The Top Ten Hits for 2020—An Update on Labor and Employment Law Developments Affecting Counties

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2020 CAASNY Annual Meeting

Via Zoom® on September 14, 2020

John F. Corcoran, Esq.

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What a Slogan!

- "During the pandemic, we should not expect perfection in anything we do."

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FOIL Developments

- Until recently, Section 50-a of the NYS Civil Rights Law provided that personnel records of police officers, deputy sheriffs, correction officers, and paid firefighters used to evaluate performance toward continued employment were specifically exempted from disclosure unless pursuant to court order.

- On June 12, 2020, Governor Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Section 50-a and amending FOIL to add provisions on law enforcement disciplinary records. See Supplemental Materials.

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FOIL Developments

- Section 86 of the Public Officers Law ("POL") was amended to add four new subdivisions:
  - (6) Defines "law enforcement disciplinary records" as "any record created in furtherance of a law enforcement disciplinary proceeding" including complaints, allegations, and charges against employee; name of the employee; transcript of any disciplinary trial or hearing including exhibits; the disposition of the matter including final written decision, agency's factual findings, and analysis of conduct and appropriate discipline.

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FOIL Developments

- (7) Defines "law enforcement disciplinary proceeding" as commencement of any investigation and any subsequent hearing or disciplinary action.

- (8) Defines "law enforcement agency" as any police agency employing police officers as defined in Section 1.20 of the NYS Criminal Procedure Law; a sheriff's department; local department of correction; local probation department; fire department; or force of firefighters or firefighter/paramedics.

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FOIL Developments

- (9) Defines "technical infraction" as a minor rule violation solely related to enforcement of administrative departmental rules that do not:
  - involve interactions with the public, are not of public concern, and are not "otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities."

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FOIL Developments

- Section 87 of the POL was also amended to add two new subdivisions 4-a and 4-b to identify required or permitted redactions when confronted with a FOIL request for law enforcement disciplinary records.

- You shall redact:
  - medical histories but not including records obtained during course of agency's investigation of the employee's misconduct that are relevant to the disposition of the investigation.

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FOIL Developments

- You shall also redact:
  - home addresses;
  - personal telephone numbers;
  - personal e-mail addresses;
  - social security numbers;
  - employee's use of an EAP, mental health service, or substance abuse assistive service, unless use is mandated by the law enforcement disciplinary proceeding.

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FOIL Developments

- You may redact:
  - records pertaining to "technical infractions."

- According to the Committee on Open Government ("COG"), the new provisions of FOIL did not make changes to the "unwarranted invasion of personal privacy" exemption in Section 87(2)(b) of the POL. See July 27, 2020 Advisory Opinion issued to City of Syracuse in Supplemental Materials.

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FOIL Developments

- Therefore, according to COG, unsubstantiated, unfounded, or unproven complaints, or exonerated complaints, are subject to the personal privacy exemption as applied to law enforcement disciplinary records as has long been true with regard to non-law enforcement personnel.

- Although no court has formally held as much, the COG noted that at least two courts (NYS Supreme Court – Erie County and U.S. SDNY) have temporarily enjoined disclosure of such complaints pending final determinations.

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FOIL Developments

- COG also opined that the law enforcement "technical infractions" records enjoy greater protection from disclosure than those contained in the disciplinary records of non-law enforcement personnel.

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FOIL Developments

- Chapter 96 of the Laws of 2020 has spurred a higher level of FOIL requests for the disclosure of law enforcement disciplinary records and personnel file materials:
  - MuckRock FOIL requests
  - media FOIL requests
  - "concerned citizen" FOIL requests

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FOIL Developments

- Other FOIL exemptions under Section 87(2) of POL may also apply to FOIL requests for the disciplinary and personnel file materials:
  - Law enforcement exemption (interfere with criminal investigations or judicial proceedings, ID confidential sources, reveal non-routine investigative techniques or procedures)
  - Personal safety exemption
  - Intra-agency or inter-agency materials not consisting of factual data or final agency determinations

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Collective Bargaining Trends

- Are we still on pause?
- Are we negotiating face-to-face or remotely?
- Rollover agreements are on the rise.
- Settlements continue to be modest.
- PERB is offering remote mediations.

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Collective Bargaining Trends

- Early COVID-19 – bonus pay/extra paid leave time for the "essentials."
- More recently – voluntary unpaid furloughs/temporary layoffs.
- Union bargaining demands related to FOIL requests for police officer/deputy sheriff personnel records.
- Yet to come – effects bargaining due to layoffs?

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Police Reform

- Governor Cuomo's Executive Order No. 203 (6/12/20)(See Supplemental Materials).

- Division of Budget/DCJS guidance to local governments issued August 2020 titled "New York State Police Reform and Reinvention Collaborative." 135 pages. Can be found at Governor Cuomo's website at: https://www.governor.ny.gov/news/governor-cuomo-announces-new-guidance-police-reform-collaborative-reinvent-and-modernize.

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Police Reform

- Each county with a police agency must perform comprehensive review of many items associated with policing and develop a written plan for improvements.

- Chief executive officer must convene Sheriff and community stakeholders to develop the plan.

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Police Reform

- Plan must be offered for public comment and presented to county's legislative body for ratification or adoption via local law or resolution, as appropriate, no later than 4/1/21.

- County must certify existence of plan to State Director of the Division of the Budget, or risk loss of state or federal funds.

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Police Reform

- Potential labor issues – bargaining demands/improper practice charges/contract grievances over establishment/operation of police review boards (i.e., police accountability boards or citizen review boards).

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Salary History Ban

- Effective January 6, 2020, NYS Labor Law Section 194-a prohibits private and public sector employers from making any inquiries about a job applicant's, or current employee's, salary history which includes compensation and benefits. See Supplement.

- The employer may, however, ask an applicant about salary expectations for the position.

- See "Salary History Ban – What You Need To Know" in the Supplemental Materials.

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NYS COVID-19 Paid Leave

- Guarantees job-protected paid leave to workers who are subject to a mandatory or precautionary order of quarantine or isolation for COVID-19, issued by the State of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order, or whose minor dependent child is under such an order.

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NYS COVID-19 Paid Leave

- Public employers (no matter how many employees) must provide employees with:
  - Job protection for the duration of the order of quarantine or isolation; and
  - At least 14 days of paid sick leave.

- Not available to employees who are able to work through remote access or through other means.

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NYS Travel Advisory

"In response to increased rates of COVID-19 transmission in certain states within the United States, and to protect New York's successful containment of COVID-19, the State has joined with New Jersey and Connecticut in jointly issuing a travel advisory for anyone returning from travel to states that have a significant degree of community-wide spread of COVID-19."

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NYS Travel Advisory

- If you have traveled from within one of the designated states with significant community spread, you must quarantine when you enter New York for 14 days from the last travel within such designated state, provided on the date you enter into New York State that such state met the criteria for requiring such quarantine.

- The requirements of the travel advisory do not apply to any individual passing through designated states for a limited duration (i.e., less than 24 hours) through the course of travel.

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NYS Travel Advisory

- If you have traveled from within one of the designated states with significant community spread, you must quarantine when you enter New York for 14 days from the last travel within such designated state, provided on the date you enter into New York State that such state met the criteria for requiring such quarantine.

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NYS Travel Advisory

- Extensive quarantine requirements.
- Restricted state list based upon a seven day rolling average, of positive tests in excess of 10%, or number of positive cases exceeding 10 per 100,000 residents.
- See https://coronavirus.health.ny.gov/covid-19-travel-advisory for details and updates.

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NYS Travel Advisory

- Employees forgo NYS COVID-19 paid sick leave benefits if they engage in non-essential travel to high risk states (mirrors provision re: traveling to CDC's "hot spot" countries).

- Travel advisory does not apply if the employee travels for work or at the employer's request.

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EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▸ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▸ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▸ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

▸ ENFORCEMENT

Families First Coronavirus Response Act

- Exempted by USDOL guidance:
  - "Health care workers"
    - Anyone employed by a healthcare center, nursing facility, retirement home, pharmacy, etc.
  - "Emergency responders"
    - Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.

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Families First Coronavirus Response Act

- State of New York v. U.S. Dep't of Labor *, et al.* , 20-CV-3020 (S.D.N.Y . Aug. 3, 2020)

- August 3, 2020 decision from Judge J. Paul Oetken of the U.S. District Court for the S.D.N.Y . vacated parts of USDOL's final rule that:
  - Broadly defined healthcare exemptions;
  - Allowed employers to deny leave if work wasn't available; and
  - Required workers to get employer consent to take intermittent leave.

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SDNY Decision's Outstanding Issues

- Does this decision apply nationwide? Only to NY?

- What's USDOL's next move?
  - Has until early October to appeal
  - Guidance remains online…
  - Considering issuing new rule?
  - No direction given to W&H Investigators…

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Pandemic Paid Leave

- Where does this leave employees who may need intermittent leave under the FFRCA due to "hybrid" school re-openings in certain school districts?

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Remote Work Reminder

- At minimum, ensure reasonable time reporting procedures are in place and that employees are clearly on notice of those procedures.

- Doing so may limit liability for potential wage & hour claims from overtime non-exempt employees.

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What's Old Is New Again?

- Generally, employees are eligible for up to two hours of paid time off to vote if they do not have "sufficient time to vote" (meaning an employee has four consecutive hours to vote either from the opening of the polls to the beginning of their work shift, or four consecutive hours between the end of a working shift and the closing of the polls).

- Must provide two business days' notice.

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CROWN Act

- Reminder: On July 12, 2019, Governor Cuomo signed into law S.6209A/A.7797A, which amended the Human Rights Law and Dignity for All Students Act to make clear that discrimination based on race includes hairstyles or traits associated with race.

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Questions/Contact Information

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Disclaimer

This presentation is for informational purposes and is not intended as legal advice.

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STATE OF NEW YORK

8496

IN SENATE

June 6, 2020

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil rights law and the public officers law, in relation to the disclosure of law enforcement disciplinary records; and to repeal section 50-a of the civil rights law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 50-a of the civil rights law is REPEALED.

§ 2. Section 86 of the public officers law is amended by adding four new subdivisions 6, 7, 8 and 9 to read as follows:

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

(a) the complaints, allegations, and charges against an employee;

(b) the name of the employee complained of or charged;

(c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(d) the disposition of any disciplinary proceeding; and

(e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD16577-06-0

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

§ 3. Section 87 of the public officers law is amended by adding two new subdivisions 4-a and 4-b to read as follows:

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

§ 4. Section 89 of the public officers law is amended by adding two new subdivisions 2-b and 2-c to read as follows:

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

§ 5. This act shall take effect immediately.

State of New York
Department of State
Committee on Open Government

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FOIL AO 19775

By electronic mail only

July 27, 2020

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear:

I am writing in response to your request for an advisory opinion regarding the obligations of the City of Syracuse (the "City") under the Freedom of Information Law (FOIL) in connection with requests for law enforcement disciplinary records, specifically relating to unsubstantiated and unfounded complaints against a police officer. In your inquiry, you note that Public Officers Law § 86(6)(a) defines "law enforcement disciplinary records" to include "complaints, allegations, and charges against an employee." You ask whether "an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome." I note that yours is the first, but not the only, inquiry we have received in recent weeks asking this question.

