**COVID-19 Leave: Common Scenarios and Frequently Asked Questions**

1. **Instructions for Members**

If you are a member who thinks you may be entitled to COVID-19 paid leave, you should take the following steps **immediately**:

1. **Call (do not visit) your healthcare provider** or an urgent care clinic. Explain your situation, for example, exposure to someone with the virus, experiencing symptoms, etc. Ask for an appointment – many offices will give you a “telehealth” appointment. Make sure to save any documentation of your visit or ask for a note from the provider.
2. **Contact your** **local health department** to ask for a “**Quarantine Order**.” For example, if you live in Nassau County, you will contact the Nassau County Health Department. Your local health department’s website should have more information and/or a phone number that you can call to get a Quarantine Order.
3. **Advise your Employer** of your situation and **request paid leave from your Employer**.
4. **IF YOU WORK FOR AN EMPLOYER WITH LESS THAN 500 EMPLOYEES**, you will request COVID-19 paid leave under **Federal law**, and there is no application or paperwork for you to fill out – simply request the paid leave from your Employer.
5. **IF YOU WORK FOR AN EMPLOYER WITH MORE THAN 500 EMPLOYEES**, you will request COVID-19 paid leave under **New York State law**, and you must complete and submit the following application form directly to your Employer:

<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>.

1. If you have any questions or if your Employer refuses to honor your request for COVID-19 leave, please contact John S. Groarke, Esq. or Taylor A. Waites, Esq., of Colleran, O’Hara & Mills, LLPat **(516) 248-5757**.
2. **Common Scenarios**

The laws providing for COVID-19 paid leave at the federal and state level (detailed below in Sections C and D) are complex, fact-specific and will apply differently in different situations. To illustrate how these laws are applied, below we provide some common scenarios and explanations of the leave that would be available based on the facts provided. Please note that these scenarios are provided for educational purposes only and should not be substituted for legal advice.

**EXAMPLE:** **Member A tests positive for COVID-19 and obtains a Quarantine Order from his local health department. Member A works closely with Member B and Member C at the jobsite. Members A, B, and C also carpool to work together. Member B and C are not experiencing any symptoms. The Employer sends Members A, B, and C home to quarantine for 2 weeks.**

1. **SCENARIO #1 – Employer with *over* 500 employees, “ABC Corp.”**

ABC Corp. has over 500 employees. Due to its size, ABC Corp. is exempt from the Federal law providing COVID-19 leave, so its employees are ***only*** **eligible for the COVID-19 paid leave under the New York State law.**

* Employers with more than 100 employees in New York must provide employees who are under a Quarantine Order with **at least 14 days of paid sick leave**.
* Member A already has a Quarantine Order from his local health department, which he must submit with his application for NYS COVID-19 leave.
* Member A should contact ABC Corp., let them know he is under a Quarantine Order, and that he is requesting paid leave.
* Members B and C must contact a healthcare provider and their local health departments and request a Quarantine Order based on their exposure to Member A, and then
* Once Members A, B, and C each obtain a Quarantine Order, they should submit the Order with their applications for COVID-19 leave to ABC Corp. They should each receive 14 days of paid sick leave.
1. **SCENARIO #2 – Employer with *under* 500 employees, “XYZ Corp.”**

XYZ Corp. has under 500 employees. Due to its size, XYZ Corp. is covered by both the Federal and New York State laws providing COVID-19 leave, so its employees are **eligible for COVID-19 paid leave under *either* the Federal law or the New York State Law.** As a practical matter, it may be easier to obtain the Federal leave because there is no application required.

* Employers with under 500 employees must provide employees who are quarantined or experiencing symptoms with **two weeks (maximum of 80 hours) of paid sick leave**.
* Member A will qualify for two weeks of paid leave under the Federal law because he has been ordered to quarantine by both his doctor and his local health department.
* Because Members B and C have *not* been quarantined by a healthcare provider or their local health departments, they must contact a healthcare provider or their local health department and obtain either a) a doctor’s note ordering them to quarantine or b) a Quarantine Order from the local health department.
	+ Once they complete this step, Members B and C will also qualify for two weeks of paid leave under the Federal law.
1. **Federal Law**
2. **What is the COVID-19 leave provided under federal law?**

The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide employees with paid sick leave and/or expanded family and medical leave for specified reasons related to COVID-19.

1. **What kinds of employers must provide COVID-19 leave under the FFCRA?**

Generally, the paid sick leave and expanded family and medical leave provisions of the FFCRA apply to “covered employers,” which includes **private employers with fewer than 500 employees**, as well as certain public employers. Note that employers with *over* 500 employees are exempt. In addition, small businesses with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would “jeopardize the viability of the business.”

1. **Under the FFCRA, when is an employee eligible for COVID-19 leave?**

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

* is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
* has been advised by a health care provider to self-quarantine related to COVID-19;
* is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
* is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
* is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
* is experiencing any other “substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.”

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

1. **How much paid COVID-19 leave must an employer provide under the FFCRA?**

“Covered employers” (*see* #2, above) must provide:

* **Two weeks (up to 80 hours)** of **paid sick leave** at the employee’s ***regular rate of pay*** where an employee is unable to work because:
	+ The employee is quarantined (pursuant to a Federal, State, or local government order or per the advice of a health care provider), and/or
	+ The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis; or
* **Two weeks (up to 80 hours)** of **paid sick leave** at ***two-thirds of the employee’s regular rate of pay*** where an employee is unable to work due to:
* The employee’s bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or
* The employee’s need to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19 and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
* **Up to *an additional 10 weeks*** of **paid expanded family and medical leave**at ***two-thirds the employee’s regular rate of pay***where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.
1. **Under the FFCRA, what rate of pay must be used for COVID-19 leave?**

Under the FFCRA, employees who are eligible for COVID-19 leave are entitled to payment either at their regular rate of pay, or at 2/3 of their regular rate of pay (*see* #4, above). For purposes of the FFCRA, the regular rate of pay used to calculate an employee’s paid leave is the average of their regular rate over a period of up to 6 months prior to the date on which the leave begins. If the employee has not worked for the employer for 6 months, the regular rate used to calculate paid leave is the average of the employee’s regular rate of pay for each week they have worked for the employer. If the employee is paid by commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA. The applicable rate can also be determined for each employee by adding all compensation that is part of the regular rate over the above period, divided by all hours actually worked in the same period.

