

## EMPLOYER ALERT:

# Employers Obligation to Provide Employees with COVID-19 Sick Leave Endures into 2022

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As 2022 dawns and the COVID-19 pandemic continues (along with the expansion of COVID-19 cases due to the omicron variant), employers in New York State *still* have an obligation to provide employees with COVID-19 Sick Leave. In an effort to stave off confusion about this obligation, I write to provide guidance as to employers' obligations.

**1. When is an employer in New York State required to provide a COVID-19 Sick Leave to an employee?**—In order to obtain a COVID-19 Sick Leave under New York State law, an employee must be subject to an order of quarantine or isolation issued by a qualified government official/entity. The order of quarantine or isolation can be precautionary or mandatory. The qualified government official/entity who can issue a mandatory or precautionary order of quarantine or isolation includes the State of New York, a county Department of Health, a local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.

In addition, if the employee's local health department is unable to *immediately* provide the employee with a mandatory or precautionary order of quarantine or isolation, an employee can rely on an attestation from the employee's licensed medical provider. Here is an overview of these alternative requirements:

- If the employee is subject to Mandatory Isolation, they must submit an attestation from their licensed medical provider that the employee meets one of the following criteria:
  - a. The employee has tested positive for COVID-19; *or*
  - b. Testing is currently unavailable to the employee, but the employee is symptomatic and has had contact with a known COVID-19 case.
- If the employee is subject to Mandatory Quarantine, they must submit an attestation from their licensed medical provider that the employee meets one of the following criteria:
  - a. The employee has been in close contact with someone who has tested positive for COVID-19 or is currently in mandatory isolation; *or*
  - b. The employee is symptomatic and has returned within the past 14-days from a country designated with a level 2, 3, or 4 advisory for COVID-19.
- If the employee is subject to Precautionary Quarantine, they must submit an attestation from their licensed medical provider that the employee meets one of the following criteria:
  - a. The employee is asymptomatic and has returned within the past 14-days from a country designated with a level 2,3 or 4 advisory for COVID-19; *or*
  - b. The employee has been determined to have had proximate exposure with someone who has tested positive for COVID-19.

It is important to remember that relying on an attestation from the employee's licensed medical provider is only required if the local health department is unable to immediately issue a mandatory or precautionary order of quarantine or isolation.

Perhaps the most important fact to remember from this opening question is the following: an employee who claims to be ill with COVID-19 or otherwise unable to perform work is not entitled to COVID-19 Sick Leave under this law *unless* the employee provides the employer with a mandatory or precautionary order of quarantine

or isolation issued by an authorized government official (or that meets the requirements for an attestation issued by the employee's licensed medical provider).

Thus, for example, an employee who has a positive result from an at-home COVID-19 test is not entitled to any COVID-19 Sick Leave benefit under this law unless the employee obtains a mandatory or precautionary order of quarantine or isolation from an authorized government official or an attestation from the employee's licensed medical provider. To be clear, an employee simply contacting their employer and complaining of COVID-19 symptoms or stating that they had a positive at-home test is not sufficient to trigger payment of the benefits required by this law.

**2. What COVID-19 Sick Leave benefit must be provided to an employee subject to a mandatory or precautionary order of quarantine or isolation?**—The answer to this question depends on the number of employees employed by the employer.

***A. Employers with 10 or Fewer Employees & Low Net Income***

- For employers with 10 or fewer employees on January 1, 2020 which also had a net income of less than one million dollars (\$1,000,000) in the previous tax year, the employer is required to provide job-protected COVID-19 Sick Leave to a qualifying employee until the quarantine/isolation order is terminated.
- For this size organization, this job-protected COVID-19 Sick Leave is **unpaid** (*i.e.*, the employer is not required to make any payment to the employee during their job-protected COVID-19 Sick Leave).

***B. Employers with 11-99 Employees OR Employers with 10 or Fewer Employees & High Net Income***

- For employers with 11-99 employees on January 1, 2020, or employers with 10 or fewer employees on January 1, 2020 which also had a net income more than one million dollars (\$1,000,000) in the previous tax year, the employer is required to provide job-protected COVID-19 Sick Leave to a qualifying employee until the quarantine/isolation order is terminated.
- For this size organization, the employer is required to provide an employee that is subject to a mandatory or precautionary order of quarantine or isolation with five (5) days of **paid** COVID-19 Sick Leave through the employer's normal payroll. To be clear, this benefit is paid by the employer at the employer's expense.
  - The five (5) days of paid COVID-19 Sick Leave are paid at the employee's regular rate of pay, but without any reduction for any credits against the minimum wage (such as a meal credit, a tip credit, or any other credit permitted by law).
  - The paid COVID-19 Sick Leave benefit must be provided without loss of an employee's accrued paid sick leave benefit (such as any paid sick leave benefit provided by the employer as part of the employee's terms and conditions of employment, or any paid sick leave accrued pursuant to New York's paid sick leave law).
- After the five (5) days of paid COVID-19 Sick Leave are exhausted, the employee is entitled to job-protected COVID-19 sick leave until the quarantine/isolation order is terminated; however, the employee is not entitled to any further payment from the employer for this leave period.

