

JacksonLewis

April 20, 2021

Top 10 Employer Issues for 2021

Michael Jakowsky

Michael Jakowsky

Jackson Lewis P.C. | New York City

Michael.Jakowsky@jacksonlewis.com |

212-545-4086

What We'll Discuss

1. COVID-19 Vaccines
2. Employee Travel
3. Remote Work
4. Is COVID-19 a Disability Under the ADA?
5. Accommodation Issues
6. Vulnerable Employees & Their Families
7. Medical Inquiries During the Pandemic
8. Leave Management Issues
9. Mitigating Wage & Hour Risks
10. Social & Political Movements

I was told 2021 would be different...





1

COVID-19 VACCINES

May Employers Mandate A COVID-19 Vaccine?

- Employers may opt to make a vaccine mandatory
 - To keep customers, employees safe and/or for business liability reasons
- But that comes with legal risks - liability if employee suffers health complications from vaccine
 - EUA vs. full FDA approval
- Employees who object to receiving the vaccine on medical or religious grounds will be entitled to reasonable accommodation through the ordinary EEO process
 - Must have sincerely held religious belief
- See EEOC's What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws ("WYSK"), Questions K.1 through K.10, added 12/16/2020 (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>)

Mandating time off for vaccinations

The New York amends both the Civil Service Law and the Labor Law to mandate that employers provide 4 hours of paid leave per COVID-19 vaccination injection.

- A03354B (*passed on February 3, 2021*)
- S02588-A (*pending as of February 11, 2021*)

NYS Mandatory Vaccination?

A State Assembly Bill would mandate the vaccination of all individuals who are proven to be safe to receive a COVID-19 vaccine. Should the bill become law, employers would likely be permitted to implement mandatory vaccination policies, with exceptions for disability-related and religious accommodations.

- Assemble Bill: A11179

Additional Considerations

- EEOC warns that while an employee who does not receive vaccination due to an accommodation may be excluded from the workplace, they may not automatically be terminated
- Even once vaccinated, employers will still need to continue to take safety precautions – mask, social distancing, daily screenings.
- **BEST PRACTICE:**
- Vaccine policy recommended
 - Decide if will be mandatory/strongly encouraged
- Have vaccine declination form



Employee Travel

Employee Travel

- A written policy isn't mandatory but **recommended** to ensure employees are aware of the consequences of travel
- Some elements of a travel policy:
 - Require employees to notify management/HR in advance of travel plans outside New York
- May an employer restrict travel outside of New York during the pandemic?
 - NY had mandatory quarantine requirements for travelers entering New York from any other non-contiguous state (i.e., New Jersey, Connecticut, Pennsylvania, Massachusetts, or Vermont). Those ended for domestic travel April 1, 2021.
 - NY employees will forgo their paid sick leave benefits from NY's COVID-19 paid sick leave law if they engage in non-essential travel until the end of the required period of quarantine or isolation.
- Check state laws, e.g., Follow current state and CDC travel restrictions/guidance

Remote Work During Post-Travel Quarantine

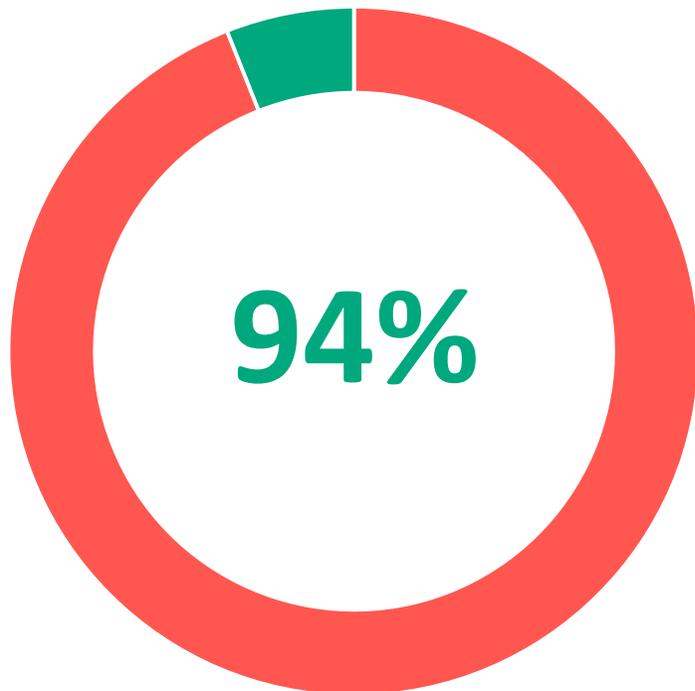
- Can employee work remotely?
 - Employers can technically mandate remote work during a travel related quarantine period.
 - If not, employers may permit employees to use accrued PTO or take unpaid leave during the quarantine period.

