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RURAL LAW INITIATIVE

Labor Issues Affecting
Small Businesses

March 3, 2021

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SPEAKER BIOGRAPHY

PAUL BUEHLER, ESQ., regularly represents clients in a variety of complex labor and employment matters, including defending against actions in federal and state courts alleging violations of the Americans with Disabilities Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act, and wage and hour class action lawsuits, among others. He has successfully represented employers before the Equal Employment Opportunity Commission, Occupational Safety and Health Administration, National Labor Relations Board, New York State Division of Human Rights, and New York City Commission on Human Rights. Paul also routinely advises clients in various industries regarding all aspects of labor and employment law, such as reasonable accommodations, leaves of absence, employee discipline and terminations, employer policies, and COVID-19 precautions and guidance. He graduated, summa cum laude, from Albany Law School.

Bond

Legal Issues Affecting Small Business: Labor and Employment
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Presenter



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New York General (Non-COVID-19) Sick Leave Law



NY PSL - Basics

- Passed as part of budget bill signed by Governor Cuomo on April 3, 2020
- Became effective 180 days after it was enacted - September 30, 2020
- Allowed use of sick time began January 1, 2021

NY PSL - Eligibility

- All employees – including full and part-time
- PSL can be used as soon as it's accrued
 - If front-loaded, can be used immediately (after 1/1/21)
 - If accrued, can be used after 1st hour accrued (i.e., after working 30 hours – after 1/1/21)

Accrual Method

- **Option 1**: Provide the total amount of sick leave at the beginning of the year
 - But employer may not then reduce or revoke any accrued paid sick leave based on the number of hours worked by the employee
- **Option 2**: Employees accrue sick leave at a rate of not less than one hour per every thirty hours worked
 - Accrual starts at the commencement of employment or the effective date of the paid sick leave law, whichever is later

Carryover and Termination

- Carryover
 - Unused sick leave is carried over to the following calendar year
 - Employers with fewer than 100 employees can limit the use of sick leave to 40 hours in a calendar year
 - Employers with 100 or more employees can limit the use of sick leave to 56 hours in a calendar year
- No requirement to pay unused sick leave upon separation

NY PSL – Amount of Leave

Employer Size	Sick Leave
4 or fewer employees & net income < \$1M	Up to 40 hours of <u>unpaid</u> sick leave
4 or fewer employees & net income > \$1M	Up to 40 hours of paid sick leave
5 to 99 employees	Up to 40 hours of paid sick leave
100+ employees	Up to 56 hours of paid sick leave

NY PSL - Qualifying Reasons for Leave

- For a mental or physical illness, injury, or health condition of the employee or family member, regardless of whether the illness has been diagnosed or requires medical care at time of leave request
- For the diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of the employee or family member
- For an absence from work for reasons related to the employee or a family member being the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking

NY PSL - Use of Sick Leave

- Increments of use
 - Employer may set a reasonable minimum increment for the use of sick leave, but cannot exceed 4 hours
- Compensation
 - Paid sick leave must be paid at the employee's regular rate of pay, or minimum wage, whichever is greater
- Documentation: Employer may require a medical note or attestation after 3 consecutive missed workdays/shifts, but cannot require the disclosure of confidential information as a condition of providing sick leave

NY PSL – Existing Policies

- An employer is not required to provide any additional sick leave under the statute if...
 - The employer has adopted a sick leave or time off policy that provides employees with an amount of leave which meets or exceeds the requirements of the statute; and
 - The policy satisfies the accrual, carryover, and use requirements of the sick leave statute

NY PSL – CBAs

- CBAs entered into on or after 9/30/20 can provide “comparable” benefits and disclaim NY PSL requirements
 - Should specifically acknowledge NY PSL and identify “comparable” benefits
- What to do for CBAs not up for re-negotiation
 - Can notify union of NY PSL plan and see if they want to engage in interim bargaining