As you know, until very recently, personnel records of police officers, corrections officers, and paid firefighters that were used to evaluate performance toward continued employment were specifically exempted from disclosure by state statute: Civil Rights Law § 50-a and, because of this, Public Officers Law § 87(2)(a). On June 12, 2020, however, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending FOIL to add certain provisions relating to law enforcement disciplinary records. Where prior to June 12, 2020, access to personnel records of a police officer was governed by § 50-a and the resulting FOIL exemption pursuant to § 87(a)(2), ending the FOIL analysis immediately, access is now governed by FOIL alone.

As a general matter, FOIL is based upon a presumption of access. All records of an agency are available except to the extent that records or portions thereof fall within one or more grounds for exemption appearing in § 87(2)(a) through (q) of the Law. Section 87(2)(b) of FOIL, a provision which until June 12, 2020, had not been applied to law enforcement disciplinary records because of Civil Rights Law § 50-a, permits an agency to withhold records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article . . . ." As you note in your inquiry, the Committee on Open Government has frequently addressed issues relating to rights of access to disciplinary records of public employees pursuant to this subsection of the FOIL.

In FOIL Advisory Opinion 17195, staff of the Committee opined that a record of an unsubstantiated or unfounded complaint may be withheld under FOIL where the agency determines such complaint would constitute an unwarranted invasion of personal privacy:

> The exception of significance is § 87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be

> more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of one's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy . . . . Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy . . . . [W]hen allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld based on considerations of privacy.

Committee staff have issued similar opinions in FOIL AO 19771, FOIL AO 16764, FOIL AO 12802, FOIL AO 12722, FOIL AO 11747, FOIL AO 9463 , and FOIL AO 7602. In sum, Committee staff have long advised that where an agency determines that a record of an unsubstantiated or unfounded complaint would, if disclosed (even in a redacted form (*see, e.g.*, FOIL AO 19771)), constitute an unwarranted invasion of personal privacy, such record need not be disclosed.

The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in § 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent. Moreover, while no court has yet issued an opinion formally answering the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, at least two have recently temporarily enjoined the disclosure of such complaints pending a final determination. [1]

In further support of this interpretation, there is a suggestion in the new FOIL provisions that some law enforcement disciplinary records, which the legislature calls "technical infractions" (FOIL § 89(2-c)), enjoy *greater* (rather than less) protection than such infractions contained in the disciplinary records of other government employees. In other words, while there is some express language in the statute to render certain records of law enforcement agency employees *less* available than those of other government employees, there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees.

Accordingly, it is our opinion, in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose "unsubstantiated and unfounded complaints against an officer" where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2)(a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy.

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[1] *See* https://gothamist.com/news/federal-judge-blocks-release-nypd-misconduct-records-orders-nyclu-keep-records-secret (U.S. District Court for the Southern District of New York) and https://buffalonews.com/news/local/crime-and-courts/city-of-buffalo-blockedfrom-releasing-portions-of-police-disciplinary-records/article_2acfc25c-cde6-11ea-8d7f-3b130bc09a73.html (New York State Supreme Court).

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay
Executive Director

SVB/ko

FOIL-AO-f19775
19775

JUNE 12, 2020 Albany, NY

No. 203: New York State Police Reform and Reinvention Collaborative

No. 203

EXECUTIVE ORDER

NEW YORK STATE POLICE REFORM AND REINVENTION COLLABORATIVE

WHEREAS, the Constitution of the State of New York obliges the Governor to take care that the laws of New York are faithfully executed; and

WHEREAS, I have solemnly sworn, pursuant to Article 13, Section 1 of the Constitution, to support the Constitution and faithfully discharge the duties of the Office of Governor; and

WHEREAS, beginning on May 25, 2020, following the police-involved death of George Floyd in Minnesota, protests have taken place daily throughout the nation and in communities across New York State in response to police-involved deaths and racially-biased law enforcement to demand change, action, and accountability; and

WHEREAS, there is a long and painful history in New York State of discrimination and mistreatment of black and African-American citizens dating back to the arrival of the first enslaved Africans in America; and

WHEREAS, this recent history includes a number of incidents involving the police that have resulted in the deaths of unarmed civilians, predominantly black and African-American men, that have undermined the public's confidence and trust in our system of law enforcement and criminal justice, and such condition is ongoing and urgently needs to be rectified; and

WHEREAS, these deaths in New York State include those of Anthony Baez, Amadou Diallo, Ousmane Zango, Sean Bell, Ramarley Graham, Patrick Dorismond, Akai Gurley, and Eric Garner, amongst others, and, in other states, include Oscar Grant, Trayvon Martin, Michael Brown, Tamir Rice, Laquan McDonald, Walter Scott, Freddie Gray, Philando Castile, Antwon Rose Jr., Ahmaud Arbery, Breonna Taylor, and George Floyd, amongst others,

WHEREAS, these needless deaths have led me to sign into law the Say Their Name Agenda which reforms aspects of policing in New York State; and

WHEREAS, government has a responsibility to ensure that all of its citizens are treated equally, fairly, and justly before the law; and

WHEREAS, recent outpouring of protests and demonstrations which have been manifested in every area of the state have illustrated the depth and breadth of the concern; and

WHEREAS, black lives matter; and

WHEREAS, the foregoing compels me to conclude that urgent and immediate action is needed to eliminate racial inequities in policing, to modify and modernize policing strategies, policies, procedures, and practices, and to

develop practices to better address the particular needs of communities of color to promote public safety, improve community engagement, and foster trust; and

WHEREAS, the Division of the Budget is empowered to determine the appropriate use of funds in furtherance of the state laws and New York State Constitution; and

WHEREAS, in coordination with the resources of the Division of Criminal Justice Services, the Division of the Budget can increase the effectiveness of the criminal justice system by ensuring that the local police agencies within the state have been actively engaged with stakeholders in the local community and have locally-approved plans for the strategies, policies and procedures of local police agencies; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, in particular Article IV, section one, I do hereby order and direct as follows:

The director of the Division of the Budget, in consultation with the Division of Criminal Justice Services, shall promulgate guidance to be sent to all local governments directing that:

Each local government entity which has a police agency operating with police officers as defined under 1.20 of the criminal procedure law must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and

legitimacy, and to address any racial bias and disproportionate policing of communities of color.

Each chief executive of such local government shall convene the head of the local police agency, and stakeholders in the community to develop such plan, which shall consider evidence-based policing strategies, including but not limited to, use of force policies, procedural justice; any studies addressing systemic racial bias or racial justice in policing; implicit bias awareness training; de-escalation training and practices; law enforcement assisted diversion programs; restorative justice practices; community-based outreach and conflict resolution; problem-oriented policing; hot spots policing; focused deterrence; crime prevention through environmental design; violence prevention and reduction interventions; model policies and guidelines promulgated by the New York State Municipal Police Training Council; and standards promulgated by the New York State Law Enforcement Accreditation Program.

The political subdivision, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; the local public defender; and local elected officials, and create a plan to adopt and implement the recommendations resulting from its review and consultation, including any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing.

Such plan shall be offered for public comment to all citizens in the locality, and after consideration of such comments, shall be presented to the local legislative body in such political subdivision, which shall ratify or adopt such plan by local law or resolution, as appropriate, no later than April 1, 2021; and

Such local government shall transmit a certification to the Director of the Division of the Budget to affirm that such process has been complied with and such local law or resolution has been adopted; and

The Director of the Division of the Budget shall be authorized to condition receipt of future appropriated state or federal funds upon filing of such certification for which such local government would otherwise be eligible; and

The Director is authorized to seek the support and assistance of any state agency in order to effectuate these purposes.

G I V E N under my hand and the Privy Seal of the State in the City of Albany this twelfth day of June in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

Effective: January 6, 2020

McKinney's Labor Law § 194-a

§ 194-a. Wage or salary history inquiries prohibited

Currentness

1. No employer shall:

a. rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual.

b. orally or in writing seek, request, or require the wage or salary history from an applicant or current employee as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion.

c. orally or in writing seek, request, or require the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer, except as provided in subdivision three of this section.

d. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee based upon prior wage or salary history.

e. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee because such applicant or current employee did not provide wage or salary history in accordance with this section.

f. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current or former employee because the applicant or current or former employee filed a complaint with the department alleging a violation of this section.

2. Nothing in this section shall prevent an applicant or current employee from voluntarily, and without prompting, disclosing or verifying wage or salary history, including but not limited to for the purposes of negotiating wages or salary.

3. An employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant or current employee responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered by the employer.

4. For the purposes of this section, "employer" shall include but not be limited to any person, corporation, limited liability company, association, labor organization, or entity employing any individual in any occupation, industry, trade, business or service, or any agent thereof. For the purposes of this section, the term "employer" shall also include the state, any political subdivision thereof, any public authority or any other governmental entity or instrumentality thereof, and any person, corporation, limited liability company, association or entity acting as an employment agent, recruiter, or otherwise connecting applicants with employers.

5. An applicant or current or former employee aggrieved by a violation of this section may bring a civil action for compensation for any damages sustained as a result of such violation on behalf of such applicant, employee, or other persons similarly situated in any court of competent jurisdiction. The court may award injunctive relief as well as reasonable attorneys' fees to a plaintiff who prevails in a civil action brought under this paragraph.

6. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any applicant or current or former employee under any other law or regulation or under any collective bargaining agreement or employment contract.

7. This section shall not supersede any federal, state or local law enacted prior to the effective date of this section that requires the disclosure or verification of salary history information to determine an employee's compensation.

8. The department shall conduct a public awareness outreach campaign, which shall include making information available on its website, and otherwise informing employers of the provisions of this section.

Credits

(Added L.2019, c. 94, § 1, eff. Jan. 6, 2020.)

McKinney's Labor Law § 194-a, NY LABOR § 194-a
Current through L.2019, chapter 758 and L.2020, chapters 1 to 56, 58 to 142. Some statute sections may be more current, see credits for details.

End of Document

< Salary History Ban

Salary History Ban - What You Need To Know

May a prospective employer ask an applicant about their current or past salary, compensation or benefits?

No. Effective January 6, 2020, Labor Law Section 194-a prohibits an employer from, either orally or in writing, personally or through an agent (directly or indirectly), asking any information concerning an applicant's salary history information. This includes compensation and benefits. The law also prohibits an employer from relying on an applicant's salary history information as a factor in determining whether to interview or offer employment at all or in determining what salary to offer. Please note that additional protections under local laws may also apply.

An employer may ask an applicant for their salary expectations for the position instead of asking what the applicant earned in the past.

Who is an "applicant?"

An "applicant" is someone who took an affirmative step to seek employment with the employer and who is not currently employed with that employer, its

parent company or a subsidiary. This includes part-time, seasonal and temporary workers, regardless of their immigration status.

Does this law apply to current employees?

Yes. Employers cannot request prior salary history information from current employees as a condition of being interviewed or considered for a promotion. However, employers may consider information already in their possession for existing employees (i.e. a current employee's current salary or benefits being paid by that employer). For example, an employer may use an employee's current salary to calculate a raise but may not ask that employee about pay from other jobs.

What should an employer do to comply with the new Section 194-a of the Labor Law?