3

REMOTE WORK

But What About Productivity...Or “If I Can’t See Them How Do I Know They’re Working”?

The jury is still out. According to one survey in Summer 2020:



94% of employers say **productivity has remained the same or improved** since employees began working remotely

Source: Mercer (flexible working survey, 07/15/2020-08/14/2020)

On The Other Hand...

According to a September 2020 survey of 50 U.S. companies:

40%

have started to see a decrease in productivity since the start of remote work during the pandemic

vs.

56%

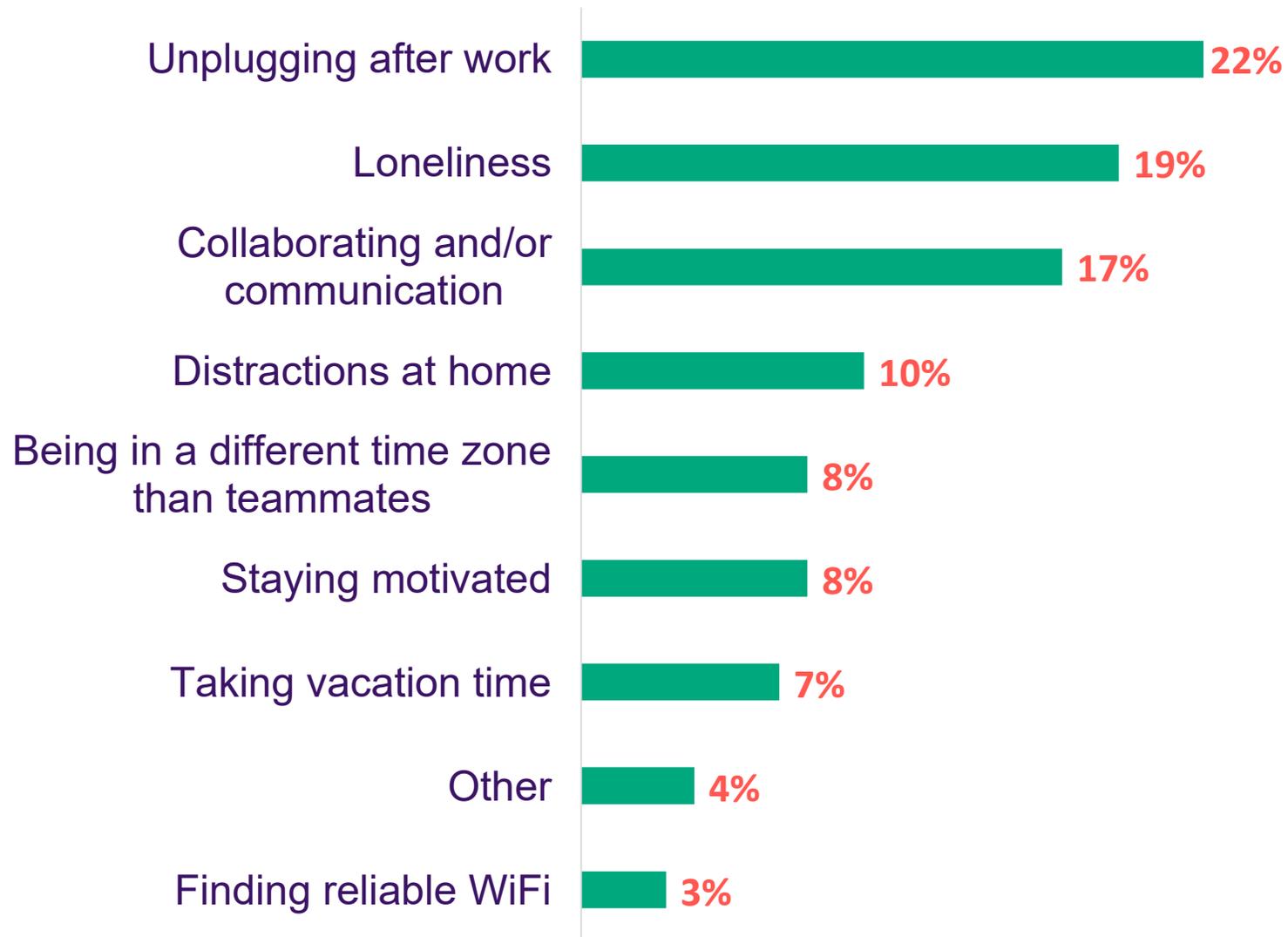
rated their productivity as “excellent” in April 2020

