

ALERT

April 2020

COVID-19 EMPLOYMENT LEGISLATION

By: Jonathan Trafimow, Keith Frank & Helena Nagel

The New York and federal governments have passed, in record time, legislation that significantly affects the employer-employee relationship. The federal government passed the Families First Coronavirus Response Act (“FFCRA”), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, and will go into effect on April 1, 2020. New York also recently passed paid sick leave legislation that is already in effect. Through this legislation, the federal and state governments seek to mitigate the disastrous effects of the COVID-19 pandemic.

We have put together an informal guide that employers may use to navigate the intricacies and overlap of these new laws. However, this is not legal advice, and employers should consult a member of Moritt Hock & Hamroff LLP’s employment team to develop or revise their response plans, (response plans explained in greater detail here, [MHH March Alert: A Company's Best Responses To COVID-19](#)) based on these new laws.

Federal Emergency Paid Sick Leave Act (Effective April 1, 2020¹ – December 31, 2020)

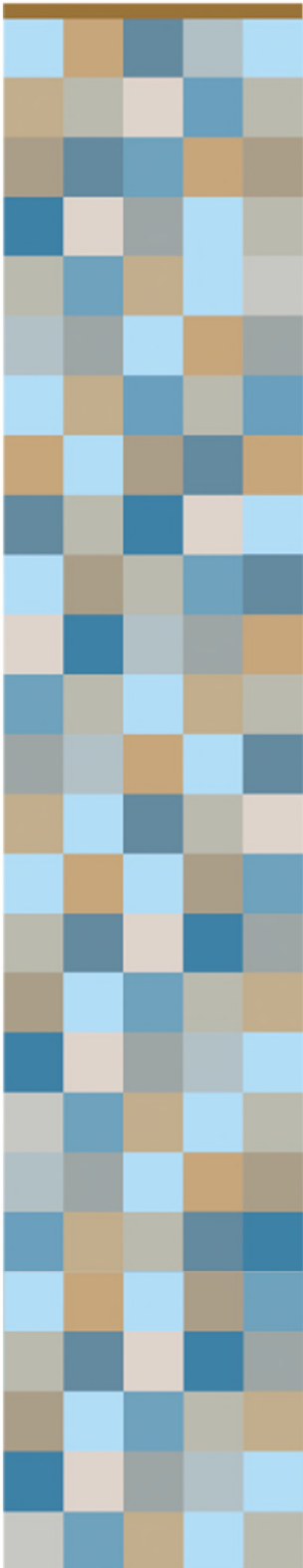
The Federal Emergency Paid Sick Leave Act (“EPSLA”) requires certain public employers, and private employers with less than 500 employees to provide their employees with paid sick leave if their employees are unable to work or telework for any of the following reasons (“Qualifying Reasons”):

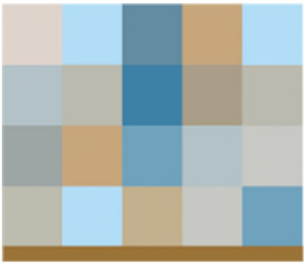
1. Employee is subject to a federal, state or local or isolation order related to COVID-19;
2. Employee has been directed by a health care provider to self-quarantine due to COVID-19;
3. Employee has symptoms of COVID-19 and is seeking a medical diagnosis;
4. Employee is caring for someone subject to a federal, state or local quarantine or isolation order or for someone who has been directed by a health care provider to self-quarantine due to COVID-19;
5. Employee is caring for a child if the child’s school or place of care is closed or otherwise unavailable due to COVID-19;²
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of Treasury and the Secretary of Labor.

Full time employees can receive up to 80 hours of paid sick leave if they meet at least one of the Qualifying Reasons. Similarly, part time employees that satisfy at least one of the Qualifying Reasons may receive paid sick leave in the amount that is equal to the average number of hours the employee worked during a two-week

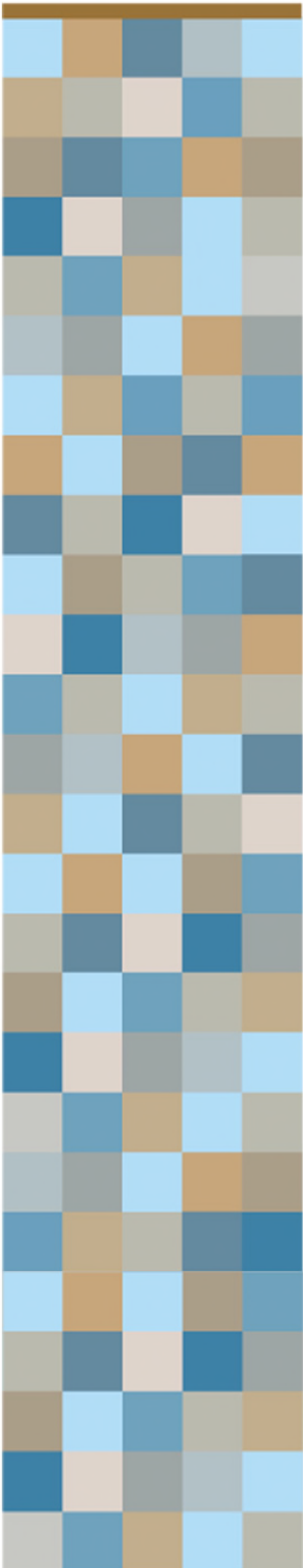
¹ The United States Department of Labor (“DOL”) has stated that it will not bring an enforcement action against an employer before April 17, 2020 so long as the employer has acted reasonably and in good faith to comply with the law.