All employers should review their job applications and related processes and train hiring personnel to ensure compliance. For example, an employer should eliminate questions seeking an applicant's current or past salary from all job applications, unless required by law. Additionally, an employer may wish to proactively state in job postings that it does not seek salary history information from job applicants.

May an applicant voluntarily disclose salary history information to a prospective employer?

Yes. The Labor Law permits an applicant to voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer. If an applicant voluntarily and without prompting discloses salary history information, the prospective employer may factor in that voluntarily disclosed information in determining the salary for that person.

An employer may not, for example, pose an "optional" salary history question on a job application seeking a voluntary response.

May an employer ask someone other than the employee or applicant about the employee or applicant's prior salary history?

No. Employers may not seek or obtain such information from a separate source of the information, such as by asking an applicant's former employer.

An employer may seek to confirm wage or salary history only if an applicant voluntarily discloses such information. An employer, however, is prohibited from relying on prior salary to justify a pay difference between employees of different or various protected classes who are performing substantially similar work as this violates Section 194 of the Labor Law.

Is an employer required to provide the pay scale or salary range for a position?

The Labor Law does not require an employer to post or set a pay scale for an open position. However, collective bargaining agreements may include such requirements.

Is an applicant protected from retaliation for complaining about a potential violation or refusing to provide their salary history?

Yes. The Labor Law specifically prohibits an employer from retaliating against an employee for refusing to provide their salary history or complaining about an alleged violation of the Labor Law.

What should an applicant do if they believe they have been retaliated against for refusing to provide salary history information?

An applicant who believes that they have been retaliated against should contact the Department of Labor's Division of Labor Standards: Phone: 888-525-2267 E-mail: LSAsk@labor.ny.gov

May an employer inquire about salary history information required by Federal, State or Local Law?

Yes. However, employers may require salary history information only if it is required pursuant to Federal Law, State or local law in effect as of January 6, 2020, the effective date of Section 194-a of the Labor Law.

Does this law apply to New York City employers or to public employers?

Yes. It applies to all public and private employers in New York State, including New York City and public authorities.

Does this law cover independent contractors?

This law does not apply to bonafide independent contractors, freelance workers or other contract workers unless they are to work through an employment agency.

Does this law apply to jobs based in New York State even if the employer is not based in New York State?

Yes. This law applies to any position that will be based primarily in New York State, even if the interview process takes place virtually, via telephone or in another state.

How is the law enforced and what is an employee's right of redress?

Individuals believing an employer violated this law may bring a civil court action against such an employer or they may contact the Division of Labor Standards.

STATE OF NEW YORK

8091

IN SENATE

March 18, 2020

Introduced by Sen. RAMOS -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT providing requirements for sick leave and the provision of certain employee benefits when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. 1.(a) For employers with ten or fewer employees as of January 1, 2020, each employee who is subject to 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 governmental entity duly authorized to issue such order due to COVID-19, shall be provided with unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation due to COVID-19 and any other benefit as provided by any other provision of law. During the period of mandatory or precautionary quarantine or isolation, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act. An employer with ten or fewer employees as of January 1, 2020, and that has a net income of greater than one million dollars in the previous tax year, shall provide each employee who is subject to a precautionary or mandatory order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

(b) For employers with between eleven and ninety-nine employees as of January 1, 2020, each employee who is subject to 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 governmental entity duly authorized to issue such order due to COVID-19, shall

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD12052-01-0

be provided with at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

(c) For employers with one hundred or more employees as of January 1, 2020, each employee who is subject to 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 governmental entity duly authorized to issue such order due to COVID-19, shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation.

(d) For public employers, each officer or employee who is subject to 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 governmental entity duly authorized to issue such order due to COVID-19 shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation. Each officer or employee shall be compensated at his or her regular rate of pay for those regular work hours during which the officer or employee is absent from work due to a mandatory or precautionary order of quarantine or isolation due to COVID-19. For purposes of this act, "public employer" shall mean the following: (i) the state; (ii) a county, city, town or village; (iii) a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended; (iv) any governmental entity operating a college or university; (v) a public improvement or special district including police or fire districts; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of this state.

(e) Such leave shall be provided without loss of an officer or employee's accrued sick leave.

2. For purposes of this act, "mandatory or precautionary order of quarantine or isolation" shall mean 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 order due to COVID-19.

3. Upon return to work following leave taken pursuant to this act, an employee shall be restored by his or her employer to the position of employment held by the employee prior to any leave taken pursuant to this act with the same pay and other terms and conditions of employment. No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has taken leave pursuant to this act.

4. An employee shall not receive paid sick leave benefits or any other paid benefits provided by any provisions of this section if the employee is subject to a mandatory or precautionary order of quarantine because the employee has returned to the United States after traveling to a country for which the Centers for Disease Control and Prevention has a level two or three travel health notice and the travel to that country was not taken as part of the employee's employment or at the direction of the employee's employer, and if the employee was provided notice of

the travel health notice and the limitations of this subdivision prior to such travel. Such employee shall be eligible to use accrued leave provided by the employer, or to the extent that such employee does not have accrued leave or sufficient accrued leave, unpaid sick leave shall be provided for the duration of the mandatory or precautionary quarantine or isolation.

5. The commissioner of labor shall have authority to adopt regulations, including emergency regulations, and issue guidance to effectuate any of the provisions of this act. Employers shall comply with regulations promulgated by the commissioner of labor for this purpose which may include, but is not limited to, standards for the use, payment, and employee eligibility of sick leave pursuant to this act.

6. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "disability" shall mean: any inability of an employee to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19 and when the employee has exhausted all paid sick leave provided by the employee's employer under this act.

7. Notwithstanding subdivision 1 of section 204 of the workers' compensation law, disability benefits payable pursuant to this act shall be payable on the first day of disability.

8. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "family leave" shall mean: (a) any leave taken by an employee from work when an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19; or (b) to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19.

9. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, disability and family leave benefits pursuant to this act may be payable concurrently to an eligible employee upon the first full day of an unpaid period of mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19, provided however, an employee may not collect any benefits that would exceed $840.70 in paid family leave and $2,043.92 in benefits due pursuant to disability per week.

10. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, the maximum weekly benefit which the employee is entitled to receive for benefits due pursuant to disability pursuant to subdivision six of this section only shall be the difference between the maximum weekly family leave benefit and such employee's total average weekly wage from each covered employer up to a maximum benefit due pursuant to disability of $2,043.92 per week.

11. Notwithstanding subdivision 7 of section 590, and subdivision 2 of section 607, of the labor law, a claim for benefits under article 18 of

the labor law due to closure of an employer otherwise subject to this section for a reason related to COVID-19 or due to a mandatory order of a government entity duly authorized to issue such order to close such employer otherwise subject to this section, shall not be subject to a waiting period for a claim for benefits pursuant to such title.

12. A mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19 shall be sufficient proof of disability or proof of need for family leave taken pursuant to this act.

13. The provisions of this act shall not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means.

14. Nothing in this section shall be deemed to impede, infringe, diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement, or the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining relationship, or to prohibit any personnel action which otherwise would have been taken regardless of any request to use, or utilization of, any leave provided by this act.

15. Notwithstanding any inconsistent provision of law, on or before June 1, 2020, the superintendent of financial services by regulation, in consultation with the director of the state insurance fund and the chair of the workers' compensation board of the state, shall promulgate regulations necessary for the implementation of a risk adjustment pool to be administered directly by the superintendent of financial services, in consultation with the director of the state insurance fund and the chair of the workers' compensation board of the state. "Risk adjustment pool" as used in this subdivision shall mean the process used to stabilize member claims pursuant to this act in order to protect insurers from disproportionate adverse risks. Disproportionate losses of any members of the risk adjustment pool in excess of threshold limits established by the superintendent of financial services of the state may be supported, if required by the superintendent, by other members of such pool including the state insurance fund in a proportion to be determined by the superintendent. Any such support provided by members of the pool shall be fully repaid, including reasonable interest, through a mechanism and period of time to be determined by the superintendent of financial services.

16. (a) The superintendent of financial services, in consultation with the director of the state insurance fund and the chair of the workers' compensation board shall issue two reports assessing the risk adjustment pool required by this act.

(b) On or before January 1, 2022, an initial report shall be provided to the speaker of the assembly, the chair of the assembly ways and means committee and the chair of the assembly labor committee, the temporary president of the senate, the chair of the senate finance committee and the chair of the senate labor committee. Such report shall include: the total number of claims filed pursuant to this section for (i) family leave benefits, and (ii) benefits due to disability, as a result of a mandatory or precautionary order of quarantine or isolation due to COVID-19; the aggregate amount of paid family leave claims and disability claims; the total amount of the claims paid for out of the risk

adjustment pool; the threshold limits established by the department of financial services; and any other information the superintendent of financial services deems necessary to provide to the legislature.

(c) On or before January 1, 2025, a final report shall be provided to the speaker of the assembly, the chair of the assembly ways and means committee and the chair of the assembly labor committee, the temporary president of the senate, the chair of the senate finance committee and the chair of the senate labor committee. Such report shall include the balance of the risk adjustment pool, if any, the total amount collected through the repayment mechanism established by the department of financial services including interest; and any other information the superintendent of financial services deems necessary to provide to the legislature. If there exists a balance in the risk adjustment pool, the final report shall provide a timeline by which repayment will be completed.

17. If at any point while this section shall be in effect the federal government by law or regulation provides sick leave and/or employee benefits for employees related to COVID-19, then the provisions of this section, including, but not limited to, paid sick leave, paid family leave, and benefits due to disability, shall not be available to any employee otherwise subject to the provisions of this section; provided, however, that if the provisions of this section would have provided sick leave and/or employee benefits in excess of the benefits provided by the federal government by law or regulation, then such employee shall be able to claim such additional sick leave and/or employee benefits pursuant to the provisions of this section in an amount that shall be the difference between the benefits available under this section and the benefits available to such employee, if any, as provided by such federal law or regulation.

§ 2. This act shall take effect immediately.

DIVISION E—EMERGENCY PAID SICK LEAVE ACT

Emergency Paid Sick Leave Act.

SEC. 5101. SHORT TITLE.

29 USC 2601 note.

This Act may be cited as the "Emergency Paid Sick Leave Act".

SEC. 5102. PAID SICK TIME REQUIREMENT.

29 USC 2601 note.

(a) IN GENERAL.—An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

(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 symptoms of COVID–19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter

has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

Consultation.

(6) The employee is 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.

Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

(b) DURATION OF PAID SICK TIME.—

(1) IN GENERAL.—An employee shall be entitled to paid sick time for an amount of hours determined under paragraph (2).

(2) AMOUNT OF HOURS.—The amount of hours of paid sick time to which an employee is entitled shall be as follows:

(A) For full-time employees, 80 hours.

(B) For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

(3) CARRYOVER.—Paid sick time under this section shall not carry over from 1 year to the next.

(c) EMPLOYER'S TERMINATION OF PAID SICK TIME.—Paid sick time provided to an employee under this Act shall cease beginning with the employee's next scheduled workshift immediately following the termination of the need for paid sick time under subsection (a).

(d) PROHIBITION.—An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

(e) USE OF PAID SICK TIME.—

(1) IN GENERAL.—The paid sick time under subsection (a) shall be available for immediate use by the employee for the purposes described in such subsection, regardless of how long the employee has been employed by an employer.

