

MEMORANDUM

TO: LOCAL PRESIDENTS
NYSUT LABOR RELATIONS SPECIALISTS
NYSUT REGIONAL STAFF DIRECTORS

FROM: NYSUT OFFICE OF GENERAL COUNSEL
NYSUT FIELD AND AFFILIATE SERVICES

DATE: JANUARY 4, 2021

RE: **EXPIRATION OF THE FAMILIES FIRST CORONAVIRUS
RESPONSE ACT (FFCRA)**

The Families First Coronavirus Response Act (FFCRA) expires on December 31, 2020 and was not extended by Congress. Effective January 1, 2021, employees will no longer be eligible for FFCRA leave and any employee who is currently on FFCRA leave as of December 31, 2020 will be ineligible for continued leave after that date, unless such leave would be covered by another law or contract. This memorandum explains the type of COVID-19 related leave available under New York state law and addresses specific circumstances that may be affected by the expiration of FFCRA.

1. New York Emergency COVID-19 Paid Sick Leave Law

The New York Emergency COVID-19 Paid Sick Leave Law (“New York Law”) went into effect in late March 2020 and will remain in effect on and after January 1, 2021. NY Senate Bill S. 8091, Ch. 25, L. 2020. The New York Law provides a paid leave benefit of “at least fourteen days” for any public employee “who is subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19”. Ch. 25, L. 2020, §(1)(d).

The New York Law provides for leave if an employee is personally placed under a quarantine order by a government entity or if the employee needs to care for a minor child who is subject to a similar order. *New Paid Leave for COVID-19*, N.Y. Dept. of Labor, <https://paidfamilyleave.ny.gov/COVID19>. Such an order may be issued if the employee tests positive for the virus, or a precautionary order may be issued if the employee has returned within the past 14 days from a country designated with a 2, 3, or 4 advisory for COVID-19, or has had proximate exposure with someone who has tested positive for COVID-19. <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs#obtaining-a-quarantine-order>. It is likely that an employee cannot obtain a quarantine order as a preventative measure in order to avoid exposure to the virus. New York issued guidance for how an employee can obtain an order for mandatory or precautionary quarantine or isolation order. That guidance can be found here: [obtain-order-of-quarantine.pdf \(ny.gov\)](#)

Several local leaders and field staff have asked whether members may be entitled to multiple leaves for multiple periods of quarantine or isolation under the New York Law. Although there does not appear to be a definitive answer to this question, the plain language of the statute supports the conclusion that multiple leaves for separate orders of quarantine or isolation are covered. The New York Law provides that public employers shall provide “**at least** fourteen days of paid sick leave during **any** mandatory or precautionary order of quarantine or isolation.” Ch. 25, L. 2020, §(1)(d) (*emphasis added*). The law provides no cumulative cap or other language that limits the paid sick leave to a single qualifying event. Unlike the paid leave in FFCRA, which provided for **up to** 80 hours of leave, the New York Law contains no such limiting language. OGC and field staff have argued, with varying degrees of success, that the plain meaning of “any ... order”, demonstrates the legislature’s intention to provide paid leave to cover multiple ordered quarantines or periods of isolation.

As there is no legal precedent on this point, we recommend consulting with OGC regarding fact patterns pertaining to this issue.

The New York Law provides leave to all private and public employees. The level of benefits for private employers varies based on the size of the employer (*see* <https://paidfamilyleave.ny.gov/if-you-are-quarantined-yourself>). However, all public employees receive 14 days of paid leave.

Upon returning to work from leave taken under the New York Law, an employee must be restored to their previous position. Ch. 25, L. 2020, §3. It is unlawful for an employer to discharge, threaten, penalize, or in any other manner discriminate or retaliate against an employee for taking leave under the New York Law. *Id.*

2. **Specific Circumstances Affected by FFCRA Expiration**

A. **Out-of-State Travel**

Effective June 25, 2020, Governor Cuomo issued Executive Order 205 that requires individuals returning to New York after travel to quarantine. It was modified by Executive Order 205.2, issued on October 30, 2020, which states that “All travelers entering New York from a state which is not a contiguous state shall quarantine for a period of 14 days consistent with Department of Health regulations for quarantine . . .” unless the travel was for a period of less than 24 hours. For travel to a non-contiguous state of a duration of more than 24 hours, “such traveler must seek testing prior to departure from that state, within 72 hours of departure, prior to arrival in New York.” Exec. Order 205.2. Further, “[t]he traveler must, upon arrival in New York, quarantine according to Department of Health guidelines for a minimum of three days, measured from time of arrival and on day 4 may seek a diagnostic test to exit quarantine. The traveler may exit quarantine upon receipt of the second negative test result.” *Id.*

Executive Order 202.60 provides that “an employee shall not be eligible for paid sick leave benefits or any other paid benefits pursuant to this chapter if such employee voluntarily travels to a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven day rolling average, and which the commissioner of the department of health has designated as meeting these conditions as outlined in the advisory issued pursuant to Executive Order 205”

On November 3, 2020, the New York State Department of Health (“DOH”) issued updated guidance on quarantine requirements after out of state travel. Department of Health, *Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel*, (Nov. 3, 2020), available at [interim_guidance_travel_advisory.pdf \(ny.gov\)](https://www.health.ny.gov/interim_guidance_travel_advisory.pdf)

