



# New Guidance Significantly Expands NY COVID-19 Sick Leave

Insights

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Approximately 10 months after New York state enacted a law providing paid leave for New York workers who have been quarantined or isolated as a result of COVID-19 (COVID-19 Sick Leave), the New York State Department of Labor issued new guidance that significantly expands on employers' obligations set forth in the statute. What do New York employers need to know about this latest development?

## A Review Of NY's COVID-19 Sick Leave Requirements

As enacted, the COVID-19 Sick Leave law requires employers to provide certain paid and unpaid leave to New York employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by any governmental body related to COVID-19. The level of obligation is keyed to the size (and in some cases, revenue) of employers:

- **10 or fewer employees as of January 1, 2020:** unpaid sick leave until the termination of the order of quarantine or isolation.
- **10 or fewer employees as of January 1, 2020 with a net income of greater than \$1 million in the previous tax year, or between 11 and 99 employees as of January 1, 2020:** at least five days of paid sick leave, and unpaid leave until the termination of the order of quarantine or isolation.
- **100 or more employees as of January 1, 2020:** At least 14 days of paid sick leave during the order of quarantine or isolation.

The statute also allows employees of employers with fewer than 100 employees (i.e., those who receive less than 14 days of paid leave to cover the period of quarantine or isolation) to utilize New York Paid Family Leave (NYPFL) and disability benefits for the remainder of the period of quarantine or isolation.

## What Does The NY DOL's Guidance Entail?

The NY DOL's guidance, issued on January 20, provides that employees can qualify for COVID-19 Sick Leave for *up to three* orders of quarantine or isolation. To be eligible for the statutory sick leave benefits during the second and third quarantine or isolation order, the employee must either (1) return to work following a period of quarantine or isolation and subsequently receive a positive

diagnostic test result for COVID-19, or (2) continue to test positive for COVID-19 after the end of the initial quarantine or isolation period.

In these circumstances, the employee shall be deemed to be subject to a second (or third) mandatory order of isolation from the Department of Health, and per the NY DOL's guidance, the employee will be entitled to COVID-19 Sick Leave for the second (or third) period. The employee must submit documentation from a medical provider or testing facility confirm the positive test. The NY DOL guidance further states that in no circumstances can employee receive COVID-19 Sick Leave for more than three orders of quarantine or isolation.

The NY DOL guidance notes that an employee subject to a quarantine or isolation order does not need to be tested before return for work (except for nursing home staff), and that it is not recommended that employees be tested to discontinue isolation or quarantine. If testing is nonetheless undertaken, an employee may be eligible for additional COVID-19 Sick Leave if they receive a positive test, in accordance with this guidance.

Additionally, the guidance purports to create leave obligations even in circumstances where an employee is not subject to an order of quarantine or isolation. If an employer requires an employee who is not otherwise subject to an order of quarantine or isolation to remain out of work due to exposure or potential exposure to COVID-19, regardless of whether the exposure was in the workplace, the employer is required to continue to pay the employee at the employee's regular rate of pay until either the employer allows the employee to return to work, or the employee becomes subject to an order of quarantine or isolation, at which time the employee shall receive COVID-19 Sick Leave.

## **What Should We Do Now?**

It was long assumed, per the statute, that COVID-19 Sick Leave was capped at 14 days for large employers. The statute also made clear that leave was only available in the event an employee was subject to an order of quarantine or isolation. The NY DOL guidance appears to create obligations for employers that go beyond the statute.

Accordingly, the guidance may be subject to legal challenge since an agency like the NY DOL can only promulgate regulations that interpret a statute and cannot create obligations that go beyond the statutory requirements. However, the guidance reflects the NY DOL's current position regarding COVID-19 Sick Leave, so employers must proceed with caution. You should consult with legal counsel regarding your obligations to comply with the NY DOL's guidance. Additionally, be sure to monitor further developments in this area.

We will continue to monitor developments impacting New York employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our New York City office.

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