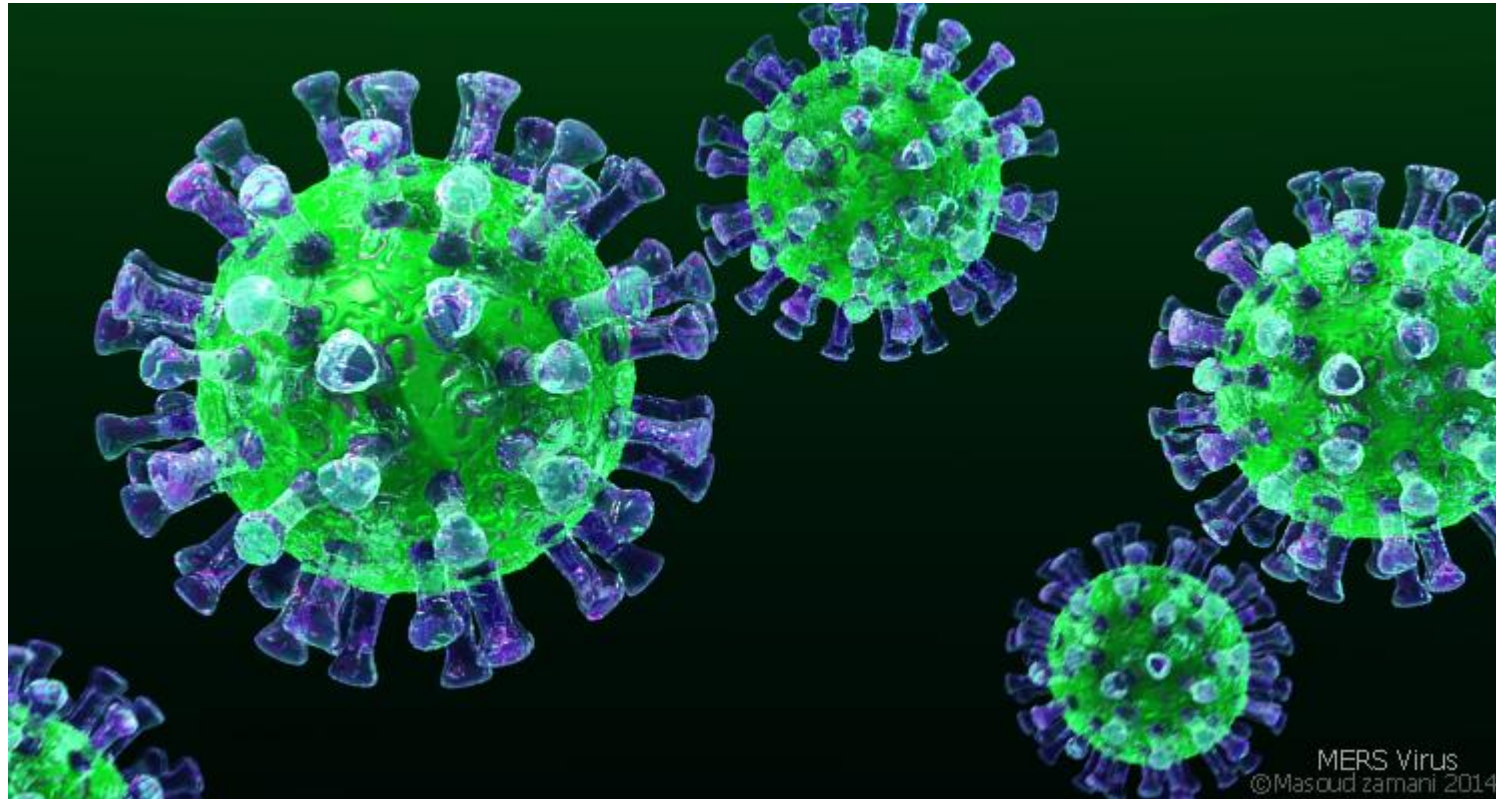
Miscellaneous

- No retaliation for exercising right to use sick leave
- Cannot mandate specific notice prior to employee's use of leave
- Restoration to same position with same terms
- Payroll records must reflect the amount of sick leave provided to each employee
- Upon employee's written or oral request, employer must provide summary of sick leave accrued and used in all years to employee within three business days

