

Need Some Time? COVID-19 Edition

*Strategies for navigating the complicated web of pandemic-related leave
and accommodation rules*

Labor and Employment Webinar Series
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Agenda

- Families First Coronavirus Response Act (“FFCRA”)
- New York State COVID-19 Paid Sick Leave Law
- Family and Medical Leave Act (“FMLA”)
- New York Paid Family Leave Law (“NYPFL”)
- State and local paid sick leave laws
- ADA/NYSHRL/NYCHRL (reasonable accommodations)

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FFCRA

- The Families First Coronavirus Response Act (FFCRA) contains two paid leave laws:
 - Emergency Paid Sick Leave Act (EPSLA)
 - Emergency Family and Medical Leave Expansion Act (EFMLEA)
- Applies to private employers with fewer than 500 employees and public employers of any size.
 - Private employers with fewer than 50 employees can claim an exemption from providing EPSLA and EFMLEA due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would “jeopardize the viability of the small business as a going concern.”
- Effective April 1, 2020.
- Sunsets December 31, 2020.

FFCRA – EPSLA

- Covered employers must provide all employees with up to two weeks of paid leave for the following reasons:
 - The employee is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19;
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
 - The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - The employee is caring for his or her son or daughter (as defined under the FMLA) if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

FFCRA – EPSLA

- EPSLA taken for the first three qualifying reasons must be paid at the employee's regular rate of pay or the applicable minimum wage rate (whichever is greater), capped at **\$511 per day and \$5,110 in the aggregate** per employee.
- EPSLA taken for the last three qualifying reasons must be paid at two-thirds of the employee's regular rate of pay or the applicable minimum wage rate (whichever is greater), capped at **\$200 per day and \$2,000 in the aggregate** per employee.
- Employers may elect to exclude employees who are health care providers or emergency responders from the provisions of the paid sick leave law.
- Employers may not require an employee to use other paid leave before this paid sick leave.
- Unused paid sick time does not carry over from one year to the next.

FFCRA – EFMLEA

- Expands FMLA to apply when an employee needs leave to care for his or her minor child because the child's school or place of care has been closed, or the child's child care provider is unavailable, because an emergency has been declared by a federal, state, or local authority with respect to COVID-19.
- For this qualifying reason:
 - Covered employees are those who have been employed by the employer for at least 30 days.
 - The first 10 days can be unpaid.
 - After 10 days, the leave must be paid by the employer at two-thirds the employee's regular rate of pay, with benefits capped at **\$200 per day and \$10,000** in the aggregate for each employee.

FFCRA – USDOL Regulations

- On April 1, 2020, the United State Department of Labor (“USDOL”) issued regulations to implement FFCRA’s provisions.
- On August 3, 2020, the United States District for the Southern District of New York (“SDNY”) issued a decision in *State of New York v. U.S. Department of Labor*, vacating several important aspects of the USDOL regulations.
 1. Court vacates work availability requirement.
 - USDOL rule stated that paid leave for certain specified reasons under the FFCRA is not available to employees where the employer does not have work for the employee to perform (e.g., where the employee is on layoff or furlough).
 - The court held that the work availability requirement exceeded the USDOL’s authority because it applied only to three of six qualifying conditions for EPSLA leave, which the court found to be “entirely unreasoned” and contrary to the language of the FFCRA.
 - The court also found that the USDOL’s “barebones” explanation for the work availability requirement was “patently deficient” given its enormously consequential impact of considerably narrowing the scope of the FFCRA.

FFCRA – USDOL Regulations

2. Court vacates definition of “health care provider.”
 - Under the FFCRA, employers may deny leave to an employee with a qualifying condition if the employee is a “health care provider or emergency responder.”
 - USDOL had defined the term very broadly to include 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.”
 - The court found this definition to be “vastly overbroad” because it included individuals whose roles bore no nexus to the provision of healthcare services and who were not even arguably necessary or relevant to the healthcare system’s vitality.
3. Court vacates, in part, intermittent leave provisions.
 - The USDOL regulations allowed employees to take leave intermittently only if the employer and employee agreed and, even then, only for a limited subset of qualifying conditions.
 - The court upheld that portion of the regulations that limited leave to qualifying reasons that are not logically correlated with a higher risk of viral infection (i.e., leave to care for the employee’s child whose school or place of care is closed, or child care provider is unavailable, because of reasons related to COVID-19).
 - However, the court determined that the USDOL failed to offer an appropriate justification for the blanket requirement of employer consent.

