

COMPREHENSIVE COVID-19 UPDATE FOR EMPLOYERS

Laws imposing new employer obligations relating to COVID-19 and their impact on New York employees are continually changing. Over the last week, three (3) new laws were enacted on the Federal and State levels providing employees with paid sick leave and emergency leave pursuant to the Family and Medical Leave Act (“FMLA”).

Complicating the legal landscape further, on Friday March 20th Governor Cuomo issued an edict requiring all New York employees working in “non-essential” businesses to stay home. The enacting government bodies have provided very little guidance and directives are changing rapidly. Nevertheless, below please find some guidance that should assist in employer determinations at this time:

1. New York State Closure of “Non-Essential Businesses”- Effective March 22nd at 8:00 P.M. through April 19, 2020

Effective Sunday March 22, 2020 at 8:00 P.M. all employees employed in a “non-essential” business must remain home. Only employees of essential businesses may report to work. As of the publication of this Client Alert, the following industries are identified as “essential”:

- Health Care Operations;
- Infrastructure (i.e. utilities);
- Essential Manufacturing (i.e. food processing);
- Essential Retail (i.e. grocery stores);
- Essential Services (i.e. mail, trash);
- News Media;
- Financial Institutions;
- Providers of Basic Necessities to Economically Disadvantaged;
- Construction;
- Defense;
- Essential Services (i.e. law enforcement);
- Vendors that provide Essential Services or Products.

A complete description of jobs that fall within the above-referenced categories can be found at:

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

Continuing to operate under the assumption your enterprise qualifies as an “essential business” without definitive clarity carries risk of the imposition of civil penalties. As of now, there are only two ways to avoid all risk. First, you can shutter your entire business. We obviously understand that such shuttering may be economically and/or financially infeasible.

Second, if your business has not identified in by the State as “essential” you can seek an “Essential Service” Waiver from the Empire State Development organization. The waiver form will allow you to describe your business and request that it be deemed “essential.” At this time,

we are not aware of the length of time it will take the State to respond with a designation determination. The waiver form and directions for submission can be found at:

https://esd.ny.gov/sites/default/files/Request%20for%20Designation%20Form_0.pdf

On March 21st Governor Cuomo signed Executive Order 202.8 which does not appear to clarify the essential vs. non-essential designation issues. Rather, the Order provides the following additional language relating to entities providing “essential services or functions”:

- An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function. Any business violating the above order shall be subject to enforcement as if this were a violation of an order pursuant to section 12 of the Public Health Law.

The Empire State Development released additional guidance as follows:

- With respect to business or entities that operate or provide both essential and non-essential services, supplies or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the restrictions.

In sum, it appears the Executive Order addresses considerations regarding staffing levels for those entities designated as “essential” but does not clarify questions for those employers whose functions fall within the fringes of the definition of “essential.”

Finally, the Executive Order for the first time identifies penalties for those businesses that fail to comply with the Executive Order. Specifically, businesses that do not comply are subject to the civil penalty provisions of the New York Public Health Law that provides for penalties as follows:

- A penalty of up to \$2,000 for employers who disobey the Executive Order;
- A penalty of up to \$5,000 for a subsequent violation within 12 months and the violation amounts to a “serious threat to the health and safety of an individual or individuals”;
- A penalty of up to \$10,000 “if the violation directly results in serious physical harm to any patient or patients.”
- Effective April 1st, an employer may also be subject to injunctions by the Attorney General in connection with violations of the Executive Order.

2. New York State Emergency Paid Sick Leave- Effective March 18th

On March 18th, Governor Cuomo signed into law an emergency measure providing for paid sick leave and other benefits for all New York State employees. Highlights of this law include:

- Guaranteed unpaid or paid sick leave for all full time and part time employees **who are not able to work from home** and who are subject to mandatory or precautionary quarantine order due to COVID-19.

- Whether sick leave is “paid” is based on the size of the employer. Paid sick leave entitlements range from five (5) to fourteen (14) days.
- The law provides employees with leave that is in addition to any Paid Leave or PTO the employee has accrued under employer policies. **An employer cannot require an employee to use their accrued PTO in lieu of or concurrently with COVID-19 Paid Sick Leave.**
- All employees are also eligible for Paid Family Leave and Disability benefits through employers’ existing insurance policies. The State indicated employees may receive their salaries up to a maximum of \$2,884.62 per week for the duration of the mandatory or precautionary quarantine.

Further information regarding New York State’s Emergency Paid Sick Leave program can be found at:

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/COVID_Sick_Leave_Employees_3-18-20_1.pdf

3. Federal Emergency Paid Sick Leave Act- Effective April 2nd

On March 18th President Trump signed into law the Families First Coronavirus Response Act. The Act contains various provisions extending a number of benefits to companies and employees alike. The law enacts an Emergency Paid Sick Leave provision, which, like New York State, provides employees with paid sick leave. Relevant highlights include:

- All employers with fewer than 500 employees are covered.
- Full-Time Employees are entitled to 80 hours of paid sick leave.
- Part-Time Employees are entitled to paid sick leave that is based on their average number of hours worked over a two-week period.
- Like New York, the Federal Emergency Paid Sick Leave Act only covers employees who are unable to work from home.
- The Act provides benefits to employees for various reasons. We have interpreted Governor Cuomo’s full closure of non-essential businesses as triggering the Federal Paid Sick Leave entitlements *once they go in effect on April 2nd*.
- Unlike New York State, the Federal Sick Leave provision caps employer payments from \$2,000 to \$5,110 depending on the reason for leave.
- Employers will be able to obtain certain tax credits and related recoupments based on their payments under the Federal Sick Leave Act and the Federal FMLA Expansion Act. These incentives are further discussed in section 4 below.

4. Federal Emergency FMLA Expansion Act- Effective April 2nd

The Families First Coronavirus Response Act also enacts the Emergency FMLA Expansion Act which provides for paid FMLA for employees employed by organizations with fewer than 500 employees. Highlights include:

- Emergency FMLA applicable to all employees who are unable to telework and who need to care for a child due to school closures.
- FMLA is a 12 week entitlement. The first 10 days are unpaid. The remainder of the period is paid at 2/3 the employees regular rate of pay for the number of hours the employee would otherwise be scheduled to work.
- There is a cap for FMLA entitlement, which is \$200 per day for a maximum of \$10,000.

The Act also provides for tax credits against FICA taxes for wages paid by an employer which are required to be paid under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

- The Act provides a 100% credit against such taxes with respect to qualified sick leave wages and qualified family leave wages paid by an employer during the calendar quarter.
- If the credit exceeds the FICA taxes owed, the excess amount will be paid to the employer as a refund. It should be noted that the employer's federal taxable income for the year will generally be increased by the full amount of any credits.
- In addition, certain qualified health plan expenses of the employer may also qualify for the credit.

5. Conclusion

The interplay between the Federal and State Emergency Leave laws is complicated and robust. To assist employers navigate through the new laws we have attached a chart identifying the essential component of the three statutes. To access the chart please see the link in the email accompanying this alert.

We anticipate regulations implementing the new statutes will be issued in the next few weeks. As it relates to the closure of non-essential businesses, we anticipate further clarity from the Governors' Office or the Empire State Development relative to the essential vs. non-essential designation.

Meltzer Lippe remains committed to partnering with our clients and friends to assist them in any way we can. We will remain at the forefront of all developments and will continue to provide you real-time updates. Until then, please do not hesitate to call your Meltzer Lippe contact with any further questions. We wish you good personal and business health.

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