² Please note, employees who are unable to work or telework due to this Qualifying Reason may also be entitled to an additional ten weeks of leave based on the federal Family and Medical Leave Expansion Act, which is outlined in greater detail below.





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period. According to [guidance](#) issued by the DOL, employers may use a six-month average to calculate an employee’s average daily hours if the employee’s schedule varies week by week. If an employee has not worked for the employer for at least six months, the employer can use the number of hours the parties agreed that the employee would work upon hiring, if any. If the parties did not agree upon a set number of hours, the employer may calculate the employee’s average daily hours during his or her entire employment with this employer.

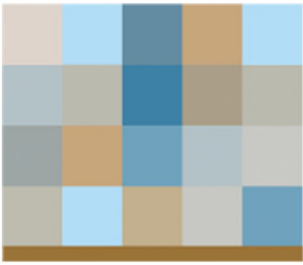
Employees are not eligible for paid sick leave under EPSLA after December 31, 2020. Any remaining, unused hours will not be carried over to next year. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement or other separation from employment.

If an employee is unable to work or telework because of Qualifying Reasons (1) through (3), the employee is entitled to his or her regular rate of payment, up to \$511 a day, for a maximum of \$5,110 in the aggregate. For an employee who is unable to work or telework because of Qualifying Reasons (4) through (6), he or she is entitled to two-thirds of his or her regular pay, up to \$200 per day, for a maximum of \$2,000 in the aggregate. If two-thirds of the employee’s regular rate of pay is less than two-thirds of the applicable minimum wage rate, employers must pay the employee at two-thirds of the applicable minimum wage rate up to a maximum of \$200 per day.

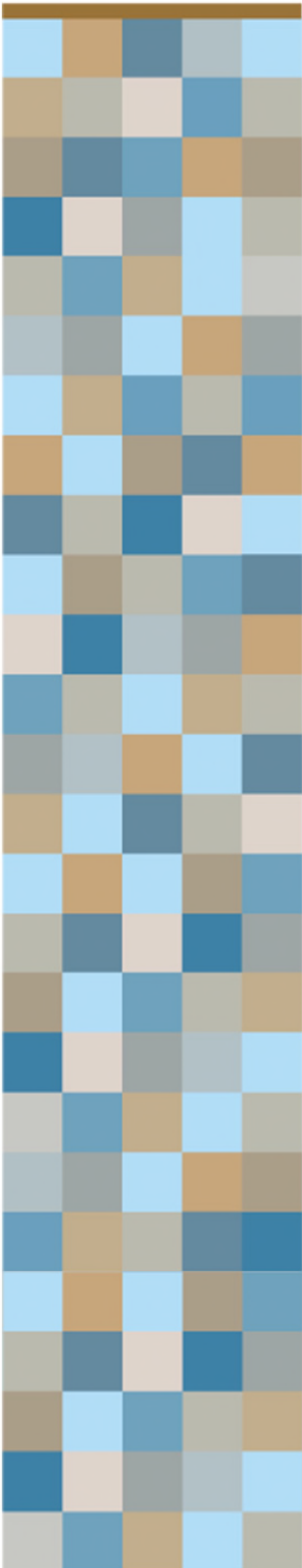
The below chart summarizes the rate requirements under EPSLA.

Qualifying Reason	Rate of Payment
(1) Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19	The employee is entitled to his or her regular rate of payment, up to \$511 a day, for a maximum of \$5,110 in the aggregate. Employers must ensure compliance with the applicable minimum wage laws.
(2) Employee has been directed by a health care provider to self-quarantine due to COVID-19	
(3) Employee has symptoms of COVID-19 and is seeking a medical diagnosis	
(4) Employee is caring for someone subject to a federal, state or local quarantine or isolation order or for someone who has been directed by a health care provider to self-quarantine due to COVID-19	The employee is entitled to two-thirds of his or her regular pay, up to \$200 per day, for a maximum of \$2,000 in the aggregate. If two-thirds of the employee’s regular rate of pay is less than the applicable minimum wage, employers must pay the employee at the minimum wage rate up to a maximum of \$200 per day.
(5) Employee is caring for a child if the child's school or place of care is closed or otherwise unavailable due to COVID-19 ³	
(6) Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of Treasury and the Secretary of Labor	

³ Please note, employees who are unable to work or telework due to this Qualifying Reason may also be entitled to an additional ten weeks of leave based on the federal Family and Medical Leave Expansion Act, which is outlined in greater detail below.



