

The Return to Work Series: "The Road Back" for Stage 2 and Federal Paid Leave Considerations

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On June 8, 2020, New York City will enter "Phase 1" of the State of New York's Reopening Plan, which could result in upwards of 400,000 individuals returning to work in the City. Similar reopening plans in New Jersey and Massachusetts have begun to hit the first of several criteria in their respective Reopening Plans. For instance, Governor Murphy announced on June 1st that outdoor dining and certain nonessential retail stores will be allowed to reopen with restrictions on June 15, 2020 as New Jersey begins "Phase 2" of the Reopening Plan (i.e., The Road Back: Restoring Economic Health Through Public Health^[1]) to reopen all businesses throughout the state of New Jersey. "Essential" businesses currently are operating in full force, and navigating through various federal and state laws, such as the Families First Coronavirus Response Act ("FFCRA"), to ensure their employees receive the appropriate paid leave during the pandemic. However, many of the recently enacted paid leave laws still will be in effect once more businesses reopen, and employers can be penalized under their respective state's emergency labor rules, if applicable. This article will provide a brief overview of the Reopening Plans, and answer frequently asked questions regarding the federal paid leave that businesses will have as they begin to return to work.

The Road Back to "Normal"

On April 27, 2020, Governor Murphy outlined four prerequisites in order for New Jersey to begin its multi-phased economic restart:

1. Sustained Reductions in New COVID-19 Cases

- New Jersey would need to have a 14 day trend line showing appreciable and sustained drops in new COVID-19 related cases. New Jersey, New York, and Massachusetts -- three of the hardest hit areas in the United States -- all are showing a steady decline as of June 1, 2020.^[2]

2. Expanded Testing Capacities

- At the end of April, New Jersey had the capacity to test approximately 12,000 individuals per day, which would need to be doubled in order to begin reopening other businesses.^[3] As of June 1, 2020, Governor Murphy has stated New Jersey has met this threshold due to a deal made with Walmart to permit 18,000 additional pharmacists to perform tests.^[4]

3. Robust Contact Tracing

- The State has recruited volunteers and paid personnel to identify and trace all contacts of virus. According to CDC guidance, this new and unique profession would require 1300 to 7000 individuals to be hired, and effectively trained, to properly handle New Jersey's population.

4. Safe Locations for Isolation

- These are sterilized locations in which to isolate, and provide medical -services to any infected individual.

As of June 1, 2020, New Jersey, New York, and Massachusetts all have hit their respective criteria to begin reopening certain businesses, and have used a tiered approach to determine which businesses open first. On June 1, 2020, New Jersey, Massachusetts, and New York (except for New York City) released plans to reopen "Phase 2" businesses which would result in over half a million individuals suddenly returning to the workforce. New Jersey's "Phase 2" reopening will begin on June 15, 2020. Below we highlight some important considerations for all employers as we inch closer to a full return of the workforce.

Ignorance Is No Excuse: Penalties for Failure to Provide Paid Leave

Although the FFCRA was passed in response to the initial outbreak of COVID-19 in March of 2020, employers must know that employees still are eligible for leave pursuant to the FFCRA until December 31, 2020. Furthermore, the New Jersey Department of Labor adopted emergency rules, effective until ninety (90) days after the Public State of Emergency is lifted, which prohibit an employer from terminating or otherwise penalizing an employee during New Jersey's "Public Health Emergency and State of Emergency" if the employee requests or takes time off from work under certain circumstances. If the employee presents a recommendation of a medical professional licensed in New Jersey that the employee has, or is likely to have, an infectious disease (i.e. COVID-19), which may infect others at the employee's workplace, the employee may take any federal or state leave to which the employee is entitled without being penalized or terminated.

Employers that violate these rules will be forced to re-hire the employee and could face \$2,500 fines for each infraction.

The Department of Labor recently extended the timeline for public comment on the concurrently proposed rules which mirror the emergent rules.[5] Comments will be accepted until June 19, 2020, and the proposed rules will be readopted in accordance with the normal rulemaking requirements, but be subject to amendment. Similar penalties are being imposed for businesses in New York if an employee is penalized for taking leave related to COVID-19.[6]

Below are answers to some frequently asked questions regarding the FFCRA, Department of Labor Regulations, and the intersection of state paid leave:

1. Can an employee utilize leave pursuant to the FFCRA (e.g. Emergency Paid Sick Leave or Emergency Childcare Leave) after the State of Emergency is lifted?