NY PSL – Guidance/Proposed Regulation Insights

- Calendar Year – can be any 12-month period you decide
- Accrual – only working hours count, not PSL or other PTO
- Bereavement leave not covered
- Immediate eligibility
- Pay rate – not necessarily federal regular rate, but similar calculation
- Additional guidance/regulations are forthcoming
- Confidential Information defined

New York COVID-19 Law



New York COVID-19 Paid Sick Leave

- Provides leave if:
 - An employee is subject to an “order of quarantine or isolation”
 - An “order of quarantine or isolation” must be issued by New York State, the Department of Health, local Board of Health, or a governmental entity
 - An employee’s physician cannot create this order
 - An employee cannot create his/her own order
 - Self-isolation is not sufficient
- Exceptions:
 - Employees who travel to CDC level 2 or 3 country, or to restricted states despite warning
 - Asymptomatic telecommuters

NY COVID-19 Paid Sick Leave Chart

Employer Size (as of 1/1/20)	Paid Sick Leave (calendar days)	Additional PFL/STD
10 or fewer employees & net income < \$1M	N/A	Until termination of quarantine/isolation order
10 or fewer employees & net income > \$1M	5 days	Until termination of quarantine/isolation order
11 to 99 employees	5 days	Until termination of quarantine/isolation order
100+ employees	14 days	N/A?
All “public employers”	14 days	If opted-in - N/A?

Impact of New Guidance

- Places a cap on the number of paid quarantine leaves available:
 - 1st paid quarantine can be for any order of quarantine
 - 2nd and 3rd paid quarantines must be for positive test
- Employees who continue to test positive after completing quarantine are considered to have another order of quarantine – cannot return to work without physician clearance
- Considers positive test equivalent to quarantine order
- Requires employers who mandate an employee be out of work due to exposure or potential exposure be paid
 - Applies regardless of quarantine order
 - New obligation creates legal questions

New York State Paid Family Leave



New PFL Benefits

- Definition of “family leave” expanded to include leave taken by employees because they and/or their minor dependent children are subject to an order of quarantine
 - Does not include most “family members”
- Same benefit level – up to **\$840.70** per week
- But no cap on benefit weeks

New DBL Benefits

- Definition of “disability” expanded to apply where employee (1) is unable to work due to order and (2) has exhausted all paid sick leave provided by employer under this law
- Benefits payable on **first day** of disability
- Maximum weekly benefit is the difference between maximum weekly PFL benefit (\$840.70) and the employee’s **total** average weekly wage from each covered employer, up to maximum benefit of **\$2,043.92**
- No cap on benefit weeks

Interplay of New PFL and DBL

- Normally, PFL and disability benefits cannot be taken at the same time
- PFL and disability benefits payable under this act only may be taken concurrently, starting on first full day of unpaid period of disability
- Employee may not collect any benefits that would exceed **\$840.70** in PFL and **\$2,043.92** in disability benefits per week