(2) SEQUENCING.—

(A) IN GENERAL.—An employee may first use the paid sick time under subsection (a) for the purposes described in such subsection.

(B) PROHIBITION.—An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under subsection (a).

29 USC 2601 note.

SEC. 5103. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in this Act.

Public information.

(b) MODEL NOTICE.—Not later than 7 days after the date of enactment of this Act, the Secretary of Labor shall make publicly available a model of a notice that meets the requirements of subsection (a).

29 USC 2601 note.

SEC. 5104. PROHIBITED ACTS.

It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—

(1) takes leave in accordance with this Act; and

(2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.

SEC. 5105. ENFORCEMENT.

29 USC 2601 note.

(a) UNPAID SICK LEAVE.—An employer who violates section 5102 shall—

(1) be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

(b) UNLAWFUL TERMINATION.—An employer who willfully violates section 5104 shall—

(1) be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

SEC. 5106. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS.

29 USC 2601 note.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under this Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified under section 5102(a).

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for the uses specified in section 5102(a).

SEC. 5107. RULES OF CONSTRUCTION.

29 USC 2601 note.

Nothing in this Act shall be construed—

(1) to in any way diminish the rights or benefits that an employee is entitled to under any—

(A) other Federal, State, or local law;

(B) collective bargaining agreement; or

(C) existing employer policy; or

(2) to require financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for paid sick time under this Act that has not been used by such employee.

29 USC 2601 note.

SEC. 5108. EFFECTIVE DATE.

This Act, and the requirements under this Act, shall take effect not later than 15 days after the date of enactment of this Act.

29 USC 2601 note.

SEC. 5109. SUNSET.

This Act, and the requirements under this Act, shall expire on December 31, 2020.

29 USC 2601 note.

SEC. 5110. DEFINITIONS.

For purposes of the Act:

(1) EMPLOYEE.—The terms "employee" means an individual who is—

(A)(i) an employee, as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under subparagraph (E) or (F), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a reference to an employer described in clauses (i)(I) and (ii) of paragraph (5)(A); or

(ii) an employee of the Government Accountability Office;

(B) a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a));

(C) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), other than an applicant for employment;

(D) a covered employee, as defined in section 411(c) of title 3, United States Code;

(E) a Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code; or

(F) any other individual occupying a position in the civil service (as that term is defined in section 2101(1) of title 5, United States Code).

(2) EMPLOYER.—

(A) IN GENERAL.—The term "employer" means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under subclause (V);

(II) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(III) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an Executive Agency as defined in section 105 of title 5, United States Code, and including the U.S. Postal Service and the Postal Regulatory Commission; and

(ii) engaged in commerce (including government), or an industry or activity affecting commerce (including government), as defined in subparagraph (B)(iii).

(B) COVERED EMPLOYER.—

(i) IN GENERAL.—In subparagraph (A)(i)(I), the term "covered employer"—

(I) means any person engaged in commerce or in any industry or activity affecting commerce that—

(aa) in the case of a private entity or individual, employs fewer than 500 employees; and

(bb) in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees;

(II) includes—

(aa) includes any person acting directly or indirectly in the interest of an employer in relation to an employee (within the meaning of such phrase in section 3(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)); and

(bb) any successor in interest of an employer;

(III) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(IV) includes the Government Accountability Office and the Library of Congress.

(ii) PUBLIC AGENCY.—For purposes of clause (i)(IV), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(iii) DEFINITIONS.—For purposes of this subparagraph:

(I) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act of 1947 (29 U.S.C. 142 (1) and (3)).

(II) EMPLOYEE.—The term "employee" has the same meaning given such term in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)).

(III) PERSON.—The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(3) FLSA TERMS.—The terms "employ" and "State" have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(4) FMLA TERMS.—The terms "health care provider" and "son or daughter" have the meanings given such terms in section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611).

(5) PAID SICK TIME.—

(A) IN GENERAL.—The term "paid sick time" means an increment of compensated leave that—

(i) is provided by an employer for use during an absence from employment for a reason described in any paragraph of section 2(a); and

(ii) is calculated based on the employee's required compensation under subparagraph (B) and the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)), except that in no event shall such paid sick time exceed—

(I) $511 per day and $5,110 in the aggregate for a use described in paragraph (1), (2), or (3) of section 5102(a); and

(II) $200 per day and $2,000 in the aggregate for a use described in paragraph (4), (5), or (6) of section 5102(a).

(B) REQUIRED COMPENSATION.—

(i) IN GENERAL.—Subject to subparagraph (A)(ii), the employee's required compensation under this subparagraph shall be not less than the greater of the following:

(I) The employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)).

(II) The minimum wage rate in effect under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)).

(III) The minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed.

(ii) SPECIAL RULE FOR CARE OF FAMILY MEMBERS.—Subject to subparagraph (A)(ii), with respect to any paid sick time provided for any use described in paragraph (4), (5), or (6) of section 5102(a), the employee's required compensation under this subparagraph shall be two-thirds of the amount described in clause (B)(i).

(C) VARYING SCHEDULE HOURS CALCULATION.—In the case of a part-time employee described in section 5102(b)(2)(B) whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time under section 2(a), the employer shall use the following in place of such number:

Time period.

(i) Subject to clause (ii), a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.

(ii) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

(D) GUIDELINES.—Not later than 15 days after the date of the enactment of this Act, the Secretary of Labor

shall issue guidelines to assist employers in calculating the amount of paid sick time under subparagraph (A).

(E) REASONABLE NOTICE.—After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

SEC. 5111. REGULATORY AUTHORITIES.

29 USC 2601 note.

The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

(1) to exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out;

(2) to exempt small businesses with fewer than 50 employees from the requirements of section 5102(a)(5) when the imposition of such requirements would jeopardize the viability of the business as a going concern; and

(3) as necessary, to carry out the purposes of this Act, including to ensure consistency between this Act and Division C and Division G of the Families First Coronavirus Response Act.

DIVISION C—EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Emergency Family and Medical Leave Expansion Act.

SEC. 3101. SHORT TITLE.

29 USC 2601 note.

This Act may be cited as "Emergency Family and Medical Leave Expansion Act".

SEC. 3102. AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

(a) PUBLIC HEALTH EMERGENCY LEAVE.—

(1) IN GENERAL.—Section 102(a)(1) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)(1)) is amended by adding at the end the following:

"(F) During the period beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section 110.". Time period.

(2) PAID LEAVE REQUIREMENT.—Section 102(c) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(c)) is amended by striking "under subsection (a)" and inserting "under subsection (a) (other than certain periods of leave under subsection (a)(1)(F))".

(b) REQUIREMENTS.—Title I of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.) is amended by adding at the end the following:

"SEC. 110. PUBLIC HEALTH EMERGENCY LEAVE.

29 USC 2620.

"(a) DEFINITIONS.—The following shall apply with respect to leave under section 102(a)(1)(F): Applicability.

"(1) APPLICATION OF CERTAIN TERMS.—The definitions in section 101 shall apply, except as follows:

"(A) ELIGIBLE EMPLOYEE.—In lieu of the definition in sections 101(2)(A) and 101(2)(B)(ii), the term 'eligible employee' means an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested under section 102(a)(1)(F).

"(B) EMPLOYER THRESHOLD.—Section 101(4)(A)(i) shall be applied by substituting 'fewer than 500 employees' for '50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year'.

"(2) ADDITIONAL DEFINITIONS.—In addition to the definitions described in paragraph (1), the following definitions shall apply with respect to leave under section 102(a)(1)(F):

"(A) QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY.—The term 'qualifying need related to a public health emergency', with respect to leave, means the

employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

"(B) PUBLIC HEALTH EMERGENCY.—The term 'public health emergency' means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

"(C) CHILD CARE PROVIDER.—The term 'child care provider' means a provider who receives compensation for providing child care services on a regular basis, including an 'eligible child care provider' (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

"(D) SCHOOL.—The term 'school' means an 'elementary school' or 'secondary school' as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

"(3) REGULATORY AUTHORITIES.—The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

"(A) to exclude certain health care providers and emergency responders from the definition of eligible employee under section 110(a)(1)(A); and

"(B) to exempt small businesses with fewer than 50 employees from the requirements of section 102(a)(1)(F) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

"(b) RELATIONSHIP TO PAID LEAVE.—

"(1) UNPAID LEAVE FOR INITIAL 10 DAYS.—

"(A) IN GENERAL.—The first 10 days for which an employee takes leave under section 102(a)(1)(F) may consist of unpaid leave.

"(B) EMPLOYEE ELECTION.—An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave under section 102(a)(1)(F) in accordance with section 102(d)(2)(B).

"(2) PAID LEAVE FOR SUBSEQUENT DAYS.—

"(A) IN GENERAL.—An employer shall provide paid leave for each day of leave under section 102(a)(1)(F) that an employee takes after taking leave under such section for 10 days.

"(B) CALCULATION.—

"(i) IN GENERAL.—Subject to clause (ii), paid leave under subparagraph (A) for an employee shall be calculated based on—

"(I) an amount that is not less than two-thirds of an employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)); and

"(II) the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)).

"(ii) CLARIFICATION.—In no event shall such paid leave exceed $200 per day and $10,000 in the aggregate.

"(C) VARYING SCHEDULE HOURS CALCULATION.—In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave under section 102(a)(1)(F), the employer shall use the following in place of such number:

Time period.

"(i) Subject to clause (ii), a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.

"(ii) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

"(c) NOTICE.—In any case where the necessity for leave under section 102(a)(1)(F) for the purpose described in subsection (a)(2)(A)(iii) is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.

"(d) RESTORATION TO POSITION.—

"(1) IN GENERAL.—Section 104(a)(1) shall not apply with respect to an employee of an employer who employs fewer than 25 employees if the conditions described in paragraph (2) are met.

"(2) CONDITIONS.—The conditions described in this paragraph are the following:

"(A) The employee takes leave under section 102(a)(1)(F).

"(B) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer—

"(i) that affect employment; and

"(ii) are caused by a public health emergency during the period of leave.

"(C) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

"(D) If the reasonable efforts of the employer under subparagraph (C) fail, the employer makes reasonable efforts during the period described in paragraph (3) to contact the employee if an equivalent position described in subparagraph (C) becomes available.

"(3) CONTACT PERIOD.—The period described under this paragraph is the 1-year period beginning on the earlier of—

"(A) the date on which the qualifying need related to a public health emergency concludes; or

"(B) the date that is 12 weeks after the date on which the employee's leave under section 102(a)(1)(F) commences.".

29 USC 2620 note.

SEC. 3103. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under section 110(b)(2) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act, by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

29 USC 2620 note.

SEC. 3104. SPECIAL RULE FOR CERTAIN EMPLOYERS.

An employer under 110(a)(B) shall not be subject to section 107(a) for a violation of section 102(a)(1)(F) if the employer does not meet the definition of employer set forth in Section 101(4)(A)(i).

29 USC 2620 note.

SEC. 3105. SPECIAL RULE FOR HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made under of section 3102 of this Act.

29 USC 2620 note.

SEC. 3106. EFFECTIVE DATE.

