

NEW NYSDOL GUIDANCE CHANGES THE LANDSCAPE FOR NYS COVID-19 PAID SICK LEAVE

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On January 20, 2021, the New York State Department of Labor (“NYSDOL”) issued guidance (the “Guidance”) relating to NYS COVID-19 Paid Sick Leave. This Guidance can be found [here](#).

Based on the Guidance, New York employers must provide additional NYS COVID-19 Paid Sick Leave beyond what was long assumed to be a capped 14-day sick leave benefit for large and public sector employers. A serious concern we have about this Guidance is that it appears to create obligations for employers that go beyond the requirements of the underlying statutory language. A fundamental principle of administrative law is that an executive agency, such as the NYSDOL, can promulgate regulations that interpret a statute. However, the agency cannot expand a statute beyond its terms. Only the Legislature can do that. The Guidance here, which is an informal administrative announcement and not a regulation, could be subject to legal challenge to the extent it sets forth requirements that are not within the scope of the underlying legislation that the Guidance purports to explain. That said, the Guidance reflects the current view of the NYSDOL.

The Guidance indicates that all employees are eligible for NYS COVID-19 Paid Sick Leave benefits for up to three quarantine periods under two circumstances:

1. An employee returns to work and subsequently tests positive for COVID-19; and
2. An employee continues to test positive for COVID-19 after completing an initial quarantine or isolation period.

Pursuant to the Guidance, in order to be eligible for NYS COVID-19 Paid Sick Leave benefits during the second and third mandatory quarantine or isolation periods under these two circumstances, the employee must submit documentation from a licensed medical provider or testing facility attesting that the employee tested positive for COVID-19. If the employer administered the COVID-19 test, that employer may not require the employee to submit any additional documentation.

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This recent Guidance mirrors the joint guidance that the New York State Department of Health and the NYSDOL issued on June 25, 2020 regarding health care workers. That earlier joint guidance provided that health care workers are eligible for NYS COVID-19 Paid Sick Leave for up to three orders of quarantine or isolation.

According to the new Guidance, all New York employers are now responsible for paying employees whom they send home due to exposure or potential exposure to COVID-19. Specifically, under the Guidance, if an employer sends home an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation, the employer must continue to pay the employee at the employee's regular rate of pay until: (1) the employer permits the employee to return to work, or (2) the employee becomes subject to a mandatory or precautionary order of quarantine or isolation, at which time the employee would be eligible for NYS COVID-19 Paid Sick Leave.

The Guidance also indicates that an employer must provide NYS COVID-19 Paid Sick Leave to an employee even without proof that the employee is under a "mandatory order of quarantine or isolation" when that employee tests positive for COVID-19. This, however, will not have a significant impact on when an employer must provide an employee with NYS COVID-19 Paid Sick Leave because an individual who tests positive for COVID-19 is automatically under a mandatory order of isolation.

Key takeaways from this Guidance include:

1. Employees are now eligible for NYS COVID-19 Paid Sick Leave for up to three orders of quarantine or isolation if they are under a subsequent order of quarantine or isolation because they test positive for COVID-19.
2. Employees are eligible for up to 14 days (depending on the size and type of the employer) of NYS COVID-19 Paid Sick Leave per quarantine period.
3. An employee who returns to work following a period of mandatory quarantine or isolation does not need to be tested before returning to work, except for nursing home staff.
4. If an employee continues to test positive for COVID-19 after completing an initial quarantine or isolation period, the employee cannot return to work.
5. In no event will an employee qualify for NYS COVID-19 Paid Sick Leave benefits for more than three orders of quarantine or isolation.
6. The second and third orders must be based on a positive COVID-19 test as outlined above.
7. While the Guidance may be subject to future legal challenge, it reflects the current position of the NYSDOL.

If you have any questions relating to the Guidance or NYS COVID-19 Paid Sick Leave in general, or have any related inquiries, please contact Glen Doherty (518.433.2433), Charles H. Kaplan (646.218.7513), Elizabeth McPhail (716.848.1530), Luisa Bostick (716.848.1705) or any member of our [Labor & Employment Practice](#).

Please check our [Coronavirus Resource Center](#) and our [CARES Act](#) page to access information related to both of these rapidly evolving topics.

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