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Employees who meet one of the Qualifying Events are entitled to use this leave prior to using other paid time off, such as vacation days.

The following employers may not be bound by EPSLA:

1. Employers with under 50 employees who can show that compliance with EPSLA would threaten the viability of their business;
2. Employers of healthcare providers and emergency responders;
3. Employers who are party to multiemployer collective bargaining agreements may meet their obligations by contributing to a multiemployer fund based on the hours to which their employees are entitled under EPSLA while working under the collective bargaining agreement—as long as employees may secure payment from the fund for qualifying uses under EPSLA.

Federal Emergency Family and Medical Leave Expansion Act
(Effective April 1, 2020⁴ - December 31, 2020)

The Federal Emergency Family and Medical Leave Expansion Act (“Expanded FMLA”) broadens the scope of the federal Family and Medical Leave Act (“FMLA”) and applies to certain public employers, and private employers with fewer than 500 employees. As an initial matter, it is important to note that the minimum employee requirements under FMLA – namely that FMLA applies to employers who employ 50 or more employees in a 75-mile radius – do not apply to the Expanded FMLA.

Moreover, the minimum hours threshold under FMLA – namely, that employees must work at least 1250 hours for an employer within the past year to be covered – does not apply to the Expanded FMLA. Instead, an employee need only be employed by his or her employer for 30 calendar days to be eligible for leave under the Expanded FMLA.

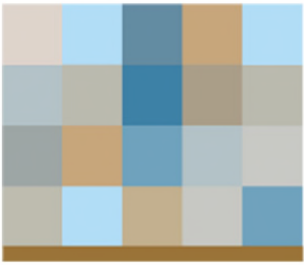
The Expanded FMLA provides that any covered employee who is unable to work or telework because he or she must care for a child whose school or childcare is closed, or otherwise unavailable, for reasons related to COVID-19 is entitled to 12 weeks of leave to be used before December 31, 2020. The first ten days of this leave are unpaid. However, an employee may use his or her accrued paid leave or paid sick leave, if any, during these first 10 days. After the 10th day, employers must provide paid leave at a rate of at least two-thirds of the employee’s regular rate of pay according to the number of hours the employee is otherwise scheduled to work, up to \$200 per day, for a maximum of \$10,000 in the aggregate.

An employer with fewer than 50 employees may seek a waiver if it can show that compliance with the law’s requirements would jeopardize the validity of the business. The United States Department of Labor advised that it will provide guidance concerning the application process for such exemption in the near future.

Requirements Under Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act

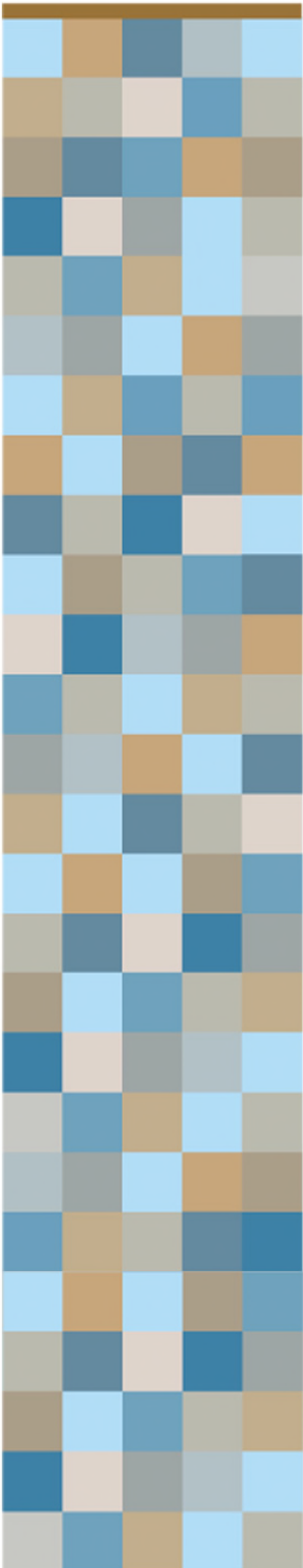
Employers covered under the EPSLA, the Expanded FMLA, or both, must post this [model policy](#) in a conspicuous place on its premises. To the extent employees are teleworking, employers may also send this notice to employees by mail, e-mail or posting the notice on an employee information internal or external website.

