

SMALL BUSINESS EMPLOYMENT ISSUES AND COVID-19

New York State on PAUSE

N.Y. State Exec. Order No. 202.8, New York State on Pause (March 20, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf

Under Governor Cuomo's PAUSE order, all non-essential businesses were required to close indefinitely as of March 22. (Essential businesses may remain open, including, among others, pharmacies, gas stations, laundromats, child care services, building cleaning and maintenance, homeless shelters, and food banks)¹. Under the PAUSE order, employers are not required—whether operating an essential or non-essential business—to retain any employees, pay employees or provide any benefits to employees while the PAUSE plan is in effect. Additionally if an employer chooses to terminate its employees, this PAUSE order does not require an employer to re-hire employees after the PAUSE plan is no longer in effect. Because the situation is rapidly evolving, employers should continue to monitor any legislation that is enacted that may change employers' obligations.

Duty to Pay Employees When the Business Is Closed

While there is no duty for any employer to retain employees while the PAUSE Order remains in effect, if you choose to retain employees, you may have a duty to pay them. In order to determine if you must pay your employees, first, determine which employees are non-exempt employees and which are exempt.

- Non-exempt employees are employees who are covered by the minimum wage and overtime provisions of the Fair Labor and Standards Act (FLSA). These employees are paid hourly for the time they have actually worked (and paid at an overtime rate for time worked over 40 hours in a work week).
- Exempt employees are paid on a "salary basis" and are exempt from FLSA's minimum wage and overtime requirements because of the nature of their job requirements.

Next, determine if your employees are performing any work while the PAUSE Order is in effect, either at his or her place of employment (if an essential business) or at home (if a non-essential business). Working from home can include phone calls, e-mail, research, COVID-19 related follow-up for the employer, etc. Non-exempt employees must only be paid for the hours they worked—meaning you need not pay them if they are not working. The requirements are different for exempt employees. If an exempt employee works for any part of the work week, the employee must be paid for the entire week. If an exempt employee does not perform any work for the entire work week, an employer may require the exempt employee to use their vacation or paid time off instead of paying the employee. However, if the employee has not worked the entire week and has no accrued paid time off, the employer is not required to pay the exempt employee's salary. See <https://www.dol.gov/agencies/whd/flsa/pandemic>.

Duty to Provide Employee Leave

N.Y. Paid Sick Leave Bill, No. S. 08091 (March 18, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB_9_PAID_SICK_LEAVE_BILL.pdf

If an employer is still operating its business while the PAUSE Order is in effect, (i.e. if it is an essential business or if employees are working from home) or re-opens its business once the PAUSE plan is no longer in effect, employers are obligated under a newly enacted New York State law to provide certain sick leave (detailed below) to employees who have been diagnosed with COVID-19 and are subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, or any authorized government entity. Employees who need to take leave to care for a minor child subject to a quarantine order are eligible for paid family leave.² If an employee takes leave under this law, an employee must be reinstated to the position of employment he or she held prior to the leave with the same pay. Employers are prohibited from discharging or penalizing employees who take leave subject to this act.

Sick Leave During COVID

Under New York's new sick leave law, employers are obligated to provide leave to employees who have been diagnosed with COVID-19 and are subject to a mandatory or precautionary order of quarantine or isolation in accordance with the following:³

- For employers with ten or fewer employees as of January 1, 2020 with a net income less than 1 million dollars in the previous tax year, each employee subject to a quarantine order must be provided with unpaid sick leave through the termination date of a qualifying order. Sick leave must be provided without loss of an employee's accrued sick leave.
- For employers with ten or fewer employees as of January 1, 2020 who had a net income more than 1 million dollars in the previous tax year, or employers with 11-99 employees as of January 1, 2020, each employee subject to a quarantine order must be provided with at least five days of paid sick leave and unpaid leave until the termination of such an order.

New York Paid Family Leave

Employees may also be eligible for leave under New York Paid Family Leave if they are still subject to a mandatory or precautionary order of quarantine after they have exhausted any paid sick leave as detailed above. For more information and details on how to apply, employees should visit <https://paidfamilyleave.ny.gov/if-you-are-quarantined-yourself>

In addition to leave for employees themselves, the New York Paid Family Leave also provides paid leave to employees whose minor dependent child is subject to a quarantine order due to COVID-19. Employees may also be eligible for paid family leave if their children's school is closed due to a mandatory or precautionary order of quarantine issued by the State or another governmental entity (but not if the school itself has decided to close for preventative social distancing). For more information on how employees can apply for Paid Family Leave, please visit <https://paidfamilyleave.ny.gov/if-your-minor-dependent-child-quarantined>.

New York Paid Family Leave would cover up to 60% of employee's pay,

up to a maximum weekly benefit of \$840.70.⁴

Families First Coronavirus Response Act (“FFCRA”)

Congress recently passed the FFCRA, which expands paid leave for employees in certain circumstances related to COVID-19. (See Families First Coronavirus Response Act, No. 116-127 (Mar. 18, 2020), (<https://www.congress.gov/bill/116th-congress/house-bill/6201>)). This law does not impose any requirements on employers whose businesses are closed, nor does it apply to employees who are able to work from home.

