

## EMPLOYER ALERT: Paid COVID-19 Leave Obligations in 2021

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As 2020 comes to a close and everyone looks forward to a much better year in 2021, restaurateurs need to take a moment and examine their on-going paid leave obligations to employees in the coming months due to COVID-19.

Just before Christmas, Congress passed the Consolidated Appropriations Act, 2021. Among other things, this new law included \$900 billion in stimulus relief related to the COVID-19 pandemic. On Sunday, December 27, 2020, the President signed this legislation into law. This law is very important for many in the hospitality industry because of the economic relief contained therein.

This most recent COVID stimulus package is also important because of what it does **not** do—it did not contain any extension of the paid leave obligations contained in the Families First Coronavirus Response Act (passed in March 2020). All of the paid leave provided in the Families First Coronavirus Response Act will expire on December 31, 2020, and employers will not have an obligation to provide those benefits in 2021.

With this Federal leave benefit expiring, employers in New York are only required to provide employees with paid COVID-19 leave in limited circumstances. Here is an overview.

- When is an employer in New York State required to provide a paid leave benefit to an employee impacted by COVID-19?** —In order to obtain a paid COVID-19 leave under New York State law, an employee must be subject of an order of quarantine or isolation issued by a qualified government official/entity. The order of quarantine or isolation can be precautionary or mandatory. The qualified government official/entity includes the State of New York, a county Department of Health, a local board of health, or any governmental entity duly authorized to issue such order due to COVID-19,

To be clear, an employee who claims to be ill with COVID-19 or otherwise unable to perform work is not entitled to paid COVID-19 leave under this law, unless the individual provides the employer with an order of quarantine or isolation from an authorized government official.

- What paid leave benefit must be provided to an employee subject to a quarantine or isolation order?** —The answer to this question depends on the number of employees employed by the employer.

***A. Employers with 10 or Fewer Employees & Low Net Income***

- This section applies to an employer with 10 or fewer employees on January 1, 2020 which also had a net income less than one million dollars (\$1,000,000) in the previous tax year.
- Such an employer is required to provide job-protected sick leave to a qualifying employee until the quarantine/isolation order is terminated.
- The employer is NOT required to make any direct payment to the employee.
- The employee should be given a form to apply for disability and/or paid family leave due to COVID-19 quarantine or isolation. *See #3 (below) for more information about this benefit.*

## ***B. Employers with 10 or Fewer Employees & High Net Income OR***

### ***Employers with 11-99 Employees***

- This section applies to an employer with 10 or fewer employees on January 1, 2020 which also had a net income greater than one million dollars (\$1,000,000) in the previous tax year.
- This section also applies to an employer with 11 to 99 employees on January 1, 2020.
- Such an employer is required to provide a qualifying employee with five (5) days of paid, job-protected sick leave at the employer's expense. After the five (5) days are exhausted, the employee is entitled to unpaid, job-protected sick leave until the quarantine/isolation order is terminated.
  - The five (5) paid sick days are paid by the employer (at the employer's expense) through normal payroll.
  - The five (5) paid sick days are paid at the employee's regular rate of pay, but without any reduction for the tip credit or any addition for lost tips. So, if the employee is a server and is normally paid the minimum wage less the tip credit, the employee is entitled to five (5) paid sick days at the minimum wage.
  - This paid sick leave benefit must be provided without loss of an employee's accrued sick leave benefit (*i.e.*, benefits provided by the employer as part of the employee's terms and conditions of employment).
- After the five (5) paid sick days, the employee is not eligible for any further direct payment from the employer. However, the employee may be eligible for disability and/or paid family leave due to COVID-19 quarantine or isolation—a benefit provided through the employer's disability/paid family leave insurance carrier. The employee should be given a form to apply for disability and/or paid family leave due to COVID-19 quarantine or isolation. *See #3 (below) for more information about this benefit.*

## ***C. Employers with 100 or More Employees***

- This section applies to an employer with 100 or more employees on January 1, 2020.
- Such an employer is required to provide a qualifying employee with fourteen (14) days of paid, job-protected sick leave at the employer's expense. After the fourteen (14) days are exhausted, the employee is entitled to unpaid, job-protected sick leave until the quarantine/isolation order is terminated.
  - The fourteen (14) paid sick days are paid by the employer (at the employer's expense) through normal payroll.
  - The fourteen (14) paid sick days are paid at the employee's regular rate of pay, but without any reduction for the tip credit or any addition for lost tips. So, if the employee is a server and is normally paid the minimum wage less the tip credit, the employee is entitled to fourteen (14) paid sick days at the minimum wage.
  - This paid sick leave benefit must be provided without loss of an employee's accrued sick leave benefit (*i.e.*, benefits provided by the employer as part of the employee's terms and conditions of employment).
- After the fourteen (14) paid sick days, the employee is not eligible for any further direct payment from the employer. However, the employee may be eligible for disability and/or paid family leave due to COVID-19 quarantine or isolation—a benefit provided through the employer's disability/paid family leave insurance carrier. The employee should be given a form to apply for disability and/or paid family leave due to COVID-19 quarantine or isolation. *See #3 (below) for more information about this benefit.*

3. **What information must an employer provide to an employee about disability and/or paid family leave due to COVID-19 quarantine or isolation?** —Because this is a special benefit created due to the COVID-19 pandemic, the State created special forms for this benefit. Once an employee has exhausted any paid benefit that must be provided by the employer, the employee may be eligible to receive paid

family leave and/or COVID-19 disability benefits under New York law. Due to the nature of the pandemic, any waiting period previously applicable to disability and/or paid family leave benefits has been eliminated for these benefits. Employees should be permitted to apply for those benefits with the following application forms:

- This Form should be provided to employees to apply for Disability and/or Paid Family Leave for Employee due to COVID-19 Quarantine/Isolation:  
<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>.
- This Form should be provided to employees to apply for Paid Family Leave for a Minor Dependent Child due to COVID-19 Quarantine/Isolation:  
<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/ccovid19.pdf>.
- This Form should be provided to employees to apply for Paid Family Leave to Care for a Family Member with Serious Health Condition (which may include COVID-19):  
<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/PFL3.pdf>.

As with any other application for Paid Family Leave under New York law, it is the employee's obligation to complete the required portions of the applicable forms. The employee must then turn the form into the employer to complete the "Employer Section" within 3 business days. Once completed by the employer and returned to the employee, it is the employee's obligation to submit the forms to the insurance carrier for review, processing and consideration.

**4. What other rules or guidance can you provide about these leaves and employee benefits because of COVID-19?**

- An employee returning to work from a leave covered by this law must be restored to the position they held before their absence with the same pay, benefits, and other terms and conditions of employment.
- Employers are prohibited from discharging, threatening, discriminating against, retaliating against or otherwise taking any adverse employment action against an employee because they utilize any of the sick leave benefits provided under New York law.
- An employee is **NOT** eligible for the paid sick leave benefits provided by this law if (a) the employee is subject to a qualifying quarantine or isolation order, but (b) is deemed asymptomatic **and** (c) is physically able to perform the work assigned by the employer through remote means or otherwise.

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Hopefully this information clarifies your obligations under the New York paid sick leave law related to COVID-19. If you have any questions regarding this leave benefit or your obligations to employees under this law, the *new* New York paid sick leave law (which is a general obligation applicable to all New York employers, and under which leave obligations begin on Friday, January 1, 2021), or any other issues concerning labor and employment law, please do not hesitate to contact us for assistance.



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