Discrimination, Harassment and Discovery Law Update

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SUMMARY OF 2019 UPDATES TO THE NEW YORK STATE HUMAN RIGHTS LAW WITH RESPECT TO EMPLOYMENT DISCRIMINATION AND HARASSMENT

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In August of 2019, New York State passed a major law amending the New York State Human Rights Law (Executive Law Article 15) expanding protections against discrimination and harassment. Below is a summary of the portions of the law most relevant to public employers and when the various provisions are effective.

Effective (and applicable to claims filed on or after) August 12, 2019:

- Requires courts to interpret Human Rights Law ("HRL") liberally and exceptions to be construed narrowly, regardless of whether similarly worded federal laws have been interpreted liberally;
- Expands the power of the NYS Attorney General to enforce the HRL based on any protected class/category;
- Requires employers to provide employees with notice of employer's sexual harassment policy in English and in employee's primary language;
- Requires a study on expanding harassment policies to all types of discrimination;
- Requires review of the state model sexual harassment policies every four years beginning in 2022.

Effective (and applicable to claims filed on or after) October 11, 2019:

- Eliminates the requirement that harassment be "severe and pervasive" in order to rise to the level of a violation of state law;
    - This was the standard previously applied by courts to analyze harassment complaints. The new standard considers whether the conduct "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more protected category."
- An employer can be liable even if the individual does not make a complaint of discrimination or harassment to the employer. (This erodes what was previously known as the "Farragher/Ellerth defense," which provided an affirmative defense for employers who had consistent and accessible harassment complaint procedures where the employee failed to avail themselves of those procedures. That defense may not now apply.)
    - The law instead provides a new affirmative defense for employers, where the employer can show that "the harassing conduct did not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."
- Expands protections against discrimination and harassment to domestic workers;
- Expands the protections against discrimination and harassment *on any basis* to non-employees (previously, this applied only to sexual harassment);

- Allows punitive damages to be awarded *against private employers* in discrimination and harassment cases ("Private employer" does not include the state or local subdivisions, boards, agencies or commissions);
- Allows for attorney's fees to be awarded against any employer in employment discrimination cases;
- Expands the prohibition on non-disclosure agreements to all types of harassment (not just sexual harassment);
- Provides that non-disclosure agreements may not prohibit the disclosure of the underlying facts and circumstances to the claim or action, unless the condition of confidentiality is the plaintiff's preference in all types of harassment cases;
- Prohibits mandatory arbitration to resolve cases of harassment (not just sexual harassment).

Effective January 1, 2020:

- Provides that settlements of employment discrimination claims cannot prevent complainants from speaking to an attorney, the Division of Human Rights, the EEOC, local human rights commissions, or any other form of law enforcement.

Effective (and applicable to claims filed on or after) February 8, 2020:

- Provides that the Human Rights Law covers all employers in the state, regardless of size, and specifically includes state and political subdivisions of the state (removing the prior 4-employee minimum).

Effective August 12, 2020

- Expands the time for filing a complaint with the Division of Human Rights from one year to three years for sexual harassment cases.

HOT EMPLOYMENT TOPICS IN THE COVID-19 WORLD

Prepared By: Roemer Wallens Gold & Mineaux LLP (Earl Redding Esq.; Elena Pablo, Esq.)
Prepared For: County Attorney Association Conference; September 14, 2020

I. LEAVE ISSUES

A. NEW YORK STATE COVID-19 PAID LEAVE

New York passed a law on March 18, 2020 providing paid sick leave and job protection to employees quarantined or for whom isolation is recommended. **(S8091; Law attached in Appendix.)**

Leave Entitlement: Public employers (regardless of size) are required to provide **at least 14 days of paid sick leave** to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, state or local department/board of health, or any governmental entity authorized to issue such orders due to COVID-19 ("quarantine or isolation.")[1]

Work-From-Home Employees: An employee who is asymptomatic or has not been diagnosed with a medical condition, and can work remotely during a quarantine or isolation, is not entitled to such leave.

Compensation and Accrued Leave: The employee must be compensated at their regular rate of pay for those regular work hours during which the employee is absent due to quarantine or isolation. The employee cannot be charged accrued sick leave.

Interaction with CBA: The law does not diminish any rights to greater benefits under a CBA or employer policy.

Return to Work Requirements: Employees must be returned to their position with the same pay and benefits when they return to work. Retaliation or penalization of an employee for taking this leave is prohibited.

