

NYS COVID-19 Paid Leave

We recently updated you about COVID-19 paid leave as it related to the expiration of the Families First Coronavirus Response Act's (FFCRA) Emergency Paid Sick Leave (ESPL) and Emergency FMLA (EFMLA) benefits on December 31, 2020 and the continued availability of NYS COVID-19 paid leave. We now need to advise you of a recent change issued by New York State and also alert you to a potential reinstatement of EPSL and EFMLA. We know how complicated this has been for you to manage; please know that we will be with you every step of the way as you navigate these new updates.

NYS COVID-19 Leave “Guidance”

On March 18, 2020, New York State enacted legislation authorizing paid sick leave for employees subject to a mandatory or precautionary order of quarantine or isolation from a health department due to COVID-19. The law provides for paid and unpaid sick leave benefits depending on the size of the employer, with some employers, including public employers, being required to provide eligible employees with up to 14 days (two weeks) of paid leave due to the quarantine. On January 20, 2021, NYS Department of Labor (NYSDOL) published a new document titled “Guidance on Use of COVID Sick Leave,” which requires employers to provide NYS COVID-19 paid leave benefits beyond what most employers in the State had understood

was a maximum 14-day leave benefit. The NYSDOL guidance also provides that NYS COVID-19 paid leave must be provided in certain circumstances even *without* a mandatory order of quarantine or isolation, which is expressly required by the statute. The guidance can also be found at https://dol.ny.gov/system/files/documents/2021/01/covid-19-sick-leave-guidance_1.pdf

The NYSDOL “guidance” is remarkably unclear and seems to have created more questions than answers for employers and employees. At this time, without further clarification from NYSDOL, we believe that an employer can interpret the advice in several ways.

The guidance actually establishes fairly significant modifications to the statute related to three fact patterns. These three fact patterns are as follows:

Fact Pattern #1: An employee who returns to work following a period of mandatory quarantine or isolation and who subsequently receives a positive diagnostic test result for COVID-19 shall be deemed to be subject to a mandatory order of isolation from the Department of Health and shall be entitled to sick leave under New York’s COVID-19 sick leave law, whether or not the employee already has received sick leave as required by the law for the first period of quarantine or



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isolation. This employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has tested positive for COVID-19.

Fact Pattern #2: 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 must not report to work. The employee shall be deemed to be subject to a second mandatory order of isolation from the Department of Health and shall be entitled to sick leave under New York's COVID-19 sick leave law for the second period of isolation. The employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has received a positive diagnostic test for COVID-19 after completing the initial period of isolation. This guidance specifically states that the State does not recommend that an employee be tested to discontinue isolation or quarantine.

Fact Pattern #3: If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation 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 must 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 (and is therefore otherwise eligible for sick leave as required by New York's COVID-19 sick leave law).

The guidance states that no employee qualifies for New York's COVID-19 sick leave benefits for more than three orders of quarantine or isolation and the receipt of paid sick leave is only required for any second or third order of quarantine if the employee has received a positive COVID-19 test.

This guidance document states that it supplements prior guidance on the application of COVID-19 sick leave. All prior guidance remains in effect.

The guidance also states that, except for health care workers, employees who are subject to a mandatory quarantine or isolation order are not required to provide an employer with a negative test result before returning to work. It seems to leave open to the employer the discretion to continue to require a negative test in these circumstances.

The guidance is dated January 20, 2021, and is assumed to be prospective guidance. This is notable, since most employers have been capping NYS COVID-19 sick leave benefits at a maximum of 14 days total since last year when the law was first enacted.

A few areas that are not clear, and may be subject to interpretation by employers, employees, unions:

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- The timing associated with fact pattern #1, between the two periods of quarantine, is not specified. The open question is whether an employee who *subsequently* tests positive *after returning* to work following a quarantine or isolation order is only covered for a second or third leave if the positive test occurs immediately after the first quarantine period, or whether these events could be separated in time by many weeks, months, or longer. Does the additional paid quarantine leave benefit apply only to a situation where, for example, an employee's spouse is COVID-19 positive and the entire family, including the employee, is subject to a DOH quarantine order for 10 days and the employee immediately thereafter (on the eleventh day) tests COVID-19 positive herself—and therefore must continue to be out of work for an additional period of quarantine? Or does this also apply when, for example, an employee was quarantined by DOH last April, in 2020, due to her exposure to COVID-19, and now, in January of 2021, she tests positive for COVID-19, completely unrelated to the first quarantine period? The guidance could be interpreted either way.
- Regarding fact pattern #3, there is an open question as to whether an employer's direction that the employee remain out of work triggers unlimited NYS COVID-19 paid sick leave

benefits based on multiple directions, or whether the employee is capped at three paid COVID-19 leaves in total. It seems more likely that any employer-directed leave must be compensated without any cap; however, instruction #4 creates an ambiguity and it is not necessarily unreasonable to interpret this guidance as stating that under no circumstances, including fact pattern #3, may an employee receive more than three COVID-19 paid leave periods in total.

- Some employees and unions are arguing that if an employee receives 2 or 3 written orders of quarantine or isolation from the DOH, as opposed to testing positive for COVID-19 after returning to work or following the expiration of the period of quarantine or isolation, that the employee is entitled to paid leave; however, instruction #3 of the guidance seems clear that a second and third paid leave period must be based on an employee himself or herself testing positive for COVID-19. However, since the entire guidance document is not altogether clear, this may be an open question.

FFCRA May Be Reinstated and Expanded

President Biden has laid out a COVID-19 relief package which includes a reinstatement and expansion of paid leave per the FFCRA. The FFCRA's mandatory paid leave provisions expired on December 31, 2020,



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however, Congress extended the tax credit for covered employers who voluntarily provide leave. President Biden's proposed legislation includes the following points:

- Reinstates the FFCRA through September 30, 2021 with the requirement that all employers, regardless of size or number of employees, provide paid leave and expand coverage to all employees.
- Removes the exemption for healthcare workers and first responders.
- Expands paid sick and emergency family medical leave to 14 weeks (previously Emergency Paid Sick leave was only available for up to 80 hours) for the same reasons included in the FFCRA as well as for time off to get the vaccine.
- Extend the weekly maximum paid leave benefit to \$1,400 per-week, which would require employers to pay full wage replacement to workers earning up to \$73,000 annually.
- Reimburse employers with less than 500 employees for the full cost of the leave by extending the tax credits.
- The bill proposes to reimburse state and local governments for the cost of the leave.
- This plan does not address tax credits for employers with more than 500 employees.

We will keep you informed as rapid changes are being issued from the federal and state governments.

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