

COVID-19 & The Law

What You Need to Know About Recent Federal & New York Laws On Employment-Related Benefits & Leaves of Absence Due to the Covid-19 Pandemic

In response to the COVID-19 pandemic, the federal and State of New York governments have passed laws to assist employees who are fired or who must take a leave of absence to care for themselves or others. The federal law is the **Families First Coronavirus Response Act** (the “Federal Act”) and the New York law is called the **Quarantine Leave Law** (“New York Act”). The Federal Act is intended to provide you the primary benefits, while the New York Act supplements the benefits the Federal Act provides. This document summarizes and details your rights under both laws.

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Overview of what the Federal Act Provides:

- ➔ Two weeks (up to 80 hours) of **paid sick leave** at the your regular rate of pay where you are unable to work because you are quarantined (under a Federal, State, or local government order or advice of a health care provider), or you are experiencing COVID-19 symptoms and seeking a medical diagnosis; **or**
- ➔ Two weeks (up to 80 hours) of **paid sick leave** at two-thirds your regular rate of pay because you are unable to work because of a real 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 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 you are 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, which is paid** at two-thirds your regular rate of pay if you are unable to work due to a real need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. You must be employed for at least 30 calendar days to be eligible for this leave.

What employers are covered under the Federal Act?

Private employer that employs **fewer than 500 employees**. The Act also applies to most public workers.

What employees are covered under the Federal Act?

All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19, as discussed below. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19, as discussed below.

What are the qualifying reasons for leave?

You qualify for paid sick time if you are unable to work or unable to telework for one of these six reasons:

1. You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. You have been advised by a health care provider to self-quarantine related to COVID-19;

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3. You are experiencing COVID-19 symptoms and are seeking a medical diagnosis;
4. You are caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. You are 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
6. You are experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

What is the duration of leave you may take?

The duration of leave you may take depends on the reason for taking leave and if you are a full-time or part-time employee.

If you are taking leave for reasons **1-4 and 6** (listed above)

And you are a **full-time employee**: you are eligible for 80 hours of leave (or two weeks); or

You are a **part-time employee**: you are eligible for the number of hours of leave that you are normally scheduled to work over a two-week period.

If you are taking leave under **reason 5** (listed above)

And you are a **full-time employee**: you are eligible for up to 12 weeks of leave (two weeks of paid sick leave plus up to 10 weeks of paid expanded and medical leave) at 40 hours a week; or

You are a **part-time employee**: you are eligible for leave for the number of hours that you are normally scheduled to work over a two week period.

How much paid leave will you receive under the Federal Act?

How much paid leave you will receive depends on the reasons you are taking leave.

If you are taking **leave for reasons 1, 2 or 3** (listed above), you are entitled to paid sick leave at your **full regular rate, capped at \$511.00 per day** (\$5,110.00 in total over a two week period).

Here are some examples to illustrate this

Example 1: You are a full-time employee who earns \$60,000.00 per year, which equals \$1,153.85 per week (\$60,000.00/52 weeks) and \$230.77 per day (\$1,153.85/5 days); you are entitled to \$230.77 of paid leave for two weeks.

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Example 2: You are a full-time employee who earns \$200,000.00 per year, which equals \$3,846.15 per week ($\$200,000.00/52$ weeks) and \$769.23 per day ($\$3,846.15/5$ days); because 2/3s of \$769.23 is \$507.69. ($\$769.23 \times .66$), which is greater than \$200.00/day permitted by the Act, so you are entitled to only the maximum of \$200.00 per day of paid leave for two weeks.

Example 3: You get paid \$15.00 per hour and work 8 hours per day for 4 days, totaling 32 hours per week, totaling \$120.00 per day ($\15×8 hours) and \$480.00 per week ($\120.00×4); you are entitled to \$79.20 per day, which is 2/3s of \$120.00 ($\$120.00 \times .66$), for two weeks.

If you are **taking leave for reason 5**, you are entitled to pay at 2/3 your regular rate of pay or 2/3 the applicable minimum wage, whichever is higher, with a maximum of \$200.00 per day and \$12,000.00 in total (over 12 weeks). You may only take leave for this reason if you have worked for an employer, which has fewer than 500 employees, for at least 30 days. In taking leave for this reason, you are taking leave under a temporary expansion of Family Medical Leave Act. Importantly, this temporary expansion does **not** increase the total number of weeks available to you under the FMLA, which remains at a maximum of 12 weeks. In other words, if you already used 4 weeks of FMLA leave unrelated to Covid-19, you can only use 8 week under the Covid-19 expansion.