Interaction with Other State Leave Benefits: Once all paid sick leave is exhausted, employees who cannot perform their duties because of quarantine or isolation or who are needed to care for a family member for these reasons are entitled to short-term disability and/or paid family leave under state law where the employer has opted to provide those benefits.

[1] An exception applies to an employee who is subject to quarantine because they are returning from a country which the CDC deemed a level two or three warning level, they were provided with notice of that threat beforehand, and they went on their own (not at the direction of the employer or as part of their job duties.) A temporary exception applies for employees returning from states on the travel advisory list which require 2-weeks of quarantine upon return, and who have had notice beforehand that they were traveling to a state on this list and went on their own.

Unemployment Insurance: The waiting periods normally applicable to collect unemployment benefits is waived for individuals applying for these benefits because of a closure of an employer for COVID-19-related reasons due to a mandatory order of a government entity authorized to issue such order.

Interaction with Federal Legislation: Any federal benefits equal or greater than those in this bill will apply. In the event the provisions of the state law would provide leave and/or benefits in excess of the benefits provided under federal law, employees are entitled to the "difference" of the state law benefits.

i. NYS Department of Health Guidance – COVID-19 Sick Leave for Health Care Employers

On June 25, 2020, the NYS Department of Health and NYS Department of Labor provided a jointly-issued guidance on the use of NYS COVID-19 sick leave by health care employees. **(Guidance attached in Appendix.)**

The Guidance defines "health care employee," and the goes on to state that, for those employees:

1. A health care employee who returns to work following a mandatory quarantine or isolation and subsequently receives a positive COVID-19 diagnosis must not return to work. The employee "shall be deemed subject to a mandatory isolation order from the Department of Health and shall be entitled to sick leave" under the NYS law *whether or not they have already received* sick leave for the first quarantine period. The employee must submit documentation of the positive test (unless the test was administered by their employer.)
2. If the health care employee subject to an order of quarantine or isolation but continues to test positive at the end of the quarantine or isolation period, they must not return to work. The employee "will be deemed subject to a second mandatory order of quarantine or isolation from the Department of Health and shall be entitled to sick leave" under the NYS law. The employee must submit documentation attesting they have received a positive test for COVID-19 after completing the initial isolation/quarantine period (unless the test was administered by their employer.)
3. The health care employee may not qualify for sick leave under NYS COVID-19 sick leave law for more than three orders of quarantine or isolation. The 2nd and 3rd order must be based on a positive COVID-19 test.

B. FEDERAL EMERGENCY LEAVE LAW

In addition to the leave discussed above, a new federal law has also provided for paid leave benefits for two weeks at full pay for employees for certain COVID-related absences, and two week and 2/3 pay for additional types of COVID-related absences. The law extends FMLA benefits to employees who need to stay home due to a school closure. The employer can exempt certain health care workers and emergency responders from the emergency paid leave provisions.

i. EMERGENCY PAID SICK LEAVE ("EPSL")

Effective Date: The emergency paid leave provisions are in effect until December 31, 2020.

Eligible Employees: Available regardless of how long the employee has been employed.

Amount of Paid Leave: Full-time employees are entitled to 80 hours (2 weeks). Part-time employees are entitled to a 2-week equivalent of the hours they normally work for qualifying reasons.

Pay Calculation: Pay must be provided at:

- Full pay UP TO $511/day and $5,110 total for leave under items 1-3;
- 2/3 pay UP TO $200/day and $2,000 total for leave under item 4-6.

Pay is calculated based on the regular rate of pay and number of hours the employee would be normally scheduled to work.

QUALIFYING FOR EMERGENCY PAID LEAVE:

An employer shall provide paid leave where the employee is unable to work (or telework) because:

1. They are subject to a federal, state, or local quarantine or isolation COVID-19 order;
2. They have been advised by a health care provider to self-quarantine due to COVID-19 concern;
3. They are experiencing COVID-19 symptoms and seeking a medical diagnosis;
4. They are caring for an individual who is subject to a federal, state or local quarantine or isolation order or have been advised by a health care provided to self-quarantine;
5. They are caring for their child because the school or place of care of the child has been closed, or the childcare provider is unavailable due to COVID-19;
6. They are experiencing other "substantially similar" conditions as determined by the federal Health and Human Services, Department of Labor and Department of Treasury. (So far, no such conditions have been specified.)

Interaction with State Law: There is overlap with the state-required 2 weeks of leave *ONLY* for employees subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, state or local department/board of health, or any governmental entity authorized to issue such orders due to COVID-19. Employees may not use both, but may use the more generous of the two.

