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New guidance from the New York State Department of Labor significantly alters employers' obligations to provide COVID-19-related leave

By Kimberly K. Harding and David A. Tauster

On January 20, 2021, the New York State (NYS) Department of Labor (DOL) issued "Guidance on Use of COVID-19 Sick Leave." The guidance is ostensibly intended to clarify the circumstances in which employees may be entitled to leave under the State's COVID-19 emergency sick leave law, which was passed last March and discussed in our [prior alert](#). However, while the guidance provides some useful clarifications for employers, including potential limits on an employee's ability to take sick leave in multiple instances, it also appears to drastically expand the circumstances in which employers may be obligated to provide leave to employees.

As noted in the prior alert, the law requires employers to provide "up to" fourteen (14) days of paid sick leave¹ in the sole event that an employee is the subject of a "mandatory or precautionary order of quarantine or isolation" issued by a local Department of Health or other authorized entity due to COVID-19 exposure or infection (a COVID-19 Order), and where the employee is not able to perform their duties remotely. The law does not explicitly require an employer to provide leave in any instance other than when an employee is subject to a COVID-19 Order. However, the law provides that the NYS DOL has the authority to adopt regulations and issue guidance to "effectuate any of the provisions of this act" and that such regulations or guidance may address issues including "standards for the use, payment, and employee eligibility of sick leave pursuant to this act."

In the immediate wake of the law, the NYS DOL issued limited guidance, primarily relating to the use of New York State Paid Family Leave benefits under the law. However, the new guidance significantly alters the landscape by limiting the circumstances in which an employee must obtain a COVID-19 Order before becoming eligible for leave and expanding the circumstances in which an employer may be obligated to pay an employee who is out of work due to COVID-19 exposure.

¹ Employers with fewer than 100 employees need only provide five (5) days of paid leave, except that employers with fewer than four (4) employees and less than a million dollars in net income in the previous tax year need only provide five (5) days of unpaid leave.

- Initially, the guidance largely downplays the relationship between testing and leave under the law. The guidance indicates that an employee “does not need to be tested before returning to work” following a period of mandatory quarantine or isolation, with the exception of certain health care employees. Indeed, the guidance goes so far as to note that it does not recommend that an employee “be tested to discontinue isolation or quarantine.”
- If an employee tests positive for COVID-19 before returning from a period of quarantine or isolation, then the employee “must not report to work.” Notably, in such an instance, the employee would be deemed to be *automatically* subject to a COVID-19 Order and, therefore, eligible for paid leave under the law (regardless of whether the employee was receiving paid leave for the first period of quarantine or isolation). Where an employee is already the subject of a COVID-19 Order and tests positive, the positive test would be deemed to create a second (or third) COVID-19 Order, such that the employee would be entitled to the full amount of paid leave required by the law for this second period of quarantine or isolation.
- The guidance clarifies that an employee is only eligible for sick leave under the law for up to three COVID-19 Orders. Moreover, the guidance clarifies that leave for a second or third COVID-19 Order is only available when the employee has continued to test positive for COVID-19 after expiration of the initial COVID-19 Order. The guidance requires employees who are claiming leave due to a positive test to provide appropriate documentation regarding the positive test unless the test was provided by the employer.
- Most significantly, the guidance provides that if an employer requires an employee who is not otherwise (or yet) subject to a COVID-19 Order to remain out of work due to exposure or potential exposure to COVID-19 (regardless of whether the exposure occurred within the workplace), the employer must continue to pay the employee at their regular rate of pay (again, to the extent that the employee is not able to work remotely) until the employer permits the employee to return to work or until the employee becomes subject to a COVID-19 Order (and therefore formally eligible for leave under the law), if ever. Notably, this is not phrased as a leave obligation or entitlement, such that an employer seemingly cannot require an employee to utilize other paid leave during this period.

Although the guidance is intended to provide clarity, it leaves some important related issues unaddressed. For instance, the guidance does not include any provisions permitting an employer to request or require documentation or other information regarding potential exposure outside of the workplace, leaving employers virtually powerless to manage this provision. Further, there is an argument to be made that the law could require employers to provide days (or even weeks) of leave even without a COVID-19 Order, to the extent that the employer takes the exceedingly rational step of requiring employees who report potential COVID-19 exposure to remain out of the workplace.

Given that the guidance sweepingly expands the benefits under the law, in a manner seemingly inconsistent with the statutory language, it is possible that it will be subject to legal challenges, or that the DOL will elect to issue subsequent guidance to clarify or limit the scope of these changes. However, in the interim, employers must reckon with this new guidance and should consult with counsel to determine any necessary modifications to their COVID-19 protocols or sick leave policies.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Kimberly K. Harding, 585-263-1037, kharding@nixonpeabody.com
- David A. Tauster, 516-832-7559, dtauster@nixonpeabody.com