- Yes, so long as the employee uses it prior to December 31, 2020, and meets the necessary conditions to qualify for the leave. Emergency Paid Sick Leave and Emergency Childcare Leave are not contingent on the State of Emergency remaining in effect.

2. Does the FFCRA apply to private employers with over 500 employees? Do the emergency Department of Labor rules apply to private employers with over 500 employees?

- The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Publicly traded companies with less than 500 employees would qualify as a "private employer" and be required to provide employees with FFCRA leave. However, most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by the FFCRA. Therefore, they are not covered by the expanded family and medical leave provisions of the FFCRA but do qualify for FFCRA paid leave.

Although private employers with over 500 employees are not covered under the FFCRA, these employers are subject to their respective state laws, such as the emergency New Jersey Department of Labor rules, which broadly define employer

as "any individual, partnership, association, corporation, and the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality thereof, or any person, or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee." This means that private employers, regardless of their employment size, cannot penalize any employee for utilizing any state leave related to COVID-19. In addition to these penalties, employers could also be exposed to a wrongful termination lawsuit, such as the one filed by a New Jersey employee who alleges he was terminated after informing his employer that the employer's COVID-19 safety measures were insufficient.

3. If an employee utilizes FFCRA leave, can the employer require that the employee utilize similar paid state leave concurrently?

- No, the federal leave must be taken separately from any state leave pursuant to emergent rules adopted by the United States Department of Labor effective from April 2, 2020 through December 31, 2020.[7] In addition to federal emergency paid leaves, all New Jersey and Massachusetts workers can utilize any earned sick leave after the expiration of FFCRA leave under their respective Earned Sick Leave Laws in addition to family leave insurance benefits. If an employee is utilizing unpaid FFCRA leave, he/she would be permitted to supplement the leave with paid time off[8] (e.g., vacation, personal time, etc.)

4. Can an employer require an employee to pay medical insurance contributions when the employee utilizes either Emergency Paid Sick Leave or Emergency Childcare Leave?

- Employees in a group health plan who utilize the emergency federal leave must continue to pay the same portion of the premium via the same method the premium normally is deducted. If for some reason premiums are adjusted, the employee is required to pay the new premium contribution on the same terms as other employees.
- An employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.[9]

5. Do self-employed individuals receive any benefits under FFCRA?

- Certain individuals who are self-employed are eligible for a tax credit pursuant to the FFCRA. If the self-employed individual is unable to work due to the same factors as a qualified employee, he or she can receive either \$511 or \$200 per day (for sick leave and family leave, respectively) or 67% of his/her average daily self-employment income, whichever is lower. Those who are self-employed should maintain any medical recommendation or similar documentation to prove their eligibility for the credit.

6. If an employer provides in excess of 80 hours of Emergency Paid Sick Leave to an employee, can the employer receive tax benefits for the excess hours?

- An employer always may choose to pay a greater amount of sick leave than required under federal law, but the employer will not be permitted to take any additional tax credit above the 80 hours. Moreover, the tax credit is only available for paid leave pursuant to the FFCRA, and any similar state leave would not qualify for the tax credits included in the FFCRA.

[1] Source: <https://covid19.nj.gov/faqs/announcements/all-announcements/governor-murphy-announces-%E2%80%9Cthe-road-back:-restoring-economic-health-through-public-health%E2%80%9D>

[2] Source: https://www.nj.gov/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf;

<https://www.mass.gov/doc/covid-19-dashboard-may-31-2020/download>

[3] Source: <https://youtu.be/Zno1a8ltVGc?t=730>

[4] Source: <https://www.njtvonline.org/news/video/walmart-pharmacists-to-expand-new-jersey-covid-19-testing/>

[5] Source: <https://aboutbtax.com/Q7A>

[6] Source: <https://labor.ny.gov/workerprotection/laborstandards/coronavirus-complaints.shtm>

[7] Source: <https://www.dol.gov/agencies/whd/ffcra>

[8] Ibid.

[9] Source: 29 U.S.C. 2614(c); see also 29 U.S.C. 1182 and 26 CFR 54.9802-1(e)(2)(i); 29 CFR 2590.702(e).