Interaction with Existing Leave Entitlements: These provisions cannot diminish any rights or benefits the employee is entitled to under state or local law, CBA, or existing employer policy.

ii. EMERGENCY PAID FAMILY MEDICAL LEAVE ("EPFML")

NEW (TEMPORARY) QUALIFYING REASON FOR FMLA LEAVE: Through the end of 2020, a new qualifying reason for leave under the FMLA will be added in situations, like our current one, where a public health emergency has been declared with respect to the coronavirus by either federal, state or local authority. It includes diminished eligibility requirements.

FMLA QUALIFYING REASON – NEED RELATED TO COVID-19 PUBLIC HEALTH EMERGENCY: Where the employee is unable to work (or telework) due to the need to care for a son or daughter (under 18) whose school or place of care has been closed, or the child care provider is unavailable, due to public health emergency.

Effective Date:: Through December 31, 2020.

Eligible Employees: Any employee who has been employed for at least 30 days. (The requirement that the employee work 1,250 hours and be employed for 12 months does not apply.)

Relationship to Paid Leave:

- The first 10 days of leave may be unpaid. An employee may elect to substitute accrued leave (vacation, personal, sick) but the employer cannot require substitution. (Note this leave may paid, however, using EPSL as described above.)
- After the first 10 days, the employer must provide paid leave for each day of leave up to the 12-week allotment, at not less than 2/3 of the employee's regular rate of pay under the FLSA their normally scheduled work UP TO $200/day and $12,000 in total for the full 12 weeks.

Interaction with Traditional FMLA: Any use of EPFML by an employee counts toward the 12-weeks of FMLA leave they are entitled to for *any* qualifying reason in a 12-month period. An employee can take a maximum of 12 weeks of EPFML during the period this leave is active (4/2/2012/31/20) even if that period spans two FMLA leave 12-month periods.

Pay Calculation: The initial 2 weeks of leave can be unpaid, but the employee can concurrently use the 2/3 pay of EPSL for those two weeks if they have it available. After that, the remainder of the leave is also paid at 2/3 pay.[2] The pay is capped at $200/day up to $10,000 for the additional 10 weeks, and $200/day up to $2,000 for the first two weeks when running concurrently with EPSL.

Interaction with EPSL: An employee caring for a child whose school or place of care is closed or unavailable may be eligible to take leave both EPSL and EPFML. If so, the benefits run concurrently. They can be paid for the first two weeks under the EPSL, and then if they have a balance of FMLA time, can take up to an additional 10 weeks.

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2 An employee who has exhausted their 12 weeks of FMLA may still take up to 2 weeks of EPSL unless it has already been used for another EPSL reason.

Interaction with Accrued Paid Leave: An employee taking EPFML may take EPSL to be paid during the first two weeks, or may substitute accrued leave and be paid at full pay. After the first two weeks, the employee may elect or the employer may require the employee to take the remaining EPFML at the same time as existing paid leave that would be available to them for that reason and be paid at full pay. The employee and employer may also agree to supplement the 2/3 pay with accrued leave so the employee receives full pay at any time during the 12 weeks.

iii. NEW FFCRA GUIDANCE REGARDING FALL SCHOOL OPTIONS

When is a school or place of care "closed"?

Hybrid: If a school is operating on a hybrid-attendance basis (each student can only be present on certain days), the parent is eligible to take leave under the FFCRA on days when the child is not permitted to attend in-person. The school is "closed" to a child on days the child cannot attend in person.

Parent Choice: If the school gives parents the choice of whether the child will attend in person or remotely, the parent is not eligible to take leave under the FFCRA because the school is not "closed." However, if a child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the parent may be entitled to EPSL (for up to two weeks.)

Intermittent Leave: EPSL and EPFML can only be taken intermittently for reason (5) above - caring for a child whose school/day care is closed, and only if the employer and employee agree. Intermittently leave could *not* be taken for leaves (1)-(4) above.[3]

iv. DISCRETION FOR EXCLUSION OF EMPLOYEES FROM FFCRA

An employer who employs a health care provider or emergency responder may exempt those employees from EPSL and/or EPFML. These are defined as follows:

Health care provider: anyone employed by a 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 a permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.[4]

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. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized

3 See SDNY decision discussed below.
4 See SDNY case below.

equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing those individuals and whose work is necessary to maintain the operation of the facility.

v. REPORTING TO NYS RETIREMENT SYSTEM

The Office of the NYS Comptroller has issued guidance on how employees on furlough, paid leave, or FFCRA leave should be tracked and reported to the NYS Retirement System for purposes of determining service credit. **(Full Guidance Attached in Appendix.)**

vi. TELEWORK

Employees are only entitled to NYS COVID-19 sick leave, ESPL and/or EPFML if they are **not able to work OR telework** due to a COVID-19 related reason. This is an important distinction.

