

UPDATE ON COVID-19 PAID LEAVE

Although the federal Families First Coronavirus Response Act (“FFCRA”) mandatory paid leave requirement expired on 12/31/20,¹ employees who are affected by COVID-19 may still seek paid leave pursuant to the New York State Emergency Paid Sick Leave (“NYSEPSL”) (2019 Bill Text NY S.B. 8091).

I. Overview of NY Emergency Paid Sick Leave

The NYEPSL provides that an employee (or the employee’s minor and dependent child) who is **subject to a mandatory or precautionary order of quarantine** can obtain paid leave for up to 14 days. The paid leave is provided a) from the employer entirely (large employers), b) from a combination of pay from the employer and Paid Family Leave/Disability insurance benefits (mid-sized employers), or c) entirely through Paid Family Leave/Disability insurance benefits (small employers). The employer’s requirement to provide paid leave is tied to its size as described below.

Employer Size	Employer Sick Leave	NYS PFL/DB Insurance Benefit
1-10 employees (2019 net income less than \$1 million)	Unpaid sick leave until termination of the quarantine order	Payable on 1 st day of quarantine for the duration of the quarantine order
1-10 employees (2019 net income greater than \$1 million)	5 days paid sick leave + unpaid sick leave until termination of the quarantine order	Payable on the 6 th day of quarantine for the duration of the quarantine order
11-99 employees	5 days paid sick leave + unpaid sick leave until termination of the quarantine order	Payable on the 6 th day of quarantine for the duration of the quarantine order
100+ employees	14 days paid sick leave	No NYS PFL/DB benefit

¹ The Consolidated Appropriations Act now allows for an employer to **voluntarily** provide COVID-19 paid relief as prescribed in the FFCRA. An employer who chooses to continue payment of FFCRA benefits can obtain a tax credit until March 31, 2021.

II. Clarification from the NY DOL on What Union Members are Entitled to Under the Law

The New York State Department of Labor recently provided clarification in its guidance on what employees are entitled to receive for eligible COVID-19 paid leave under the NYSEPSL. The updated FAQ from the NYS DOL clarifies that **wages and benefits** must be paid by the employer in connection with their requirement above, i.e., for 5 or 14 days of paid leave.

The “New York Paid Family COVID-19: Frequently Asked Questions” has now been updated (in bold) on what “paid leave” means as follows:

“At what rate of pay does leave need to be paid?”

For the applicable paid leave period (five or 14 days), employers must pay the amount that the worker would have otherwise received had they been continuing to work for that period based upon the amount that the employee was scheduled or would have been scheduled had the employer’s operations continued in its normal due course. **The definition of “wages” in Article 6 of the Labor Law applies to the amount the employee must be paid.** Employees who work a fixed schedule or are paid a salary should simply continue to receive pay for the applicable period. For hourly, part-time, commission-based salespeople, and other employees who are not paid a fixed wage, employers should determine the employee’s pay by looking at a representative period of time to set the employee’s average daily pay rate. “New York Paid Family COVID-19: Frequently Asked Questions” at <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>

Article 6 of the Labor Law defines wages as: “The term “wages” also includes **benefits or wage supplements** as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.”

Sec. 198-C further defines “wages” as:

As used in this section, the term “benefits or wage supplements” includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Section 198-C also explains the penalties for failing to provide these benefits:

In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, **shall be guilty of a misdemeanor**, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

It is now clear with this added guidance from New York State that a union member is entitled to receive the full wages and benefits package he or she would have otherwise received had they continued working under the NYEPSL.

It is also clear that any employer who fails to comply with the law is subject to criminal penalties that can include fines of up to \$5,000 or imprisonment for up to one year. (NYLL Section 198-A).

III. How Can a Union Member Obtain NYS Paid Leave

A member should notify his or her employer that they are subject to mandatory or precautionary quarantine and request to be paid while unable to work. The employer may require the member to provide something to show they are entitled to the leave such as a doctor's note or an order of quarantine from a local health department.

