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To: United Way of New York State

From: Hinman Straub P.C.

Date: March 18, 2020

Re: Paid Sick Leave Law

On March 18, 2020, Governor Andrew Cuomo signed into law a bill providing protections to employees subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19, and requiring both private and public employers to provide sick leave to those impacted employees, the amount of leave and whether paid or unpaid to be determined based on the size of the employer (hereinafter “the COVID-19 Sick Leave Law”). This memorandum will review the details of the new law. The full text of the law and the sponsor’s memorandum are available.

Additionally, as part of the 2020-2021 proposed budget, it is anticipated that Governor Cuomo will be advancing a bill to amend New York’s Labor Law, requiring all employers to provide employees with sick leave every calendar year, the amount of leave and whether paid or unpaid to be determined based on the size of the employer. Hinman Straub will continue to monitor this bill and provide pertinent updates as received.

COVID-19 Sick Leave Law

The COVID-19 Sick Leave Law will be effective immediately. It will require employers to provide sick leave to each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issued such order due to COVID-19. The type of sick leave provided will be based upon the number of employees, an employer had as of January 1, 2020.

1. Employers with ten (10) or fewer employees must provide unpaid sick leave until the termination of the employee’s mandatory or precautionary order of quarantine or isolation. During this period of unpaid leave, the employee is eligible for paid family leave and disability benefits. (Section 1(a)).

2. Employers with ten (10) or fewer employees with a net income of greater than one (1) million dollars in the previous tax year, must provide at least five (5) days of paid sick leave, and unpaid leave thereafter, until the termination of the employee's mandatory or precautionary order of quarantine or isolation. After the five (5) days of paid leave, the employee is eligible for paid family leave and disability benefits. (Section 1(a)).
3. Employers with between eleven (11) and ninety-nine (99) employees, must provide at least five (5) days of paid sick leave, and unpaid leave thereafter, until the termination of the employee's mandatory or precautionary order of quarantine or isolation. After the five (5) days of paid leave, the employee is eligible for paid family leave and disability benefits. (Section 1(b)).
4. Employees with one hundred (100) or more employees, must provide at least fourteen (14) days of paid sick during the mandatory or precautionary order of quarantine or isolation.

Significantly, employers with 100 or more employees are not required to provide unpaid sick leave after the 14 paid days have been exhausted and the employee is still subject to the mandatory or precautionary order of quarantine. Additionally, the COVID-19 Sick Leave Law does not provide that employees who work for an employer with 100 or more employees, as compared to employers with less than 100 employees, will be eligible to apply for paid family leave or disability benefits after such paid leave has been utilized.

Public Employers

The COVID-19 Sick Leave Law also applies to public employers, defined as: (i) the state; (ii) a county, city, town or village; (iii) a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended; (iv) any governmental entity operating a college or university; (v) a public improvement or special district including police or fire districts; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of this state. (Section 1 (d)).

Public employers are required to provide at least fourteen (14) days of paid sick leave during the mandatory or precautionary order of quarantine or isolation. Every employee will be compensated based on their regular rate of pay for their regular hours worked during their absence. (Section 1 (d)). However, the law does not include the ability for public employees to take additional time off, either unpaid, if there are not available accruals, or use existing accruals. Since Paid Family leave or NYS Disability is not applicable to municipal entities unless they had previously opted in, their employees will be limited to the fourteen (14) days paid sick leave as well as any other contractual rights they may have to time off.

In fact, this law does not diminish right of the public employers and employees under an existing Collective Bargaining Agreement ("CBA"). (Section 14). Thus, if a CBA exists

between a public employer, or any private employer and a bargaining unit, there could be potential limits on an employee's ability to use time off after the initial fourteen paid days has been exhausted. Employees and Employers should review the applicable provisions of their CBA.

Job Protection

Under the COVID-19 Sick Leave Law, an employee utilizing sick leave under this new law will be entitled to job protection and "shall be restored by his or her employer to the position of employment held by the employee prior to any leave taken . . . with the same pay and other terms and conditions of employment." (Section 3). Additionally, employers are prohibited from "dischar[ing], threaten[ing], penalize[ing], discriminat[ing] or retaliat[ing] against any employee because such employee has taken leave pursuant to this [law]." (Section 4).

Interplay with Paid Family Leave and Disability Law

The COVID-19 Sick Leave Law also expands the definition of "disability" under the worker's compensation law to include eligibility for disability benefits where the employee is unable to perform their regular duties because of a mandatory or precautionary quarantine or isolation, even if they have available leave accruals (that are not mandatory under this law) from their employer. (Section 6). All disability benefits will be payable on the first day of disability. (Section 7).

With respect to disability and Paid Family leave benefits, an employee will be eligible on day one (1), as opposed to waiting seven (7) days to receive the benefit. (Section 9). Section 9 provides that an employee can collect the maximum payment from both Paid Family leave and disability benefits, not to exceed \$840.70 in paid family leave and \$2,042.92 in benefits due pursuant to disability per week. (Section 9). However, the law provides that the maximum weekly benefit which the employee is entitled to receive for benefits due pursuant to disability as a result of "mandatory or precautionary order of quarantine or isolation" "shall be the difference between the maximum weekly family leave benefit and such employee's total average weekly wage from each covered employer up to a maximum benefit due pursuant to disability of \$2,043.92 per week." (Section 10).

A mandatory or precautionary order of quarantine or isolation shall be sufficient proof of disability or proof of need for family leave taken pursuant to this act. (Section 12). However, the law further states that employees will not be eligible for sick leave "where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means." (Section 13). These provisions of the law appear to incongruous since an individual may be considered disabled for benefits purposes, but still be able to work remotely and be asymptomatic, and thus, not eligible for sick leave under the law.

Exclusion

Pursuant to the COVID-19 Sick Leave Law, an employee will not be entitled to paid sick leave or any other paid benefits as allowed by this law, where “the employee is subject to a mandatory or precautionary order of quarantine because the employee has returned to the United States after traveling to a country for which the Centers for Disease Control and Prevention has a level two or three travel health notice and the travel to that country was not taken as part of the employee's employment or at the direction of the employee's employer, and ***if the employee was provided notice of the travel health notice and the limitations of this subdivision prior to such travel.***” (Section 4) (*emphasis added*). In this instance, the employee may utilize accrued leave provided by their employer or unpaid sick leave for the duration of the quarantine or isolation. (Id.). However, it is unclear how the employer will determine if an employee was notified of the particular travel advisory.

Future Regulations and Guidance

The commissioner of labor is empowered under the COVID-19 Sick Leave Law to adopt regulations, including emergency regulations, as well as to issue guidance to clarify the effect of the COVID-19 sick leave law. Hinman Straub will continue to monitor same and provide updates as they are issued by the commissioner of labor.

If you have any additional questions, please contact Sean Doolan, Esq. (sdoolan@hinmanstraub.com), Elena DeFio Kean, Esq. (ekean@hinmanstraub.com) or Kristin Foust, Esq. (kfoust@hinmanstraub.com) at (518) 436-0751.