The term "telework" means work the employer permits/allows the employee to perform while at home or a location other than their normal workplace. An employee is able to telework if:

1. Their employer has work for them;[5]
2. The employer permits the employee to work from that location; and
3. There are no extenuating circumstances that prevent the employee from performing that telework. (Ex: power outage, COVID-19 symptoms)

Note: The DOL has issued guidance on employers' obligations for tracking compensable hours for employees who are teleworking. **(Field Assistance Bulletin No. 202-5; Attached in Appendix.)**

vii. NYS CASE VACATING PORTIONS OF THE FFCRA REGULATIONS

The NYS Attorney General challenged portions of the FFCRA regulations earlier this year. On August 3, 2020, a federal district court in the Southern District of New York struck down four portions of the DOL-issued regulations as overly broad. **(NY v. DOL; 20-CV-3020; Case attached in Appendix.)**

1. In defining a health care provider who can be exempted from coverage under the FFCRA, the inclusion of "anyone employed at" a doctor's office, hospital, medical school, or facilities "where medical services are provided" is too broad, according to the court.
2. The FFCRA regulations state that leave is not available to employees where the employer does not have work for that employee, which the DOL argued was intended to exclude those employees who would not be able to work regardless of the FFCRA reason for leave. The court found this requirement is not a permissible interpretation of the statute.

5 See SDNY decision discussed below.

3. The regulations permit employees using FFCRA leave to care of a child home due to a school closure to use the leave intermittently, only if the employer and employee agree. The court found:
    a. Leave does not need to be taken in a single block with the remainder being forfeit, but can instead be taken in various blocks for separate qualifying reasons.
    b. The requirement that the employer agree to intermittent use is impermissible.
4. The regulations also require employees to provide certain documentation/information prior to taking leave. The court also struck down this provision, as the statute requires reasonable notice only after the first workday an employee receives paid sick leave.

II. NYS TRAVEL ADVISORY

New York State Governor Andrew Cuomo, issued Executive Order 205, effective June 25, 2020, which provides, in part:

> All travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven day rolling average, will be required to quarantine for a period of 14 days consistent with Department of Health regulations for quarantine.
>
> The Commissioner may issue additional protocols for essential workers, or for other extraordinary circumstances, when quarantine is not possible, provided such measures continue to safeguard the public health.

The list of states subject to the EO travel advisory is updated daily. The Department of Health issued interim guidance and additional protocols, which include differing requirements for essential workers and first responders. **(Attached in the Appendix.)**[6]

Eligibility For NYS COVID-19 Leave for Travel Quarantine: The Governor clarified in E.O. 202.45 that employees who knowingly undertake voluntary travel to covered states after June 25, 2020 (not taken at the direction of the employer) are not eligible for the 14-day New York State paid COVID-19 sick leave enacted earlier this year.

Eligibility For FFCRA Leave for Travel Quarantine: The FFCRA provides similar leave to NYS COVID-19 leave, but does not carve out a clear exemption for personal travel to an area which the employee knows will subject them to quarantine. The FFCRA provides for leave when the employee is "subject to a quarantine or isolation order" which includes "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g. of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their

6 It is unclear whether these guidelines apply to personal travel between states by these workers, or only official travel.

employers have work for them." The federal law does not speak to either voluntary or mandatory travel to highly affected areas at all.

The employee qualifies only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his/her employer, either at the normal workplace or by telework. The DOL Q&A on emergency paid sick leave states that an employee who decides to self-quarantine for two weeks without advice from a health care provider to do so and without seeking medical diagnosis for symptoms would not be entitled to the leave.

It is possible employees would qualify for FFCRA leave while subject to travel quarantine, although the DOL has yet to address the issue formally.

Can I require employees who are subject to this quarantine to telework? Yes. An employee who is not sick and able to telework is not entitled to either NYS COVID Leave or FFCRA Emergency Paid Sick Leave and can be required to do so.

