

**March 25, 2022**

## **Compliance with New York COVID-19 Leave Laws**

In the first two years of the pandemic, an array of federal, New York State and New York City laws were enacted requiring many New York City employers to provide new forms of paid and unpaid leave to their employees in connection with COVID-19.

While the new leave requirements of the federal Families First Coronavirus Response Act (“FFCRA”) expired on December 31, 2020,<sup>1</sup> many New York State and New York City COVID-19 leave laws remain in effect and have been expanded in light of the widespread availability of vaccines for both adults and children. In addition, changes in the guidance from the Centers for Disease Control and Prevention (“CDC”) regarding the length of quarantine and isolation periods have also impacted the amount of leave employees are entitled to under these laws.

This Legal Alert provides an outline of the laws regarding COVID-specific leave in effect as of the date of this alert that may impact nonprofits with employees in New York City.

### **Paid Leave for COVID-19 Vaccinations (including Booster Shots)**

#### ***Employee’s Own Vaccination (Paid)***

On March 12, 2021, then-Governor Cuomo signed a new law giving all employees of private employers (including nonprofits) in New York State additional paid time off to get vaccinated against COVID-19.<sup>2</sup> This leave is available for the purposes of vaccination only – it does not include recovery from vaccine side effects, like the child vaccination law discussed below.

Employers must give each employee a “sufficient period of time, not to exceed four hours per vaccine injection” to be paid at the employee’s regular rate of pay.

In October 2021, the New York State Department of Labor (“NYS DOL”) updated its FAQs on the vaccine leave law to confirm that this leave is available for both the initial vaccine series (i.e., one shot of Johnson & Johnson or two shots of either Pfizer or Moderna) and to any booster shot.<sup>3</sup>

This leave is in addition to all other leaves otherwise available to an employee, and, as such, cannot be charged against any other leave the employee has earned or accrued, such as vacation or standard sick leave.

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<sup>1</sup> Note that certain provisions of the FFCRA contain continuing obligations for employers (including, for example, the requirement to maintain records).

<sup>2</sup> <https://www.nysenate.gov/legislation/laws/LAB/196-C>

<sup>3</sup> [https://dol.ny.gov/system/files/documents/2021/10/cd6-paid-leave-for-covid19-vaccinations-10-12-21\\_0.pdf](https://dol.ny.gov/system/files/documents/2021/10/cd6-paid-leave-for-covid19-vaccinations-10-12-21_0.pdf)

Employers may require advance notice before an employee takes leave for vaccination and/or may require proof that the employee was actually vaccinated. However, employers may not retaliate against employees who request or use vaccine leave under the law.

Certain requirements of the law may be changed or waived pursuant to a collective bargaining agreement.

Note that this leave is only available for an employee's own vaccination – see below for additional paid leave requirements for employees in New York City who are taking their children to get vaccinated.

The law took effect on March 12, 2021 and will remain in effect until **December 31, 2022**.

### ***Vaccination and Vaccine-Related Care of Employee's Children (Paid)***

Under a December 2021 amendment to New York City's Earned Safe and Sick Time Act ("ESSTA"),<sup>4</sup> essentially all employees of private sector New York City employers (including nonprofits) are entitled to additional paid time off to take their children to get the COVID-19 vaccine and/or to care for their children who are experiencing temporary side effects from the vaccine.<sup>5</sup>

Employees are entitled to up to four hours off for each vaccine injection for each child under the age of 18 or any older child who is incapable of self-care because of a mental or physical disability.

Employers may require reasonable advance notice (not to exceed seven days) from employees if the need for such time off is foreseeable and may require employees who have utilized leave to provide reasonable documentation that the employee's child received a COVID-19 vaccine.

Employees taking time off cannot be required to find other employees to cover for them during the time off, nor can they be required to work additional hours to "make up" for the missed time.

As with time off for an employee's own vaccination, discussed above, the time off must be paid at the employee's regular rate of pay and may not be charged against the employee's otherwise earned or accrued leave time under the ESSTA.

Although the amendment went into effect on December 24, 2021, it was retroactive to November 2, 2021 which was the day the CDC approved the Pfizer vaccine for children between five and eleven.<sup>6</sup> Employers with employees who took unpaid time off between November 2, 2021 and December 24, 2021 to take their children to get vaccinated or to care for children experiencing side effects from the vaccine should pay such employees for such time in the next payroll period. For employees who used other paid ESSTA leave for such purpose during that time, employers should credit the time used back to the employee's accrued ESSTA time.<sup>7</sup>

Employers who do not compensate employees for COVID-19 child vaccination time in accordance with the law may be subject to a fine equal to the greater of (i) three times the wages payable for the leave

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<sup>4</sup> <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5209882&GUID=760C4EFA-B5FD-4256-B842-4B821A3C221C&Options=ID|Text|&Search=2448>

<sup>5</sup> See our Legal Alert: [New York City's Earned Safe and Sick Time Act Updated to Comply with State Requirements](#) (January 7, 2021) for more information on certain nonprofit employees not subject to the ESSTA.

