

Bond

Update and Discussion
on Continuing Legal
and Practical Issues
Related to COVID-19
May 12, 2020



 **BOND** SCHOENECK
& KING ATTORNEYS

1

Introduction



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2

FFCRA Leave and Rehiring Issues (Full and Partial and Phased Ramp-Up)



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3

FFCRA Issues



4

When Can Rehired Employees Use FFCRA Leave?

- Paul was hired for a full-time position by your company on January 1, 2020. He was laid off on March 15, 2020. You rehire him on May 15, 2020. On his first day back, he requests EPSL and EFMLA leave to care of his children. ***Is he eligible?***



5

When Can Rehired Employees Use FFCRA Leave? (cont.)

- Emergency Paid Sick Leave (“EPSL”): immediately eligible
- Emergency Family and Medical Leave (“EFMLA”): after employed for 30 calendar days
 - Rehires meet this eligibility requirement if:
 - Laid off by employer on or after March 1, 2020,
 - Worked at least 30 of 60 calendar days prior to layoff, and
 - Rehired by same employer



6

What if We Reduce Employees' Hours?

- Anne typically works 40 hours per week (10 hours per day on Monday – Thursday). On May 1, her employer reduced her schedule by eliminating her Thursday hours. Anne asks to take EFMLA leave intermittently to care for her children on Thursdays. ***Is she eligible?***
- Anne's husband has been caring for their children since mid-March. However, his employer is reopening on May 15, and he will be returning to work. Anne is no longer able to work (or telework) because she needs to care for their children. She asks to take EFMLA and EPSL leave. ***How to calculate her pay?***



7

What if We Reduce Employees' Hours? (cont.)

- Employees cannot take FFCRA during hours that they are no longer scheduled to work
- However, the amount of FFCRA leave may be impacted by your employees' prior work schedule
 - Normal schedule
 - Six-month average
 - Agreed upon schedule at hiring
 - Average work schedule for entire period of employment
- ***Can Anne continue EFMLA leave into summer, when school would otherwise have been closed?***



8

What if We Reduce Employees' Pay?

- Tom's regular rate is \$30 per hour. On May 20, you reduce his regular rate to \$25 per hour due to business slowdown. On May 30, Tom asks for EPSL because he is experiencing symptoms of COVID-19 and is seeking diagnosis. ***What regular rate should you use in calculating his EPSL?***



9

What if We Reduce Employees' Pay?

- Regular rate = average regular rate over all full workweeks during the 6-month period ending on the first day that EPSL or EFMLA is taken
- Paul returns to work after two weeks. Six months later, he is still earning a regular rate of \$25 per hour. He asks to take EFMLA to care for his children. ***What regular rate should you use in calculating his EPSL?***



10

Are You Taking the Correct Tax Credit?

- Take the full amount:
 - 100 percent of the qualified EPSL or EFMLA wages,
 - Employer's share of Medicare tax on those qualified wages, and
 - Allocable qualified health plan expenses
- But don't take too much!
 - No tax credit for leave under NY's COVID-19 law
 - Don't use the same payroll code!



11

Working Remotely



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12

Employer Considerations for Managing a Remote Workforce

- Wage and Hour Compliance
- Employee Safety / Workers' Compensation
- Confidentiality and Cyber Security
- Reasonable Accommodations
- Professionalism
- Telecommuting Policy



13

Wage and Hour Compliance

- Accurate record keeping
- Non-Exempt (“hourly”) Employees
 - At least Minimum wage for all hours worked
 - Time and ½ for overtime, even if unauthorized
- Meal Periods
 - Required under New York Law



14

Employee Safety / Workers Compensation

- Safe Working Environment
 - Designate a space for work
 - Maintain that space in a safe condition
 - Report injuries to employer immediately

- Workers' Compensation
 - Governed by state law
 - Employees may receive benefits for occupational injuries that “arise out of and in the course of employment”



15

Confidentiality and Cybersecurity

- Confidentiality
 - Requires extra attention when employees are remote
 - Convey specific guidelines
 - What items can be taken home, where to conduct calls and place files

- Cyber Security
 - Phishing e-mails at an all-time high
 - Avoid credential sharing
 - Be wary of links and attachments
 - Share anything questionable with Information Technology Dep't.
 - Renew Training