The employer (of any size) **must** provide the employee with guaranteed job protection for the duration of the quarantine order. The employer **must** provide paid leave based on its size as described above. If an employer refuses to provide paid leave as required, the member can file a complaint with NYS by calling the COVID-19 Paid Sick Leave Hotline at 844-337-6303.

Once the employer's paid leave responsibility has been exhausted, if still subject to a quarantine order, the member can apply for the balance of lost pay by submitting forms to the employer's PFL/DB insurance carrier, and the employer must promptly assist the member by filling out the employer portions of the forms.

A. Anyone seeking paid leave should obtain an Order of Quarantine

As stated above, in order to be eligible for NYSEPSL paid leave, the employee (or the employee's minor child) must be subject to a quarantine order. It is therefore anticipated that an employer will require a copy of the quarantine order before agreeing to pay the employee for missed work.

An order can be obtained from the member's local health department. The orders will be available in electronic or paper format. For a list of local health departments, go to: https://www.health.ny.gov/contact/contact_information/.

B. New York State provides the following instructions for this process:²

If your local health department is unable to immediately provide you with the order of quarantine or isolation, you should submit documentation from a licensed medical provider that has treated you (or your minor dependent child), attesting that you (or your child) qualify for the order to your employer's Paid Family Leave insurance carrier with your quarantine leave request package. You should follow up with your local health department and submit the order from your local health department to your employer's Paid Family Leave insurance carrier as soon as it is available. Local health departments must provide the requested orders **within 30 days.**

What does the documentation from my licensed medical provider have to include if I am subject to an order of quarantine or isolation?

Mandatory Isolation: If you are subject to mandatory isolation, the attestation must say:

1. You have **tested positive** for COVID-19; or
2. Testing is not currently available for you, but you have COVID-19 symptoms and have had contact with a known COVID-19 case.

Mandatory Quarantine: If you are subject to a mandatory quarantine, the attestation must say:

1. You have been in **close contact** with someone who has tested positive for COVID-19 or who is currently in mandatory isolation; or
2. You have COVID-19 symptoms and have returned within the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19.

Precautionary Quarantine: If you are subject to a precautionary quarantine, the attestation must say:

1. You are asymptomatic and have returned within the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19; or
2. You have been determined to have had **proximate exposure** with someone who has tested positive for COVID-19 **while that person was symptomatic**.

² See <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs> for an overview.

What does the documentation from a licensed medical provider have to include if my minor dependent child is subject to an order of quarantine or isolation?

Mandatory Isolation: If your child is subject to mandatory isolation, the attestation must say:

1. Your child has tested positive for COVID-19; or
2. Testing is not currently available for your child, but your child has COVID-19 symptoms and has had contact with a known COVID-19 case.

Mandatory Quarantine: If your child is subject to a mandatory quarantine, the attestation must say:

1. Your child has been in close contact with someone who has tested positive for COVID-19 or who is currently in mandatory isolation; or
2. Your child has COVID-19 symptoms and has returned within the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19.

Precautionary Quarantine: If your child is subject to a precautionary quarantine, the attestation must say:

1. Your child is asymptomatic and has returned within the past 14 days from a country designated with a level 2, 3, or 4 advisory for COVID-19; or
2. Your child has been determined to have had proximate exposure with someone who has tested positive for COVID-19 while that person was symptomatic.

IV. How to Seek Benefits from the Employer's Paid Family Leave/Disability Insurance Coverage

All forms for applying for Paid Family Leave/Disability insurance payments to recover for any unpaid time are available at: <https://paidfamilyleave.ny.gov/forms>

The employee must fill out the applicable forms and submit to their employer. The employer is required to attest on these forms that the paid leave requirement discussed above (5-14 days) has been exhausted. Therefore, an employee should only be seeking PFL/DB benefits once the employer has paid their required number of days based on its size.

Employees are eligible for a combination of PFL benefits and statutory disability during the quarantine period up to a maximum of \$3,015.53 per week (max of \$2,043.92 in DBL and max of \$971.61 in 2021 for PFL). *Only employees who have worked for an employer for **26 consecutive weeks** can get the Paid Family Leave portion of the benefit, which is capped at \$971.61 per week.*