This Act shall take effect not later than 15 days after the date of enactment of this Act.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
Plaintiff,

-v-

UNITED STATES DEPARTMENT OF LABOR, *et al.*
Defendants.

20-CV-3020 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

The ongoing COVID-19 pandemic has visited unforeseen and drastic hardship upon American workers. In response to this extraordinary challenge, Congress passed the Families First Coronavirus Response Act, which, broadly speaking, entitles employees who are unable to work due to COVID-19's myriad effects to federally subsidized paid leave. Congress charged the Department of Labor ("DOL") with administering the statute, and the agency promulgated a Final Rule implementing the law's provisions. *See* 85 Fed. Reg. 19,326 (Apr. 6, 2020) ("Final Rule").

The State of New York brings this suit under the Administrative Procedure Act, claiming that several features of DOL's Final Rule exceed the agency's authority under the statute. The parties have cross-moved for summary judgment, and DOL has moved to dismiss for lack of standing. For the reasons that follow, the Court concludes that New York has standing to sue and that several features of the Final Rule are invalid. New York's motion for summary judgment is therefore granted in substantial part, as explained below.

I. Background

"COVID-19 [is] a novel severe acute respiratory illness that has killed . . . more than 1[5]0,000 nationwide" to date. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct.

1613, 1613 (2020) (Mem.) (Roberts, C.J., concurring in denial of application for injunctive relief); *see also* Centers for Disease Control and Prevention, Coronavirus Disease 2019: Cases and Deaths in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html (last visited Aug. 1, 2020). "At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church*, 140 S. Ct. at 1613. Accordingly, social-distancing measures have been taken nationwide, by state and local governments and by civil society, to stem the spread of the virus. The impact on American workers is multifold, as both the infection itself and the public-health response have been dramatically disruptive to daily life and work.

The legislation at the heart of this litigation, the Families First Coronavirus Response Act, is one of several measures Congress has taken to provide relief to American workers and to promote public health. *See* Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020) ("FFCRA"). Broadly speaking, and as relevant here, the FFCRA obligates employers to offer sick leave and emergency family leave to employees who are unable to work because of the pandemic. By granting the employers a corresponding, offsetting tax credit, Congress subsidizes these benefits, though the employers front the costs.

This litigation involves two major provisions of that law: the Emergency Family and Medical Leave Expansion Act ("EFMLEA ") and the Emergency Paid Sick Leave Act ("EPSLA").

A. Emergency Family and Medical Leave Expansion Act

As its name suggests, the EFMLEA entitles employees who are unable to work because they must care for a dependent child due to COVID-19 to paid leave for a term of several

weeks.[1] *See* FFCRA §§ 3102(a)(2); 3102(b). Formally, it is an amendment to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Congress ultimately foots the bill for these benefits, by way of a tax credit to the employer or self-employed individual. *See* FFCRA §§ 7003(a), 7004(a).

An employer of "an employee who is a health care provider or emergency responder may elect to exclude such employee" from the benefits provided by the EFMLEA. *See* FFCRA § 3105. The FMLA defines "health care provider" as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate)," or "any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6)(B).

B. Emergency Paid Sick Leave Act

The EPSLA requires covered employers to provide paid sick leave[2] to employees with one of six qualifying COVID-19-related conditions. *See* FFCRA §§ 5102, 5110(2). The conditions include that the employee: (1) "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19"; (2) "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19"; (3) "is experiencing symptoms of COVID-19 and seeking a medical diagnosis"; (4) "is caring for an individual subject" to a quarantine or isolation order by the government or a healthcare provider; (5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or (6) "is experiencing any other substantially similar condition specified by the Secretary of Health

[1] The first ten days for which an employee of a covered employer takes emergency family leave under the EFMLEA may be unpaid, but after ten days, employees are entitled to job-protected emergency family leave at two-thirds of their regular wages for another ten weeks. *See* FFCRA § 3102(b) (adding FMLA § 110(b)(2)).

[2] The EPSLA entitles full-time employees to 80 hours — or roughly two weeks — of job-protected paid sick leave. *Id.* §§ 5102(b)(2)(A), 5104(1).

and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor." *Id.* § 5102(a). In parallel to the EFMLEA's exemption for healthcare providers, under the EPSLA, an employer may deny leave to an employee with a qualifying condition if the employee "is a health care provider or an emergency responder." *Id.* The statute specifies that "health care provider" has the same meaning given that term in the FMLA. *Id.* § 5110(4) (citing 29 U.S.C. § 2611). And the Secretary of Labor "may issue regulations to exclude certain health care providers and emergency responders from the definition of employee." *Id.* § 5111(1). As it does under the EFMLEA, the federal government ultimately covers the cost of the benefits through a tax credit to employers. FFCRA §§ 7001(a), 7002.

C. The Department of Labor's Final Rule

On April 1, 2020, DOL promulgated its Final Rule implementing the FFCRA.[3] As explained in greater detail below, the present challenge relates to four features of that regulation: its so-called "work-availability" requirement; its definition of "health care provider"; its provisions relating to intermittent leave; and its documentation requirements. Broadly speaking, New York argues that each of these provisions unduly restricts paid leave.

On April 14, 2020, New York filed this suit and simultaneously moved for summary judgment. (*See* Dkt. No. 1.) On April 28, 2020, DOL cross-moved for summary judgment and moved to dismiss for lack of standing. (*See* Dkt. No. 24.) Those motions are now fully briefed, and the Court has received the brief of amici curiae Service Employees International and 1199SEIU, United Healthcare Workers East in support of New York.[4] (*See* Dkt. No. 31.) The Court heard oral argument on May 12, 2020.

[3] The Rule was promulgated without notice-and-comment procedures, pursuant to a statutory designation of good cause under the APA. *See* FFCRA §§ 501(a)(3), 5111.

[4] The unions' motion to file their amicus brief is granted. (*See* Dkt. No. 31.)

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When "a party seeks review of agency action under the APA, the 'entire case on review is a question of law,' such that 'judicial review of agency action is often accomplished by filing cross-motions for summary judgment.'" *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (alteration and citation omitted). Sitting as an "appellate tribunal," the district court must "decid[e], as a matter of law, whether the agency action is . . . consistent with the APA standard of review." *Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting *Kadi v. Geithner*, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015).

III. Discussion

A. Standing

The Court's analysis begins with its jurisdiction, specifically the State of New York's standing to sue. Though DOL styled its objection to New York's standing as a motion to dismiss pursuant to Rule 12(b)(1), "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). New York has moved for summary judgment on its claims, and it bears the burden of proof at trial to show its own standing. Irrespective of DOL's labeling, then, New York must demonstrate, through "affidavit or other evidence," *id.* at 561, that there exists no genuine dispute of material fact that it has standing, as it must do with respect to every element of its claim to obtain summary judgment.

To establish its constitutional standing, New York must demonstrate (1) an injury in fact . . . [that is] concrete and particularized [and] actual or imminent, not conjectural or

hypothetical," (2) that the injury is "fairly traceable to the challenged action," and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal alterations, quotation marks, and citations omitted). All three components of standing — injury-in-fact, causation, and redressability — are contested here.

In the context of state standing, courts generally recognize three types of constitutionally cognizable injuries. First, like a private entity, a state may suffer a direct, proprietary injury, for example, a monetary injury. *See New York v. Mnuchin*, 408 F. Supp. 3d 399, 408 (S.D.N.Y. 2019). Second, a state may suffer an injury to its so-called "quasi-sovereign interests." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Though the universe of "quasi-sovereign interests" has never been comprehensively defined, it is understood to encompass both "the health and well-being — []physical and economic — of its residents in general," as well as the state's interest in "not being discriminatorily denied its rightful status within the federal system." *Id.* When a state sues to vindicate its quasi-sovereign interests, it is said to be suing in its *parens patriae* capacity. *Id.* (The third type of injury, which is not at issue in this case, is an injury to a sovereign interest, such as "the power to create and enforce a legal code," *id.*, or those implicated in the "adjudication of boundary disputes or water rights," *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000).) Importantly, these categories (proprietary, quasi-sovereign, and sovereign) are not hermetically sealed from one another, and a single act may injure a state in more than one respect.

New York claims that the Final Rule's challenged features, which either limit paid leave or burden its exercise, impose both proprietary and quasi-sovereign injuries on the state. (*See* Dkt. No. 27 at 3–13.) Without paid leave, New York argues, employees must choose between taking unpaid leave and going to work even when sick. (*See* Dkt. No. 27 at 7–13.) Some

employees will elect the former, the State predicts, diminishing their taxable income and therefore the State's tax revenue. (*See* Dkt. No. 27 at 11–13.) Some will choose the latter, escalating the spread of the virus and thereby raising the State's healthcare costs. (*See* Dkt. No. 27 at 7–10.) And overall, the bind employees are left in will result in greater reliance on various state-administered programs, increasing the State's administrative burden. (*See* Dkt. No. 27 at 10–11.)

These predictions are supported by New York's record evidence, which consists of declarations from public-health and policy experts opining, based on empirical studies, that when paid leave is diminished, fewer sick employees take leave, transmission of flu-like diseases rises, and more employees take unpaid leave. (*See* Dkt. No. 26, Ex. 1, ¶ 17; Dkt. No. 26, Ex. 4 ¶ 12.) Indeed, the Final Rule itself is grounded in an acknowledgement that a dearth of paid leave will result in employees' being "forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19." Final Rule at 19,335. The evidence also suggests that the predictable consequence of the Final Rule will be less taxable income for the state, because both regular wages and paid leave benefits are taxable income, but unpaid leave generates no taxable income. (*See* Dkt. No. 26, Ex. 3.) Because "[a] state's 'loss of *specific* tax revenues' is a 'direct [proprietary] injury' capable of supporting standing," New York may sue to vindicate this "[e]xpected financial loss." *New York*, 408 F. Supp. 3d at 409 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992)) (emphasis added).

DOL complains that New York's evidence is insufficient because at summary judgment, the State is required to show "empirical" evidence quantifying these effects "in minimally concrete numbers and terms." (Dkt. No. 30 at 5.) But no precedent requires the Court to disregard non-quantitative evidence, or to demand specific numerical projections. To the

contrary, because even "an identifiable trifle" suffices to demonstrate standing, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973), all New York must show is that it will be injured, not the magnitude of its injury. Indeed, the very out-of-circuit precedent cited by DOL eschews any notion that the specific amount of the financial loss, rather than the mere fact of it, must be shown to demonstrate standing. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 923 F.3d 209, 226 (1st Cir. 2019) ("The Departments' attack on the accuracy of the numbers provided by the Commonwealth misses the point: the Commonwealth need not be exactly correct in its numerical estimates in order to demonstrate an imminent fiscal harm."); *id.* ("Whether costs to the Commonwealth are above or below this [estimate], they are not zero.") In urging that New York's injury is not sufficiently "concretized," DOL confuses a qualitatively concrete harm, which the standing precedents require, with a quantitatively concrete harm, which has no special constitutional significance.