Source: Vocon survey of 45,000 employees at 50 U.S. countries (September 2020)

Status Of Remote Working

- Many major companies have no immediate plans for their employees to return to the office even after COVID-19:
 - **Facebook** - plans to keep staff remote through July 2021; post-pandemic goal is to have 50% of company working remotely within 5-10 years
 - **Amazon** - employees may work from home until July or August 2021
 - **Google** - employees may work from home through September 2021
 - **Uber, Ford** - employees may work from home through June 2021
 - **Zillow, Twitter, Square, REI** - employees may work remotely indefinitely
 - **Spotify** - employees may continue to work remotely until 2021; each office will open according to city-by-city government guidelines
 - **MasterCard** - employees can remain remote until they are comfortable returning

WHAT'S YOUR BIGGEST STRUGGLE WITH WORKING REMOTELY?



Source: 2019 *State of Remote Work*, buffer.com

Everyone Struggles With Working Remotely

Community

- With employees working from home, the sense of isolation can be overwhelming:
 - Check in on employees frequently
 - Remind your team of the availability of any Employee Assistance Programs, other resources
 - Encourage regular communication and collaboration among team members
- If employees return to the office in phases, consider having all team members, even those in-office, attend meetings by video or phone so remote employees can participate on equal footing

Community (*cont'd*)

- If you have a mentorship program in place, encourage mentors to connect regularly with their mentees
- Consider ways to modify team-building exercises for the remote environment
 - Remote scavenger hunts
 - Virtual coffee breaks or lunches
 - Trivia contests about the company
 - Team fundraisers (virtual 5Ks, etc.)

How To Ensure/Manage Remote Worker Productivity

- Communications:
 - Describe protocol – type/frequency, platform
 - Schedule regular (daily/weekly) meetings to keep everyone connected - employee/manager/team
 - Identify **measurable** productivity goals, deadlines, priorities.
- Maintain regular performance management process
 - If disciplinary issues arise, deal with them
 - Quarterly check-ins, annual/biannual reviews – by phone or video
 - Electronic exchange of performance reviews
- ***Given the circumstances, be flexible***

Must Employers Grant Employee Requests To Work Remotely?

- Engage in dialogue with employee - are there:
 - Childcare issues or other family obligations?
 - General fear/concern of exposure to COVID-19 - absent a pre-existing mental illness/disorder such as anxiety, PTSD?
 - Are the employee's concerns reasonable?
 - Underlying risk factors or preexisting medical or mental health conditions?
 - ADA analysis

EEOC Guidance On The ADA And Remote Work

- Interactive process - get information re: why accommodation is needed
- Verify that employee has disability/needs requested accommodation
 - Some continued obstacles to getting certifications from healthcare providers, so employers need to be flexible/open to alternate ways to substantiate the disability/request.
 - Employers encouraged to provide requested accommodation on temporary, interim, or trial basis while they obtain more information.
- Enter into Reasonable Accommodation Agreement.
- EEOC's Guidance is here: <https://www.eeoc.gov//facts/telework.html> and its Supplemental Guidance (WYSK) last updated December 16, 2020 is here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Remote Work Agreements

- Use a Remote Work Agreement with all employees to include:
 - Disclaimers:
 - The telework arrangement is temporary due to the pandemic or on a trial basis
 - The employee may not be performing all essential functions due to the emergency
 - The arrangement may be revoked at the employer's discretion
 - Employer's expectations regarding work hours, recording work hours, availability, performance, work location and condition of work location (free from noise and distraction).
- Also, consider whether you need/should reimburse for home office related expenses.



SHOULD WE SCHEDULE
OUR NEXT ZOOM
MEETING OR JUST HIT
OURSELVES REPEATEDLY
IN THE HEAD WITH A
HAMMER?