FFCRA – USDOL Regulations

4. Court invalidates USDOL's temporal documentation requirements.
 - New York also challenged the USDOL's regulations to the extent that they required employees to provide their employer with documentation supporting the need for leave ***in advance*** of taking leave.
 - After noting that the FFCRA is silent with regard to a documentation requirement, the court concluded that the DOL's requirement that employees provide documentation in advance imposed different and more stringent preconditions to leave that were inconsistent with the FFCRA's notice provisions to the extent that it required documentation to be provided ***before*** taking leave.
 - The court was careful to indicate that the substance of the documentation requirements, as distinguished from its "temporal aspect," remain intact.

FFCRA – USDOL Regulations

- On September 11, 2020, USDOL issued new FFCRA regulations in response to the SDNY decision.
 1. USDOL reaffirms work availability requirement.
 - USDOL explained that the purpose of the EPSLA and EFMLEA was to discourage potentially infected employees from reporting to work. If there is no work available, there is no need to discourage such employees from going to work.
 - USDOL also explained that its requirement that work be available is consistent with the general understanding of the term “leave” as an excused absence *from work*, as well as the manner in which the FMLA has been interpreted and applied.
 2. USDOL narrows definition of health care provider to include:
 - Any employee who is a health care provider under the existing FMLA regulations
 - Any other employee who is capable of providing diagnostic, preventative, or treatment services; and
 - Any other employee who is capable of providing other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

FFCRA – USDOL Regulations

3. USDOL reaffirms employer consent requirement for intermittent leave, with a key change.
 - USDOL now appears to define intermittent a bit differently when an employee’s child participates in hybrid learning in which schools operate on adjusted or alternating schedules. According to USDOL, each school closure under a hybrid model “constitutes a separate reason for . . . leave that ends when the school opens the next day.” In other words, intermittent leave is not necessary (and therefore neither is the employer’s consent) where the school literally closes and opens repeatedly.
4. USDOL revises documentation timing requirements.
 - Workers must provide documentation, consisting of their name, the date(s) for which leave is requested, the qualifying reason for the leave, and an oral or written statement that the employee is unable to work because of the qualified reason for leave, “as soon as practicable.”
 - However, in most cases, “as soon as practicable” will be when the employee provides notice of the need for leave.

NYS COVID-19 Paid Sick Leave

- Guarantees leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.
 - Private employers with 10 or fewer employees and net income of one million dollars or less in the previous tax year must provide **unpaid sick leave until the termination of the order.**
 - Private employers with 10 or fewer employees and net income over one million dollars in the previous tax year and private employers with between 11 and 99 employees, regardless of income, must provide **five (5) days of paid sick leave, followed by unpaid sick leave until the termination of the order.**
 - Private employers with 100 or more employees and public employers of any size must provide **14 days of paid sick leave.**

NYS COVID-19 Paid Sick Leave

- According to guidance issued by New York State, “5 days” and “14 days” mean calendar days, and the pay must represent the amount of money the employee would have otherwise received for the 5 or 14 day period, as applicable.
- Leave must “be provided without loss of the officer or employee’s accrued sick leave.”
 - What about vacation, PTO, and other time off banks not designated as “sick leave”?
- During unpaid portion of these leaves, employees of private employers with fewer than 100 employees can apply for increased Disability Benefits (DB) and Paid Family Leave Benefits (PFL) from the employer’s insurance carrier, up to a maximum of **\$2,883.92** per week.
- The legislation also made PFL available when an employee’s minor child is subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.

