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New NYSDOL Guidance Changes Employers' Obligations Under NY COVID-19 Sick Leave Law

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On January 20, 2021, approximately ten months after New York State enacted the New York COVID-19 Paid Sick Leave Law ("NY COVID-19 Leave Law"), the New York State Department of Labor issued supplemental guidance ("NYSDOL Guidance") on the use of COVID-19 sick leave. This guidance clarifies certain issues and changes employers' obligations.

Sick Leave for Multiple Periods of Quarantine

NYSDOL Guidance clarifies that employees can take leave multiple times under NY COVID-19 Leave Law. Employees are now eligible for benefits for up to three periods of quarantine. There are two circumstances where this may apply:

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

Generally, the amount of paid leave an employer is required to provide an individual under NY COVID-19 Leave Law depends on the size of the employer and the employer's net annual income. Previously, the amount of leave available under this law was believed to be limited to 14 days total for large and public sector employers. Now, under NYSDOL Guidance, an employee is eligible for up to 14 days (depending on the size and type of employer) of NY COVID-19 Leave *per quarantine period*.

Documentation Requirements

Usually, except for nursing home staff, and consistent with CDC guidance, an employee returning to work following a period of mandatory quarantine or isolation does not need to be tested. (Similar to CDC guidance, NYSDOL guidance indicates that "an employee is not recommended to be tested to discontinue isolation or quarantine.") However, if an employee tests positive for COVID-19 after completing the requisite quarantine or isolation period, that employee cannot return to work. Instead, the employee is subject to a second mandatory order of isolation and is entitled to leave under NY COVID 19 Leave Law, regardless of whether the employee has already received leave for the first period of quarantine or isolation.

The second and third leave periods must be based on a positive COVID-19 test. For each leave period, the employee must submit a positive COVID-19 test result to the employer, unless the employer administers the test, in which case the employee is not required to submit the test result to the employer.

"Employer Mandated" Stay Home Order

If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19 (issued by the state of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order) must 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: (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 shall receive sick leave as required by NY COVID-19 Leave Law for the period of quarantine or isolation.

Notably, NYSDOL Guidance does not indicate the length of time for which an employer may require an employee to remain out of work. Potentially, this time period could be longer than the usual amount of leave an employer is required to provide under NY COVID-19 Leave Law (5 days for smaller employers or 14 days for larger employers and public employers).

Summary

The interaction between the Families First Coronavirus Response Act, NY COVID-19 Leave Law, New York State Paid Sick Leave Law, and other leave laws and employer policies is highly fact-specific and complex. Employers are encouraged to consult with legal counsel to ensure compliance with the myriad of responsibilities and requirements as they apply to individual businesses and employees.

If you have questions regarding any aspects of employment law and any implications the COVID-19 virus has caused or will cause to your place of business, feel free to contact Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com, James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, or Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com.

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