TOM
FISH
BURNE

Zoom, Zoom, Zoom

- Virtual meeting technology was embraced early in the pandemic to maintain communication, connection and collaboration with remote workers due to ease of use, gave a sense of normalcy to the workday, allowed isolated employees to stay in touch
- But the amount of video calls/meetings has exploded
- Employees are complaining of mental and physical “Zoom fatigue”
 - Long hours sitting in front of their computers
 - Video calls are more tiring than in-person meetings (multiple people speaking at once, maintaining constant eye contact, visual and audible distractions, watching yourself on screen)
- Employers should address this issue in order to avoid employee burnout
 - Some employers are enforcing limits on virtual meetings
 - “Quiet Fridays” – no virtual meetings, minimal emails
 - No-meeting morning hours

4

**Is COVID-19 A DISABILITY
UNDER THE ADA, THE
NYSHRL OR THE
NYCHRL?**

Transitory AND Minor

- Transitory and minor impairments do not meet “regarded as” prong of disability under ADA
- **BUT** must be both transitory and minor
- “Transitory” is defined as “lasting or expected to last six months or less”
- “Minor” is undefined and may require consideration of:
 - Symptoms and severity of impairment
 - Type of treatment involved
 - Risk involved
 - Whether any kind of surgical intervention is anticipated or necessary
 - Nature and scope of any post-operative care

Transitory AND Minor

- Recent cases:
 - Surgery to remove nodule from lung: 2-month limitation may be disability
 - Impairment lasting 2 months from lap band surgery not enough to show disability
- COVID-19 may be disability under ADA – unclear
 - Less likely if no symptoms or mild symptoms and quick recovery
 - More likely if “long-hauler,” or if it exacerbates other health conditions/disabilities
- Remember that COVID-19 may be FMLA-qualifying event

NYSHRL Guidance

- The Division issued guidance related to COVID-19 under the New York State Human Rights Law (“NYSHRL”).
- The guidance makes clear that individuals may file a complaint with the Division regarding discrimination because of a “perceived connection between [the person’s] race, national origin, or disability and the novel Coronavirus.”
- It also makes clear that the NYSHRL prohibits discrimination against individuals who are assumed to have been exposed to COVID-19 based on their protected characteristics, including race, national origin, and disability.

NYCHRL Guidance

- The Commission issued guidance on harassment and discrimination under the New York City Human Rights Law (“NYCHRL”) on the basis of race, national origin, age, and disability (including having COVID-19 or another serious illness).
- The guidance also includes a section on employment protections. The employment protections guidance makes clear that employers cannot harass or discriminate against employees because of “fears or stigma around COVID-19, including on the basis of actual or perceived race, national origin, age, disability, or other protected class.”
- It adds that in many cases, infection with COVID-19 qualifies as a disability under the NYCHRL. It also provides that treating an employee less well because they are perceived to have COVID-19 violates the NYCHRL.



5

ACCOMMODATION ISSUES

Do We Have To Provide Accommodations For The Employee's Home Office?

- Maybe
- Discuss what the employee needs and why.
- The key is listening, discussing and offering alternatives.
- Undue hardship considerations
- A reasonable accommodation that is feasible and doesn't pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework
 - The fact that the period of telework may be of an elongated or unknown duration may render certain accommodations either not feasible or an undue hardship
 - There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment

But You Let Me Work From Home Before!

Must employees who are unproductive at home be allowed to telework?

- Not necessarily.
 - An employee's demonstrated ability to telework productively and reliably can be one of the factors used to determine whether telework is a "reasonable" accommodation under the ADA, the NYSHRL or the NYCHRL
 - Just because an employee was allowed (or even required) to work from home during the pandemic does not mean doing so is automatically a "reasonable" accommodation
- The EEOC recognizes that just because an accommodation was provided during the pandemic, does not mean the employer must provide it after the pandemic
 - **BUT** the employer will need to be able to explain what changed.
 - The employer will also need to be mindful if any protected characteristic impacted the employee's ability to be productive (leave, illness, childcare, etc.).
- Conversely, accommodations that may be reasonable outside the pandemic may not be reasonable now
 - EEOC recognizes that budgetary issues may create an undue hardship now, where typically it might not ("[p]rior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources")
 - The employer may have permitted the employee to forego some essential job functions during the crisis, or it may be more difficult for the employee to work from home now that others will be back at work collaborating

EEOC COVID-19 Guidance

- See the EEOC’s “What You Should Know” Guidance:
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Commission Guidance on the NYCHRL and Remote Work

- Under NYCHRL, employers are required to engage in a cooperative dialogue with the employee about the employee's requested accommodation.
- Employers are not required by the NYCHRL to provide accommodations based on an employee's generalized fears. Employers are required to provide reasonable accommodations for:
 - Underlying disability
 - Risks of complications related to a pregnancy
- Per Commission guidance, employers are encouraged to provide reasonable accommodations for:
 - Risks of complication related to age
 - Risks to a vulnerable family member of the employee
 - An inability to secure childcare



6

VULNERABLE EMPLOYEES & THEIR FAMILY MEMBERS

Vulnerable Employees

Do “vulnerable” employees have the right to telework?

