

**Labor, Employment & Employee Benefits****New York Issues Guidance on COVID-19 Sick Leave for Health Care Employees**

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On May 17, 2020, the New York State Department of Health and New York State Department of Labor jointly issued guidance (the "Guidance") addressing health care employee eligibility to take leave under New York's COVID-19 Sick Leave Law. As we described in a previous alert, (<https://bhlawpllc.com/publication/new-york-state-paid-sick-leave-and-covid-19/>), New York State enacted this legislation in March 2020, providing paid and unpaid sick leave to employees and expanding New York Paid Family Leave and disability benefits to cover employees subject to a quarantine or isolation order due to COVID-19.

On April 2, 2020, the Federal Families First Coronavirus Response Act (FFCRA) took effect. As we explained in a previous alert, (<https://bhlawpllc.com/publication/federal-emergency-paid-sick-leave-act/>), the FFCRA requires covered employers to provide most employees with paid leave for specific COVID-19-related reasons. Significantly, FFCRA allows employers to exempt "health care providers and emergency responders" from its leave requirements from paid sick time. New York's COVID-19 Sick Leave Law does not provide this exemption.

Prior to the Guidance, New York health care employers and employees affected by COVID-19 were left with uncertainty about how federal law exemptions for health care employees intersected with paid and unpaid sick leave protections under New York's COVID-19 Sick Leave Law. Could employers require health care workers to return to work despite exposure to the virus, testing positive for the virus, and/or exhibiting symptoms of the virus? With this Guidance now in place, New York has defined, for purposes of New York's COVID-19 Sick Leave Law, the category of health care employees, when they are eligible to take sick leave related to COVID-19, and when employers may require them to return to work. Here are the key takeaways:

**"Health Care Employee" is Broadly Defined**

The broad definition includes many health care professionals in a variety of settings: "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." Employers should consult this definition closely when determining if an employee is a "health care employee" for purposes of the New York COVID-19 Sick Leave Law.

**Health Care Employees' Eligibility for Leave is Significantly Expanded**

Prior to the Guidance issued, the New York COVID-19 Sick Leave Law applied only to employees ordered to quarantine or isolate by New York State, the Department of Health, or another government entity authorized to issue a quarantine or isolation order. Now, under the Guidance, if an **employer** directs a health care employee not to work, or prohibits a health care employee from working because the employer suspects or confirms that the health care employee has been exposed to COVID-19, exhibits symptoms of COVID-19, and/or is diagnosed with COVID-19, that health care employee shall be deemed to be subject to a mandatory order of quarantine from the Department of Health. Under these circumstances, a health care employee is entitled to leave under New York law, and is not required to provide their employer with additional supporting documentation.

*Continued on Next Page*



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If a health care employee tests positive for and/or is symptomatic for COVID-19, the health care employee must not report to work and will be deemed subject to a mandatory order of isolation from the Department of Health. Under these circumstances, the health care employee must submit documentation from a licensed medical provider that treated the health care employee, attesting that the health care employee has tested positive for and/or is symptomatic for COVID-19 (unless the test yielding a positive result was given by the employer).

### **When Faced with a "Staffing Shortage", Employers may Require Health Care Employees to Return to Work when Certain Requirements are Met**

The Guidance gives employers the ability to require health care employees who are taking leave pursuant to the New York COVID-19 Sick Leave Law to return to work where the employer can demonstrate a "staffing shortage". Employers must establish that they have a staffing shortage of the type of health care employee that the employer needs to report to work, that the 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.

Once an employer demonstrates a "staffing shortage", an employer may require an employee to return to work in two circumstances:

**Exposure to COVID-19:** For a health care employee who has been exposed to COVID-19, an employer can require them to report to work if the following conditions are met: (1) the health care employee is asymptomatic for COVID-19; (2) the health care employee has not tested positive for COVID-19; and (3) the health care employee's contacts with confirmed or suspected cases of COVID-19 are limited to those that are asymptomatic.

**Positive COVID-19 Test and/or Symptomatic for COVID-19:** For 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, an employer can require them to report to work if the following conditions are met: (1) 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 before returning to work; and (2) the health care employee who is asymptomatic but who has tested positive for COVID-19 must maintain isolation for at least 7 days after the date of the positive test and, if the employee develops symptoms during that time, the employee must maintain isolation for at least 7 days after developing those symptoms, must be fever-free for at least 72 hours without the use of fever reducing medications, and must have other symptoms improving, before returning to work.

Health care employers should become familiar with this Guidance and consult an attorney with fact-specific questions that may arise when confronted with issues of COVID-19 related leave.

If we can provide you with additional insight and information regarding changing employment laws related to the current coronavirus pandemic and how to address internal issues at your business, please contact :



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## Labor, Employment & Employee Benefits

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