***C. Employers with 100 or More Employees***

- For employers with 100 or more employees on January 1, 2020, the employer is required to provide job-protected COVID-19 Sick Leave to a qualifying employee until the quarantine/isolation order is terminated.
- For this size organization, the employer is also required to provide an employee that is subject to a mandatory or precautionary order of quarantine or isolation with fourteen (14) days of

**paid** COVID-19 Sick Leave through the employer’s normal payroll. To be clear, this benefit is paid by the employer at the employer’s expense.

- The fourteen (14) days of paid COVID-19 Sick Leave are paid at the employee’s regular rate of pay, but without any reduction for any credits against the minimum wage (such as a meal credit, a tip credit, or any other credit permitted by law).
  - The paid COVID-19 Sick Leave benefit must be provided without loss of an employee’s accrued paid sick leave benefit (such as any paid sick leave benefit provided by the employer as part of the employee’s terms and conditions of employment, or any paid sick leave accrued pursuant to New York’s paid sick leave law).
- After the fourteen (14) days of paid COVID-19 Sick Leave are exhausted, the employee is entitled to continue their job-protected COVID-19 Sick Leave until the quarantine/isolation order is terminated; however, the employee is not entitled to any further payment from the employer for this leave period.

**3. Are employees entitled to any benefit if they receive an unpaid COVID-19 Sick Leave or they exhaust their employer-provided paid COVID-19 Sick Leave Benefit?**—Yes, employees are entitled to a paid benefit if they receive an unpaid COVID-19 Sick Leave or after they use all of the employer-provided paid COVID-19 Sick Leave benefit.

An employee working for a small employer (who receives an unpaid COVID-19 Sick Leave) will likely be eligible for disability and/or paid family leave due to COVID-19 quarantine or isolation. An employee who has exhausted their five (5) or fourteen (14) day employer-provided paid COVID-19 Sick Leave benefit will also likely be eligible for disability and/or paid family leave due to COVID-19 quarantine or isolation. This disability and/or paid family leave benefit is paid by the disability/paid family leave insurance carrier—*not by the employer*.

When an employer learns that the employee is subject to a mandatory or precautionary order of quarantine or isolation, the employer should provide the employee with the form to apply for such benefits. *See #4 (below) for more information about this information.*

Employers should remember that the entire period of time that the employee is unable to work because they are subject to a mandatory or precautionary order of quarantine or isolation is job-protected leave. Thus, when the order of quarantine or isolation concludes, the employee is entitled to reinstatement to the position held before their leave with equal pay and benefits.

*A cautionary note:* An employee may ask about using accrued paid sick leave under New York’s paid sick leave law after their paid COVID-19 Sick Leave has concluded. Allowing employees to use their paid sick leave benefit for any COVID-19 related absence is inconsistent with the law instituted by the State. Indeed, this is why the State requires employers to provide some period of paid COVID-19 Sick Leave and then disability and/or paid family leave benefits. Accordingly, employees should be directed to apply for disability and/or paid family leave benefits and should not use their paid sick leave accrual.

**4. What information must an employer provide to an employee about disability and/or paid family leave due to COVID-19 quarantine or isolation?**—An employee entitled to unpaid COVID-19 Sick Leave (*see* Section 2(A), *above*) or who has exhausted any paid COVID-19 Sick Leave benefit that must be provided by the employer (*see* Sections 2(B) and 2(C), *above*) will likely be eligible to receive disability and/or paid family leave benefits under New York law. This is a benefit payable by the insurer that provides disability and paid family leave benefits. The State created special forms for this benefit.

Employees must be permitted to apply for paid family leave and/or COVID-19 disability benefits with the following application forms:

- This Form should be provided to employees to apply for Disability and/or Paid Family Leave for Employee due to COVID-19 Quarantine/Isolation:  
<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>.

- This Form should be provided to employees to apply for Paid Family Leave for a Minor Dependent Child due to COVID-19 Quarantine/Isolation:

<http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/ccovid19.pdf>.

As with any other application for Paid Family Leave under New York law, it is the employee's obligation to complete the required portions of the applicable forms. The employee must then turn the form into the employer to complete the "Employer Section" within three (3) business days. Once completed by the employer and returned to the employee, it is the employee's obligation to submit the forms to the insurance carrier for review, processing, and consideration.