16

Americans with Disabilities Act (“ADA”): Reasonable Accommodations

- Remote employees may need reasonable accommodations to perform the essential functions of their jobs at home
- Be wary of “out of sight, out of mind”
- Engage in the interactive process as necessary



17

Professionalism

- Communication and Responsiveness
 - When and how must employees be responsive?
- Dress and Appearance
 - Depending on employee’s responsibilities, appearance is important even when working from home.
- Consider a Formal Policy for Present Circumstances



18

New York's Public Sector – Restricted, Not Paused



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19

New York's Public Employers

- Not on Pause. Slow motion. Personnel restrictions.

- Stick to Fundamentals
 - Executive Order 202.4
 - Executive Order 202.14
 - Executive Order 202.16
 - Executive Order 202.18
 - Executive Order 202.29



20

Workforce Restriction – Still Applies

- **Executive Order 202.4 (*in part*)** – any local government or political subdivision shall, effective March 17, 2020, allow non-essential personnel as determined by the local government, to be able to work from home or take leave without charging accruals, except for those personnel essential to the locality’s response to the COVID-19 emergency. Such non-essential personnel shall total no less than fifty percent (50%) of the total number of employees across the entire workforce of such local government or political subdivision.



21

New York’s Private Employers

- Exec. Orders 202.6 – 202.8 put the rest of New York “on pause”
- These Executive Orders did NOT apply to Public Sector
 - Empire State Development Corp. – Guidance on EO 202.6 – State and local governments, including municipalities, authorities, and school districts, are exempt from these essential business reductions, but are subject to other provisions that restrict non-essential, in-person workforce and other operations under Executive Order 202.
 - Also see, FAQ #5 – state and local gov’t ... not covered by EO 202.8



22

Extensions to Executive Order 202.4

- Executive Order 202.4's workforce restrictions initially in effect through April 15, 2020
- The “expiration” date was subsequently extended as follows:
 - EO 202.14 – April 29, 2020
 - EO 202.18 – May 15, 2020
 - EO 202.29 – June 7, 2020** - “... do hereby continue the suspensions and modifications of law, and any directives, not superseded by a subsequent directive, made by Executive Order ... 202.18 ... for thirty days until June 7, 2020.”



23

New York Forward – Regions & Phases

- Q. - In which phase (#1-4) do you find “local government?”
 - A. – None
- Why? Local governments were not “paused” or shut down. Thus, not “re-opening.” Not explicitly phased-in or reviewed by Region.
- Some day, will return to full in-person workforce
 - Perhaps gradual return – 75% of total workforce, then 100%. Perhaps by Region. Stay tuned.



24

Additional Considerations in Public Sector

- Executive Order 202.16 – Guidance from NYS Dept. of Health states (in part): “Essential businesses, as well as state and local government agencies and authorities, must procure, fashion, or otherwise obtain face coverings and provide such coverings to employees who directly interact with the public during the course of their work at no-cost to the employee.”



25

Update from Albany




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26

	14-Day Decline in net Hospitalizations OR Under 15 new Hospitalizations (3-day avg)	14-Day Decline in Hospital Deaths OR Fewer than 5 deaths (3-day avg)	New Hospitalizations (Under 2 per 100K residents - 3 day rolling avg)	Share of total beds available (threshold 30%)
Capital Region	No ✗	No ✗	0.68 ✓	42% ✓
Central New York	Yes ✓	Yes ✓	1.16 ✓	45% ✓
Finger Lakes	Yes ✓	Yes ✓	0.94 ✓	46% ✓
Long Island	Yes ✓	No ✗	2.85 ✗	33% ✓
Mid-Hudson	Yes ✓	No ✗	2.79 ✗	32% ✓
Mohawk Valley	Yes ✓	Yes ✓	0.82 ✓	55% ✓
New York City	Yes ✓	Yes ✓	3.46 ✗	29% ✗
North Country	Yes ✓	Yes ✓	0.00 ✓	54% ✓
Southern Tier	Yes ✓	Yes ✓	0.11 ✓	50% ✓
Western New York	No ✗	No ✗	1.45 ✓	45% ✓



