



May 21, 2020

New York State Department of Health and New York State Department of Labor Guidance on Use of COVID-19 Sick Leave For Health Care Employers

On March 18, 2020, in response to the COVID-19 outbreak, New York State enacted an emergency COVID-19 leave law, providing workers with job protection, sick leave (paid or unpaid, depending on the size of the employer), and access to expanded family leave and temporary disability benefits, in the event they are subject to a mandatory or precautionary order of quarantine or isolation.

On April 1, 2020, the federal Families First Coronavirus Response Act (“FFCRA”) went into effect, requiring certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.

Under the FFCRA, covered employers may exempt health care providers from the leave requirements. No such exemption is permitted under the New York law. Thus, even if an employer is exempted by the FFCRA, it must still follow New York’s COVID-19 sick leave law.

Recognizing that health care employees are essential to the fight against COVID-19, on May 17, 2020, the New York State Department of Health (“DOH”) and New York State Department of Labor (“DOL”) jointly issued guidance on the use of COVID-19 sick leave for health care employers of health care employees.

Health Care Employees Defined

A “*health care employee*” is defined for purposes of this guidance as a person employed at a doctor’s office, hospital, long-term care facility, outpatient clinic, nursing home, end stage renal disease facility, post-secondary educational institution offering health care instruction, medical school, local health department or agency, assisted living residence, adult care facility, residence for people with developmental disabilities, home health provider, emergency medical services agency, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, including any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

NY COVID-19 Sick Leave Eligibility for Health Care Employees

Under the new guidance, a health care employee must not report to work and will be deemed to be subject to a mandatory order of quarantine from the Department of Health and thus entitled to sick leave under New York’s COVID-19 sick leave law if:

(1) An employer directs the health care employee not to work or prohibits a health care employee from working because:

- the employer suspects or confirms the health care employee has been exposed to COVID-19;
- the health care employee exhibits symptoms of COVID-19; or
- the health care employee is diagnosed with COVID-19; or

(2) The health care employee has tested positive for COVID-19 and/or is symptomatic for COVID-19.

If an employer directs a health care employee not to work or prohibits the employee from working due to any of the reasons in (1) above, the health care employee does not need to provide the employer with any additional documentation. If the health care employee has tested positive for COVID-19 and/or is symptomatic, the health care employee must still submit documentation from a medical provider, unless the employee’s employer administered the COVID-19 test.

Exceptions for Staffing Shortage

Notwithstanding the above, an employer may require a health care employee who has been exposed to COVID-19 to report to work, if it can demonstrate a “staffing shortage” and the following other conditions are met:

- the health care employee is asymptomatic for COVID-19; and
- the health care employee has not tested positive for COVID-19; and
- the health care employee’s contact with confirmed or suspected cases of COVID-19 are limited to those that are asymptomatic

In addition, notwithstanding the above, an employer may require a health care employee who has tested positive for COVID-19 and/or has been symptomatic for COVID-19, to return to work prior to the

end of a 14-day quarantine or isolation period, if the employer can demonstrate a “staffing shortage” and the following other conditions are met:

- the health care employee with confirmed or suspected COVID-19 must:
 - maintain isolation for at least 7 days after onset of symptoms,
 - must be fever-free for at least 72 hours without the use of fever reducing medications, and
 - must have other symptoms improving.
- the health care employee who has tested positive for COVID-19, but is asymptomatic, must:
 - maintain isolation for at least 7 days after the date of the positive;
 - if the employee develops symptoms during that time, the employee must maintain isolation for at least 7 days after developing the symptoms;
 - must be fever-free for at least 72 hours without the use of fever reducing medications; and
 - must have other symptoms improving.

For purposes of the health care employee exception, an employer demonstrates a “*staffing shortage*” by the following:

- The employer has a staffing shortage of the type of health care employee that the employer seeks to report to work. For example, if the employer has a shortage of respiratory therapists, it can only require respiratory therapists to report to work.
- The employer’s staffing shortage would adversely impact the employer’s ability to safely provide health care services, and the employer has not been able to address the shortage through other means.
- However, once a staffing shortage ends, the employer cannot require a health care employee to report to work if the health care employee would otherwise qualify for a mandatory or precautionary order of quarantine or isolation.

Takeaway

Employers of health care employees may now be able to exclude certain essential employees from New York’s COVID-19 sick leave requirements due to a demonstrated staffing shortage. However, employers of health care employees should continue to follow any DOH advisories regarding return to work.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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