

New York State Issues New Guidance on COVID-19 Sick Leave

By Jonathan A. Wexler, Blythe E. Lovinger and Victoria L. Jaus

February 11, 2020

On January 20, 2021, the New York State Department of Labor (“NY DOL”) released new [guidance](#) (the “Guidance”) on the use of COVID-19 sick leave. The Guidance is intended to supplement prior NY DOL guidance that interpreted state legislation enacted in March 2020 (the “NYS COVID-19 Sick Leave Law” or the “Law”) authorizing sick leave for employees following a mandatory or precautionary order of quarantine or isolation due to COVID-19 issued by a public health authority, such as the NYS Department of Health or a County Health Department. Please see our prior bulletin, [New York State Issues Guidance on Its COVID-19 Paid Sick Leave](#).

The Guidance addresses the following four topics:

1. Testing requirements

An employee who returns to work after a mandatory quarantine or isolation does not need to receive a negative test result before returning to work.¹ However, if an employee chooses to be tested and receives a positive COVID-19 result, the employee will be deemed subject to a mandatory order of isolation, will not be permitted to return to work, and will be entitled to paid COVID-19 sick leave “whether or not the employee has already received sick leave as required by the law for the first period of quarantine or isolation.” The employee will be required to submit documentation from a licensed medical provider or testing facility to receive the paid leave, unless the employee’s employer administered the positive COVID-19 test to the employee.

2. Employees who continue to test positive for COVID-19

An employee who is subject to an order of quarantine or isolation who continues to test positive after the end of the quarantine or isolation is not permitted to report to work, and will be allowed to take a second round of paid COVID-19 sick leave for the second period of isolation, assuming that documentation is provided confirming the positive test result. The Guidance makes clear, however, that it is not recommended that employees be tested before ending quarantine or isolation.

3. Rate of pay

The Guidance further states that if an employer mandates that an employee remain out of work, despite the employee’s not being subject to a mandatory or precautionary order of quarantine or isolation, the employer must pay the employee his or her regular rate of pay until the employee is permitted to return to the workplace, or until the employee becomes subject to a mandatory or precautionary order of quarantine or isolation, at which time the employee would switch to receiving paid COVID-19 leave under the paid COVID-19 sick leave law. It is not clear whether the pay continuation being “required” by the Guidance can come from employer-provided paid time off and/or pursuant to the New York State Paid Sick Leave Law or the New York City Earned Safe and Sick Time Act.

4. How many times can an employee take COVID-19 leave?

The Guidance also specifically addresses whether employees are entitled to take job-protected paid leave on multiple occasions, and states that an employee may take COVID-19 paid sick leave three separate times in connection with three

¹ The exception to this is nursing home staff, who must obtain a negative COVID-19 test result before returning to work

orders of quarantine or isolation – the second and third of which must be based on a positive COVID-19 test. The Guidance suggests that even if an employee has already exhausted his or her COVID-19 sick leave under a previous mandatory or precautionary quarantine or isolation (i.e., 5 or 14 days, depending on the number of employees a company employs), he or she would still be entitled to two more rounds of COVID-19 paid sick leave. If this is in fact the intention of the NY DOL, employers could, pursuant to the Guidance, be obligated to provide employees with up to six weeks of COVID-19 paid leave.

5. Summary

On its face, the Guidance potentially represents a significant departure from, and expansion of the benefits provided by, the NYS COVID-19 Paid Sick Leave Law. The Guidance thus may be in conflict with the Law and challengeable by employers as a result. On the one hand, the Guidance could mean that employees have the ability only to break up the 5 or 14 total days of paid sick leave to which they are entitled under the Law into up to three separate periods of leave. On the other hand, if the Guidance intends to permit employees to take three separate leaves of absence during **each** of which the 5 or 14 days of paid leave can be used, this essentially triples the amount of paid leave that the Law provides. It is questionable whether, in an administrative guidance, the NY DOL could alter a legislative enactment so significantly.

In addition, the Guidance's indication that positive tests are the equivalent of a quarantine order entitling an employee to COVID-19 sick leave is problematic in that an individual who has contracted COVID-19 may test positive for up to three months after his or her symptoms have resolved.

Finally, the Guidance's requirement that an employer continue to pay an employee whom the employer requires to remain out of work as a result of exposure or potential exposure to the virus seems to create yet another "bucket" of paid sick leave that may or may not derive from paid leave under the employer's PTO policies or pursuant to applicable (non-COVID) paid sick leave laws.

Employers should carefully evaluate the Guidance and consult with legal counsel regarding its application.

If you have any questions about this article, please contact **Jonathan A. Wexler** at +1 (212) 407-7732, **Blythe E. Lovinger** at +1 (212) 407-7770, **Victoria L. Jaus** at +1 (212) 407-7745, or any other Vedder Price attorney with whom you have worked.

vedderprice.com