<sup>6</sup> <https://www.cdc.gov/media/releases/2021/s1102-PediatricCOVID-19Vaccine.html>

<sup>7</sup> This approach is not explicitly required by the law (which only addresses employees who previously took *unpaid* time off for child vaccination) but should be allowed.

time or (ii) \$250. The fine for employers who unlawfully deny an employee's request for COVID-19 child vaccination leave or who unlawfully charge such time to an employee's accrued ESSTA leave is \$500. Violations may also subject the employer to additional civil penalties to the City.

The amendment will remain in effect until **December 31, 2022**.

### **Leave for COVID-19 Quarantine or Isolation (Paid/Unpaid)**

New York State passed a law in the early days of the pandemic providing for additional job-protected leave for employees who are unable to work because they are subject to a mandatory or precautionary order of quarantine or isolation.<sup>8</sup> The leave is not available if the employee is not experiencing symptoms and is able to work from home during the quarantine or isolation period. There is also a carveout for employees who have traveled (for non-work-related reasons) to a country with a level two or three travel health notice from the CDC, in certain situations.<sup>9</sup>

Whether such leave must be paid or unpaid – and, in the case of paid leave, the amount of time that must be paid – depends on the size of the employer as of January 1, 2020. According to guidance issued by the NYS DOL, for purposes of calculating employer size, the number of employees includes all U.S.-based employees on January 1, 2020, not just employees in New York.<sup>10</sup>

- *Small employers* (10 or fewer employees as of January 1, 2020 **and** net annual income of less than \$1 million in the prior year): job-protected, *unpaid* leave for the duration of the order of quarantine or isolation
- *Medium employers* (11-99 employees as of January 1, 2020 **or** net annual income greater than \$1 million in the prior year): job protection for the entirety of the order of quarantine or isolation and at least 5 days of *paid* COVID-19 sick leave
- *Large employers* (100+ employees as of January 1, 2020): job protection for the entirety of the order of quarantine or isolation and at least 14 days of *paid* COVID-19 sick leave

The law has not been amended since it was first passed in March 2020 and, given the changes over the past two years, some of its provisions no longer align with the current guidance from the CDC.

Notably, the minimum period of required paid leave for large employers under the law (i.e., 14 days) is now much longer than the current five-day orders of quarantine or isolation being issued by the New York State Department of Health ("NYS DOH"), following changes in CDC guidance earlier this year. Paid leave under the law is only required for the duration of the applicable order, so employees who qualify for this leave will likely only be entitled to five days of paid leave under each order regardless of employer size (and notwithstanding the reference to 14 days in the law).

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<sup>8</sup> <https://www.nysenate.gov/legislation/bills/2019/s8091>

<sup>9</sup> The CDC changed the 3-level system in place at the time of the passage of the law to a 4-level system in November 2020. This change has not been reflected in the leave law. See <https://www.cdc.gov/coronavirus/2019-ncov/travelers/how-level-is-determined.html>.

<sup>10</sup> <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>

In addition, under the new guidance from the CDC adopted by the NYS DOH, individuals who are “up to date” with their vaccinations (meaning they have received a full initial series *plus* a booster, if eligible)<sup>11</sup>, are no longer required to quarantine after close contact or exposure to COVID-19. This change has been reflected in the Affirmation of Quarantine form made available by the NYS DOH for employee use (see below).

Guidance from the NYS DOL also indicates that the number of paid days required under the law corresponds to sequential calendar days, not working days, and aligns with the applicable quarantine or isolation period (rather than an employee’s work schedule).<sup>12</sup> For part-time employees, for example, the guidance indicates that such employees “should be paid for the number of days or work shifts during the period of quarantine that they would have otherwise been paid for[.]”

Beginning in January 2022, the NYS DOH made self-certification forms available for employees to use to evidence the order of isolation or quarantine required under the law.<sup>13</sup> Employees may complete the appropriate affirmation to satisfy the law’s requirement that they have an order of isolation or quarantine, as applicable, from a duly authorized government authority.

