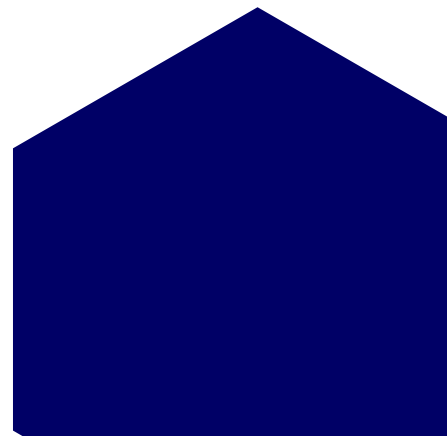
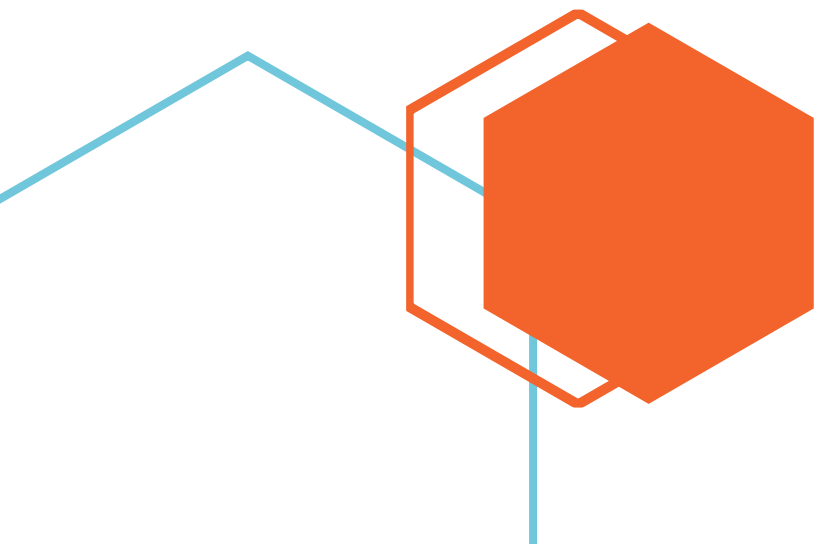




International Lawyers Network

Paid Leave – North America

The following paper aims to succinctly address the question "Are employees entitled to paid leave due to Covid-19?"





This guide offers an overview of legal aspects of paid leave in the requisite jurisdictions. It is meant as an overview in these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

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Canada - Quebec

In Quebec, no employer is, by statute, required to pay for more than two days of medical leave and this pursuant to Sections 79.1, 79.7 and 79.16 of the *Labour Standards Act* ("LSA") taken together.

An employee, on the other hand, may be absent from work for a period of 26 weeks over a rolling period of 12 months inter alia owing to illness, and see his or her job protected at least to the same extent as anyone else to continue to work. Employers are however urged to bear in mind Section 79.3 LSA which provides that an employee's participation in the group insurance and pension plans "(...) shall not be affected by the absence from work, subject to regular payment of the contributions payable under those plans, the usual part of which is paid by the employer".

At the end of the period of medical leave the employer is obliged to reinstate the employee in the employee's former position with the same benefits including any increases to which the employee would have been entitled had the employee remained at work.

On the other hand, in the event of layoffs, the employee enjoys no greater benefits than those employees who would have remained at work.

The issue of COVID-19 is not specifically dealt with, *per se*, but the issue may well arise in certain essential industries that have continued to operate notwithstanding the order to cease operations made by the provincial government during the week of March 18. The medical leave provided for at Section 79.1 LSA specifically exempts illnesses covered by Quebec's Workers Compensation Legislation. There have been several COVID-19 infections amongst workers at long-term eldercare establishments and other industries, which, in the fullness of time, may very well be recognized as covered by Workers Compensation.

When covered by Workers Compensation, the rules are slightly different with the employer being obliged to continue payment of wages for five days subject to the decision of the CNESST (Quebec's Workers Compensation Board) as to whether or not it is covered by Workers Compensation Legislation, for eventual reimbursement. There remains the issue of whether, attracting a COVID-19 infection while teleworking at the employer's request would qualify as an industrial illness.

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United States – Overview

The Families First Coronavirus Response Act ("FFCRA") provides two key leave provisions: the Emergency Paid Sick Leave Act, or EPSLA, and the Public Health Emergency Leave, or PHEL, under amendments to the Family and Medical Leave Act. Both of these provisions provide for paid job-protected leave for workers missing work due to COVID-19-related reasons. Both laws apply to private employers with fewer than 500 employees; however, there are certain exemptions for small employers and health care employers.