This guidance outlines the new travel quarantine requirements in further detail than Executive Order 205.2. It also provides specific guidance for teachers:

Teachers, school employees, and childcare workers must quarantine for a minimum of 3 days after returning to New York from a designated state or country due to the nature of education and child care services and the risk and difficulty of adherence to the guidelines that govern such exemptions, and must be tested on day 4 after arriving, pursuant to EO 205.2. Although such workers are essential, the travel advisory exemption for essential workers does not apply to teachers, school employees, or childcare workers, due to the sensitivity of these congregate settings. *Id.*

The travel guidance further states that “any New York State resident who voluntarily travels to a non-contiguous state for travel that was not taken as part of the person’s employment or at the direction of the person’s employer, will not be eligible benefits under New York’s COVID-19 paid sick leave law.” *Id.*

Employees in New York who were required to quarantine due to out-of-state travel were permitted to use leave under FFCRA, pursuant to the Emergency Paid Sick Leave Act (EPSLA), but with FFCRA’s expiration, employees will no longer be eligible for paid leave to quarantine as a result of out-of-state travel. Thus, employers can deny any paid leave, including contractual sick leave, to employees who are required to quarantine following out-of-state travel as required by the Executive Orders.

B. Child Care Leave

Employees who were unable to work or telework due to the need to care for a child whose school or childcare was unavailable due to the COVID-19 pandemic under the Emergency Family Medical Leave Expansion Act (EFMLEA) provisions of FFCRA were eligible for 12 weeks of emergency leave for childcare (10 weeks of which were paid). With FFCRA’s expiration, employers and members may be able to address childcare needs resulting from COVID-19 with bargaining. This may take the form of negotiating additional leave for individual members, on a case-by-case basis. Some locals may also consider negotiating the expanded use of existing accrued contractual leave in a memorandum of agreement between the local and the employer.

C. Leaves Available to Private Sector Members

Although FFCRA’s leave provisions were not extended into 2021, the stimulus bill extends the FFCRA payroll tax credit for covered, private sector employers who continue to offer paid sick and family leave through March 31, 2021. *See* H.R. 133, 116th Cong. §286 (2020). Therefore, effective January 1, 2021, employers are no longer required to provide FFCRA leave; however, covered employers may voluntarily offer employees the ability to use any remaining, unused emergency paid sick leave or family leave (EPSLA or EFMLEA) and may utilize payroll tax credits to cover the cost of benefits paid to employees until March 31, 2021. It should be noted that the qualifying reasons that support an employee’s need to take a leave and other FFCRA requirements remain in place.¹ **Please note that this tax credit and the ability to voluntarily extend FFCRA leave into 2021 does not apply to public employers.** Governmental employers, including “the government of any State or political subdivision thereof,” and any agencies or instrumentalities of those governments are **not** considered eligible

¹ The law also does not change the amount of leave that employees are entitled to take under the FFCRA. Full-time employees are entitled to a one-time allotment of 80 hours of paid sick leave and 12 weeks of expanded family medical leave. If a covered employer chooses to permit an extension of FFCRA leave, the employee would be permitted to take any remaining, unused leave.

employers and are not entitled to receive tax credits for providing paid leave wages under the FFCRA.²

Private sector employees may also be eligible for leave under New York's new sick and safe leave law. *See* Labor Law § 196-b. For more information on benefits under this law, see the New York State Department of Labor's fact sheet here: [New York State Paid Sick Leave - Labor Unions \(ny.gov\)](#).

New York also amended the Paid Family Leave Benefits Law (PFLBL) to address use of leave for quarantine. In the public sector, the PFLBL applies if the union and the employer have agreed to opt-in to that law's coverage. In the private sector, the law applies automatically unless the employer already has an equivalent or better benefit, whether by way of unilateral policy or under a union contract. If this law is applicable, family leave of up to ten weeks can be taken under the law if an employee is under a quarantine order or if an employee needs to provide care for a minor child who is subject to a quarantine order issued by a government entity. Ch. 25, L. 2020, §8. Family Leave benefits are capped at 60% of weekly pay. Worker's Compensation Law § 204(2)(a). Paid leave under the PFLBL must be taken concurrently with FMLA leave. *Id.* at §206(4). Further, if "engaged in a professional or teaching capacity in or for a religious, charitable or educational institution" or engaged in work that is "not subject to routine supervision and which requires the consistent exercise of discretion and judgement in its performance," an employee is not covered by the PFLBL. Workers' Compensation Law §201(5). For more information regarding PFLBL, see [New York State Paid Family Leave \(ny.gov\)](#).

Conclusion

As with all COVID-related inquiries, the laws and guidance are evolving. We anticipate 2021 will bring new challenges and NYSUT will continue to provide guidance, as needed.

RTR /LMA/JNC:lg

² FFCRA, H.R. 6201, 116th Congress, §7003(e)(4) (2020). *See also Families First Coronavirus Response Act: Questions and Answers*, DOL (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (private sector employers that provided paid sick leave and expanded family and medical leave required by FFCRA are eligible for reimbursements of the costs of that leave through refundable tax credits); [COVID-19 Related Tax Credits: What is an Eligible Employer FAQs | Internal Revenue Service \(irs.gov\)](#).