- When an employee asks to telework due to an underlying health condition making him/her more vulnerable to COVID, this should be handled like any other reasonable accommodation request:
 - Ask for medical documentation
 - Work with the employee in an interactive process
 - Evaluate potential reasonable accommodations
- Employers are encouraged to provide requested accommodation on temporary, interim, or trial basis while they obtain more information
- If telework is not possible, consider leave, as well as possible FMLA issues
- Use ADA certification form

Can Employers Involuntarily Exclude Vulnerable Populations From The Workplace During The Pandemic To Keep Them Safe?

- **May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?**
 - No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.
- **May an employer exclude an employee from the workplace involuntarily due to pregnancy?**
 - No. Sex discrimination under Title VII of the Civil Rights Act, the NYSHRL and the NYCHRL includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.
- **May an employer suggest an accommodation for an employee who falls in a vulnerable population?**
 - Not recommended

What About Older Workers?

- Unlike employees with disabilities, older workers do not have a right to reasonable accommodation under federal law (always check state and local laws, however)
- Still, advisable to try to accommodate older workers with telework when requested, if feasible
- Do not, however, make assumptions about older workers
 - Example: unlawful to require all workers over age 55 to telework, whether they want to or not

Vulnerable Family Members

Do employees with vulnerable family members have the right to telework?

- EEOC Guidance (Question D.13) *Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?*
 - No. Although the ADA, the NYSHRL and the NYCHRL prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA, the NYSHRL and the NYCHRL do not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.
 - For example, an employee without a disability is not entitled under the ADA, the NYSHRL or the NYCHRL to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure
- **BEST PRACTICE:** Consider permitting telework in this situation where feasible. Use legitimate, neutral criteria as much as possible.
- Also be mindful of potential PFL issues.



7

MEDICAL INQUIRIES DURING THE PANDEMIC

How Are Requests For Medical Information Treated Outside the Pandemic?

- During employment, all medical inquiries must be job related and consistent with business necessity
- Requests for medical information and medical records must be narrowly tailored - any request for information beyond those related to condition at issue is overly broad

EEOC Has “Informally” Approved

For employees who are not working from home and if applied across the board:

- Temperature Checks
 - Because the CDC/state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions
 - Check state laws as some states have mandated questions
- Questions about COVID and its symptoms
 - Including if they have COVID-19
 - If they have symptoms associated with COVID-19
 - If they have been tested for COVID-19
- Fitness-for-duty notes

What About Asking About Family Members?

- No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members
- But can ask employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease

Requirement for Employers To Maintain Confidentiality Of Medical Information

- If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?
 - Yes; the employer needs to maintain the confidentiality of this information
- May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?
 - Yes

Close Contact Disclosures

- **May the employer tell others who have been in close contact with an infected individual the identity of who tested positive?**
 - No. The employer can 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, NYSHRL or NYCHRL 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.

Confidential Medical Files

- The ADA, the NYSHRL and the NYCHRL requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files



8

LEAVE MANAGEMENT ISSUES

Now That The FFCRA Has Expired...

- Review workplace policies regarding availability of any additional paid or unpaid leave time
- Consider any applicable state or local laws providing for paid or unpaid leave
- The employer may need to consider FMLA (federal and/or state, if applicable) if the employee suffers from a serious health condition
- The employer may need to consider FMLA (federal and/or state, if applicable) leave to allow the employee to care for a child, spouse, or parent if COVID-19 complications create a “serious health condition”
- Even if no other leaves are available, consider ADA accommodations (workplace modifications, remote work, leave of absence)
- Consider allowing the employee to work remotely with the knowledge that if this is permitted it must be applied consistently to other employees

Absence Management:

The 3 Questions To Determine How Much Time Off You Are Required To Provide Remain The Same

Is the employee “entitled” to be absent with job protection?

- **FMLA, State Paid Sick Leave and Other State Entitlements**

Has employer “committed” to providing additional job-protected leave?