Employees may take EPSLA leave for six reasons, one of which overlaps with the PHEL (see number 5, below). An employee is eligible for these leaves only if the employee is also unable to work or telework:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing the symptoms of coronavirus and seeking a medical diagnosis;
4. The employee is caring for an individual (need not be a family member) who is subject to an order described in number 1, above, or has been advised to self-quarantine, as described in number 2, above;
5. The employee is caring for a son or daughter under the age of 18 because such son or daughter's school or place of care has been closed, or such son or daughter's care provider is unavailable due to the coronavirus; or
6. The employee is experiencing any other "substantially similar condition" specified by the secretary of the U.S. Department of Health and Human Services in consultation with the secretaries of the U.S. Department of the Treasury and DOL.

An employee is eligible for two weeks of paid leave under the EPSLA. Employers must pay full-time employees for up to 80 hours of work, and those working a variable schedule for the number of hours worked during their average work schedule across a two-week period.

The EPSLA for the employee's own care (reasons 1 through 3, above) is payable at an employee's regular rate (as defined under the FLSA), up to a maximum of \$511 per day (\$5,110 in the aggregate). The EPSLA for the employee's care for another person (reasons 4 through 5, above) or reasons to be determined by future regulations (reason 6, above) is payable at an employee's regular rate, up to a maximum of \$200 per day (\$2,000 in the aggregate).

The first two weeks of leave of EPHL are unpaid. Presumably, an employee would use the EPSLA leave to receive compensation during this time, but employers cannot require employees to use the EPSLA, paid time off or other paid leave during the first two weeks. If the employee remains eligible for the additional 10 weeks of PHEL, the employer must pay two-thirds of an employee's wages, up to a maximum of \$200 per day (\$10,000 in the aggregate). Both the EPSLA and EPHL paid leave may be recovered in tax credits by the employer.

Several local jurisdictions have also enacted new paid leave laws or expanded existing sick leave, disability insurance, or paid family leave insurance laws for COVID-19 related reasons. New York State now requires paid leave for an employee subject to a mandatory or precautionary quarantine or isolation order. Three California cities - Los Angeles, San Francisco, and San Jose - have passed legislation addressing additional paid leave. Colorado enacted a new paid COVID-19 testing leave, as well.

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United States - Massachusetts

Over the past weeks, the circumstances of the COVID-19 pandemic and government action in response have changed from day to day and moment to moment, as have the operational and financial needs of businesses, and the legislation and regulations designed to support both the needs of business and those of individual employees through this very difficult period. Recent changes to the law have made it possible for employers to take all measures necessary to protect their businesses while also providing for their employees. The following addresses the paid leave available to Massachusetts employees and required to be provided by their employers.

Federal Paid Leave

Amid the COVID-19 pandemic, many American employees are now eligible for federal, COVID-19-related paid leave under the Families First Coronavirus Response Act (FFCRA), which went into effect on April 1, 2020. The FFCRA mandates that most private sector employers with fewer than 500 employees, and all public sector employers, provide their employees with up to 40 hours of paid sick time to care for their own COVID-19 symptoms or those of a family member, comply with a quarantine or shelter-in-place order, or care for a child whose school or childcare provider is closed due to COVID-19. The same employers must provide their employees with up to ten additional weeks of paid family and medical leave, but only to care for a child whose school or childcare provider is closed due to COVID-19. Yet due to exemptions available for certain small businesses and broadly defined "healthcare providers" and "emergency responders," many Americans working for businesses with fewer than 500 employees will still find themselves ineligible for paid leave benefits under FFCRA.

Paid Leave in Massachusetts

Nearly all Massachusetts employees are entitled to take up to 40 hours per year of accrued sick leave from work under the state's Earned Sick Time (EST) Law. For employees of businesses with 11 or more employees, this earned sick time must be paid by the employer. Employees of companies with fewer than 11 employees are still entitled to EST, but the leave may be unpaid. Under the EST Law, employees must accrue one hour of EST (paid or unpaid) per 30 thirty hours worked, which they may use to care for their own medical condition or that of an immediate family member (spouse, child, parent, or parent-in-law), or attend their own medical appointment or that of an immediate family member, among other reasons. Since the COVID-19 pandemic began, the Massachusetts Attorney General's Office has clarified that employees are also entitled to use EST when a healthcare provider or public health official requires or recommends quarantine for the employee or an immediate family member.