Can I be fired for taking leave under the Federal Act?

No. It is illegal for your employer to retaliate against you for taking leave under the Federal Act. Retaliation includes firing, demoting, reducing your pay and similar adverse employment decisions.

Can my employer require me to take leave under other laws prior to using the emergency sick time under the Federal Act?

No. Employers may **not** require employees to use other available leave prior to using emergency sick time.

What happens if I am furloughed and/or laid off?

You are entitled to paid sick leave of Emergency FMLA **only** if you are actively employed and meet the other requirements. Furloughed or laid off employees are therefore **not** entitled to paid sick leave or Emergency FMLA.

Am I entitled to benefits if my employer closes my workplace due to a lack of business, or due to an order of the federal, state, or local government?

No. In either case, you are not eligible for benefits.

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What about intermittent leave?

You may take paid sick leave or Emergency FMLA intermittently only (1) if your employer allows it and (2) you are teleworking or their reason for taking leave is because you are caring for a child whose school is closed or child care provider is unavailable.

Who pays you while on leave under the Federal Act?

Your employer does. Your employer is able to receive tax credits equaling 100% of the qualified leave it pays.

What if I had to leave work because I contracted Covid-19 (or had to care for someone who did) before April 1?

The Federal Act does not apply retroactively. This means it will only provide benefits if your covered leave started on or after April 1.

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The New York Quarantine Leave Law

What about the New York Act?

The State of New York has its own law to address the immediate needs of employees affected by COVID-19 who are subject to mandatory or precautionary orders of quarantine or isolation. On March 18, 2020, the New York Quarantine Leave Law (“New York Act”) became effective immediately. The New York Act provides for additional paid and unpaid leave, and expands New York’s paid family leave and disability benefits to certain employees who are “subject to mandatory or precautionary orders of quarantine or isolation... issued by the State, the Department of Health, local board of health or any government entity authorized to issue such order” related to COVID-19.

Who is covered under the New York Act? What leave is provided under the New York Act?

If you are subject to mandatory or precautionary orders of quarantine or isolation, the New York Act provides the following benefits:

- ➔ Small employers. Employers with **10 or fewer employees and a net income less than \$1 million** must provide job protection for the quarantine order’s duration.
- ➔ Medium size employers. Employers with **11-99 employees and employers with 10 or fewer employees and a net income greater than \$1 million** must provide at least **5 days of paid sick leave and job protection** for the quarantine order’s duration.
- ➔ Large employers. Employers with **100 or more employees**, as well as all public employers (regardless of number of employees), must provide at least **14 days of paid sick leave and guarantee job protection** for the quarantine order’s duration.

The current “New York State on PAUSE” requirement that all non-essential businesses close or are allowed to only work from home does not alone entitle you to benefits under the New York Act. An order of “quarantine or isolation” is an order of a public health official that encompasses a specific individual. The recent “stay at home” order by Governor Cuomo, by contrast, is not an order of “quarantine or isolation” because that is based upon an Executive Order, which does not meet the definition of a mandatory or precautionary order of quarantine or isolation.

If you do not have symptoms or have not yet been diagnosed with any medical condition and are physically able to work remotely during the quarantine or isolation order, you are exempt from the New York Act—meaning you are not entitled to benefits. Moreover, leave benefits are not available if you are quaran-

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tined or isolated because you returned to the United States from non-work travel to a country cited by the CDC as a “level two or three travel health notice,” if you received the CDC’s notice and were informed of this exception prior to travelling. If you fall into any of those categories, your employer must allow you to use your other “accrued leave” or, if you do not have any available for use, you must be provided unpaid leave for the duration of the quarantine or isolation.

Does the New York Act apply if I am not working due to the “New York State on Pause” or stay-at-home orders?

No. The New York Act does not cover you if you have to stay home or work remotely for circumstances other than a mandatory quarantine. To illustrate, the following situations do **not** apply:

- ➔ Watching kids during school closure
- ➔ Working from home
- ➔ Voluntarily self-quarantining “just in case” or “because you are afraid of contracting COVID-19
- ➔ Being home because your job is temporarily closed

What is the relationship between the New York Act and the Federal Act?

The Federal Act is intended to be your primary source for benefits. You may be, however, eligible for extra benefits under the New York Act in the two ways described below. Also, the Federal Act does not apply to employers with more than 500 employees. Employees of those companies are therefore entitled to benefits only under the New York Act.