NYS COVID-19 Paid Sick Leave

- Does not apply where the employee is asymptomatic or has not yet been diagnosed with any other medical condition and is physically able to work while under the quarantine/isolation order through remote access or other similar means.
- An employee is not eligible for paid benefits (from the employer or carrier) if quarantined after returning to the United States from non-work-related travel to a country for which the CDC had issued a Level 2 or Level 3 travel notice.
 - If the employee was notified of the CDC's travel notice and the unavailability of paid benefits following such travel prior to the travel.
 - Even under these circumstances, the employee must be permitted to use any accrued leave, followed by unpaid leave, for the absence.
- Runs concurrently with EPSLA, but not subject to the EPSLA pay caps.

FMLA

- The FMLA allows eligible employees of covered employers to take up to 12 weeks of unpaid job-protected leave during a 52-week period for, among other reasons:
 - To care for his/her spouse, child, or parent who has a serious health condition;
 - For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- Applies to employers with “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”
- Eligible employees are those who:
 - Have been employed by the employer for at least 12 months;
 - Have worked at least 1,250 hours for the employer during the 12 month period preceding the leave; and
 - Work in a location where the employer has 50 or more employees in a 75 mile radius.

FMLA

- “Serious health condition” is an illness, injury, impairment, or physical or mental condition that involves:
 - *Inpatient care* in a hospital, hospice or residential care facility; or
 - “Inpatient care” is defined as “an overnight stay in a hospital, hospice, or residential medical facility, including any period of incapacity... or subsequent treatment in connection with such inpatient care.”
 - *Continuing treatment* by a health care provider.
 - “Continuing treatment” is defined to include, among other things, “a period of incapacity... of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves... treatment two or more times by a health care provider... or by a provider of health care services under orders of, or on referral by, a health care provider.”
 - The term “treatment” includes examinations to determine whether a serious health condition exists and evaluations of the condition, but excludes routine physical examinations.

NYPFL

- NYPFL applies to virtually all private employers in New York.
- Covered employees:
 - Employees whose regular schedule is 20 or more hours per week: Covered after having been in employment for at least 26 consecutive work weeks; and
 - Employees whose regular schedule is under 20 hours per week: Covered after having worked 175 days in such employment.
- Provides job-protected leave, with paid benefits through the employer's NYPFL insurance, to care for a covered family member with a serious health condition.
 - Covered family member is broader than under FMLA and applies to the employee's spouse, domestic partner, child (any age), parent, parent-in-law, parents or child of domestic partner, grandparent, or grandchild.

NYPFL

- “Serious health condition” includes COVID -19 infection.
- Care includes necessary physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.
 - An employee must be in close and continuing proximity to the care recipient to be providing care. This means present at the same location as the family member during the majority of the employment period from which leave has been taken.
 - Travel necessitated to secure medication or to arrange care for the family member, or other such deviations reasonably related to providing care, also constitute “care.”

Paid Sick Leave Laws

- COVID-19 related absences may also be covered by applicable paid sick leave laws.
- Two most prominent:
 - New York State Paid Sick Leave Law
 - NYC Earned Sick and Safe Leave Act (“NYC ESSTA”)

NYS Paid Sick Leave Law

- Applies to virtually all private sector employers in New York.

Type of Employer		Employee Leave Entitlement
4 or fewer employees	Net income less than \$1 million	At least 40 hours of unpaid sick leave
	Net income more than \$1 million	At least 40 hours of paid sick leave
Between 5 and 99 employees		At least 40 hours of paid sick leave
100 or more employees		At least 56 hours of paid sick leave

- Does not apply to federal, state, and local government employers.
- All employees, including part-time employees, seasonal and temporary employees, and interns, must earn sick time.
- Employees needed to begin accruing leave as of September 30, 2020, but employees are not entitled to use time until January 1, 2021.

NYS Paid Sick Leave Law

- Leave may be used for:
 - A **mental or physical illness**, injury or health condition **of an employee or an employee's family member**, regardless of whether that condition has been diagnosed or requires medical care at the time the employee requests leave;
 - The **diagnosis, care, or treatment of a mental or physical illness**, injury or health condition of, or need for medical diagnosis of, **or preventative care for, an employee or an employee's family member**; and
 - Certain absences from work due to **domestic violence, a family offense, sexual offense, stalking, or human trafficking**, of an employee or an employee's family member.
- "Family member" is defined broadly and includes:
 - Employee's child, spouse, domestic partner, parent, sibling, grandchild, grandparent, and child or parent of the employee's spouse or domestic partner.

