

## Latest New York State Department of Labor Guidance Significantly Expands COVID-19 Sick Leave Obligations

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By [Susan Gross Sholinsky](#), [Genevieve M. Murphy-Bradacs](#), [Ann Knuckles Mahoney](#), and [Jenna D. Russell](#)\*

On January 20, 2021, the New York State Department of Labor (“NY DOL”) issued another round of [guidance](#) (“Guidance”) on the use of COVID-19 sick leave under the New York State COVID-19 Sick Leave Law (“Law”). Supplementing prior state guidance,<sup>1</sup> this Guidance appears to actually expand the Law by increasing the availability of paid leave. For example, the Guidance now obligates an employer to pay an employee who is required to remain out of the workplace *by the employer* due to actual or potential exposure to the virus. Under the Law, however, an employee is entitled to paid leave only if he or she is subject to a mandatory or precautionary order of quarantine or isolation (“QO”).

As we [previously reported](#), the Law provides all employees subject to a QO issued by an authorized governmental entity with up to 14 calendar days of COVID-19 sick leave, depending on the employer’s size and net income.<sup>2</sup> The Law also mandates job protection for all employees for the duration of the quarantine, regardless of employer size or profitability, and, where applicable, provides access to expanded paid family leave and temporary disability benefits as well. Benefits under the Law, however, are not available to employees who are asymptomatic or not yet diagnosed with any medical condition where the employee is physically able to work remotely while under a QO.

### The New Guidance

The Guidance contains four parts, summarized below.

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<sup>1</sup> See our [blog post](#) on previous Frequently Asked Questions released by the NY DOL concerning the Law.

<sup>2</sup> For employers with 10 or fewer employees as of January 1, 2020, employees must be provided with unpaid sick leave for the duration of the QO. For employers with 10 or fewer employees as of January 1, 2020, but with a net income greater than \$1 million in the previous year, and employers with between 11 and 99 employees (regardless of their net income), employees must be provided with at least five days of paid sick leave, as well as job-protected unpaid leave for the duration of the QO. For employers with more than 100 employees as of January 1, 2020, employees must be provided with at least 14 calendar days of paid sick leave during the QO.

- I. *An employee who returns to work following a QO and subsequently tests positive must not report to work and is deemed subject to another QO and therefore entitled to additional COVID-19 sick leave under the Law, regardless of whether the employee has already received COVID-19 sick leave under the initial QO.*

The Guidance clarifies that an employee returning to work following a QO period does not have to be tested to return to work (except for nursing home staff), but must not report to work if the employee subsequently tests positive. Based on this Guidance, if an employee decides to be tested following a QO and the test comes back positive, the employee is automatically deemed subject to a QO, and therefore entitled to an additional period of COVID-19 sick leave under the Law. For large employers (more than 100 employees), for example, the employee would be entitled to an additional 14-day period of paid COVID-19 sick leave. The employee is required to submit documentation from a licensed medical provider or testing facility substantiating the positive result, unless the employer gave the employee the test.

- II. *An employee who continues to test positive for COVID-19 after the end of a QO period must not report to work and is deemed subject to another QO and thus entitled to additional COVID-19 sick leave under the Law.*

Again, the employee is required to submit documentation from a licensed medical provider or testing facility substantiating the positive result, unless the employer gave the employee the test. The Guidance reiterates that it is not recommended that an employee be tested in order to discontinue quarantine, but if the employee decides to be tested following a QO, and tests positive, the employee must not return to work.