The two extra benefits you may be entitled to receive under the New York Act

First, if your salary exceeds the federal cap, you will receive extra benefits for the days you are to receive paid leave under the New York Act. That is, for the days of quarantine or isolation for which you are entitled to receive paid leave under the New York Act, you are to receive that paid leave at your full salary – not at the salary cap under Federal Law.

Here are examples to illustrate:

Example 1: You work for a company with less than 100 employees and earn \$200,000.00 per year, which equals \$3,846.15 per week (\$200,000.00/52 weeks) and \$769.23 per day (\$3,846.15/5 days). Under the Federal Act, you would be entitled to only the maximum of \$511 per day of paid leave. But under the New York Act, you would receive \$769.23 for those 5 days of paid leave. After those 5 days, you would only receive paid leave under the Federal Act at \$511 per day.

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Example 2: You work for a company with more than 100 employees and earn \$200,000.00 per year, which equals \$3,846.15 per week ($\$200,000.00/52$ weeks) and \$769.23 per day ($\$3,846.15/5$ days). Under the Federal Act, you would be entitled to only the maximum of \$511 per day of paid leave. But under the New York Act, you would receive \$769.23 for all 14 days and would not be subject to the \$511 cap under the Federal Act.

Second, you are entitled to receive benefits provided by the government under New York Paid Family Leave and New York’s Disability Benefits Law for days of quarantine or isolation for which you are not entitled to receive paid leave under the New York Act. This applies only to employers with less than 100 employees because employers with more than 100 employees are required to provide paid leave at their full rate for 14 days.

How much is the Paid Family Leave and Disability Benefit?

The combined maximum benefit is **\$2,884.62 per week**, some of which consists of Paid family Leave and the rest Disability Benefits. Both benefits run concurrently (which is otherwise prohibited under New York law), meaning part of your pay is through Paid Family Leave and the rest through Disability Benefits:

- ➔ 60% of your weekly salary is paid through Paid Family Leave up to \$840.70 per week.
- ➔ The amount of Disability Benefits is the difference between your salary minus the Paid Family Leave portion, which is capped at \$2,043.92 per week.

Here are 3 examples:

	Weekly Salary	Paid Family Leave benefit portion (60% of weekly salary, capped at \$840.70)	Weekly salary minus Paid Family Leave amount (capped at \$2,043.92)	Total benefit amount per week
Lanny	\$1,000.00	\$600.00 ($\$1,000.00 \times 60\%$)	\$400.00 ($\$1,000.00 - \600.00)	\$1,000.00 ($\$600.00 + \400.00)
Matt	\$2,000.00	\$840.70 (i.e., the maximum)	\$1,159.30 ($\$2,000.00 - \840.70)	\$2,000.00
Chad	\$3,000.00	\$840.70 (i.e., the maximum)	\$2,2043.92 (i.e., the maximum)	\$2,884.62

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The following chart shows the relationship between the Federal Act and New York Act

Employer Size (by employee count)	Job protection	Covered Duration Starting 3/18/20	Employer's Role	Employee's pay/benefits Starting 3/18/20
1-10 (less than \$1m annual net income)	Yes	Duration of quarantine until Federal program starts (unless NY has richer benefits)	Unpaid sick leave until end of quarantine	Sick leave is entirely compen- sated through concurrent Disability Benefits/Paid Family Leave benefits: Combined maximum of \$2,884.62/week
1-10 (more than \$1m annual net income)	Yes	Duration of quarantine until Federal program starts (unless NY has richer benefits)	At least 5 days paid sick leave by ER + Unpaid sick leave until end of quarantine	Days 1-5: Full salary continuation by employer Days 6+ Concurrent Disability Benefits/Paid Family Leave benefits: Combined maximum of \$2,884.62/week
11-99	Yes	Duration of quarantine until Federal program starts (unless NY has richer benefits)	At least 5 days paid sick leave by ER + Unpaid sick leave until end of quarantine	Days 1-5: Full salary continuation by employer Days 6+ Concurrent Disability Benefits/Paid Family Leave benefits: Combined maximum of \$2,884.62/week
100+	Yes	At least 14 days	Full duration paid at regular salary by ER	Full salary continuation by employer
Public Employers	Yes	At least 14 days	Full duration paid at regular salary by ER	Full salary continuation by employer

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When do the Paid Family Leave and Disability Benefits start?

For purposes of the COVID-19 paid sick leave, the 7-day waiting period is waived. Benefits start on the employee's first full day of unpaid quarantine starting March 18 or after.

How to apply for Paid Family Leave and Disability Benefits?