Nor is the causal chain between the challenged action and the predicted harm too attenuated. The chain consists of few links, none of which DOL can seriously contest: Restricting eligibility and increasing administrative burdens for paid leave will reduce the number of employees receiving paid leave; some employees who need leave will therefore take unpaid leave;[5] their income will decrease, shrinking the state's income tax base. Despite the federal government's characterization, this is hardly an argument "that actions taken by United States Government agencies [will] injure[] a State's economy and thereby cause[] a decline in general tax revenues." *Wyoming*, 502 U.S. at 448. To the contrary, it is the specific and

[5] The Court need not and does not address the alleged diminution in the State's *sales* tax revenue, which admittedly rests on a more attenuated causal chain.

imminently threatened diminution of an identifiable source of tax revenue. And by the same token, New York's injury will be redressed by a favorable ruling. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (Kavanaugh, J.) ("Causation and redressability typically overlap as two sides of a causation coin . . . . [I]f a government action causes an injury, enjoining the action usually will redress that injury." (citation and internal quotation marks omitted)).

Because the threatened injury to New York's tax revenue is sufficient to support standing, the Court need not address the state's alternative theories of standing, namely, the potential burden on its healthcare system or the injury to its quasi-sovereign interests.[6]

[6] Though the Court does not reach New York's argument regarding *parens patriae* standing, a few words are in order about that theory. By invoking its *parens patriae* standing, New York invites the Court to enter something of a legal thicket. It is well established that an injury to a State's quasi-sovereign interest fulfills Article III's requirement that a State suffer an injury-in-fact. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. But the courts have also long recognized that generally, at least in constitutional cases, a State may not invoke its *parens patriae* standing against the federal government, because, the traditional justification goes, "[i]n that field, it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). This common-law limitation is known as the "*Mellon* bar," named for the almost hundred-year-old case in which it was first articulated. *See id.*

The success of New York's *parens patriae* argument turns on a fundamental but arguably unresolved doctrinal question about the *Mellon* bar: Does *Mellon* apply in suits, like this one, brought by a state to enforce a statute rather than the Constitution? *See Connecticut v. U.S. Dep't of Commerce*, 204 F.3d 413, 415 n.2 (2d Cir. 2000) (declining to address question). The traditional justification for the judge-made limitation would seem to hold no water in that context, because "[t]he prerogative of the federal government to represent the interests of its citizens . . . is not endangered so long as Congress has the power of conferring or withholding" the statutory right. *Maryland People's Counsel v. FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (Scalia, J.).

New York contends that the Supreme Court's decision in *Massachusetts v. EPA* definitively resolves this doctrinal question in favor of a state's *parens patriae* standing in statutory actions. (*See* Dkt. No. 27 at 3–5; *see also* 549 U.S. 497 (2007).) The *Massachusetts* majority's discussion of *parens patriae* standing is not a paragon of clarity, but that case aside, sound arguments nonetheless still seem to support the conclusion that the *Mellon* bar does not prohibit suits in which Congress has conferred a statutory cause of action upon a state. There is

no serious question that a quasi-sovereign injury satisfies the "irreducible minimum" of *Article III* standing; "[o]therwise the numerous cases allowing *parens patriae* standing in suits not involving the federal government would be inexplicable." *Maryland People's Counsel*, 760 F.2d at 321. Moreover, as noted at the outset, the traditional justification for the *Mellon* bar is seemingly inapt in the context of claims involving statutory rights. And the imposition of a judge-made, prudential bar to suit when there exists a constitutional case or controversy and Congress has endowed the litigant with a statutory cause of action is seemingly incongruous with the modern recognition that "a federal court's obligation to hear and decide" cases within its jurisdiction "is virtually unflagging," *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014) (internal quotation marks and citation omitted), as well as with basic separation-of-powers principles.

The relevant question, then, would seem to be not whether the state has *constitutional* standing to bring a suit in its *parens patriae* capacity (it does, if it has suffered a quasi-sovereign injury), but rather whether the state has *statutory* standing. Or, to use modern parlance, the relevant question is whether the state's congressionally conferred cause of action is capacious enough to support a *parens patriae* suit. *See Lexmark*, 572 U.S. at 128 n.4 (2014) (explaining that "prudential standing" is really a question of a litigant's cause of action). Indeed, even Defendants accept the conclusion that *if* Congress has furnished a cause of action to New York for this kind of suit, the *Mellon* bar has no application. (*See* Dkt. No. 25 at 13.) That conclusion squares with the Second Circuit's approach in *parens patriae* cases involving private defendants, which distinguishes between the question of constitutional injury to a quasi-sovereign interest and statutory standing to bring a *parens patriae* action. *See Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 120 (2d Cir. 2002). The touchstone, then, is congressional intent.

The D.C. Circuit, which DOL invokes repeatedly, takes just such an approach. That court has long recognized "that the courts must dispense with [the *Mellon* bar] if Congress so provides." *Maryland People's Counsel*, 760 F.2d at 321; *see also Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019) ("Because the *Mellon* bar is prudential, we have held that the Congress may by statute authorize a State to sue the federal government in its *parens patriae* capacity."). And though a recent D.C. Circuit opinion, heavily relied upon by the federal government here, held that the general cause of action in the APA did not *alone* evince an intent to authorize *parens patriae* suits by states against the federal government, it withheld judgment on the forfeited argument that the underlying statute forming the basis of the action (in that case, the National Environmental Policy Act) did so. *Id.* n.4. In short, the D.C. Circuit did not adopt a bright-line rule that APA suits can never be brought in a state's *parens patriae* capacity, but rather indicated that the question may turn on congressional intent as expressed in the *underlying* statute that the litigant claims was violated. That the inquiry might turn on the underlying statute is consistent with direct-injury cases under the APA, where the question of "statutory standing" (*i.e.*, the cause of action) also turns on "the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 (1991) (internal quotation marks and citation omitted).

Having determined that the State possesses standing based on its proprietary injury to its tax revenue, the Court proceeds to the merits.

B. The Work-Availability Requirement

New York's first challenge goes to a fundamental feature of the regulatory scheme, the work-availability requirement. By way of reminder, the EPSLA grants paid leave to employees who are "unable to work (or telework) due to a need for leave because" of any of six COVID-19-related criteria. FFCRA § 5102(a). The EFMLEA similarly applies to employees "unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency." FFCRA § 101(a)(2)(A). The Final Rule implementing each of these provisions, however, excludes from these benefits employees whose employers "do[] not have work" for them. *See* Final Rule at 19,349–50 (§§ 826.20(a)(2), (6), (9), (b)(1)).

The limitation is hugely consequential for the employees and employers covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed. The work-availability requirement may therefore greatly affect the breadth of the statutory leave entitlements.

The question posed to the Court is whether the work-availability requirement is consistent with the FFCRA. But before turning to that central issue, the Court must address the

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That understanding has considerable virtues: it harmonizes *parens patriae* cases with modern standing doctrine, and it confines the *Mellon* doctrine to its justifiable limits. Neither party here, however, has briefed the question of precisely how this Court should discern such congressional intent — for example, whether the normal zone-of-interests test for statutory standing under the APA applies, or whether, in *parens patriae* suits against the federal government, federalism concerns require something more searching. And ultimately, the State's direct, proprietary injury is sufficient to confer constitutional standing, and the federal government has not disputed that the State possesses a right of action to vindicate that injury. The Court therefore need not decide these thorny academic issues.

antecedent question of the work-availability requirement's scope. Specifically, in the context of the EPSLA, the express language of the Final Rule applies the work-availability requirement to only three of the six qualifying conditions. *See* Final Rule at 19,349–50 (§ 826.20(a)(2), (6), (9).) DOL nonetheless urges the Court to superimpose the requirement onto the three remaining conditions. In its view, the statute's language compels the work-availability requirement, and therefore, the Final Rule must be interpreted to apply it to each of the six enumerated circumstances. (*See* Dkt. No. 30 at 8.)

Even if DOL's statutory premise were correct, however, its conclusion would not follow. No canon of regulatory interpretation requires this Court to adopt a saving construction of the Final Rule, or to interpret it so as to avoid conflict with the statute. To the contrary, the Court must interpret the Final Rule based on its "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In arguing that the regulation must be interpreted consistent with the statute, even if such an interpretation is contrary to the regulation's unambiguous terms, DOL puts the proverbial cart before the horse.[7]

This Court therefore undertakes anew the task of interpreting the Final Rule, and in so doing, concludes that its terms are clear: The work-availability requirement applies only to three

[7] The doctrine of *Auer* or *Seminole Rock* deference is of no help to DOL here. Just last term, the Supreme Court made clear that "convenient litigating positions" are not entitled to such deference, *Kisor*, 139 S. Ct. at 2417, and DOL has not explained how the interpretation advanced before this Court is anything more than a newly articulated litigating position.

It is true that deference to an interpretation of a regulation embodied in the regulation's preamble is usually warranted, as it "is evidence of an agency's contemporaneous understanding of its proposed rules." *Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 52–53 (2d Cir. 2016) (citation omitted). But the preamble only reinforces that the work-availability requirement applies only to three of the six qualifying conditions, in that it only mentions the requirement in its discussion of some qualifying conditions. *See* 85 Fed. Reg. 19329–30. And, in any event, even if the preamble supported the agency's position, it could not countermand the unambiguous terms of the regulation itself.

of the Emergency Paid Sick Leave Act's six qualifying conditions. Nothing in the Final Rule's text or structure suggests the requirement applies outside of the three circumstances to which it is explicitly attached. And, as traditional tools of textual interpretation teach, the explicit recitation of the requirement with respect to some qualifying circumstances suggests by negative implication its inapplicability to the other three. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017). DOL has proffered no reason, apart from its statutory argument, that the regulation should be interpreted to apply the requirement more broadly than the Final Rule's express terms command. Accordingly, the Court concludes that the work-availability requirement applies only to three of the six qualifying conditions under the EPSLA, as well as family leave under the EFMLEA.

The question remains, however, whether that regime exceeds the agency's authority under the statute. To answer that question, the Court must apply *Chevron*'s familiar two-step framework. *See Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue," courts will defer to an agency's interpretation as long as it is reasonable. 467 U.S. at 843. Thus, at Chevron's first step, the Court must determine whether the statute is ambiguous. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 507 (2d Cir. 2017). If it is, the Court must proceed to step two and determine whether the agency's interpretation of the ambiguous statute is reasonable. *See id.*

The statute here grants paid leave to employees who, in the case of the EPSLA, are "unable to work (or telework) due to a need for leave because" of any of the six qualifying conditions or, in the case of the EFMLEA, are "unable to work (or telework) due to a need for leave to care for" a child due to COVID-19. *See* FFCRA §§ 5102(a), 110(a)(2)(A). According

to DOL, those terms are unambiguous, such that the Court's need not advance to *Chevron*'s second step. Specifically, DOL urges that the terms "due to" (as it appears in both provisions at issue) and "because" *compel* the conclusion that an employee whose employer "does not have work" for them is not entitled to leave irrespective of any qualifying condition. The terms "due to" and "because," DOL argues, imply a but-for causal relationship. If the employer lacks work for the employee, the employee's qualifying condition would not be a but-for cause of their inability to work, but rather merely one of multiple sufficient causes. And, DOL adds, an absence from work due to a lack of work is not "leave."