NYS Paid Sick Leave Law

- According to the FAQ Guidance published by NYS:

IF AN EMPLOYER HAS BEEN ORDERED TO CLOSE TEMPORARILY DUE TO A PUBLIC HEALTH EMERGENCY, MAY EMPLOYEES USE ACCRUED SICK LEAVE DURING THE PERIOD OF CLOSURE?

Whether or not the usage of sick leave in this scenario would be fact specific depending on the type of health emergency, including the risk of contagion, and other health considerations. Accrued sick leave may be used by an employee for preventive care of a mental or physical illness, injury or health condition.

Sick leave under this law is separate and additional to the quarantine leave for employees subject to a precautionary or mandatory order of quarantine or isolation related to COVID-19 (Ch. 25 of the laws of 2020), and use of COVID-19 leave does not impact or otherwise utilize an employee's paid sick leave accruals or usage. More information on COVID-19 Leave is available at paidfamilyleave.ny.gov/covid19.

NYC ESSTA

- In effect since 2014. Recently amended to harmonize (in some ways) with the state law.
- Accrued sick leave may be used for, among other reasons:
 - The employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care;
 - Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or preventive medical care;
 - Closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.
- “Public health emergency” is defined under the NYC ESSTA rules to mean “a declaration made by the commissioner of health and mental hygiene pursuant to subdivision d of section 3.01 of the New York city health code or by the mayor pursuant to section 24 of the executive law.”

Accommodations

- Under the Americans with Disabilities Act (“ADA”) and New York State Human Rights Law (“NYSHRL”), employers are required to provide reasonable accommodations for qualified individuals with disabilities, except where doing so would result in undue hardship.
 - Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
 - NYSHRL standard is broader and includes “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or* is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”

Accommodations

- Employees with underlying medical conditions that render them more susceptible to COVID-19 infection, or more likely to develop severe complications from such an infection, may request accommodations such as:
 - On-the-job modifications (e.g., isolation or significant social distancing from co-workers and the public).
 - Telework.
 - Leave.
- Employees who become infected with COVID-19 may be entitled to job-protected time off, even if they are not eligible for or have exhausted leave under the laws described above.
- A person's age, or the fact that a person resides with a person with a disability, do not alone trigger accommodation obligations.

Hypothetical 1

Per Governor Cuomo's recent Executive Order, employees who travel to other states must take a COVID-19 test within three (3) days prior to their departure from that state, quarantine themselves for three (3) days upon returning to NYS, take a COVID-19 test on the fourth day, and remain in quarantine until he or she receives negative test results. Lauren is a non-essential employee and voluntarily travels to another state for personal reasons, staying in that state for more than 24 hours.

Hypothetical 1

Question 1: Upon Lauren's return to NYS, is she eligible to take NYS COVID-19 Paid Sick Leave while in quarantine?

Yes or No?

Hypothetical 1

Question 2: Is she eligible to take EPSLA while in quarantine?

Yes or No?

Hypothetical 1

Question 3: If Lauren returns to NYS on January 2, 2021 and starts exhibiting symptoms of COVID-19, is she eligible for any type of paid leave?

Yes or No?

Hypothetical 2

Lindsay works for ABC Company, which has 50 employees. Lindsay and her five year old daughter both had close contact with someone who tested positive for COVID-19.

Hypothetical 2

Question 1: Is Lindsay eligible to take NYS COVID-19 Paid Sick Leave for herself?

Yes or No?

Hypothetical 2

Question 2: Is Lindsay eligible to take COVID-19 quarantine leave for her daughter?

Yes or No?

Hypothetical 2

Question 3: If Lindsay is eligible for leave for both herself and her daughter, which should she take?

Leave for herself or leave for her daughter?

Hypothetical 3

Liz's son's school is operating on an alternate day hybrid model. The school is open every day, but her son is only schedule to attend in person on Mondays and Tuesdays.

Hypothetical 3

Question 1: Can Liz take leave under the FFCRA in these circumstances?

Yes or No?

Hypothetical 3

Question 2: Does Liz need her employer's permission to take leave on Wednesdays, Thursdays, and Fridays?

Yes or No?