III. EEOC Guidance on Employment Issues, COVID-19, ADA and Other Laws

The EEOC has issued an extensive guidance on issues related to the ADA and other employment discrimination laws during a pandemic. The Guidance is updated regularly. The full guidance can be found at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Some relevant updates added on September 8, 2020 include:

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

IV. Other Helpful Links

- DOL COVID-19 and the American Workplace - https://www.dol.gov/agencies/whd/pandemic
- DOL COVID-19 Q&A https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- CDC Guidelines on Travel https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html
- NYS Governor Executive Orders https://www.governor.ny.gov/executiveorders

APPENDIX

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.

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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.

NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

NEW YORK STATE OF OPPORTUNITY. Department of Labor

Roberta Reardon
Commissioner

June 25, 2020

New York State Department of Health and New York State Department of Labor Guidance on Use of COVID-19 Sick Leave for Health Care Employers

On March 18, 2020, New York State enacted legislation authorizing sick leave for employees' subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. The law provides paid and unpaid sick leave with access to expanded paid family leave and temporary disability depending on the size of the employer. All employees, regardless of the size of their employer, are entitled to job protection upon return from leave.

This document supplements prior guidance on the application of COVID-19 sick leave for health care employees. All prior guidance remains in effect.

1) For purposes of New York's COVID-19 sick leave law and this guidance, a "health care employee" is a person employed at a doctor's office, hospital, long-term care facility, outpatient clinic, nursing home, end stage renal disease facility, post-secondary educational institution offering health care instruction, medical school, local health department or agency, assisted living residence, adult care facility, residence for people with developmental disabilities, home health provider, emergency medical services agency, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, including any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

2) A health care employee who returns to work following a period of mandatory quarantine or isolation and who subsequently receives a positive diagnostic test result for COVID-19 must not report to work. The health care employee shall be deemed to be subject to a mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York's COVID-19 sick leave law, whether or not the health care employee already has received sick leave as required by the law for the first period of quarantine or isolation. However, the health care employee must submit documentation from a licensed medical provider or testing facility attesting that the health care employee has tested positive for COVID-19. The health care employee does not need to submit documentation of a positive result if the health care employee's employer gave the health care employee the test for COVID-19 that showed the positive result.

3) A health care employee who is subject to an order of quarantine or isolation but continues to test positive for COVID-19 after the end of such quarantine or isolation period must not report to work. The health care employee shall be deemed to be subject to a second mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York's COVID-19 sick leave law for the second period of isolation. However, the health care employee must submit documentation from a licensed medical provider or testing facility attesting that the health care employee has

received a positive diagnostic test for COVID-19 after completing the initial period of isolation. The health care employee does not need to submit documentation of a positive result if the health care employee's employer gave the health care employee the test for COVID-19 that showed the positive result.

4) In no event shall a health care employee qualify for sick leave under New York's COVID-19 sick leave law for more than three orders of quarantine or isolation. The second and third orders must be based on a positive COVID-19 test in accordance with paragraphs 2 and 3.

For additional information about COVID-19, please visit the New York State Department of Health's coronavirus website at https://cornavirus.health.ny.gov/home. For additional information about New York's COVID-19 sick leave law, please visit https://ny.gov/COVIDpaidsickleave.

Translate

Office of the NEW YORK
STATE COMPTROLLER
NYS Comptroller Thomas P. DiNapoli

New York State & Local Retirement System

COVID-19 Guidance for Employers

These are the NYSLRS guidelines for loan payments and reporting your employees who are furloughed or on leave.

Furloughed employees and loan payments

NYSLRS members who are furloughed and placed on an unpaid leave, may defer their loan payments for 12 months or until they are working again, whichever occurs first.

To be eligible for a deferment, NYSLRS must receive written confirmation of the date an employee was put on leave and the date that the employee is expected to return.

Members must still repay their loan(s) in full within the original five year repayment term. When the member returns to the payroll, or 12 months elapses from the date their leave first began, the member's loan payments will need to be recalculated and increased, to ensure the loan(s) is paid within the five year period.

Members who wish to keep making payments while on furlough may also make direct payments on their loan balances to NYSLRS at any time. Retirement Online provides a convenient way to make such payments.

Please contact NYSLRS if you have questions about loan deferments.

Members who are furloughed

Furloughed employees who are not working and are not being paid by their employer, should not be reported to NYSLRS. When a furloughed member returns to work, begin reporting their salary and service to NYSLRS once again.