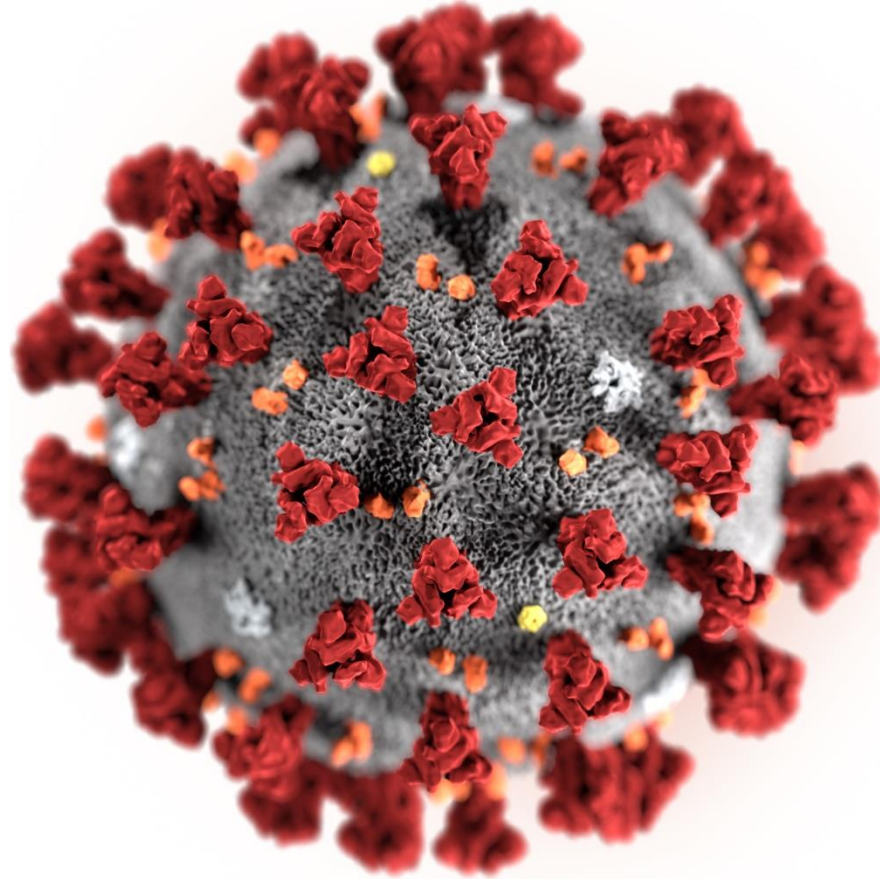
NY PFL Premium Rates – 2018-2021

	2018	2019	2020	2021
Payroll Contribution Rate (as a % of AWW)	0.126%	.153%	.27%	.511% (including 0.005% risk adjustment for COVID-19 quarantine claims)
Maximum Annual Employee Contribution	\$85.56	\$107.97	\$196.72	\$383.34

NY PFL – Policy Recommendations

- Employee Eligibility
- Deductions
- Waiver Eligibility
- Benefit Levels
- Interplay with FMLA
- Interplay with PTO
- Interplay with non-accrued leave
- Qualifying Reasons
- Notice Requirements, including timing
- Claims Procedure, including timing
- Effect of Denied Claims
- Appeal (Arbitration) Rights
- Right to Reinstatement
- Continuation of Health Insurance
- Prohibition Against Discrimination

Federal COVID-19 Law - FFCRA



Federal FFCRA: Basics

- Families First Coronavirus Response Act:
 - Effective April 1, 2020 through December 31, 2020
 - Voluntary extension through March 31, 2021
- Provided two main types of leave:
 - Emergency Paid Sick Leave (“EPSL”)
 - Emergency FMLA leave (“EFMLA”)

Eligibility

- Applicable to private employers with fewer than 500 employees (at the time of leave) and certain public employers
 - Exception for health care providers and first responders
 - Limited exception for employers with less than 50 employees in certain circumstances
- Employees eligible for EPSL immediately and EFMLA after 30 days of employment

Types of EPSL Leave

- Provides for two weeks of paid sick leave, up to 80 hours, at the employee's regular rate of pay when an employee is unable to work (or telework) due to one of the following reasons:
 1. Employee is subject to a governmental quarantine or isolation order related to COVID-19
 2. Employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns
 3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
- Leave is capped at \$511 per day and \$5,110 total per employee

Types of EPSL (cont.)

