

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 7, 2021 (REVISED)

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

The Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020 and was not extended by Congress. Effective January 1, 2021, employees are no longer eligible for FFCRA leave and any employee who was currently on FFCRA leave as of December 31, 2020 is 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, addresses specific circumstances that may be affected by the expiration of FFCRA, and contains “clickable” citations that link directly to the referenced documents. Please note that this Memorandum contains information current as of the date of issuance.

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 remains in effect on and after January 1, 2021. NY Senate Bill S. 8091, Ch. 25, L. 2020. **The paid leave benefit under the New York Law applies only to an individual employee when they are personally subject to a mandatory or precautionary order of quarantine or isolation. *Id.* This law does not apply when an employee’s family members, such as minor children, are subject to such an order.** In the public sector, the New York Law provides a paid sick 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 level of benefits for private employees 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. These 14 days are measured as calendar days, and an employee in the public sector is entitled to be paid their full rate of pay that would have otherwise been received during that 14-day period. See New York Paid Family Leave COVID-19: Frequently Asked Questions, available at <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>.

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. That guidance can be found here: [obtain-order-of-quarantine.pdf \(ny.gov\)](#). Further, an employee is prohibited from using leave under the New York Law “where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition *and* is physically able to work while under a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means.” Ch. 25, L. 2020, §13 (*emphasis added*).

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.

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**

Rules regarding out-of-state travel are set forth in the Governor’s Executive Orders and guidance issued by administrative agencies. Such Executive Orders and agency guidance may change, without notice, at any time. As a rule of thumb, any out-of-state travel, particularly to a non-contiguous state, may result in a quarantine or testing requirement that will need to be satisfied and such quarantine period might not be covered by paid leave. Obviously, these restrictions can be avoided by limiting travel to in-state travel. Anyone considering out-of-state travel should carefully consult, before traveling, any applicable Executive Orders or agency guidance in place at the time of the travel. The following rules were in place as of the date of this Memorandum.

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.*

On December 30, 2020, Governor Cuomo issued Executive Order 205.3 which further modified the out-of-state travel guidelines. See [EO 205.3.pdf \(ny.gov\)](#). The Executive Order refers to a quarantine period consistent with New York State Department of Health (DOH) guidance. The DOH guidance requires a mandatory 10-day quarantine without “testing out”, exempts certain categories of people (essential workers, those out-of-state for less than 24 hours and those traveling only to contiguous states), and continues to require all out-of-state travelers to complete the travel form. It is expected that the DOH and/or local health authorities will issue additional clarification on this issue.

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, DOH issued guidance on quarantine requirements following 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 [interm_guidance_travel_advisory.pdf \(ny.gov\)](#). The DOH guidance provides specific quarantine requirements for teachers and childcare workers:

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.*

This November 3, 2020 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 previously permitted to use leave under the now-expired FFCRA, pursuant to the Emergency Paid Sick Leave Act (EPSLA). Under the New York Law, employees are not eligible for paid leave to quarantine as a result of out-of-state travel.

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 were eligible for 12 weeks of emergency leave for childcare (10 weeks of which were paid) under the Emergency Family Medical Leave Expansion Act (EFMLEA) provisions of FFCRA. With FFCRA’s expiration, there is no statutory benefit available to public sector employees for leave based on the unavailability of school or childcare due to the pandemic. Childcare leave issues resulting from COVID-19 can only be resolved through local bargaining and advocacy. 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 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 only if the union and the employer have agreed to opt-in to that law's coverage.³ 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, or the employee does not meet the definition of a covered employee. 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, an employee is not a “covered employee” and is, therefore, not automatically entitled to leave under the PFLBL, 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

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.

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> (see questions 104 and 105, added December 31, 2020, stating that *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 \(irs.gov\)](#).

³ As far as we are aware, at the present time, no NYSUT affiliate has opted into the formal law itself, which can be cumbersome and potentially in conflict with standing benefits. Instead, a number of locals have utilized the existence of the law to bargain expansion of this type of benefit as a locally defined collective bargaining benefit.

performance.” Workers’ Compensation Law §201(5);12 NYCRR §355.2(c). 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