Members who are being paid or on paid leave

When a member is being paid, whether for work performed or through use of leave accruals (including the COVID-19 related leave provided for by the Families First Coronavirus Response Act and Emergency Family and Medical Leave Expansion Act), they must continue to be reported to NYSLRS as you normally would.

Here is furlough-related information you can share with your employees.

Reporting instructions for employers using Retirement Online enhanced reporting

When an employee is on an unpaid furlough, use the HR Transaction to inform NYSLRS of the break in service. Use the Leave of Absence (LOA) code and effective date to indicate that the employee is not currently working and receiving pay. When they return to work, use the HR Transaction Return from Leave (RFL) code and effective date to inform NYSLRS that the employee is working again, and resume reporting their days and earnings.

When an employee is working a reduced schedule, please report the employee with the reduced number of hours. For example, if an employee usually works an eight hour day and is now working half-time, report four hours of regular earnings and .5 days per day worked.

When an employee is not working but is still being paid due to a COVID-19 leave code, continue to report their earnings on your monthly report and submit their regular service credit amount prior to furlough.

Reporting members under Families First Coronavirus Response Act and Emergency Family and Medical Leave Expansion Act Reporting

Families First Coronavirus Response Act — Under the Families First Coronavirus Response Act (FFCRA), an employee is entitled to additional paid emergency sick time. Eligibility for FFCRA is determined by the employer. Certain public employers and private employers with less than 500 employees must follow the provisions of FFCRA. FFCRA provides that employers must provide two weeks (up to 80 hours) of paid sick leave to eligible employees who are impacted by COVID-19. In order to be eligible for this additional paid sick leave, the employee must be unable to work/telecommute for one of the reasons as described in FFRCA. The employer determines the amount of wages an employee is eligible to receive under FFCRA.

How members are reported under FFCRA — Members using FFCRA are reported at the amount paid under FFCRA. Any time the member is not being paid by the participating employer, the employee is not reported to NYSLRS

If the employee is taking the FFCRA leave for the following reasons they should be reported at their regular service credit amount:

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 related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

If the employee is taking the FFCRA leave for the following reasons they should be reported at an amount equivalent to 2/3 service credit:

4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. The employee is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. (HHS has yet to define “other substantially similar condition.”)

Emergency Family and Medical Leave Expansion Act — If an employer determines that an employee is eligible for leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) because they need to care for their child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, and the employee is receiving up to two-thirds of their pay, you will report the wages they are paid and two-thirds of their regular service credit. For any time the member is not being paid by the participating employer, the employee is not reported to NYSLRS.

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.")

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.

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[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

NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

Frequently Asked Questions Regarding Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel

July 2, 2020

Background:

Was a travel advisory was issued for NYS?

Yes. Effective 12:01am on Thursday, June 25, 2020, Governor Cuomo issued Executive Order 205 that requires individuals to quarantine for 14 days after traveling for 24 hours or longer within designated states that have significant rates of transmission of COVID-19. Guidance was also issued by the New York State Department of Health. Since New York has successfully reduced COVID-19 transmission, vigilance must be maintained to ensure that New York does not see a surge in new cases from states with increasing community transmission of COVID-19.

What states meet the criteria for required quarantine?

Individuals are subject to the travel advisory if they have visited states identified as having a seven-day rolling average of over 10% of all COVID-19 tests producing a positive result, or the number of positive cases exceeding 10 per 100,000 residents. This list will be continually evaluated based on cases in each state over time. Please refer to the following website for updates regarding impacted states: https://coronavirus.health.ny.gov/covid-19-travel-advisory

If I arrive in NY from a state that has been added to the designated state list before the date it was added, but before 14 days have elapsed, do I have to quarantine?

The travel advisory is not retroactive. However, travelers from those states are advised to self-monitor and get tested if they start to develop any symptoms, within the 14 day timeframe.

What does the travel advisory mean?

New York 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. The travel advisory requires all such travelers to quarantine when they enter New York for 14 days from the last day of travel in a designated state(s). The travel advisory requires all New Yorkers, as well as those visiting from out of state, to take personal responsibility for complying with the advisory in the best interest of public health and safety.

What does quarantine mean?