- Provides for two weeks of paid sick leave, up to 80 hours, at 2/3 of the employee's regular rate of pay when employee is unable to work (or telework) due to one of the following reasons:
 4. Employee is caring for an individual subject to a governmental quarantine/isolation order or health care provider recommendation
 5. Employee is caring for an eligible “son or daughter” under age 18 if the school or place of care has been closed or care provider is unavailable due to COVID-19 precautions
 6. Employee is experiencing any other “substantially similar condition” specified by Health and Human Services Secretary
- Leave is capped at \$200 per day and \$2,000 total per employee

EFMLA Leave

- Provides 12 weeks of leave where employee is unable to work (or telework) because employee must care for a son or daughter because the child's school or place of care has been closed or the childcare provider is not available due to a public health emergency related to COVID-19
- First 10 days of leave are unpaid
- Remaining leave paid at a rate of:
 - 2/3 of an employee's regular rate, multiplied by the number of hours the employee is regularly scheduled to work
 - Pay capped at \$200 per day and \$10,000 total

Unemployment Benefit Issues



Cancellation of Unemployment Benefit Charges

- NY DOL issued an order on January 14, 2021 cancelling UI charges during the pandemic
 - Retroactively cancelled UI charges dating back to March 9, 2020
 - Cancellation continues until rescinded by the DOL or the NY State of Emergency due to the pandemic concludes
 - Contemplates reimbursement of nonprofits and other entities that are self-insured for unemployment purposes
 - Timing and form of reimbursement have not yet been determined

Fraudulent Unemployment Claims

- Review your charge statements to make sure there are no fraudulent charges
- Report fraud to the Fraud Division of the New York Department of Labor
- Continue to contest improper claims

Accommodation Issues



Family and Medical Leave Act

- 50 or more employees within a 75-mile radius; employee employed for 1,250 hours in prior 12 months
- Leave can be taken for a “serious health condition”
 - Inpatient care
 - “Continuing treatment”
- Leave is unpaid

Americans with Disabilities Act and New York Human Rights Law

- ADA – applies to employers with 15+ employees
 - Physical or mental impairment that substantially limits one or more major life activities
 - Includes “record” of an impairment and being perceived as having an impairment
- HRL – applies to employers with at least 1 employee
 - Physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological condition which prevents the exercise of a normal bodily function
 - Includes record and regarded/perceived impairments

New EEOC Guidance on the ADA

- New EEOC Guidance in September 2020 regarding COVID-19 and the ADA
- Covers:
 - Telework, older employees, delays in the interactive process, confidentiality, health screenings in light of GINA, and more
- Available at: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Managing a Remote Workforce



Telecommuting Arrangements

- Have they been formalized?
- Have your expectations been clarified?
- Areas of concern:
 - Duration
 - Schedule
 - Timekeeping
 - Communication
 - Application of workplace policies

Telecommuting Arrangements

- Areas of concern:
 - Confidentiality
 - Reimbursement – who pays for what
 - Employer-provided equipment
 - Ownership
 - Maintenance
 - Personal use
 - Return
 - Reporting work-related injuries

Creating a Program

- Establish Eligibility Criteria
- Develop a Written Agreement
- Ensure Wage and Hour Compliance

Eligibility Criteria

- Objective Criteria
 - Avoid allegations of unfairness or unlawful discrimination
- Nature of the position
 - Are tasks portable?
 - Can performance be measured?
 - Is daily interaction required?
 - Supervision/training?

Eligibility Criteria

- Length of Service
 - Consider establishing a set length of service in a specific position
 - It may take time for an employee to prove themselves first
- Job Performance and Attendance
 - Proven work ethic
 - May want to limit to employees without recent discipline
- NOTE: Reasonable Accommodation obligations may trump these criteria

Written Agreement

- Require employee sign a written agreement
 - Spell out all terms and conditions of the arrangement
- Topics to Consider:
 - Worksite
 - Duration
 - Retain right to terminate
 - Address specific expectations
 - In person meetings, trainings, events, etc.