DOL is correct, of course, that the traditional meaning of "because" (and "due to") implies a but-for causal relationship. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020). But to say that these terms usually connote but-for causation is not to say that they unambiguously do. Nor does it necessarily follow that the baseline requirement of but-for causation cannot be supplemented with a special rule for the case of multiple sufficient causation. *See Burrage v. United States*, 571 U.S. 204, 214 (2014) (acknowledging that but-for causation, in typical legal usage, is sometimes supplemented with a special rule for multiple sufficient causation). Indeed, as the Supreme Court recently recognized in another statutory context interpreting the term "because,"

> Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law. *Cf.* 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because of" . . . . *Cf.* 22 U.S.C. § 2688. But none of this is the law we have.

Bostock, 140 S. Ct. 1731, 1739 (2020). Here, the Court cannot conclude that the terms "because" or "due to" unambiguously foreclose an interpretation entitling employees whose

inability to work has multiple sufficient causes — some qualifying and some not — to paid leave.

Nor is the Court persuaded that the term "leave" requires that the inability to work be caused solely by a qualifying condition. "Leave," DOL argues, connotes "authorized especially extended absence from duty or employment," or "time permitted away from work, esp[ecially] for a medical condition or illness or for some other purpose." (*See* Dkt. No. 25 at 23 (first quoting Definition of Leave, Merriam-Webster, https://www.merriam-webster.com/dictionary/leave (last accessed Aug. 2, 2020), and then quoting Definition of Leave, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/leave (last accessed Aug. 2, 2020).) But those definitions can accommodate New York's view as well as DOL's. An employee may need leave (*i.e.*, an agreed-upon and permitted absence from work) tethered to one reason even if her employer has no present work for her due to some other reason. For example, in ordinary usage, a teacher on paid parental leave may still be considered on "leave" even if school is called off for a snow day.

New York, for its part, argues that the statute unambiguously forecloses DOL's argument. (*See* Dkt. No. 4 at 8–10.) The statute, New York notes, both uses mandatory language to describe the obligation to provide paid leave and contains several express exceptions to that obligation, suggesting the absence of other implied limitations. (*See* Dkt. No. 4 at 8.) But those features of the statute are entirely consistent with DOL's interpretation. The causation requirement in the Final Rule is not an additional, implicit exception, nor a negation of the mandatory nature of the leave obligations, but rather a limiter of the universe of individuals who qualify for the leave in the first instance. The statutory regime cannot be implemented without ascribing *some* causal requirement to the causal language, and doing so is not tantamount to

adding an additional, exogenous criterion. New York also perceives a conflict between requiring but-for causation and the broader remedial goals of the statute, given that the Final Rule would dramatically narrow the pool of employees entitled to leave as compared to New York's preferred interpretation. (*See* Dkt. No. 4 at 10–11.) But any such conflict is immaterial at *Chevron*'s first step, where the Court's charge is only to determine whether the statute's text is ambiguous. And in any event, that Congress's aim in passing the statute was remedial does not require that every provision of the statute be read to unambiguously be given maximal remedial effect. The statute, like virtually all statutes, reflects a balance struck by Congress between competing objectives.

The statute's text, the Court concludes, is ambiguous as to whether it requires but-for causation in all circumstances, or instead whether some other causal relationship — specifically, multiple sufficient causation — satisfies its eligibility criteria. The Court must therefore proceed to *Chevron*'s second step.

At its second step, *Chevron* requires an inquiry into "whether the agency's answer [to the interpretive question] is based on a permissible construction." *Catskill Mountains*, 846 F.3d at 520 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011)). A reviewing court should not "disturb an agency rule at *Chevron* step two unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Id.* Even under this deferential standard of review, interpretations "arrived at with no explanation," like interpretations "picked out of a hat," are unacceptable, even if they "might otherwise be deemed reasonable on some unstated ground." *Catskill Mountains*, 846 F.3d at 520.

The Final Rule's work-availability requirement fails at *Chevron* step two, for two reasons. First, as to the EPSLA, the Final Rule's differential treatment of the six qualifying

conditions is entirely unreasoned. Nothing in the Final Rule explains this anomaly. And that differential treatment is manifestly contrary to the statute's language, given that the six qualifying conditions share a single statutory umbrella provision containing the causal language. *See* FFCRA § 5102(a). Second, and more fundamentally, the agency's barebones explanation for the work-availability requirement is patently deficient. The requirement, as an exercise of the agency's delegated authority, is an enormously consequential determination that may considerably narrow the statute's potential scope. In support of that monumental policy decision, however, the Final Rule offers only *ipse dixit* stating that "but-for" causation is required. *See, e.g.*, Final Rule at 19329 (reasoning that the work-availability requirement is justified "because the employee would be unable to work even if he or she" did not have a qualifying condition). That terse, circular regurgitation of the requirement does not pass *Chevron*'s minimal requirement of reasoned decision-making. The work-availability requirement therefore fails *Chevron*'s second step.

C. Definition of "Health Care Provider"

The State of New York next contends that the Final Rule's definition of a "health care provider" exceeds DOL's authority under the statute. (*See* Dkt. No. 4 at 11–16.) Because employers may elect to *exclude* "health care providers" from leave benefits, the breadth of the term "health care provider" has grave consequences for employees.

The FMLA, which supplies the relevant statutory definition for both provisions of the FFCRA at issue, defines a "health care provider" as: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6). The Final Rule's definition is worth quoting at

length; invoking the Secretary's authority under subsection (B), it defines a "health care provider" for the purposes of the FFCRA leave provisions as:

> anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as

> any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Final Rule at 19,351 (§ 826.25). The definition, needless to say, is expansive: DOL concedes that an English professor, librarian, or cafeteria manager at a university with a medical school would all be "health care providers" under the Rule. (*See* Dkt. No. 25 at 29.)

Returning to *Chevron*'s first step, the Court concludes that the statute unambiguously forecloses the Final Rule's definition. The broad grant of authority to the Secretary is not limitless. The statute requires that the Secretary determine that the *employee* be capable of furnishing healthcare services. It is the "person" — *i.e.*, the employee — that the Secretary must designate. 29 U.S.C. § 2611(6). And the Secretary's determination must be that the person is *capable of providing healthcare services*; not that their work is remotely related to someone else's provision of healthcare services. Of course, this limitation does not imply that the Secretary's designation must be made on an individual-by-individual basis. But the statutory text requires at least a minimally role-specific determination. DOL's definition, however, hinges

entirely on the identity of the *employer*, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees.

DOL nonetheless urges that its definition is consistent with the context in which the term is used. The term "health care provider," as used in the FFCRA, serves to exempt employees who are essential to maintaining a functioning healthcare system during the pandemic. *See* Final Rule at 19,335. A broad definition of "health care provider" operationalizes that goal, because employees who do not directly provide healthcare services to patients — for example, lab technicians or hospital administrators — may nonetheless be essential to the functioning of the healthcare system. (*See* Dkt. No. 25 at 28.) But that rationale cannot supersede the statute's unambiguous terms. And, in any event, the Final Rule's definition is vastly overbroad even if one accepts the agency's purposivistic approach to interpretation, in that it includes employees whose roles bear *no nexus whatsoever* to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system's vitality. Think, again, of the English professor, who no doubt would be surprised to find that as far as DOL is concerned, she is essential to the country's public-health response. The definition cannot stand.[8]

[8] New York levies an additional challenge against the definition of "health care provider." The Final Rule purports to define a "health care provider" solely for the purposes of the EFMLEA and EPSLA, while leaving in place the narrower definition in pre-existing regulations implementing the FMLA. The definition, New York claims, must track the definition ascribed to the same words elsewhere in the FMLA, because the same provision gives the definition of "health care provider" for both relevant sections the FFCRA and for the remainder of the FMLA. (*See* Dkt. No. 4 at 15–16.) But the Supreme Court has occasionally suggested that an agency may interpret a shared term differently across various sections of a statute, even if the statute provides a single statutory definition, as long as the different definitions individually are reasoned and do not exceed the agency's authority. *See, e.g.*, *Barber v. Thomas*, 560 U.S. 474, 574–75 (2010); *but see id.* at 582–83 (Thomas, J., dissenting). Nonetheless, because the Court rejects the Final Rule's definition on other grounds, it has no occasion to consider whether the differentiation is permissible.

D. Intermittent Leave

New York next argues that the regulation's prohibition on intermittent leave exceeds DOL's authority under the statute. The Final Rule permits "employees to take Paid Sick Leave or Expanded Family and Medical Leave intermittently (*i.e.*, in separate periods of time, rather than one continuous period) only if the Employer and Employee agree," and, even then, only for a subset of the qualifying conditions. *See* Final Rule at 19,353 (§§ 826.50(a)-(c)). By constraining the exercise of intermittent leave to "circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees," the Final Rule balances the statute's goals of employee welfare and public health. *Id.* at 19,337.

The parties again disagree on the meaning of the regulations. New York reads the regulations to require employees to take *any* qualifying leave in a single block, and that any leave not taken consecutively in a single block is thereafter forfeited. (*See* Dkt. No. 4 at 17–20.) On this understanding, an employee who took two days off while seeking a COVID-19 diagnosis but thereafter returned to work could not take any additional EFMLEA leave, even if the employee later developed a different qualifying condition. DOL responds that the regulations forbid intermittent leave only for any *single* qualifying reason. (*See* Dkt. No. 25 at 30–31.) Thus, if the employee returns to work after taking two days of qualifying leave while seeking a diagnosis, the employee may later take more paid leave if she develops another qualifying condition.

This time, the language of the regulation favors DOL's view. The Final Rule states that "[o]nce the Employee begins taking Paid Sick Leave for one or more of [the reasons for which intermittent leave is forbidden], the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave." Final Rule at 19,353. That provision, however, says nothing about forfeiting *remaining* days of

leave after leave is taken intermittently. The most natural reading of the provision, then, squares with the interpretation advanced by DOL: An employee taking leave for an intermittent-leave-restricted reason must take his or her leave consecutively until his or her need for leave abates. But once the need for leave abates, the employee retains any remaining paid leave, and may resume leave if and when another qualifying condition arises. That understanding is also in harmony with the Rule's stated justification for the restriction, which, as discussed in more detail below, relates to the public-health risk of an employee who may be infected with COVID-19 returning to work before the risk of contagion dissipates.

Turning to the heart of New York's challenge, the Court concludes that the intermittent-leave constraints, as properly interpreted, are largely though not entirely consistent with the FFCRA. Congress did not address intermittent leave at all in the FFCRA; it is therefore precisely the sort of statutory gap, under *Chevron* step one, that DOL's broad regulatory authority empowers it to fill. FFCRA § 5111(3) (delegating the authority to the Secretary to promulgate regulations "as necessary, to carry out the purposes of this Act"); *see id.* § 3102(b), *amended by* CARES Act § 3611(7) (same). Moreover, Congress knows how to address intermittent leave if it so desires; the FFCRA's silence contrasts with the presence of both affirmative grants and affirmative proscriptions on intermittent leave in the FMLA. *See* 29 U.S.C. § 2612(b)(1). Unlike in those instances, in the context of the FFCRA, Congress left this interstitial detail to the agency's expert decision-making. And though New York points to several provisions in the FFCRA that would be nonsensical if leave could not be accrued incrementally (*see* Dkt. No. 4 at 18–20), those provisions cohere with the Final Rule's intermittent leave restrictions as properly interpreted, because the Final Rule as construed contemplates leave taken in multiple increments, as long as each increment is attributable to a

different instance of qualifying conditions. DOL's intermittent-leave rules are therefore entitled to deference if they are reasonable. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168 (2d Cir. 2017).

