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New York State Department of Labor Issues Additional COVID-19 Sick Leave Guidance

The New York State Department of Labor (“DOL”) issued additional guidance on COVID-19 Sick leave, addressing issues not previously addressed, including a cap on the number of times an employee may use the leave.

February 9, 2021

The DOL issued additional guidance on the use of New York State COVID-19 Sick Leave on January 20, 2021 to supplement its prior guidance. The new guidance addresses topics that were not addressed by prior DOL guidance, such as testing requirements for employees returning to work after an order of quarantine or isolation, whether New York State COVID-19 Sick Leave is available when an employer prevents the employee from entering work, and addressing a cap on the number of times an employee may use New York State COVID-19 Sick Leave. The guidance also addresses employees who continue to test positive for COVID-19 beyond the expiration of the initial order of mandatory or precautionary quarantine or isolation.

Returning to Work After Mandatory or Precautionary Order

According to the DOL guidance, employees (other than nursing home staff) are not required to be tested for COVID-19 prior to returning to work after the expiration of a mandatory or precautionary order of quarantine or isolation. The guidance does not differentiate between orders of quarantine or isolation for the purpose of exposure, symptoms, or a positive COVID-19 test. However, if an employee has received an order of quarantine or iso-

lation, but tests positive for COVID-19 after the order expires, the employee may not report to work. This employee would be subject to a second mandatory order of quarantine or isolation, and is entitled to New York State COVID-19 Sick Leave benefits whether or not the employee has already received New York State COVID-19 Sick Leave benefits. Employees may be eligible for additional New York State COVID-19 Sick Leave benefits subject to the limit on the number of uses described below.

Continued Positive Testing

The DOL guidance recognizes the possibility that employees may continue to test positive for COVID-19 beyond the initial period of quarantine or isolation. The guidance provides that it is not recommended that employees be tested in order to discontinue their isolation or quarantine order. However, if an employee continues to test positive for COVID-19 after they have completed their quarantine or isolation period, the guidance provides that the employee must not report to work. An employee who continues to test positive for COVID-19 will be eligible for additional uses of New York State COVID-19 Sick Leave benefits. All uses of New York State COVID-19 Sick leave benefits are subject to the limits described below.

Employer-Mandated Absence from Work

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Employers may require employees to remain out of work if the employee was exposed or potentially exposed to COVID-19 but is not subject to an order of quarantine or isolation. If an employer requires an employee to remain out of work due to exposure or potential exposure, the employer is required to pay the employee their regular rate of pay while the employee is required to remain out of work whether or not the exposure or potential exposure occurred in the workplace or elsewhere. Employer-mandated absence from work due to exposure or potential exposure to COVID-19 is not a covered use of New York State COVID-19 Sick Leave, and will not count towards the maximum number of New York State COVID-19 Sick Leave periods discussed below. If at any point during this period of employer-mandated absence from work the employee becomes subject to an order of quarantine or isolation, the employee becomes eligible for New York State COVID-19 Sick Leave benefits for the period of the order.

Documentation of a Positive COVID-19 Test

When an employee is eligible for New York State COVID-19 Sick Leave benefits because the employee has tested positive for COVID-19, the employer may require the employee to submit documentation from a licensed medical provider attesting that the employee has tested positive for COVID-19. This documentation cannot be required if

the employer gave the employee the test for COVID-19, and the results of that test show the positive result.

More than One Mandatory or Precautionary Order

Employees may qualify for New York State COVID-19 Sick Leave benefits for up to three (3) orders of quarantine or isolation, however the second and third uses of these benefits must be based on orders issued due to a positive COVID-19 test. The guidance does not explicitly state whether employers are required to pay employees for the second and/or third use of New York State COVID-19 Sick Leave. However, the guidance appears to imply that additional uses of New York State COVID-19 leave should be paid. This guidance seems to expand the provision of paid sick leave beyond what was contemplated by statute. We continue to monitor the courts and DOL guidance on this matter, and will provide updates should additional guidance or clarification be published. As a precaution employers should provide pay as required by the New York State COVID-19 Sick Leave Law for each occasion in which an employee is eligible for New York State COVID-19 Sick Leave benefits. Employers should consult counsel if an employee requires multiple uses of New York State COVID-19 Sick Leave.

Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information.



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