- 1.** Collect your forms. The forms should be available from your employer, your employer's insurance carrier or from the State of New York using this website:
<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>
- 2.** Complete the forms. The forms need to be completed by you and by your employer. Your employer is required to complete and return the forms within three business days.
- 3.** Submit the forms to your insurance carrier within 30 days. You must submit your completed request package to your employer's insurance carrier within 30 days after the start of your leave to avoid losing benefits.

Does the New York Act affect accrued sick leave days?

Yes. Any Paid Family Leave and Disability Benefits you take related to COVID-19 counts as duration taken under Disability Benefits (maximum of 26 weeks per year) and Paid Family Leave (maximum of 10 weeks) and reduces the remaining benefits accordingly.

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Unemployment Benefits

The State of New York has waived the seven-day waiting period. You should apply for benefits as soon as possible. Due to the high volume of people applying for benefits, the day you may apply for benefits depends on the first letter of your last name: A – F file on Monday; G – N file on Tuesday; O – Z file on Wednesday; and Thursday, Friday and Saturday are for those you missed their day.

Any claim you file will be backdated to the date you became unemployed.

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Other Frequently Asked Questions about COVID-19

The following are answers to commonly asked questions on how the COVID-19 pandemic has changed the workplace. Many of these answered are also detailed above.

Here at Lipsky Lowe we are focused on protecting employee's rights in during this ever-changing situation.

1. When do the Paid Family Leave and Disability Benefits start?

The federal Family & Medical Leave Act (FMLA) allows a qualified employee to take up to 12 weeks of unpaid leave within a 12-month period if they or an immediate family member require care for a "serious health condition." The FMLA also entitles a qualified employee to continued health insurance benefits and requires their employer to offer them the same or equivalent position when they return.

What is a qualified employee? Individuals who have worked for at least one year, over 1,250 hours in the prior year, and whose employer has at least 50 employees in a 75-mile radius.

The Families First Coronavirus Response Act (FFCRA) allows employees who work for employers of less than 500 employees to take up to 80 hours of emergency sick leave. An employee may take emergency sick leave under the FFCRA if they are:

- ➔ Subject to quarantine or isolation order or caring for someone who is subject to a quarantine or self-isolation order;
- ➔ Advised by a health care provider to self-quarantine due to Coronavirus concerns or caring for someone who is advised to self-quarantine;
- ➔ Experiencing symptoms of Coronavirus and are seeking a medical diagnosis;
- ➔ Caring for their child if, because of Coronavirus protections, their school or day care has been closed or their childcare provider is unavailable; or
- ➔ Experiencing similar conditions, as specified by the Secretary of Health and Human Services.
- ➔ The rate of pay varies depending on the circumstances and more information is available through the Department of Labor.

New York law, as detailed above, provides even greater protections for employees.

2. Can my employer fire me if I get the Coronavirus?

No. The FMLA and other federal laws protect qualified individuals absent from work because of a serious illness.

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health condition. The Americans with Disabilities Act (ADA) likewise prohibits discriminating against individuals with a disability. In certain circumstances, an employee who has an underlying condition exacerbated by the Coronavirus (asthma or a heart condition) may be considered disabled.

The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities, a history or record of such an impairment, or a perception by others of such an impairment. Besides prohibiting discrimination against people with disabilities, the ADA requires employers to provide reasonable accommodations for such individuals. It remains unclear whether COVID-19, by itself, constitutes a disability under the ADA.

However, no doubt exists that COVID-19 does constitute a disability under the New York State Human Rights Law and New York City Human Rights Law.

3. Do I have the legal right to work from home if I'm uncomfortable reporting to my job, even if I am not sick?

Generally, no legal right exists to telecommuting, as employers have the right to dictate the employment terms. But if an underlying disability places you at high risk for Coronavirus, you may have the right to telecommute as an accommodation, depending on whether working from home is reasonable under the circumstances.

The FFCRA permits employees to take emergency sick leave to care for a child whose school or day care has closed, or where childcare is otherwise unavailable because of Coronavirus protections. Employees may also be entitled to up to an additional 10 weeks of leave at two-thirds the employee's regular rate of pay if an employee is unable to work due to bona fide child care need related to COVID-19. These payments are subject to limits on maximum benefits and more information is available through the Department of Labor.

4. What if I don't want to work from home? Can my employer require me to work from home?

Employers have the right to set the employment terms and conditions, including work location. This means an employer may require employees to work from home due to a reason such as business need or health and safety.

5. I travel for work. Can my employer ban me from traveling for work? Can my employer ban me from travelling for personal reasons?