The intermittent-leave provisions falter in part, however, at *Chevron*'s second step. Under the Final Rule, intermittent leave is allowed for only certain of the qualifying leave conditions, and, even then, only if the employer agrees to permit it. Final Rule at 19,353 (§§ 826.50(a)-(c)). The conditions for which intermittent leave is entirely barred are those which logically correlate with a higher risk of viral infection.[9] As explained in the Final Rule's preamble, this restriction advances Congress's public-health objectives by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus. *See id.* at 19,337. Fair enough. But that justification, while sufficient to explain the Final Rule's *prohibitions* on intermittent leave for qualifying conditions that correspond with an increased risk of infection, utterly fails to explain why employer *consent* is required for the remaining qualifying conditions, which concededly do not implicate the same public-health considerations. For example, as the Final Rule explains, if an employee requires paid leave "solely to care for the employee's son or daughter whose school or place of care is closed," the "absence of confirmed or suspected COVID-19 in the employee's household reduces the risk that the employee will spread COVID-19 by reporting to the employer's

[9] These include leave because employees: are subject to government quarantine or isolation order related to COVID-19, have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, are experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis, are taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

worksite while taking intermittent paid leave." Final Rule at 19,337. The Final Rule therefore acknowledges that the justification for the bar on intermittent leave for certain qualifying conditions is inapplicable to other qualifying conditions, but provides no other rationale for the blanket requirement of employer consent. Insofar as it requires employer consent for intermittent leave, then, the Rule is entirely unreasoned and fails at *Chevron* step two. It survives *Chevron* review insofar as it bans intermittent leave based on qualifying conditions that implicate an employee's risk of viral transmission.

E. Documentation Requirements

Finally, New York argues that the Final Rule's documentation requirements are inconsistent with the statute. (*See* Dkt. No. 4 at 21–23.) The Final Rule requires that employees submit to their employer, "prior to taking [FFCRA] leave," documentation indicating, *inter alia*, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. *See* Final Rule at 19,355 (§ 826.100). But the FFCRA, as New York points out, contains a reticulated scheme governing prior notice. With respect to emergency paid family leave, the EFMLEA provides that, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." FFCRA § 3102(b) (adding FMLA § 110(c)). And with respect to paid sick leave, the EPSLA provides that "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." *Id.* § 5110(5)(E). To the extent that the Final Rule's documentation requirement imposes a different and more stringent precondition to leave, it is inconsistent with the statute's unambiguous notice provisions at fails at *Chevron* step one.

The federal government urges the Court to distinguish between the question of prior notice (which is what the statutory scheme addresses) and documentation requirements (which is what the regulation describes). (*See* Dkt. No. 33–34.) But a blanket (regulatory) requirement that an employee furnish documentation *before taking leave* renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice completely nugatory. Labels aside, the two measures are in unambiguous conflict. The federal government also contends that the documentation requirements are not onerous (*see* Dkt. No. 34 at 25); be that as it may, the requirement is an unyielding condition precedent to the receipt of leave and, in that respect, is more onerous than the unambiguous statutory scheme Congress enacted. The documentation requirements, to the extent they are a precondition to leave, cannot stand.

F. Severability

The APA requires courts to "hold unlawful and set aside agency action" that is not in accordance with law or in excess of statutory authority. 5 U.S.C. § 706(2). "Agency action" may include "the whole or a part of an agency rule." 5 U.S.C. § 551(13). "Thus, the APA permits a court to sever a rule by setting aside only the offending parts of the rule." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019). To that end, the "'invalid part' of a statute or regulation 'may be dropped if what is left is fully operative as a law,' absent evidence that 'the [agency] would not have enacted those provisions which are within its power, independently of that which is not.'" *United States v. Smith*, 945 F.3d 729, 738 (2d Cir. 2019) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

Here, New York contends that each offending portion of the Final Rule is severable from the remainder of the Final Rule. (*See* Dkt. No. 4 at 23–25.) DOL does not dispute the provisions' severability, and the Court sees no reason that the remainder of the Rule cannot

operate as promulgated in the absence of the invalid provisions. The following portions, and only the following portions, of the Final Rule are therefore vacated: the work-availability requirement; the definition of "health care provider"; the requirement that an employee secure employer consent for intermittent leave; and the temporal aspect of the documentation requirement, that is, the requirement that the documentation be provided before taking leave. The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, as distinguished from its temporal aspect, stand.

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The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.

G. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is DENIED. Plaintiff's motion for summary judgment is GRANTED as to the work-availability requirement, the definition of "health care provider," and the temporal aspect of the documentation requirements, and is GRANTED in part and DENIED in part as to the intermittent-leave provision. Defendants' motion for summary judgment is GRANTED in part as to the intermittent-leave prohibition, and is otherwise DENIED.

The Clerk of Court is directed to close the motions at Docket Numbers 3, 24, and 31.

SO ORDERED.

Dated: August 3, 2020
New York, New York

J. PAUL OETKEN
United States District Judge

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

WAGE AND HOUR DIVISION

August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work.

This Field Assistance Bulletin (FAB) provides guidance regarding employers' obligation under the Fair Labor Standards Act (FLSA or Act) to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers. In a telework or remote work arrangement, the question of the employer's obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements.

An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. *See* 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours worked through reasonable diligence. *See Allen v. City of Chicago*, 865 F.3d 936, 945 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1302 (2018). One way an employer may exercise such diligence is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer. *Id*. If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours. *Id.* However, an employer's time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked, and an employee may not waive his or her rights to compensation under the Act. *Id.* at 939; *see also Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Background

The FLSA generally requires employers to compensate their employees for all hours worked, including overtime hours. As the Department's interpretive rules explain, "[w]ork not requested but suffered or permitted is work time" that must be compensated. 29 C.F.R. § 785.11. This principle applies equally to work performed away from the employer's worksite or premises, such as telework performed at the employee's home. *Id.* § 785.12. "If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." *Id.* Employers are required to exercise control to ensure that work is not performed that they do not wish to be performed. *Id*. § 785.13.

While it may be easy to define what an employer actually knows, it may not always be clear when an employer "has reason to believe that work is being performed," particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor. This confusion may be exacerbated by the increasing frequency of telework and remote work arrangements since the Department issued the above interpretive rules in 1961. The Bureau of Labor Statistics estimated in 2019 that roughly 24 percent of working Americans performed some work at home on an average day (https://www.bls.gov/news.release/atus.t06.htm). And these arrangements have expanded even further in 2020 in response to the COVID-19 pandemic. Accordingly, WHD believes it is appropriate to clarify this issue.

Employer Must Pay for All Hours Worked that it Knows or Has Reason to Believe Was Performed

The FLSA requires an employer to "exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. § 785.13. The employer bears the burden of preventing work when it is not desired, and "[t]he mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." *Id.*; *see Hellmers v. Town of Vestal, N.Y.*, 969 F. Supp. 837, 845 (N.D.N.Y. 1997).[1] Work that an employer did not request but nonetheless "suffered or permitted" is therefore compensable. *Id*. § 785.11; *see also* 29 U.S.C. § 203(g). "Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work

[1] The phrase "must make every effort" in 29 C.F.R. § 785.13, however, does not mean that the "duty of the management to exercise its control" to prevent unwanted work is unlimited. *Hellmers*, 969 F. Supp. at 845-46 ("However, the duty [under 29 C.F.R. § 785.13] is not unlimited[.] … The question then is whether an employer's inquiry was reasonable in light of the circumstances surrounding the employer's business, including existing overtime policies and requirements."); *see also Chao v. Gotham Registry, Inc*., 514 F.3d 280, 291 (2d Cir. 2008) (explaining that "the law does not require [an employer] to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result").

done, and even if they had a rule against doing the work." *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted).

"However, the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (emphasis added). Thus, the employer's obligation under 29 C.F.R. § 785.13 to "make every effort" to prevent unwanted work being performed away from the employer's worksite or premises is not boundless. This is because an employer cannot make any effort—let alone every effort—to prevent unwanted work unless "the employer knows or has reason to believe the work is being performed." 29 C.F.R. § 785.12.

An employer's obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications. The FLSA's standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed. *See id*. An employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence. *Allen*, 865 F.3d at 945; *Hertz*, 566 F.3d at 782. Importantly, "[t]he reasonable diligence standard asks what the employer should have known, not what 'it could have known.'" *Allen*, 865 F.3d at 943 (quoting *Hertz*, 566 F.3d at 782). One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work is "by establishing a reasonable process for an employee to report uncompensated work time." *Id.* at 938. But the employer cannot implicitly or overtly discourage or impede accurate reporting, and the employer must compensate employees for all reported hours of work. *Id.* at 939 ("[A]n employer's formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice."); *see also Craig*, 823 F.3d at 390 (reversing summary judgment in part because employee had miscalculated the applicable hourly rate owed, and emphasizing that an employee may not waive his or her rights under the FLSA).[2]

However, if an employee fails to report unscheduled hours worked through such a procedure, the employer is generally not required to investigate further to uncover unreported hours. *Allen*, 865 F.3d at 938. Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported. *See, e.g.*, *id.* at 945 (affirming that the district court reasonably found that employer did not need to cross-reference "phone records or

[2] Additionally, if an employer is otherwise notified of work performed through a reasonable method, or if employees are not properly instructed on using a reporting system, then an employer may be liable for those hours worked. *Allen*, 865 F.3d. at 946 n.5 ("One can certainly argue that an employer has not created a reasonable reporting system—has not been reasonably diligent—if its employees do not know when to use that system.").

supervisors' knowledge of overtime to ensure that its employees were reporting their time correctly"); *Hertz*, 566 F.3d at 782 ("It would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours."); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) ("We hold that as a matter of law such 'access' to information [regarding activities performed by plaintiff] does not constitute constructive knowledge that Newton was working overtime.").[3]

"When the employee fails to follow reasonable time reporting procedures [he or] she prevents the employer from knowing its obligation to compensate the employee." *White v. Baptist Memorial Health Care Corp*., 699 F.3d 869, 876 (6th Cir. 2012). Moreover, where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system. *Id*. at 877. And the employer could not have "suffered or permitted" work it did not know and had no reason to believe was being performed. *See* 29 C.F.R. §§ 785.11–.12. Accordingly, failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA. *Id*.; *see also Forrester v. Roth's I. G. A. Foodliner, Inc*., 646 F.2d 413, 414 (9th Cir. 1981) ("[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer …, the employer's failure to pay for the overtime hours is not a [FLSA] violation.").

[3] This is not to say that consultation of records outside of the employer's timekeeping procedure may never be relevant. Depending on the circumstances it could be practical for the employer to consult such records. If so, those records would form the basis of constructive knowledge of hours worked. *Hertz*, 566 F.3d at 782 ("We do not foreclose the possibility that another case may lend itself to a finding that access to records would provide constructive knowledge of unpaid overtime work."); *see also Craig*, 823 F.3d at 392 ("Some cases may lend themselves to a finding that access to records would provide constructive knowledge of unpaid overtime work, but that is not a foregone conclusion.")