The NYS DOL guidance also takes the position that employees may take up to three periods of leave under the law.<sup>14</sup> However, for the second and third periods, eligibility must be evidenced by a positive COVID-19 test, and the employee must submit documentation from “a licensed medical provider or testing facility” confirming the positive result, unless the employer performed the test.<sup>15</sup> As a result, under the current guidance, a positive at-home test would *not* be sufficient to establish eligibility for a second or third period of COVID-19 leave under the law.

However, other parts of the NYS DOL guidance take the position that employees who are required to stay out of the workplace by their employer due to exposure or potential exposure to COVID-19 (and who are otherwise unable to work remotely) – whether or not subject to an order of quarantine or isolation – are also eligible for paid leave and must be paid by their employer at their regular rate of pay until they are allowed to return or until they become subject to an order of quarantine or isolation (at which point, the provisions of the law discussed here would apply).<sup>16</sup> Presumably this would also apply in the case of an employee who is excluded from the workplace by their employer as a result of a positive at-home COVID-19 test and is unable to work remotely. Note, however, that the concept of paid leave absent an order of quarantine or isolation only appears in the NYS DOL guidance and not in the underlying law; as such, it may be subject to legal challenge.

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<sup>11</sup> For certain individuals who are immunocompromised, being “up to date” also includes receiving additional primary shots. See [https://coronavirus.health.ny.gov/system/files/documents/2022/02/quarantine-and-isolation-guidance-20220205\\_0.pdf](https://coronavirus.health.ny.gov/system/files/documents/2022/02/quarantine-and-isolation-guidance-20220205_0.pdf); <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>.

<sup>12</sup> <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>

<sup>13</sup> Affirmation of Isolation (for a confirmed case of COVID-19) available at: [https://coronavirus.health.ny.gov/system/files/documents/2022/01/affirmation\\_of\\_isolation\\_011222.pdf](https://coronavirus.health.ny.gov/system/files/documents/2022/01/affirmation_of_isolation_011222.pdf);

Affirmation of Quarantine (for close contact/exposure to COVID-19) available at: [https://coronavirus.health.ny.gov/system/files/documents/2022/01/Affirmation\\_of\\_Quarantine\\_011222.pdf](https://coronavirus.health.ny.gov/system/files/documents/2022/01/Affirmation_of_Quarantine_011222.pdf).

<sup>14</sup> <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

As with the other types of leave discussed in this Alert, this leave cannot be charged against any other form of leave available to an employee.

Employers are prohibited from discriminating or retaliating against employees who request or take COVID-19 quarantine or isolation leave. In addition, the leave period is job-protected and an employee's health insurance must be continued on the same terms during the duration of the leave.

Finally, note that this leave is only available for the employee's own order of quarantine or isolation. If an employee needs to take time off to care for a child or other family member who is under an order of quarantine or isolation, the employee may be eligible to utilize Paid Family Leave.<sup>17</sup>

### **Leave for Other COVID-19 Illness (including Vaccine Side Effects)**

New York City employers must continue to grant employees non-COVID-specific sick leave in accordance with the State's Paid Sick Leave Law and the City's ESSTA.<sup>18</sup>

To the extent that employees are experiencing symptoms or other illness due to COVID-19 not covered by any of the specific COVID-19 leave laws discussed above, they remain eligible to utilize normal accrued sick leave. Guidance from the NYS DOL specifically confirmed that accrued sick leave may be used by employees experiencing side effects from the COVID-19 vaccine.<sup>19</sup>

### ***Links to resources and additional information:***

#### **Paid Leave for Vaccination**

- [Paid Leave for COVID-19 Vaccinations \(NYS DOL\) – 10/21](#)
- [COVID-19 and Paid Sick Leave \(NYC Consumer and Worker Protection\) – 12/21](#)

#### **Quarantine and Isolation**

- [\\*REVISED\\* Updated Isolation & Quarantine Guidance \(NYS DOH\) – February 4, 2022](#)
- [COVID-19: Understanding Quarantine and Isolation \(NYC Health\) – 1.22.22](#)
- [Affirmation of Quarantine \(NYS DOH\)](#)
- [Affirmation of Isolation \(NYS DOH\)](#)

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<sup>17</sup> See <https://paidfamilyleave.ny.gov/if-your-minor-dependent-child-quarantined>.

<sup>18</sup> For more information on the requirements of the ESSTA, see our Legal Alert: [New York City's Earned Safe and Sick Time Act Updated to Comply with State Requirements](#) (January 7, 2021).

<sup>19</sup> <https://dol.ny.gov/system/files/documents/2021/09/psl-and-vaccine-recovery-guidance-9-22-21.pdf>

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