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On January 20, 2021, the New York State Department of Health (the “Agency”) issued guidance on the use of COVID-19 sick leave, which appears to expand the ability of individuals to access COVID-19 sick leave beyond the scope of the original New York legislation. However, the guidance prohibits an employee from qualifying for sick leave under New York’s COVID-19 sick leave law for more than three orders of quarantine or isolation.

It should be noted that this guidance is not a regulation and there is some concern that the Agency may be exceeding its authority by expanding the scope of the enacted legislation, which limits COVID-19 sick leave to up to 14 days for larger employers and does not include provisions for multiple quarantines or absences from work. Thus, the guidance may be challenged.

Background

On March 18, 2020, Governor Cuomo signed legislation (the “Act”) that implements emergency sick leave benefits to employees subject to a mandatory or precautionary order of quarantine or isolation issued by a governmental entity duly authorized to issue such order due to COVID-19 (“Quarantine Period”). The legislation provides impacted employees these benefits through the termination of the Quarantine Period.

As a reminder, employers cannot require employees to use existing sick leave accruals or other accruals (e.g., paid time off) for a COVID-19 quarantine. Employers required to provide paid COVID-19 sick leave must provide leave separate from any accruals.

Generally speaking, the minimum amount of leave is based on the employer’s size as of January 1, 2020 and is as follows:

Employer Size

Up to 10 employees* with net income of \$1M or less in the prior tax year
 Up to 10 employees* with net income greater than \$1M in the prior tax year
 11 – 99 employees*
 100 or more employees* and public employers

Minimum Sick Leave Requirements

Unpaid leave during the Quarantine Period
 5 days of paid sick leave and unpaid leave thereafter**
 5 days of paid sick leave and unpaid leave thereafter**
 14 days of paid sick leave

*Counting employees both within and without the city.

**Following the expiration of the Minimum Sick Leave Requirements, employees may also be eligible for benefits under the New York Paid Family Leave and Disability Leave Law.

What has Changed?

New York employers now appear to be required to provide COVID-19 paid sick leave for up to three orders of quarantine or isolation if the employee is under a subsequent order of quarantine or isolation because they test positive for COVID-19. This latest guidance states that additional COVID-19 sick leave may be available in the following three instances:

- An employee who returns to work following a period of mandatory quarantine or isolation, who subsequently receives a positive diagnostic test result for COVID-19 (precluding a return to work) shall be deemed to be subject to a mandatory order of isolation from the Department of Health and shall be entitled to COVID-19 sick leave whether or not the employee already has received sick leave as required by the law for the first period of quarantine or isolation.
- An employee who is subject to an order of quarantine or isolation but continues to test positive for COVID-19 after the end of such quarantine or isolation period (precluding a return to work) shall also be deemed to be subject to a second mandatory order of isolation from the Department of Health and shall be entitled to COVID-19 sick leave for the second period of isolation.
- If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation to remain out of work due to exposure or potential exposure to COVID-19, regardless of whether such exposure or potential exposure was in the workplace, the employer shall continue to pay the employee at the employee's regular rate of pay until such time as the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation. At that time, the employee shall receive COVID-19 sick leave for the period of time the employee is subject to such mandatory or precautionary order of quarantine or isolation.

Employer Action

Employers should review their obligations with employment counsel to ensure the appropriate amount of COVID-19 sick leave as well as other New York paid leave is available to employees.