- **Collective Bargaining Agreement**
- **Your policies and past practices**

Is additional leave required as a reasonable accommodation for employees with disabilities?

- **ADAAA**
- **PDA**
- **State pregnancy accommodation laws**

Why does the employee need time off?

- The first step is to determine why the employee needs time off.
 - Is it for their own health condition or quarantine order?
 - Is it for a family members health condition or quarantine order?
 - Is it for a school closure (not due to a quarantine order)?

Do You Have To Provide Leave Because Of School/Childcare Issues?

Let's start with the easy one.

Outside of some state laws (and assuming the child is healthy), generally...

NO

New York Quarantine Leave Law

- Effective March 18, 2020
- Eligible employees will be entitled to unpaid, and in many cases paid leave
- Leave entitlements are triggered due to mandatory or precautionary orders of isolation or quarantine
- Law also provides job protection, prohibits discrimination and retaliation, and expands NYPFL and STD entitlements

Which Employers are Covered by the NYS Quarantine Leave Law?

- The NYS Quarantine leave law applies to all employers, regardless of size
- The size of the employer does not impact coverage under the law, but affects the amount of paid leave entitlements employers must provide to eligible employees
- All employers will be required to provide eligible employees with leave, with job protection, job restoration, and are prohibited from discriminating against eligible employees or subjecting them to retaliation for requesting leave.

New York Quarantine Leave Law: Amount of Benefits

- The amount of benefits employers must provide to eligible employees varies by employer size and net income

<ul style="list-style-type: none">• Employers with 100+ employees;• Public employers	Must provide at least 14 paid sick days during the applicable quarantine leave period. The law does not require unpaid sick days thereafter, likely because quarantines are presumed to end after 14 days.
<ul style="list-style-type: none">• Employers with 11 to 99 employees;• Employers with 10 or fewer employees (with 2019 net income \$1,000,000+)	Must provide at least 5 paid sick days during the applicable quarantine leave period, and then unpaid sick days until termination of order.
<ul style="list-style-type: none">• Employers with 10 or fewer employees (with 2019 net income under \$1,000,000)	Must provide unpaid sick days during the applicable quarantine leave period until termination of order.

Who is Eligible for NYS Quarantine Leave?

- The law does not distinguish between part-time and full-time employees – meaning **all employees may be eligible**
- Leave rights are triggered if an employee is **unable to work** because the employee:
 - is subject to a **mandatory or precautionary** order of **quarantine or isolation** due to COVID-19; and
 - the **order is issued** by the **State of New York, New York Department of Health, Local Board of Health**, or any governmental entity duly authorized to issue a mandatory or precautionary order.

Who is Not Eligible for NYS Quarantine Leave?

- **Asymptomatic employees** subject to quarantine or isolation orders who are **able to work remotely**.
- Employees who **elect to self-isolate** absent a mandatory or precautionary order from the government.
- Employees subjected to quarantine or isolation orders **due to certain foreign travel (CDC level 2 or 3 warnings)** are not entitled to paid benefits
 - If the travel was unrelated to employment and
 - The employee was notified of **both** the travel health warnings and the Quarantine Leave law's exclusions before such travel.
- If businesses **initiate closings** on their own due to COVID-19 reasons, the employees will not be eligible for paid benefits. Instead employees may apply for unemployment insurance benefits, where the 7-day waiting period has been waived.

NYS Quarantine Prohibitions Against Discrimination

- Employees who take leave are protected against
 - Discrimination
 - Discipline
 - Retaliation
 - Discharge
 - Penalty for having taken leave under the law

- Employees returning from leave are entitled to job restoration at the **same pay** and **terms of conditions of employment**.
- **HOWEVER** – Employers are **not** prohibited from making decisions they otherwise would have made
- The law **does not provide any greater benefits** or rights employees would have if working

NYS DOL Guidance on COVID-19 Sick Leave

- January 21, 2021 NYS DOL COVID Sick Leave Guidance issued
 - No obligation to test if returning to work from a mandatory quarantine or isolation period.
 - Up to 3 QLL periods; 2 and 3 must be pursuant to a positive test.
 - Employers who mandate employees, not otherwise subject to a quarantine order, to remain out of the work due to exposure to COVID must continue to pay the employee's regular rate of pay until either:
 - The employer permits the employee to return to work; or
 - The employee becomes subject to a mandatory or precautionary order of quarantine.