- III. *Employers that require an employee who is not otherwise subject to a QO to stay out of the workplace “due to exposure or potential exposure” to COVID-19, regardless of where “such exposure or potential exposure” may have occurred, are required to continue paying the employee at his or her regular rate of pay.*

The employee must continue to be paid until either (i) the employer permits the employee to return to work, or (ii) the employee becomes subject to a QO, at which point the employee is entitled to COVID-19 sick leave under the Law. Furthermore, employers must continue pay regardless of whether the exposure or potential exposure occurs in the workplace. Per previous [guidance](#), which remains in place, COVID-19 sick leave is not available when an employee voluntarily (i.e., not at the employer’s direction) travels to a non-contiguous state (any state other than Connecticut, Massachusetts, New Jersey, Pennsylvania, and Vermont) for more than 24 hours, or to a country with a Centers for Disease Control and Prevention (“CDC”) Level 2 or higher COVID-19 Travel Health Notice.

- IV. *Employees may qualify for COVID-19 sick leave under the Law for up to three QOs.*

Although the Guidance instructs that employees are eligible for COVID-19 sick leave benefits for more than one QO period, it also limits this entitlement to three QO periods. Further, the second and third QO periods for which COVID-19 sick leave is available must be based on an employee’s own positive COVID-19 test, as opposed to that of

someone with whom the employee was in close contact. Though unclear, the Guidance suggests that if an employee—not subject to a QO—is directed by the employer to remain out of the workplace, the employer still must pay the employee during the period of absence, even if the employee has already received paid leave as a result of three QOs.

Further, although the NY DOL's prior [Frequently Asked Questions](#) provide that employees who “run out” of COVID-19 sick leave, but remain out under a QO, must apply for combined quarantine-related paid family leave and disability benefits (“PFL/DBL Benefits”) to receive compensation during the rest of a QO period, it is unclear whether, or to what extent, PFL/DBL Benefits are available to offset, or supplement, the additional COVID-19 sick leave pay required under the Guidance.

We expect that there will be pushback against the Guidance because the Law does not contain any provision requiring employers to pay their employees for employer-mandated isolation outside of a QO, nor is it clear that COVID-19 sick leave must be provided for multiple QO periods. Though the NY DOL is charged with interpreting and implementing the Law, it is not clear that the agency has the authority to expand it in this manner, particularly with regard to creating a mandate for employer-paid leave in the absence of a QO.

### **What New York Employers Should Do Now**

- Review your obligations to provide paid and unpaid leave in light of the Guidance, and update any related policies or procedures. Consult with counsel as appropriate since the Guidance is not particularly clear and, as noted above, appears, in at least some respects, to exceed the scope of the Law.
- Train human resources professionals and managers on the expanded leave entitlements under the Guidance.
- Continue to follow return-to-work guidance from the CDC,<sup>3</sup> New York State, and New York City (if applicable) by adhering to the recommended time frames and other protocols, but carefully consider the pros and cons of requiring, or not requiring, employees to produce a negative test result in order to return to work (such testing is not recommended by the [CDC](#), the [State](#) or the [City](#)). In this regard, keep in mind that individuals who have had COVID-19 may continue to test positive for weeks or months after infection, even if they are no longer infectious.
- If employees are required to stay away from the workplace due to exposure or potential exposure, encourage them to obtain a QO as soon as possible so that the time they are out is counted towards one of the QO periods for which employees can receive benefits under the Law.

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<sup>3</sup> The CDC currently recommends that “[e]mployers should not require a sick employee to provide a negative COVID-19 test result or healthcare provider’s note to return to work.”

- Continue to monitor federal, state, and local legislative, regulatory, and Executive Branch developments (and Epstein Becker Green's [Coronavirus Resource Center](#)).

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For more information about this Advisory, please contact:

**[Susan Gross Sholinsky](#)**

New York  
212-351-4789

[sgross@ebglaw.com](mailto:sgross@ebglaw.com)

**[Genevieve M. Murphy-Bradacs](#)**

New York  
212-351-4948

[gmurphybradacs@ebglaw.com](mailto:gmurphybradacs@ebglaw.com)

**[Ann Knuckles Mahoney](#)**

Tennessee  
629-802-9255

[aknuckles@ebglaw.com](mailto:aknuckles@ebglaw.com)

\***[Jenna D. Russell](#)**, a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed to the preparation of this Advisory.

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