Written Agreement

- Topics to Consider:
 - Terms of Employment/Policies
 - Make clear that all generally applicable policies apply, except where the agreement says otherwise
 - Schedule and Work Hours
 - Identify hours of remote work
 - Require authorization to work outside normal hours
 - Require notification for absences
 - Recording hours
 - Communication
 - Expectations regarding method and frequency of communication

Written Agreement

- Topics to Consider:
 - Worksite
 - Extension of employer's workspace
 - Confidentiality
 - Expectations concerning caregiving responsibilities
 - Connectivity
 - Impact of connectivity loss (employer/employee)
 - Safety & Health
 - Require employee maintain safe working conditions
 - Require reporting of work-related injuries
 - Disclaim liability for injuries to visitors

Written Agreement

- Topics to Consider:
 - Equipment/Supplies
 - Who provides what
 - Address policies regarding personal use, theft, damage, return to employer
 - Expense Reimbursement
 - Exclude home operating costs, limit authorized expenses, generally applicable reimbursement policy
 - Periodic Evaluation
 - Reevaluate arrangement periodically
 - Reserve right to end arrangement

Remote Work – Post COVID

- Remote work can be a reasonable accommodation
- EEOC issue guidance that temporary shift to remote work during pandemic does not require remote work to all who ask
 - Especially if pandemic remote work required elimination of an essential function
- EEOC guidance noted that if an employee previously requested remote work as an accommodation, performance while working remotely must be considered if the request is renewed

Wage and Hour Issues



Remote Work

- New guidance issued on calculating remote working hours:
 - All working time must be paid – even if the employer does not authorize or approve of time spent working
 - Employers must exercise “reasonable diligence” to determine when employees are working
 - Recommended reporting procedure to ensure no underpayment
 - Implement discipline procedure for employees who perform unauthorized work

Workplace Shutdowns

- For non-exempt employees, it's not a difficult issue – they don't have to be paid for time they are not working.
- For exempt employees, if it is a full-week shutdown, they do not have to be paid for that week.
- For exempt employees, if it is a partial week shutdown, they have to get their regular salary for the week. This can be done by using vacation or holiday time, but they do need to be paid their full salary for the week.

Do I have to pay for testing time?

- Probably not.
- In 2014, the U.S. Supreme Court decided *Integrity Staffing Solutions v. Busk*.
- The Court held that Amazon warehouse employees weren't owed pay for waiting on security lines, because the task was not "integral and indispensable" to workers' main duties.
- COVID-19 screenings are, in effect, security screenings for employees, so they should not be compensable time.

White Collar Exemptions

- Salary Basis
- Salary Threshold
- Duties Test
 - Executive - primary duty must be managing the enterprise or a department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire workers (or the employee's suggestions and recommendations as to hiring, firing or changing the status of other employees must be given particular weight).
 - Administrative - primary duty must be office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty also must include the exercise of discretion and independent judgment with respect to matters of significance.
 - Professional - primary duty must be work requiring advanced knowledge in a field of science or learning that is customarily acquired by prolonged, specialized, intellectual instruction and study.

White Collar Salary Thresholds (Federal)

- Employees who make less than \$35,568 are now eligible for overtime pay.
 - A rule effective for 2020 raised the salary threshold to \$684 a week (\$35,568 annualized) from \$455 a week (\$23,660 annualized).
 - Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10% of the standard salary level.
- Federal Salary Threshold applies to Administrative, Executive, and Professional Exemptions

White Collar Salary Thresholds (New York State)

- New York City
 - \$1,125/week
- Nassau, Suffolk, & Westchester
 - \$975/week in 2020
 - \$1,050/week for 2021
 - \$1,125/week increase on 12/31/21
- Rest of New York State
 - \$885/week for 2020
 - \$937.50/week for 2021

Applies to Administrative and Executive exemptions – not Professional

Any Questions?

Feel free to reach
out:

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The information in this presentation is intended as general background information on labor and employment law. It is not to be considered as legal advice. Employment law changes often and information becomes rapidly outdated.

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