1. **Can an employer require an employee to use existing sick leave accruals or other paid time off to satisfy the *paid sick leave* required by the FFCRA?**

No, unless the employee agrees. Paid sick leave under the FFCRA is in addition to an employee’s other leave entitlements. Employers may not require employees to use provided or accrued paid vacation, personal, medical, or sick leave before providing the paid sick leave required by the FFCRA. Employers also may not require employees to use such existing leave *concurrently* with the paid sick leave under the FFCRA. However, if the employer and employee agree, an employee may use preexisting leave entitlements to *supplement* the amount he or she receives from paid sick leave under the FFCRA, up to the employee’s normal earnings.

1. **Can an employer require an employee to use existing sick leave accruals or other paid time off to satisfy the *expanded family and medical leave* required by the FFCRA?**

Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the FFCRA, an employer may require that an employee take concurrently for the same hours expanded family and medical leave and existing leave that, under the employer’s policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill. If an employer does so, it must pay the employee the full amount to which he or she is entitled under the employer’s existing paid leave policy for the period of leave taken. The employer must pay the employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave. If an employee exhausts all preexisting paid vacation, personal, medical, or sick leave, the employer would need to pay the employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per day and $10,000 in the aggregate. Employers are free to amend their own policies to the extent consistent with applicable law.

*See* FFCRA §§ 5101-5111; *see also* “Families First Coronavirus Response Act: Questions and Answers,” *available at*: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

1. **New York State Law**
2. **What is the COVID-19 leave provided under New York State law?**

Under New York’s COVID-19 “quarantine leave” law, New York workers are guaranteed job protection and financial compensation while they are on a mandatory or precautionary **quarantine order** due to COVID-19. An employee under a mandatory or precautionary order of quarantine or isolation issued by the State, New York State Department of Health, local Board of Health, or other authorized government entity may be eligible for job-protected sick leave and compensation through a combination of disability and Paid Family Leave COVID-19 quarantine leave benefits.

1. **What kinds of employers are required provide COVID-19 leave under New York State law?**

Whether an employer is required to provide COVID-19 leave under New York State law will depend on whether the employer is public or private, its total number of employees, and its net income (see #3, below).

1. **How much COVID-19 leave must an employer provide under New York State law?**

The amount of leave required to be provided varies depending on the size and net income of the employer:

* Employers with **10 or fewer employees** and a **net income less than $1 million** last year must provide their employees with:
* Guaranteed job protection for the duration of the quarantine order.
* Compensation for the duration of their quarantine through the employer’s existing Paid Family Leave (PFL) and Disability Benefits (DB) policy up to $2,884.62 per week.
* Employers with **10 or fewer employees** and **a net income greater than $1 million** last year must provide their employees with:
	+ **At least 5 days** of paid sick leave and guaranteed job protection for the duration of the quarantine order.
	+ Compensation for the remainder of their quarantine through your existing PFL and DB policy up to $2,884.62 per week.
* Employers with **11-99 employees** must provide their employees with:
	+ **At least 5 days** of paid sick leave and guaranteed job protection for the duration of the quarantine order.
	+ Compensation for the remainder of their quarantine through your existing PFL and DB policy up to $2,884.62 per week.
* Employers with **100 or more employees** must provide their employees with:
	+ Guaranteed job protection for the duration of the quarantine order.
	+ **At least 14 days** of paid sick leave.
* **Public employers**, regardless of size, must provide employees with:
	+ **At least 14 days** of paid sick leave.
1. **Under New York State law, what rate of pay must be used for COVID-19 leave?**

For the applicable paid leave period (5 or 14 days), employers must pay the amount that the employee ***would have otherwise received*** had they been continuing to work for that period based upon the amount that the employee was scheduled or would have been scheduled had the employer’s operations continued in its normal due course. Employees who work a fixed schedule or are paid a salary should simply continue to receive pay for the applicable period. For hourly, part-time, and other employees who are not paid a fixed wage, employers should determine the employee’s pay by looking at a representative period of time to set the employee’s average daily pay rate.

1. **Under New York State law, how many days of COVID-19 leave are part-time employees entitled to?**

Part-time employees should be paid for the number of days/amount of time during a 5 or 14-day period that they are required to receive pay that they would have otherwise received had the employer’s operations continued in its normal due course.

1. **Under New York State law, when must payment be made to employees eligible to receive COVID-19 leave?**

Paid sick leave payments are subject to the frequency of pay requirements of Section 191 of the New York State Labor Law, so leave payments should be made in the paycheck for the applicable pay period for the leave.

1. **Under New York State law, can an employer require an employee to use existing sick leave accruals or other paid time off for COVID-19 leave?**

No. Employers required to provide paid sick leave must provide that leave separate from any accruals.

*See* New York State Senate Bill No. 8091, Assembly Bill No. 10153 (signed into law on March 18, 2020); *see also* “New York Paid Family Leave: COVID-19: Frequently Asked Questions,” *available at*: <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>