27

	Share of ICU beds available (threshold of 30%)	30 per 1k residents tested monthly (7-day avg of new tests per day)	Contact tracers 30 per 100K residents or based on infection rate	Metrics Met
Capital Region	50% ✓	1,123 / 1,085 ✓	Expected ★	5/7 ✗
Central New York	59% ✓	647 / 775 ✗	Yes ✓	6/7 ✘
Finger Lakes	55% ✓	1,458 / 1,203 ✓	Yes ✓	7/7 ✓
Long Island	33% ✓	4,317 / 2,839 ✓	Expected ★	5/7 ✗
Mid-Hudson	46% ✓	3,993 / 2,322 ✓	Expected ★	5/7 ✗
Mohawk Valley	65% ✓	502 / 485 ✓	Yes ✓	7/7 ✓
New York City	24% ✗	13,464 / 8,399 ✓	Expected ★	4/7 ✗
North Country	60% ✓	400 / 419 ✗	Yes ✓	6/7 ✘
Southern Tier	45% ✓	858 / 633 ✓	Yes ✓	7/7 ✓
Western New York	53% ✓	1,430 / 1,381 ✓	Expected ★	5/7 ✗



28

Phase 1: Construction

- Building Equipment Contractors
- Building Finishing Contractors
- Foundation, Structure, and Building Exterior Contractors **forward.ny.gov**
- Highway, Street and Bridge Construction
- Land Subdivision
- Nonresidential Building Construction
- Residential Building Construction
- Utility System Construction



29

Phase 1: Agriculture, Forestry, Fishing & Hunting

- Greenhouse, Nursery, and Floriculture Production
- Other Animal Production
- Other Crop Production
- Support Activities for Animal Production
- Support Activities for Crop Production
- Support Activities for Forestry



30

Phase 1: Retail Trade – Curbside Pickup

- Clothing Stores
- Direct Selling Establishments
- Electronics and Appliance Stores
- Electronic Shopping and Mail-Order Houses
- Furniture and Home Furnishing Stores
- Florists
- General Merchandise Stores
- Health and Personal Care Stores
- Jewelry, Luggage, and Leather Goods Stores
- Lawn and Garden Equipment and Supplies Stores
- Office Supplies, Stationery, and Gift Stores
- Used Merchandise Stores
- Shoe Stores
- Sporting Goods, Hobby, Musical Instrument and Book Stores
- Other Miscellaneous Store Retailers



31

Phase 1: Manufacturing

- Apparel Manufacturing
- Computer and Electronic Product Manufacturing
- Electric Lighting Equipment Manufacturing
- Fabricated Metal Product Manufacturing
- Furniture and Related Product Manufacturing
- Leather and Allied Product Manufacturing
- Machinery Manufacturing
- Nonmetallic Mineral Product Manufacturing
- Paper Manufacturing
- Petroleum and Coal Products Manufacturing
- Plastics and Rubber Products Manufacturing
- Printing and Related Support Activities
- Textile Mills
- Textile Product Mills
- Wood Product Manufacturing
- Other Miscellaneous Manufacturing



32

Phase 1: Wholesale

- Apparel, Piece Goods, and Notions Merchant Wholesalers
- Chemical and Allied Products Merchant Wholesalers
- Furniture and Home Furnishing Merchant Wholesalers
- Household Appliances and Electrical and Electronic Goods Merchant Wholesalers
- Machinery, Equipment, and Supplies Merchant Wholesalers

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- Metal and Mineral (except Petroleum) Merchant Wholesalers
- Paper and Paper Product Merchant Wholesalers
- Professional and Commercial Equipment and Supplies Merchant Wholesalers
- Wholesale Electronic Markets and Agents and Brokers
- Miscellaneous Durable Goods Merchant Wholesalers
- Miscellaneous Nondurable Goods Merchant Wholesalers



33

Business Safety Precautions: PLAN

- 1. Protections** for Employees and Customers
- 2. Layout:** Changes to the Physical Workspace
- 3. Adaptive** Health Protocols
- 4. Notation:** Put the Plan in Writing



34

Tax Credits, Loans and PPP Update



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35

FFCRA Leave and Rehiring Issues (Full and Partial and Phased Ramp-Up)

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NY Pause and Public (And Private) Sector Employers (Reopening Issues)

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Update from Albany

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Tax Credits, Loans and PPP Updated

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36