Notably, unlike the paid sick time afforded under FFCRA, employees in Massachusetts are not entitled to use EST (paid or unpaid) to care for their child whose school or childcare provider has closed or is unavailable due to COVID-19. Likewise, Massachusetts law does not currently mandate paid family leave for employees, whether COVID-19 related or not, beyond the minimum EST employees of businesses with 11 or more employees may use to care for ill family members. While the Massachusetts Paid Family and Medical Leave Act, enacted in 2019, will eventually offer nearly all Massachusetts employees up to 12 weeks of partially paid leave to care for their own serious medical condition or that of a family member, eligibility for those benefits does not begin until January 2021. However, many employees are eligible for up to 12 weeks per year of family and medical leave under the federal Family and Medical Leave Act (FMLA), which provides unpaid leave for an employee to care for their own serious medical condition or that of a family member, for the birth or adoption of a child, and to attend to certain exigencies arising from a family member's active duty military status. Any federal paid family and medical leave an employee uses under the FFCRA will count toward the 12 weeks of FMLA leave to which the employee may be entitled per year.

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United States – Massachusetts (cont'd)

Many employers in Massachusetts offer paid time off (PTO) policies that provide more than 40 hours of paid leave annually, which the employee can choose to use as sick time, vacation, or personal time. Employers should keep in mind that they cannot require employees to take their PTO (or legally mandated EST) concurrently with emergency paid sick time granted under the FFCRA. However, they can require employees to take PTO, or any other employer-provided leave which could be used for taking care of a child, concurrently with emergency paid family and medical leave under FFCRA. In addition, while fiscal uncertainty may tempt employers to cut costs by reducing permitted PTO, any such reductions must be prospective, as employees are entitled to take leave that they have already accrued, whether as a lump sum benefit or for hours worked.

Furthermore, employers may not retaliate against employees for using EST to which they are entitled. That said, employees using any type of leave, including emergency paid sick time or family leave under FFCRA, are not insulated from workforce reductions such as furloughs or layoffs, provided such action would have occurred regardless of the employee's leave status.

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United States – New York

On March 18, 2020, New York State enacted a mandatory sick leave law, which benefits employees affected by the COVID-19 crisis.

Q: As an employer, when do I have to provide paid sick leave under New York State law?

A: Paid New York State sick leave is only required for employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the New York Department of Health, a local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.

Q: Does the law apply to employees who are not able to work because:

1. **their place of business is closed;**
2. **a health care provider ordered them to isolate or quarantine;**
3. **their child is subject to a quarantine order,**
4. **they do not want to go to work out of fear that they may contract COVID-19;**
5. **their child's school is closed; or**
6. **they have COVID-19 symptoms?**

A: No, unless they are also subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the New York Department of Health, a local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.

Q: Are employees who are able to work remotely while subject to an order of quarantine eligible for leave under the New York State paid sick leave law?

A: No. An employee who is subject to a quarantine order, who is asymptomatic or has not yet been diagnosed with any medical condition, and who is physically able to work whether through remote access or other similar means, is not eligible for paid New York State sick leave.

Q: How much paid sick leave do I have to provide?

A: It depends on the size of the company.

- Companies with 10 or fewer employees as of January 1, 2020, that had a net annual income less than \$1 million last year, are not required to provide any paid leave but must provide leave for the duration of the order of quarantine or isolation. Their employees can apply for benefits through the employer's short-term disability/paid family leave carrier during the leave.
- Companies with 11-99 employees as of January 1, 2020, and smaller employers (1-10 employees) that had a net annual income greater than \$1 million last year, must provide leave for the duration of the order of quarantine or isolation and must pay the employee for five of those days as paid sick leave. Their employees can apply for benefits through the employer's short-term disability/paid family leave carrier with respect to the otherwise unpaid leave.
- Companies with 100 or more employees as of January 1, 2020 must provide leave for the duration of the order of quarantine or isolation and must pay the employee what the employee would have otherwise received during the 14 calendar days of the order.

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United States – New York (cont'd)

Q: Can an employer require that employees use their existing sick leave accruals or other accrued paid time off for a COVID-19 quarantine order?

A: No. Employers who are required to provide paid sick leave under New York State law must provide that leave separate from any other accrued paid time off.

Q: Is leave due to a quarantine leave “job protected”?

A: An employer cannot terminate or take any other adverse action against an employee because that employee takes leave pursuant to the New York State paid sick leave law. Employees on such a leave are generally entitled to be restored to the position they held prior to taking leave. However, the law does not prohibit any personnel action that otherwise would have been taken regardless of any request to use, or use of, any leave.

