

## NY Employers Must Prepare For New COVID-19 Closures

By **Leni Battaglia** and **Daniel Kadish** (October 16, 2020, 1:17 PM EDT)

Effective Oct. 9, pursuant to a new executive order,[1] the New York State Department of Health was charged with identifying geographic areas that require significantly enhanced public health restrictions based on clusters of COVID-19 cases and enforcing these new restrictions.

The new restrictions vary depending on the risk categorization, with red zones considered as having the most severe clusters of COVID-19 outbreaks, orange zones considered moderate severity warning areas, and yellow zones considered precautionary risk areas.

The level of restrictions varies depending on the zone and include mandatory closure for 14 days of all nonessential businesses in red zones and closure of all personal care businesses for 14 days in orange zones. These closure requirements represent the strictest rolling back of reopening efforts anywhere in the Northeast U.S. and reflect rising COVID-19 positivity rates around clusters identified by New York state authorities.

The executive order also places additional serving restrictions on restaurants, capacity restrictions on houses of worship, and in-person closure or testing requirements on schools depending on the zone designation. The state has published guidance that includes hyperlinks to maps showing each cluster subject to this cluster action initiative.[2]

Initially, there are five regions subject to restrictions under the executive order, including portions of Broome County, Orange County, Rockland County, Brooklyn and Queens. Companies can determine whether there are restrictions in place at a certain business address, or home address if needed, using a new online tool published by the state.[3]

Violations of the executive order may result in a penalty of \$1,000 for each violation. The order also provides that any individual who encourages, promotes or organizes a nonessential gathering as defined by the New York State Department of Health will be liable for a civil penalty of up to \$15,000 per day.

### Best Practices and Paid Leave Considerations



Leni Battaglia



Daniel Kadish

Given these potential penalties and the impact of an unexpected closure, which Gov. Andrew Cuomo has said will initially last two weeks in affected zones and then be subject to ongoing monitoring, employers should consider creating an action plan to monitor these closure requirements, prepare communications to affected employees, and understand potential leave entitlements available to employees working in a zone subject to a mandatory closure or caring for a child whose school or place of care is closed due these new restrictions.

As these restrictions are yet to be widely reported and are subject to revisions on a regular basis, employers with operations in New York should designate an individual or team to monitor the closure maps and state resources to ensure the employer is aware of any restrictions in place where the employer has operations.

For example, if an employer is subject to a closure as a nonessential business in a red zone under the state guidance, there is no grace period and the employer will be required to close immediately. Schools in these locations will also be required to close for in-person school and restaurants may only provide takeout or delivery service, not indoor or outdoor on-premises service.

As these interruptions can have a significant impact on both businesses and individuals, employers may consider communicating with employees in advance about the potential for a closure. In addition to informing employees about the potential for a state-mandated closure due to a regional COVID-19 outbreak, employers can also use these communications as an opportunity to inform employees about their COVID-19 protocols, leave policies, work-from-home options/requirements, limits on meeting sizes for in-person activities, and other relevant information.

Throughout the pandemic, we have seen that employers who have engaged in proactive communications with employees regarding COVID-19 updates and precautions have received fewer complaints regarding their COVID-19 procedures. Similarly, by having any closure communication and/or manager talking points drafted in advance, employers may be able to minimize some of the questions and delays that can occur when required to draft such a communication anew, which frequently results in numerous employee follow-up questions.

Employers in New York should also be aware of the various leave and pay benefits that employees may be entitled to if their workplace is subject to a closure. One common question from employees in these scenarios is whether they will be paid if they are prohibited from reporting to work and/or must stay home to care for a child whose school has closed.

To help dispel confusion, below is a brief discussion of various paid leave benefits that may or may not apply to an employee working in a business subject to close due to the application of the executive order.

### ***Families First Coronavirus Response Act***

Employees working in a worksite that is required to close under the cluster action initiative may not be able to use Families First Coronavirus Response Act leave for the closure of their own workplace. However, if an employee is caring for a child whose school is shut down for COVID-19-related reasons, which is required in red and orange zones under the cluster action initiative, then the employee may use paid time off under the FFCRA for the duration of the school closure up to a total of 12 weeks of combined sick and family leave.

During this period, the employee's pay benefits may be capped at two-thirds of the employee's regular wages or \$200 per day, whichever is lower. As a reminder, the FFCRA only applies to employees of employers with less than 500 employees.

### ***New York State COVID-19 Paid Sick Leave***

Employees in New York who are subject to a mandatory or precautionary order of quarantine or isolation issued by a New York government entity are entitled to paid leave of up to two weeks depending on the size of the employer. Employers with 100 or more employees must provide two weeks of paid sick time, smaller employers can provide less time and their employees may also use disability and paid family leave wage replacement benefits during the quarantine/isolation period.

However, the cluster action initiative is not a qualifying quarantine or isolation order such that all employees whose workplaces are required to close are entitled to this leave. Rather, it only applies where employees are specifically subject to a quarantine order or, for employees of employers with less than 100 employees, are caring for a dependent minor subject to a specific quarantine requirement.

If an individual working in a restricted zone is ordered to quarantine, then this leave would apply, but it does not generally apply solely because the individual's employer is required to close or limit operations.

### ***New York State and New York City Paid Sick Leave Laws***

Under these laws,[4] covered employees may use accrued sick leave when their business closes due to a public health emergency or when the employee needs to care for a child whose school or child care provider closed due to a public health emergency. Mandated closures due to New York state's cluster action initiative do fall under this definition.

This means that employees in New York City whose workplace closes or who need time off due to a child's school or care provider closing may use their accrued paid time off, which must be provided at 100% of the employee's regular pay rate. For the duration of 2020, leave under these laws need only be provided to employees working in New York City and may be capped at 40 hours per year for full-time employees.

However, beginning on Jan. 1, 2021, when the New York state law goes into effect, the amount of leave that will need to be provided potentially increases (depending on the size of employer) and will apply to nearly all employers across the state — not just employers in New York City. Employers with 100 or more employees shall be required to provide up to 56 hours of paid sick leave per year while smaller employers can limit the amount of sick leave provided to 40 hours.

### ***New York Paid Family Leave***

Employees subject to a mandated closure likely do not have a right to use New York Paid Family Leave based on that closure in and of itself. Further employees caring for a child who is out of school would not be able to use New York Paid Family Leave unless the child has a qualifying serious health condition.

### **Key Takeaways and Recommended Next Steps**

Given these potential penalties and the impact of an unexpected closure, employers with operations in New York should monitor the state guidance and maps to ensure they remain compliant with any

restrictions applicable to their operations in these regions. Additionally, employers should consider creating a plan of action for responding to mandated closures or an imposition of limitations on gathering size applicable to their operations.

Finally, employers should be prepared to address concerns from employees who must travel from a restricted zone to a workplace not in a restricted zone, or vice versa. By being proactive in addressing responses to these concerns, employers can stay informed on restrictions that are required of them and potentially reduce the negative impact on productivity and morale if a partial or complete shutdown ultimately is required under the cluster action initiative.

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*Leni Battaglia is a partner and Daniel Kadish is an associate at Morgan Lewis & Bockius LLP.*

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[1] New York State Executive Order 202.68, available here: <https://www.governor.ny.gov/news/no-20268-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

[2] This guidance is available here: <https://esd.ny.gov/ny-cluster-action-initiative-guidance>.

[3] The address lookup tool is available here: <https://covidhotspotlookup.health.ny.gov/#/home>.

[4] The NYS paid sick leave law became effective on Sept. 30, however employees are not permitted to use accrued paid sick time under that law until Jan. 1, 2021.