warnings and the Quarantine Leave law's exclusions before such travel.
- If businesses **initiate closings** on their own due to COVID-19 reasons, the employees will not be eligible for paid benefits. Instead employees may apply for unemployment insurance benefits, where the 7-day waiting period has been waived.

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NYS Quarantine Prohibitions Against Discrimination

- Employees who take leave are protected against
 - Discrimination
 - Discipline
 - Retaliation
 - Discharge
 - Penalty for having taken leave under the law
- Employees returning from leave are entitled to job restoration at the **same pay and terms of conditions of employment**.
- **HOWEVER** – Employers are **not** prohibited from making decisions they otherwise would have made
- The law **does not provide any greater benefits** or rights employees would have if working

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New York State Quarantine Leave Law: Expanded Paid Family Leave & Short-Term Disability Benefits

- The NYS Quarantine Leave Law also expanded the availability of NYS Paid Family Leave Benefits to Employees who are not:
 - Entitled to paid benefits
 - Exhausted paid benefits
 - Are on unpaid NYS Quarantine Leave

- NYPFL benefits may be available to employees who:
 - are subject to a mandatory or precautionary orders of quarantine or isolation; or
 - need to provide care for a minor or dependent child who is subject to a mandatory or precautionary order of quarantine or isolation.

- Short-Term Disability Benefits will be available to employees unable to work due to a mandatory or precautionary order of quarantine or isolation.

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New York State Quarantine Leave Law: Expanded Paid Family Leave & Short-Term Disability Benefits

- Expansions appear to apply only to employees who work for employers with *fewer than 100 employees*.
- Expansions also appear to be *temporary*, to fulfill the purposes of the Quarantine Leave law, and do not permanently expand rights to New York disability and paid family leave.
- Key Change – Employees may be eligible for New York Paid Family Leave benefits *concurrently* with Short-Term Disability benefits; typically, employees cannot receive both benefits at the same time.
- The 7 day waiting period for disability benefits also is eliminated for this special benefit expansion.
- Employees may prove disability by producing a mandatory or precautionary order of quarantine or isolation, or licensed health care provider attestation pending an order.

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- The potential combined STD/PFL benefit is significant.
- If collecting both Short-Term Disability Benefits and Paid Family Leave Benefits, employees may be entitled to as much as **\$2,884.62** per week (approximately **\$150,000** annually).
- The NYPFL cap is **\$840.70** per week while disability benefits are capped **\$2,043.92** per week.

New York Quarantine Leave Law: Calculation of STD & PFL

- **Example 1:**

- An employee earns an average weekly wage of \$2,000 will be entitled to \$840.70 in PFL benefits
- The employee will be entitled to \$1,159.30 in STD benefits (the difference between the average weekly wage and the PFL cap)

- **Example 2:**

- An employee earns an average weekly wage of \$3,000 will be entitled to \$840.70 in PFL benefits
- The employee will be entitled to \$2,043.92 in STD benefits (although the difference between the average weekly wage and the PFL cap is \$2,159.30, the employee cannot receive more than the \$2,043.92 STD cap)

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Coordinating NYS Quarantine Leave and the Federal Families First Coronavirus Response Act

- NYS Quarantine Leave Law reduces benefits by the amounts received for overlapping leave reasons under federal law.
- Since employers with **500 or more** employees are not covered under the FFCRA, employees should be entitled to full benefits under Quarantine Leave.
- Employees of public employers or employers with more than 100 employees but fewer than 500 employees, will be entitled to 80 hours (10 days) of paid sick time available under the FFCRA, and, if quarantine/isolation order still prevents employee from working, then entitled to at least 4 additional days of paid sick time under NYS Quarantine Leave for a **total of up to 14 paid sick days**.
- The paid leave entitlements of the FFCRA and Quarantine Leave law will run **concurrently**.

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New York Quarantine Leave Law: Relationship to PTO & Sick Leave

- Availability and use of Quarantine Leave cannot result in the loss of any other accrued sick leave under existing policies.
- As a result, any accrued but unused PTO should be available to employees once benefits under the Quarantine Leave law have been exhausted.
- The NYC Department of Consumer Affairs has issued guidance stating that the use of NYS Quarantine leave is *in addition* to NYC Safe and Sick Time

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NYC Safe and Sick Time

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NYC's Safe and Sick Leave Time Act

- The law covers:
 - part-time employees
 - full-time employees
 - temporary employees
 - per diem and
 - “on call” employees
 - undocumented employees
 - employees who are family members but not owners
 - employees who live outside of NYC but work in NYC
 - employees who have supervisory responsibilities
- Employers with 5 or more employees must provide paid leave
- Employers with fewer than 5 employees must provide unpaid leave

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NYC's Safe and Sick Leave Law Accrual

- Employees begin accruing safe and sick time on their first day of employment
- Employees may begin using safe and sick time after 120 days of employment
- Employees are entitled to take up to 40 hours of NYC Safe and Sick time in a year, which may be frontloaded or accrued at a rate of 1 hour for every 30 hours worked

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NYC's Safe and Sick Leave Qualifying Uses:

Employees are eligible to use paid NYC Safe and Sick Time if they are unable to work due to:

- Their own illness, injury, or health condition;
- To seek a medical diagnosis, care, or treatment for an illness, injury, or condition;
- To seek preventive medical care;
- To care for a family member who needs to seek a medical diagnosis, care, or treatment for an illness, injury, or health condition, or who needs preventive medical care;
- The employer's business closing due to a public health emergency;
- To care for a child whose school or child care provider closed due to a public health emergency;
- The employee or a family member having been the victim of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking and need to take restorative necessary actions.

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NYC's Safe and Sick Leave and COVID-19

- Employees can use sick leave for themselves or for a family member for diagnosis, care, or treatment of an illness, injury, or health condition or for preventive medical care (for example, staying home to observe symptoms of COVID-19).
- Examples of acceptable COVID-19 reasons to use NYC Safe and Sick leave:
 - Employee feels ill or shows symptoms of COVID-19.
 - Employee gets tested for the flu or COVID-19.
 - Employee is under quarantine—which may also be covered by state or federal law—or self-isolating for preventative purposes.
 - Employee is caring for a family member under a mandatory or precautionary order of quarantine.
- *Employers **cannot** require medical documentation from employees, unless the employee has been absent for **more than 3 consecutive days**.*

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NYC's Safe and Sick Leave and COVID-19

- Employees can use sick leave when a public official closes the business temporarily due to COVID-19.
- Employees can use sick leave when a public official closes their child's school or child care provider due to a public health emergency.
- *Employers can request verification from the employee themselves after any amount of leave to confirm the leave was taken for one of the purposes authorized under the NYCSS.*

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