Hypothetical 3

Question 3: Can Liz's employer require her to use preexisting leave entitlements and FFCRA paid sick leave and expanded FMLA leave concurrently for the same hours?

Yes or No?

Hypothetical 4

Luisa's mom provided childcare to Luisa's one-year-old daughter. Because Luisa's mom has a weakened immune system, she is no longer able to care for Luisa's daughter.

Hypothetical 4

Question 1: Is Luisa entitled to expanded FMLA to care for her daughter?

Yes or No?

Hypothetical 4

Question 2: Is Luisa required to look for alternative child care providers before being eligible for expanded FMLA leave?

Yes or No?

Hypothetical 5

Kinsey, a health care worker for a large employer with over 500 employees, exhibits COVID-19 symptoms while at work that are observed by her supervisor. Kinsey's supervisor immediately isolates her and directs her to go home and not return to work for a specified period of time after her symptoms have resolved. Kinsey leaves work to return home, and due to her job duties, she is not able to work remotely. The next day while sitting in bed, Kinsey begins to worry about how she will pay her bills, so she calls Human Resources to ask if she will be eligible for paid COVID leave as she was sent home by her supervisor.

Hypothetical 5

Question 1: Is Kinsey eligible for leave under the EPSLA?

Yes or No?

Hypothetical 5

Question 2: Is Kinsey eligible for NYS COVID-19 Paid Sick Leave?

Yes or No?

Hypothetical 6

- Peter works in the Human Resources Department of a medium size employer. He has an underlying respiratory condition that he and his physician feel exposes him to a greater risk of contracting COVID-19 or developing severe complications if exposed to the virus. He tells his boss that his doctor has advised him to self-quarantine and work from home until the pandemic emergency ends.

Hypothetical 6

Question 1: The employer does not need to consider such an open-ended and long-term request.

True or False?

Hypothetical 6

Question 2: Peter is a production associate and works on the manufacturing floor. Such an employee cannot work from home, so the employer has no obligations.

True or False?

QUESTIONS?

Immigration and Travel Update Fall 2020

David Wilks and Kinsey O'Brien
November 5, 2020

Agenda



1. New York State Travel Restrictions
2. Immigration Context
3. COVID-19 and Borders
4. COVID-19 and Consulates
5. USCIS and Regulatory Changes
6. Take Aways

NYS Travel Restrictions

- Applies to individuals entering New York from or after travel to any other state.
- Travelers from Connecticut, Massachusetts, New Jersey, Pennsylvania, or Vermont (contiguous states):
 - No quarantine or testing requirements.
 - Must complete Traveler Health Form.