⁴ The DOL has stated that it will not bring an enforcement action against an employer before April 17, 2020 so long as the employer has acted reasonably and in good faith to comply with the law.



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If an employer fails to comply with the requirements set forth in the EPSLA, it will be subject to penalties set forth in the federal Fair Labor Standards Act. The provisions set forth in the Expanded FMLA are subject to the enforcement provisions of the FMLA. Employers are still required to observe overtime requirements set forth in applicable federal, state and local laws, but are not required to pay employees a premium for overtime hours under EPSLA and Expanded FMLA.

Both the EPSLA and Expanded FMLA provide for a refundable payroll tax credit equal to 100 percent of qualified sick leave paid by an employer for each calendar quarter. However, certain tax credit caps apply based on the Qualifying Reason that led to the employee’s inability to work or telework. The tax credits are in place starting with a date to be set by the U.S. Treasury Department and ending on December 31, 2020. If an employer intends to seek this tax credit, it must request, and retain, the appropriate documentation from their employees to support the leave request. Such documentation includes: the employee’s name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, the date(s) for which leave is requested, documents supporting the reason for leave – such as the source of a quarantine or isolation order or name of healthcare provider who advised the employee to self-quarantine.

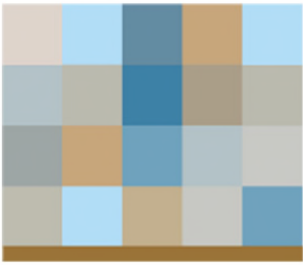
Finally, it is worth noting that employees who have been furloughed or employees of businesses that have closed are not entitled to the benefits set forth in the EPSLA and Expanded FMLA during the furlough and/or business closure. Such employees, however, may be eligible for unemployment insurance benefits.

New York State Mandatory Paid Sick Leave Law **(Effective March 18, 2020)**

New York State also enacted paid sick leave and job protection legislation in response to the COVID-19 pandemic. Under this new law, employers may not fire or penalize employees who are unable to work while subject to “a mandatory or precautionary order of quarantine or isolation due to COVID-10.” The mandatory or precautionary order may only be issued by the state of New York, the department of health, a local board of health, or any government entity with authority to issue such orders. However, employees who returned to the United States after non-work-related travel to a country which the Centers for Disease Control (CDC) had issued a level two or level three travel health notice are not eligible for the benefits under this law if the employee was provided notice of the travel advisory and chose to travel regardless.

The amount of sick leave that an employee is entitled to is tiered based upon the size of the business and its net income. The below chart outlines the amount of leave employers are required to provide under this law.

Employer Size and Net Income	Leave Requirements
Employers with 10 or less employees <u>and</u> less than \$1 million in revenue in the previous tax year	Must provide employees with unpaid leave until the end of the quarantine or isolation period
Employers with 10 or less employees <u>and</u> more than \$1 million in revenue in the previous tax year	Must provide employees with at least five days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period
Employers with 11 to 99 employees	Must provide employees with at least five days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period
Employers with 100 and more employees	Must provide employees with at least 14 days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period
Public employers	Must provide employees with at least 14 days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period



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The leave provided under this law must be provided in addition to any other accrued sick leave that may be available to the employee.

After exhausting paid sick leave under this law, employees may also receive disability benefits and paid family leave benefits, if certain requirements are met. Notably, the seven-day waiting period to collect disability benefits in these circumstances has been waived.

After an employee returns to work after taking leave under this law, the employer must restore the employee to the same position previously held with the same pay and other terms and conditions of payment.

This law also waived the seven-day waiting period for unemployment insurance benefits. Therefore, employees who are unable to work because their employer closed, temporarily or permanently, as a result of COVID-19, may immediately apply for, and receive, unemployment benefits.

To the extent this law conflicts with the federal EPSLA and Expanded FMLA, the leave provided under New York's law shall supplement the benefits offered by the federal government, up to the difference between the benefits available under the laws.

Federal Stimulus Package
(Signed Into Law March 17, 2020)

The federal government recently prepared the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), to respond to the effects of COVID-19.

Under the CARES Act, small businesses may be eligible for a loan to assist with payroll, paying employees' salaries, mortgage, rent, utilities, insurance premiums and other debt obligations. Eligible small businesses may receive a loan, up to \$10 million, that may be eligible for loan forgiveness. The amount forgiven will be reduced in proportion to any reduction in force and pay in comparison to last year.

Moritt Hock & Hamroff LLP lawyers are analyzing the new legislation and are ready to advise employers on the CARES Act and its potential impact on their business.

Our employment lawyers are equipped to assist you with developing or revising your COVID-19 response plan (see, [MHH March Alert: A Company's Best Responses To COVID-19](#)) based on these, and other, applicable laws.



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