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Hello Everyone:

Below you will find information regarding new developments in human resource management. Feel free to contact me directly if you would like any additional information or if you would like to discuss potential impacts and compliance strategies. I can be reached on the HR Line (800) 332-2117 or at frank.kerbein@bcnys.org.

UPDATE

As predicted, things are changing quickly regarding income continuation protection for employees impacted by the COVID-19 virus. There is a significant change to the memo we sent yesterday (3/18). In addition to a change in the [New York State paid sick leave legislation](#), late last night, President Trump signed into law a [federal emergency paid sick leave law](#) and a temporary expansion of the Family and Medical Leave Act.

NOTE: New York law requires that, in the event of federal action on the coronavirus, employers apply the plan most generous to employees. In most cases, New York State's new emergency paid sick leave will be more generous for employees subject to quarantine or isolation by a public health official or have a minor child quarantined as described below. In that case, employers should provide benefits provided by that law. In the case of an employee requiring leave to care for a child whose school has closed due to the

coronavirus, or other applicable situations, the Federal law would be most generous and would be in effect.

New York State Emergency Paid Sick Leave Law

First the good news. Not wanting to appear to impose a new “permanent” sick leave mandate on employers in time of crisis, the bill signed last night by Governor Cuomo does not include the mandate that employers provide job protected sick leave beyond the leave required during the coronavirus crisis. The [bill passed last night](#) only includes provisions for employees (or employees caring for minor children) under a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such an order due to COVID-19. These provisions are effective immediately. If you are an employer of 99 or less your immediate obligations are to:

- Notify employees of the availability of leave as described below (no template for this notification has yet been provided)
- To provide job protected leave as described below
- Provide forms required for employee to apply for Paid Family Leave (PFL) and New York State Short Term Disability (DBL)
- Employers of 100 or more only need to provide paid sick leave as required.

Provisions of the New York law include:

- Employers of 10 or fewer as of January 1, 2020 must provide **unpaid**, job protected sick time during an employee’s period of ordered quarantine or isolation, except those employers with net income of more than \$1 million, which must provide five days of **paid** sick leave
- Employers of 11 to 99 must provide five days of **paid** sick leave
- Employers of 100 or more must provide up to fourteen days of **paid** sick leave
- Public employers must provide at least fourteen days of paid sick leave
- Benefits **would not** be available to employees deemed asymptomatic or not yet diagnosed with any medical condition and is physically able to work, through remote access or other means

- **NOTE:** Such sick leave shall be provided without loss of an employee's accrued sick leave. That is, this leave is in addition to whatever leave is already provided by the employer and is to be used first.

This leave is job protected and employees are, interestingly, not eligible to use this leave if the employee is returning from personal travel to one of the destinations on the CDC travel advisory list. These employees would be able to use any available employer provided leave time or, absent that, unpaid sick leave for the duration of the quarantine.

For employers of 99 employees or less, should an employee's period of quarantine or isolation extend beyond available sick time as described above, the employee would be able to apply for Paid Family Leave (PFL) **and** New York State Short Term Disability (DBL) concurrently – as you know this is not possible under current law. Benefit amounts would be a combination of payments from PFL and from DBL up to 100% of an employee's average weekly wage for those employees earning up to \$150,000 per year. For example:

- An employee making \$150,000 per year (\$2,884.62 per week) may be eligible for:
 - \$840.70 payment from PFL (60% of average weekly wage to the 2020 maximum benefit amount), and
 - \$2,043.92 payment from DBL (a significant – temporary increase over the current maximum of \$170/wk.)

Additionally, there is no waiting period for the commencement of DBL payments under these circumstances. PFL/DBL benefits may also be used to care for a dependent minor child under such a mandatory quarantine or isolation order; this provision does not apply in cases where the child's school is closed and requires daycare.

The law also provides for the creation of a risk adjustment pool to help stabilize the DBL/PFL insurance carrier industry. Also, if federal COVID-19 benefits are approved, these state benefits would only apply if they would provide employee benefits in excess of what is available under federal law. Currently the US Congress is considering legislation that may expand the Family and Medical Leave Act and/or require paid sick days during the COVID-19 crisis.

Again, as mentioned above, there is no longer any obligation to provide on-going, permanent paid sick leave as described in yesterday's memo. It is anticipated that a new bill with this mandate will resurface at some time in the future.

New Federal Leave Laws

The Senate passed and the President signed the [Families First Coronavirus Response Act](#) last night that includes paid sick leave and an expanded family and medical leave act for most employers in the state. The president signed the legislation on the evening of March 18, which means the leave provisions will go into effect on April 2.

This act includes many provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. There are two provisions providing paid leave to employees forced to miss work because of the COVID-19 outbreak - an emergency expansion of the Family Medical Leave Act (FMLA) and a new federal paid sick leave law.

Emergency Family and Medical Leave Expansion Act

Expanded Coverage and Eligibility – The act significantly amends and expands FMLA on a *temporary* basis. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering those employers with fewer than 500 employees. It also lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive **paid** family and medical leave. As a result, many employers not previously subject to the FMLA may be required to provide job-protected leave to employees for a COVID-19 coronavirus-designated reason.

However, the Act includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business. If providing the leave described below could jeopardize your business. [Contact the US Department of Labor](#).

Employers may need to provide Emergency FMLA for any individual employed by the employer for at least 30 days (before the first day of leave) to take up to 12 weeks of job-protected leave to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or

the childcare provider is unavailable due to a public health emergency. This is now the only qualifying need for Emergency FMLA and a significant change from the prior version of the bill passed by the House over the weekend, which contained several other COVID-19-related reasons to provide Emergency FMLA. Other provisions of the act include:

- There is a 10-day waiting period before any Emergency FMLA. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period
- After the 10-day period, the employer generally must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The act contains guidance on calculating part-time employee benefits.
- The new act now limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee
- Job Restoration – Employers with 25 or more employees have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA
- This act takes effect April 2, 2020 and remains in effect until December 31, 2020.

Emergency Paid Sick Leave Act

In additions, there is a new paid sick leave requirement in the act. Provisions include:

Reasons for Paid Sick Leave

This Act now allows an eligible employee to take paid sick leave because the employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns
3. Experiencing COVID-19 symptoms and seeking medical diagnosis

4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Of note, caring for another who is subject to an isolation order or advised to self-quarantine as described above is no longer limited to just family members.

Eligibility

- This provision requires employers with fewer than 500 employees to provide full-time employees (regardless of the employee's duration of employment prior to leave) with 80 hours of **paid** sick leave at the employee's regular rate (or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed above).
- Provides an exception for employers who are healthcare providers or emergency responders at their election.
- Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
- This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- This act takes effect April 2, 2020 and remains in effect until December 31, 2020.

Tax Credits for Paid Sick and Paid Family Leave

The federal bill provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with

the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.