NYS Paid Family Leave Overview/Background

- New York State Paid Family Leave went into effect on January 1, 2018. Benefits phased in over four years. 2021 is the final phase.
- REASONS FOR LEAVE
 - bond with a newly born, adopted, or fostered child;
 - care for a family member with a serious health condition; or,
 - assist loved ones when a family member is deployed abroad on active military duty.
- ELIGIBILITY
 - Employees with a regular work schedule of 20 or more hours per week are eligible after 26 weeks of employment.
 - Employees with a regular work schedule of less than 20 hours per week are eligible after 175 days worked.

2021 Paid Family Leave Rates

- **AMOUNT OF LEAVE**

- As of January 1, 2021, employees are eligible for up to 12 weeks of paid leave.

- **RATE OF BENEFITS**

- The 2021 benefits rate is 67% of the employees' average weekly wage, up to 50% of the New York State average weekly wage.
- The current statewide average weekly wage is \$1,450.17, making the maximum weekly benefit for 2021 \$971.61.

- **RATE OF EMPLOYEE CONTRIBUTION**

- .511% of gross wages
- Employee contributions are capped at \$385.34 annually.
- Employers may start taking deductions at the 2021 rate on January 1, 2021.

New York State Quarantine Leave Law: Expanded Paid Family Leave & Short-Term Disability Benefits

- The NYS Quarantine Leave Law also expanded the availability of NYS Paid Family Leave Benefits to Employees who are not:
 - Entitled to paid benefits
 - Exhausted paid benefits
 - Are on unpaid NYS Quarantine Leave
- NYPFL benefits may be available to employees who:
 - need to provide care for a minor or dependent child who is subject to a mandatory or precautionary order of quarantine or isolation.
- Short-Term Disability Benefits will be available to employees unable to work due to a mandatory or precautionary order of quarantine or isolation.

New York Quarantine Leave Law: Relationship to PTO & Sick Leave

- Availability and use of Quarantine Leave cannot result in the loss of any other accrued sick leave under existing policies.
- As a result, any accrued but unused PTO should be available to employees once benefits under the Quarantine Leave law have been exhausted.
- The NYC Department of Consumer Affairs has issued guidance stating that the use of NYS Quarantine leave is *in addition* to NYC Safe and Sick Time

NYS Mandatory Paid Sick Leave

- New York state has joined the growing list of states and localities (including New York City and Westchester County) mandating that employers provide paid sick leave to employees.
- The new obligation is separate and distinct from the Quarantine Leave Law in response to COVID-19.
- The statewide sick leave law applies to all private employers with employees in the state.
- The law went into effect on September 30, 2020 (focus on accruals of time).
- Employers are not obligated to allow use of mandatory sick leave until **January 1, 2021**.
 - Employer policies still apply prior to 1/1/21.

Amount of Leave

- Employers with **fewer than 100 employees** in any calendar year must provide up to **40 hours of sick leave** per calendar year.
 - Sick leave provided by such employers **must be paid unless the employer had fewer than five employees** in any calendar year **and a net income of less than \$1 million in the previous tax year** in which case sick leave can be unpaid.
- Employers with **100 or more employees** per calendar year must provide **56 hours of paid sick leave** per calendar year.

Amount of Leave [continued]

- Headcount is determined based on a *calendar year*, defined as the 12-month period from January 1 to December 31. However, for purposes of accrual and usage limitations, an employer may use the period from January 1 to December 31 or establish its own calendar year, which can be any regular and consecutive 12-month period.
- To determine the number of employees, employers must count the total number of employees across all locations. For example, if there were 3 employees who worked at one location, and 4 employees who worked at another location, the employer would have 7 total employees, and would be required to provide up to 40 hours of paid sick time in each calendar year, for each employee.

Accrual and Usage

- Sick leave will accrue at a rate of one hour for every 30 hours worked, unless an employer elects to frontload sick leave at the beginning of the calendar year.
- Employers may set a reasonable, minimum increment for use of sick leave, which cannot exceed four hours.