NYS Travel Restrictions

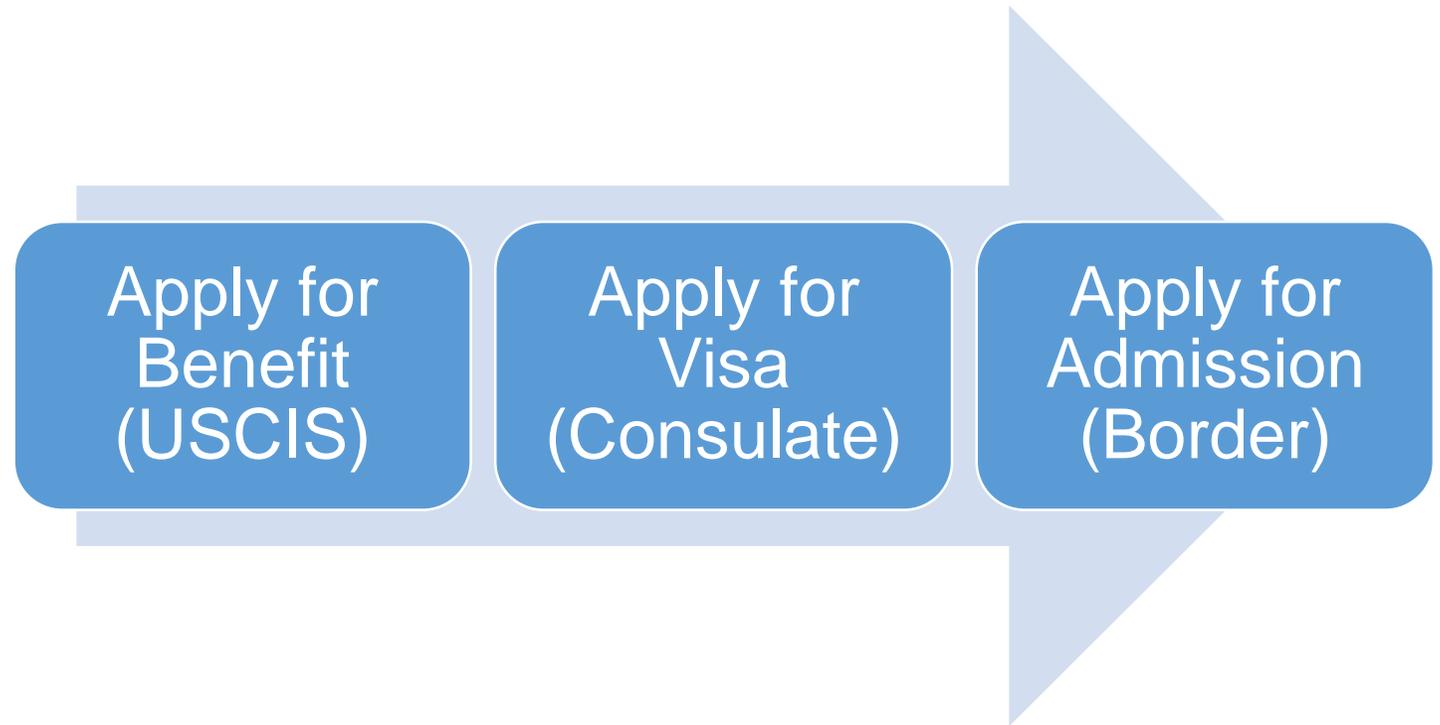
- Travelers from all other states who were out-of-state for less than 24 hours:
 - Must complete Traveler Health Form.
 - Not required to quarantine upon return to NYS.
 - On fourth day after arrival in NYS, must take COVID-19 test.
- Travelers from all other states who were out-of-state for more than 24 hours:
 - Must take COVID-19 test within three days before arrival in NYS.
 - Must complete Traveler Health Form.
 - Must quarantine upon return to NYS.
 - On fourth day after arrival in NYS, must take COVID-19 test.
 - Must continue to quarantine until both test results come back negative.

NYS Travel Restrictions

- Exception for essential workers:
 - Includes any individual employed by an entity included on the Empire State Development (ESD) Essential Business list and certain health care workers and first responders.
 - Not required to follow the testing protocols outlined above.
 - Subject to additional restrictions based on duration of time in NYS.
 - Short-term (less than 12 hours); medium term (less than 36 hours, requiring overnight stay); and long-term (more than 26 hours).
 - Note that, under the long-term rubric, the worker must take a COVID-19 test within 24 hours of arrival in NYS.

Immigration Context

1. Nonimmigrant vs. Immigrant
2. 3-Step Immigration Path
3. In-country changes, extensions, and adjustments



COVID-19 and Borders



- Canadian Border remains closed
 - Essential workers
 - Canadian quarantine
 - Airports vs. Land Borders

- 14-day Travel Ban:
 - Austria, Belgium, Brazil, China, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Iran, Italy, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Monaco, San Marino, United Kingdom, Vatican City
 - <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>
 - National Interest Exception

COVID-19 and Consulates

- Consulate appointment availability still limited (E's and NIE's)
- Limits on Immigrant Visas (Permanent Residence)
 - Does not apply to in-country submissions
 - Unexpected help to in-country green cards
- Limits on Temporary Visas (H-1B, H-2B, L-1, and certain types of J-1)
 - Does not apply to in-country submissions
 - Does not apply to Canadians



USCIS and Regulatory Changes



- Public Charge
- DOL Wage Rule
- H-1B rules
 - Offsite Employment
 - Tighter H-1B restrictions
 - Changes to lottery (preferring high-earners)

Take Aways

1. Planning International Travel
2. Planning for Foreign Nationals
3. Election Impact

Questions?

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