And notably, small businesses with 50 or fewer employees may be exempt from providing leave due to school closings or child care unavailability under this Act if compliance would jeopardize the viability of the business. According to recent guidance issued by the Department of Labor, a small business is entitled to this exemption if an authorized officer of the business makes certain determinations about the effect of the leave on the business, including that (1) the leave requested would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to stop operating, (2) the absence of the employee(s) requesting leave under this section would create a substantial risk to the financial and/or operational capabilities of the business due to the employee(s) specialized skill and knowledge, or (3) there are not sufficient workers who are willing, able, or qualified to perform the labor of the employee(s) requesting leave and the labor is needed for the small business to operate. 29 C.F.R. § 826.40(b). To elect this small business exemption, an employer should document its determination that it meets the criteria listed above and maintain this documentation in its files. Id. For more information, please visit <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

Employee Eligibility for Unemployment Insurance

If an employee is laid off as a result of the COVID-19 pandemic, the employee may file for New York State unemployment insurance and the employer’s account will not be charged. New York is waiving the seven-day waiting period for unemployment benefits for people who are out of work due to COVID-19 closures or quarantines. Self-employed individuals may also file for unemployment insurance benefits. Employees can visit <https://labor.ny.gov/unemploymentassistance.shtm> for more information.

In addition to New York State unemployment insurance benefits, employees are also entitled to unemployment insurance from the federal government under the recently passed stimulus package, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). (See The Coronavirus Aid, Relief, and Economic Security Act, No. 116-136 (March 27, 2020), (<https://www.congress.gov/bill/116th-congress/house-bill/748/text>)). The CARES Act has created a temporary Pandemic Unemployment Assistance Program to provide payments to employees and also to those who are not normally entitled to unemployment benefits under New York State, including people who are self-employed and independent contractors. The Pandemic Unemployment Assistance Program provides 39 weeks of benefits. Additionally, under Section 2104 of the CARES Act, employees who receive unemployment insurance from New York State will be eligible for an additional \$600 per week for up to four months. If an individual remains unemployed after the state unemployment benefits are no longer available, Section 2107 provides that the federal government will fund up to 13 additional weeks of unemployment benefits.

Additional Relief For Small Business Owners

The CARES Act provides a \$2.2 trillion federal stimulus package designed to provide relief to those, including small business owners, who have been affected by COVID-19. The CARES Act provides for \$349 billion in loan commitments under the Small Business Administration (“SBA”) program, whose primary program is to provide financial assistance to small business owners, including those who are self-employed. The CARES Act expands eligibility for loans to all businesses with no more than 500 employees. For more information on how to apply for a SBA loan, please visit <https://www.sba.gov/funding-programs/loans>.

The Shared Work Program of the New York State Department of Labor can help businesses avoid layoffs by allowing employers to reduce staff hours and permitting employees to collect both partial wages and partial unemployment benefits without reducing or eliminating fringe benefits. For more information, please visit <https://www.labor.ny.gov/ui/employerinfo/shared-work-program.shtm>.

The NYC Employee Retention Grant Program can also help small New York City-based businesses with one to four employees retain their employees. The program is available to New York City businesses with one to four employees that can demonstrate at least a 25% decrease in revenue as a result of COVID-19. Eligible businesses will receive a grant covering up to 40% of their payroll for two months. Businesses can access up to \$27,000. For more information, please visit <https://www1.nyc.gov/nycbusiness/article/nyc-employee-retention-grant-program>.

This guidance was updated on April 4, 2020. It is important for all small business owners to continue to monitor federal and New York State legislation for any new updates and changes in the laws.

This is for informational purposes only and is not legal advice or counsel regarding your actual circumstances. If you have any questions or need legal assistance for your small business or not-for-profit organization please contact The Legal Aid Society’s Community Development Project at (212) 426-3000 or communitydevproject@legal-aid.org

¹ For a full list of essential business, please see New York State’s guidance at <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

² These leave requirements do not apply to employees who are physically able to work while under a mandatory or precautionary order, whether through remote access or other similar means.

³ There are some exception to this requirement. Any employee subject to a quarantine order because he or she traveled to a country to which the Centers for Disease Control and Prevention has issued either a level two or three health notice, and was provided notice of this prior to travel, is not eligible for paid sick leave or any other paid benefits under this act, unless this travel was part of the person’s employment. These benefits are also not available if an employee is able to work through remote access or other means.

⁴ Employees will also be able to apply for disability benefits to match their full wages up to a maximum weekly disability benefit of \$2,043.92, for a total of \$2,884.62 per week when combined with Paid Family Leave. For more information and details on how to apply, employees should visit <https://paidfamilyleave.ny.gov/if-you-are-quarantined-yourself>.