**5. How much should an employer pay to a part-time employee entitled to paid COVID-19 Sick Leave?**—If a part-time employee is entitled to paid COVID-19 Sick Leave under this law, the best guide to determine the amount to provide as paid COVID-19 Sick Leave is to look at the employee's previous six (6) months of hours worked for the employer. [Note: if the employee has worked for the employer for a period shorter than six (6) months, then look at the hours worked for the entirety of their employment for the employer.]

To do this, first determine the total number of hours worked during the relevant timeframe. Second, determine the number of days the employer operated during that timeframe. Third, divide the total number of hours worked by the number of days identified. This provides you with an average number of hours worked per day; provide that number of hours to the employee for the five (5) or fourteen (14) days of paid COVID-19 Sick Leave that the employee is entitled to receive.

For example, an employee has worked for an employer for 18 months. That employee is issued a mandatory or precautionary order of quarantine or isolation by the local health department. During the six (6) months before issuance of the mandatory or precautionary order of quarantine or isolation, the employee worked a total of 616 hours. During the six (6) months before issuance of the mandatory or precautionary order of quarantine or isolation, the employer was open for 154 days. Thus, the employee averaged four (4) hours per day (616 divided by 154). If the employee is entitled to five (5) days of paid COVID-19 Sick Leave, the employer should pay the employee for 20 hours at the employee's regular rate (or the minimum wage if they are a tipped employee); if the employee is entitled to fourteen (14) days of paid COVID-19 Sick Leave, the employer should pay the employee for 56 hours at the employee's regular rate (or the minimum wage if they are a tipped employee).

**6. What other rules or guidance can you provide about COVID-19 Sick Leave?**

- An employee returning to work from a leave covered by this law must be restored to the position they held before their absence with the same pay, benefits, and other terms and conditions of employment.
- Employers are prohibited from discharging, threatening, discriminating against, retaliating against, or otherwise taking any adverse employment action against an employee because they utilize any of the sick leave benefits provided under New York law.
- An employee is **NOT** eligible for the paid sick leave benefits provided by this law if (a) the employee is subject to a qualifying quarantine or isolation order, but (b) is asymptomatic ***and*** (c) is physically able to perform the work assigned by the employer through remote means or otherwise.
- An employee returning to work after a period of mandatory or precautionary quarantine or isolation does not need to be tested before returning to work (except for nursing home staff). However, if an employee tests positive for COVID-19 after receiving COVID-19 Sick Leave and after returning to work, the employee shall be entitled to another period of COVID-19 Sick Leave. In this regard, the employee shall again be entitled to any payment from the employer required by the COVID-19 Sick Leave law, followed by an additional period of paid family leave and/or COVID-19 disability benefits under New York law. To receive this benefit (again), the employee must provide documentation from their licensed medical provider or the testing facility attesting to the positive COVID-19 test (the employee need NOT provide another mandatory order of quarantine from the local health department).

- If an employee is subject to a mandatory or precautionary order of quarantine or isolation but continues to test positive for COVID-19 after the end of the required quarantine or isolation period, that employee is not permitted to return to work. In that situation, the employee shall be deemed to be subject to a *second* mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York’s COVID-19 sick leave law for the second period of isolation. To receive this benefit for a second time, the employee must provide documentation from their licensed medical provider or the testing facility attesting to the positive COVID-19 test after completing an initial period of isolation (the employee need NOT provide another mandatory order of quarantine from the local health department).
- Importantly, under guidance issued by the Commissioner of Labor, an employee can only receive COVID-19 Sick Leave for a maximum of three orders of quarantine or isolation. In this regard, the second or third entitlement to COVID-19 Sick Leave must be in accordance with the preceding two bullet points only; other than the limitations in the preceding two bullet points, there is no time limit on when an employee can obtain an order of quarantine or isolation and be entitled to COVID-19 Sick Leave.
- If an employee is not subject to a mandatory or precautionary order of quarantine or isolation but is mandated by the employer to remain out of work because of an exposure or potential exposure to COVID-19 (regardless of whether such exposure or potential exposure occurred at work), the employer is required to continue to pay the employee at their regular rate of pay until the employee is allowed to return to work or is subject to a mandatory or precautionary order of quarantine or isolation.

If the employee is subject to a mandatory or precautionary order of quarantine or isolation, they shall be entitled to any pay that is required by the COVID-19 Sick Leave law. In this regard, if the mandatory or precautionary order of quarantine or isolation is dated to include the period of time that the employee was mandated to be absent from work by the employer due to their exposure or potential exposure, those dates would count toward the paid days the employee is entitled to receive under the COVID-19 Sick Leave law.

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If you have any questions regarding the obligation to provide COVID-19 Sick Leave benefits to employees or any other issues concerning labor and employment law, please do not hesitate to contact us for assistance.



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