If you are returning from travel to a designated state, and if such travel was for longer than the limited duration outlined above, you are required to quarantine when you enter New York for 14 days from the last day you were in a designated state(s), unless you are an essential worker or fall under another exception as determined by the Commissioner. The requirements to safely quarantine include:

- The individual must not be in public or otherwise leave the quarters that they have identified as suitable.
- The individual must be situated in separate quarters with a separate bathroom facility for each individual or family group. Access to a sink with soap, water, and paper towels is necessary. Cleaning supplies (e.g. household cleaning wipes, bleach) must be provided in any shared bathroom.
- The individual must have a way to self-quarantine from household members as soon as fever or other symptoms develop, in a separate room(s) with a separate door. Given that an exposed person might become ill while sleeping, the exposed person must sleep in a separate bedroom from household members.
- Food must be delivered to the person's quarters.
- Quarters must have a supply of face masks for individuals to put on if they become symptomatic.
- Garbage must be bagged and left outside for routine pick up. Special handling is not required.
- A system for temperature and symptom monitoring must be implemented to provide assessment in-place for the quarantined persons in their separate quarters.
- Nearby medical facilities must be notified, if the individual begins to experience more than mild symptoms and may require medical assistance.
- The quarters must be secure against unauthorized access.

What does the travel advisory mean for first responders and essential workers?

As stated above, there are specific protocols for essential workers related to the travel advisory, to allow such workers to work upon their return to New York while also taking steps to mitigate any risk of transmission of COVID-19.

In addition, all essential workers must continue to adhere to existing guidance, including guidance regarding return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.

Further, for all essential workers who have been in a designated state in the 14 days prior to arrival in New York State shall abide by the following requirements. These conditions may change over time.

Quarantine and monitoring requirements of traveling essential workers apply for the following timeframes:

Short Term – for essential workers traveling to New York State for a period of less than 12 hours.

- This includes instances such as an essential worker passing through New York, delivering goods, awaiting flight layovers, and other short duration activities.
- Essential workers should stay in their vehicle and/or limit personal exposure by avoiding public spaces as much as possible.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distance, and clean and disinfect workspaces.
- Essential workers are required, unless required for such essential work, to avoid extended periods in public, contact with strangers, and large congregate settings, for 14 days.

Medium Term – for essential workers traveling to New York State for a period of less than 36 hours, requiring them to stay overnight.

- This includes instances such as an essential worker delivering multiple goods in New York, awaiting longer flight layover, and other medium duration activities.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distance, and clean and disinfect workspaces.
- Essential workers are required, to the extent possible unless required for such essential work, to avoid extended periods in public, contact with strangers, and large congregate settings for a period of at least 14 days.

Long Term – for essential workers traveling to New York State for any period of greater than 36 hours, requiring them to stay at least several days.

- This includes instances such as an essential worker working on longer projects, fulfilling extended employment obligations, and other longer duration activities.
- Essential workers should seek diagnostic testing for COVID-19 as soon as possible upon arrival (within 24 hours) to ensure they are not positive.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distancing, clean and disinfect workspaces for a minimum of 14 days.
- Essential workers, to the extent possible unless required for such essential work, are required to avoid extended periods in public, contact with strangers, and large congregate settings for a period of at least 14 days.

Who is an essential worker?

An "essential worker" is (1) any individual employed by an entity included on the Empire State Development (ESD) Essential Business list; or (2) any individual who is employed as a health care worker, first responder, or in any position within a nursing home, long-term care facility, or other congregate care setting, or an individual who is employed as an essential employee who directly interacts with the public while working, or (3) any other worker or person deemed such by the Commissioner of Health. Pursuant to Executive Order 202.45, any essential employee who travels to a designated state as part of the person's employment, or at the direction of the employee's employer, will remain eligible for benefits under New York's COVID-19 paid sick leave law.

Resources for essential worker lists:

- ESD Essential Business list: https://esd.ny.gov/guidance-executive-order-2026
- DOH Protocol for COVID-19 Testing (5/13/20): https://coronavirus.health.ny.gov/system/files/documents/2020/06/doh_covid19_revisedtestingprotocol_053120.pdf
- DOH Interim Guidance for Professional Sports Teams Traveling Between States with Significant Community Spread of Covid-19 and New York State (7/1/20): https://coronavirus.health.ny.gov/system/files/documents/2020/07/professional-sports-travel-advisory-guidance.pdf

How does this travel restriction affect healthcare personnel?