Traveling is considered an employment term and condition. This means your employer may lawfully prohibit you from traveling for business reasons. By contrast, your employer cannot prevent you from

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traveling for personal reasons on your own time, but it may be able to bar you from working in the office if you have recently traveled or for purposes related to health and safety.

6. If my employer requires me to work from home, am I entitled to be paid for that time?

Yes. If you are a salaried employee: generally, if you work any portion of the week, you must be paid your regular weekly pay. Hourly employees: who work from home are entitled to be paid for all hours worked, including overtime hours.

7. Is my employer required to pay for the cost of me setting up a home office?

It depends on a few things. If the expenses you incur in setting up your home office causes your weekly pay to drop below the minimum wage, you may have a claim under the federal Fair Labor Standards Act and New York Labor Law.

8. Can an employer withdraw an offer letter or employment agreement because of Covid-19?

Generally, yes. An offer of employment may be withdrawn or revoked for any reason – provided it is a lawful reason. Discriminating against someone is an example of an unlawful reason.

Also, most offer letters do not modify the employee's at-will status. This allows the employer to fire the employees without cause at any time, without warning. And this includes before the employment has started.

9. Can an employer renege upon a fully executed severance agreement or deny payment to an employee based on economic changes at the company?

As a general matter, no. A severance agreement is a legally binding contract and an employer would be breaching the agreement if it if reneges on that promise, absent a material breach by the employee. If an employer fails to honor its obligations under a severance agreement, the employee may be able to sue for breach of contract.

10. I am aware that my company is not following the law or is fraudulently billing the government for medical supplies and equipment. Do I have any protections if I come forward?

The False Claims Act (FCA) protects employees, contractors, and agents who report to their employer or supervisor any company conduct that may result in a fraud on the government. Healthcare-related fraud on the government. Healthcare-related fraud might include opposing double-billing of Medicare or Medicaid, reporting the sale of defective products to the government, refusing to follow an order to upcode, reporting the payment of kickbacks to refer patients for services reimbursed by Medicare or Medicaid, or trying to stop a provider from billing Medicaid for unnecessary medical services. If you know

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your employer is fraudulently billing the government or breaking the law in other ways, contact an attorney immediately so you can take steps to make sure you are protected.

11. What if my employer or coworkers are discriminating against me because of my race, ethnicity, or national origin?

As the pandemic grows, employees are being discriminated against in a variety of ways. Employers are firing employees who come from countries that are having a high outbreak – that is national origin discrimination. Employers are also firing employees because they have COVID-19 or they believe they have the virus – that is disability discrimination.

Importantly, discrimination does not have to be in the form of termination. Discrimination takes many forms, including derogatory comments, slurs, stereotyping, and adverse employment actions like poor performance reviews, demotion, or termination. If you have reason to believe you are being discriminated against because of a protected characteristic like your race, ethnicity, or national origin, contact an employment discrimination attorney immediately to understand what options you may have.

12. What is the difference between being furloughed and being fired?

Not much. When someone is furloughed, their employment is effectively terminated and that individual is then entitled to file for unemployment benefits. Companies often tell employees they are furloughed because it is the company's hope and expectation that they will re-hire those furloughed employees as soon as conditions change. By contrast, when a company tells employees they are fired, that company usually has no plans to rehire that individual.

13. Is it legal for my employer to reduce my pay or hours during the COVID-19 pandemic?

Generally, yes. Your compensation and hours worked are considered terms and conditions of your employment. This means your employer is permitted to reduce your hours and pay – provided your pay is not being reduced below the minimum wage.

But it is illegal for your employer to reduce your pay or hours because you took leave because you are sick from Coronavirus or you need to care for someone who is sick.

14. Do you have to give your employer notice before taking leave?

If you can reasonably foresee needing to take leave, you should provide notice of leave to your employer (Example: if you know your child's school is going to close). After the first workday of paid sick time, your employer may require you to follow reasonable notice procedures to continue receiving paid sick time.

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Personal Message

Everyone here at Lipsky Lowe hopes you and your family stay safe in these difficult and uncertain times. We will, collectively, get through this.

Very truly yours,

Douglas Lipsky and Christopher Lowe

We represent clients in New York and New Jersey in all aspects of the employment relationship, from:

- ➔ Hiring and employment agreements
- ➔ Termination and separation agreements
- ➔ Employment litigation
- ➔ Employment discrimination
- ➔ Sexual harassment
- ➔ Hostile work environment
- ➔ Whistleblower retaliation
- ➔ Breach of contract
- ➔ Unpaid overtime, minimum wage and tips



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