Accrual and Usage

- Employees do not accrue leave for pay received for non-working time.
- Employees do not accrue leave for payments that are not for hours worked, such as bonuses or subject-to-call time. However, time that is considered “hours worked,” including on-call time, training time, and travel time, must be counted for the purposes of accruing leave.
- There is no minimum period of employment before an employee can use sick leave. However, unless an employer provides the required amount of sick leave up-front at the beginning of a calendar year or otherwise has a sick leave policy that exceeds the requirements of the law, an employee would have to work at least 30 hours before accruing any sick leave.
 - NYC ESSTA – pay stub requirement

Front-Load Accrual for Part-Time Employees

- At the beginning of each calendar year, employers can provide part-time employees with the hours of sick leave they would accrue based on the hours they are anticipated to work at the accrual rate of one hour of sick leave for every 30 hours the employee is anticipated to work.
- However, if the employer frontloads fewer than 40 hours, the employer must still track the employee's hours worked and accrual of sick leave because a part-time worker may work more hours than anticipated. If the employee works more hours than anticipated, the employer must allow the employee to accrue leave at the rate of one hour for every 30 hours worked until the total amount of front-loaded plus accrued sick leave in a calendar year equals 40 hours.

Front-Load Accrual for Part-Time Employees

- Employees who are front-loaded less than 40 hours in a calendar year must be allowed to use up to 40 hours of sick leave in a calendar year if they have accrued it.
- An employer who front-loads fewer than 40 hours must allow employees to carry over up to 40 hours of unused sick leave into the new calendar year, in addition to front-loading the amount of time the employer expects the employee to earn in the new calendar year.

Reminder: If the employer has not calculated employees' use and accruals, the employer cannot change the policy in the new calendar year since employees are entitled to carry over unused sick leave and use those hours at the beginning of the new calendar year.

Sick leave may be used for any of the following reasons (upon employee's oral or written request):

- Mental or physical illness, injury, or health condition of the employee or an employee's covered family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time of the request for leave;
- For diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
- For an absence from work for various reasons when the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking.

Permissible reasons to use accrued sick leave do **not** include a period of bereavement.

Carry Over and Payout

- Unused sick leave must be carried over to the next calendar year, but the employer may limit the amount of sick leave that may be used in a calendar year to 40 hours (employers with fewer than 100 employees) and 56 hours (employers with 100 or more employees).
- Employers are not required to pay an employee for unused sick leave upon their separation of employment.
- Sick leave must be paid at the greater of the employee's regular rate of pay or the applicable state minimum wage.
 - What about those who have multiple rates of pay?

9

MITIGATING WAGE AND HOUR RISKS

Best Practices For Tracking Compensable Time

- Have written policies and practices for employees to report unscheduled hours of work
 - Get signed acknowledgment for existing, revised timekeeping policies
- Allow employees to ask questions, report errors and perceived violations without fear of retaliation
- Make sure employees know what constitutes off-the-clock work (working during meal breaks, off-hours checking/responding to emails)
- Prohibit off-the-clock/unscheduled work that is not recorded as time worked, include disciplinary consequences for violation
 - Employees must be paid even for **unauthorized** unscheduled work
- Train Managers
- Prohibit managers/supervisors from requesting/permitting off-the-clock work

10

POLITICAL & SOCIAL JUSTICE MOVEMENTS & THE WORKPLACE

New York Prohibits Discrimination Based On Lawful Off-Duty Activities

- Managing political and social justice movements in the workplace is challenging.
- Some areas of growing concern:
 - Politically charged masks and clothing.
 - Social media posts.
 - Intranet posts.
 - Workplace speech.
 - Workplace solicitations.

Consistency

- Lack of uniformity in company approach can result in discrimination claims.
- Company approach must be consistently applied.
 - Typically, all or nothing.
 - If you allow one, you generally have to allow others.
- There is nothing wrong with an across the board ban.
- Must be careful when issuing solidarity statements as well to avoid any inference of discrimination.
- Also, keep in mind, New York protects lawful off-duty activities, which include someone's political affiliation.

Thank **you.**

About Jackson Lewis

Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms

JL Resources

- JL Web Resources
 - COVID Resource Center: <https://www.jacksonlewis.com/practice/covid-19>
 - COVID Advisor: <https://www.jacksonlewis.com/covid19-advisor>
 - State surveys on openings, closures, predictive scheduling, health and safety protocols, data privacy, FMLA, unemployment, sick leave
 - JL Reimagining the Workplace: <https://www.jacksonlewis.com/reimagining-the-workplace7>
 - Reopening resources- checklists, articles, daily updates, industry-specific information (e.g., retail, restaurants, healthcare)
 - COVID-19 Employment LitWatch: <https://www.jacksonlewis.com/covid19-litwatch>
 - Tracks complaints filed in federal and state courts nationwide that allege labor and employment law violations related to COVID-19