Anyone who has traveled to a designated state will be required to quarantine when entering New York State for 14 days from the last day in a designated state. However, entities may allow healthcare personnel (HCP) who have traveled to a designated state to work as essential workers if all the following conditions are met:

1. Furloughing such HCP would result in staff shortages that would adversely impact operation of the healthcare entity, and all other staffing options have been exhausted.
2. HCPs are asymptomatic.
3. HCP received diagnostic testing for COVID-19 within 24 hours of arrival in New York.
4. HCP is self-monitoring twice a day (i.e. temperature, symptoms), and receiving temperature monitoring and symptom checks at the beginning of each shift, and at least every 12 hours during a shift.
5. HCP is wearing a facemask while working.
6. To the extent possible, HCP working under these conditions should preferentially be assigned to patients at lower risk for severe complications, as opposed to higher-risk patients (e.g. severely immunocompromised, elderly).

7. HCP allowed to return to work under these conditions should maintain self-quarantine when not at work.
8. At any time, if the HCP working under these conditions develop symptoms consistent with COVID-19, they should immediately stop work and isolate at home. All staff with symptoms consistent with COVID-19 should be immediately referred for diagnostic testing for SARS-CoV-2.

What if I have a medical appointment or procedure?

If you have a health care procedure or appointment scheduled in New York that cannot be postponed, you (and your support person/companion) may travel to the extent necessary to maintain that appointment, but must otherwise remain quarantined. For further information, see the Department's guidance on this topic.

Are students enrolled in NYS health care education programs who reside out of state required to quarantine upon their return to New York for classes?

Students who have traveled in or to any of the designated states requiring quarantine, and are currently enrolled in a NYS health care education program, are required to adhere to the essential worker guidance upon their arrival in New York.

Additional Questions:

If I am not an essential worker, can I travel to one of the designated states for vacation or to see family?

Yes. However, upon your return you will be required to quarantine when you enter New York for 14 days from the last day you were in a designated state(s). In addition, pursuant to Executive Order 202.45, any New York State resident who voluntarily travels to a designated state for travel that was not taken as part of the person's employment or at the direction of the person's employer, will not be eligible benefits under New York's COVID-19 paid sick leave law.

I am only passing through designated states for less than 24 hours through my course of travel. Do I need to quarantine?

No. Individuals passing through a designated state for less than 24 hours, such as stopping at rest stops for vehicles, buses, and/or trains; or lay-overs for air travel, bus travel, or train travel, are not required to quarantine.

I am a resident of a designated state and will be visiting family in NYS for less than 14 days. Will I have to quarantine in NYS for the full 14 days?

While in New York State, you will need to maintain quarantine for 14 days from the last day you were in a designated state(s). If you are in New York State for less than 14 days, you will need to quarantine for the entire time you are in New York and, to protect the public wherever you are, you should complete the remainder of the 14-day period quarantine period in your home upon return to a designated state.

I am traveling from a designated state to New York State am visiting for less than 14 days. If I am required to quarantine for 14 days, who will pay for my accommodations, meals, and lost wages?

Travelers from designated states may leave the state prior to the expiration of the 14-day quarantine period. However, to protect the public wherever you are, you should still maintain quarantine for the remainder of the 14-day period. Travelers are responsible for their own expenses during quarantine.

If I am a New York State resident arriving from a designated state, will I be given a quarantine order? Do I have to report myself to the local health department?

The NYS Department of Health expects all travelers to comply and protect public health by adhering to the quarantine without receipt of an individual order. However, the NYS Department of Health and the local health departments reserve the right to issue a mandatory quarantine order, if needed. If you would like an order for purposes of applying for a sick leave benefit, please contact the local health department where you are staying or where you reside. However, as mentioned above, pursuant to Executive Order 202.45, any New York State resident who voluntarily travels to a designated state for travel that was not taken as part of the person's employment or at the direction of the person's employer, will not be eligible benefits under New York's COVID-19 paid sick leave law.

Clinical Testing

If I have a negative COVID-19 diagnostic test, does that mean I can come out of quarantine?

No. Symptoms of COVID-19 can appear as late as 14 days after exposure. Therefore, a negative test cannot guarantee that you will not become sick. The full 14 days of quarantine are required.

Compliance

How will my quarantine be enforced?

The NYS Department of Health expects all travelers to comply and protect public health by adhering to the quarantine. However, the NYS Department of Health and the local health departments reserve the right to issue a mandatory quarantine order, if needed. Pursuant to Executive Order 205, anyone who

violates a quarantine order may be subject to a civil penalty of up to $10,000 or imprisonment up to 15 days per PHL 229.

If I am driving from a designated state to New York State. Will law enforcement stop me because I have an out-of-state license plate?

The Executive Order does not direct law enforcement to stop people solely due to an out-of-state license plate.