Vax or Mask Mandate Requirements Lifted, but not for Home Care

Effective Thursday, February 10, 2022, Governor Hochul lifted the "vaccinate or mask-up" mandate for the majority of New York businesses. However, healthcare settings are excluded from this waiver and must continue to require their staff to mask up, regardless of vaccination status. Home care **offices** (and, of course, the home setting) are considered healthcare settings. If providers have any questions about these requirements, please let us know.

Quarantine and Isolation Rules for Healthcare Personnel are Revised, Again

The State DOH has once again updated the isolation and quarantine requirements for healthcare staff (see **here**). The changes largely affect individuals who are exposed but not infected.

For **infected** healthcare staff, employers in “contingency” phases are required to provide five days of leave to employees, regardless of vaccination status of the employee, and employees can return to work on day 6 if they are asymptomatic or have mild-moderate symptoms.

For employees who were **exposed**, the DOH instructs that such healthcare personnel, if fully vaccinated (including boosted), will have no work restrictions if the agency is in a contingency phase. (Most home care providers are in that phase, but each agency should evaluate its own circumstances). If the agency is in a “normal” phase (and not in contingency), then an exposed worker can only return to work upon testing negative on days 1,5, 6 and 7 after exposure. The day of exposure is day 0. Exposed workers who are not boosted, even if they are fully vaccinated, may return to work after 7 days with a negative test, or in 10 days without testing, if the agency is in a contingency phase.

NYS DOH Publishes Self-Attestations for COVID-19 Sick Leave Eligibility

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The State Department of Health (DOH) has published on its website self-attesting **quarantine** and **isolation** forms that employees may use to demonstrate eligibility for the State’s COVID-19 COVID sick leave pay.

As we have discussed in prior articles, the New York State COVID Sick Leave Law requires employers to provide paid leave for employees who are subject to a mandatory or precautionary **order** of quarantine or isolation, as well as for employees caring for a minor or dependent child who is required to quarantine. The law requires

employees to be subject to “an order” of quarantine or isolation issued by the State of New York, a state or local health department, or any other governmental entity. In issuing the self-attestation forms, the DOH intends for employers to recognize the attestation as if a governmental entity has issued it for purposes of the COVID sick leave pay. Indeed, the Isolation form, for example, specifically states that “This form may be used for Isolation Release or for New York Paid Family Leave COVID-19 claims as if it was an individual Order for Isolation issued by the New York State Department of Health or relevant County’s Commissioner of Health or designee.”

However, the COVID sick leave law itself never contemplated a self-attesting form, even one that is on a government template. The law, as originally enacted, intended for a government entity to certify to an employee’s need for isolation or quarantine. As we have seen over the course of the pandemic, local departments of health (e.g., Nassau County, Onondaga County) and other governmental entities (e.g., NYC) have turned to self-attestation forms in view of practical challenges in issuing individualized quarantine or isolation orders to thousands of individuals per day. The State DOH’s own form now follows those local efforts.

Employers who have been inundated with requests for paid COVID sick leave should carefully consider whether to recognize self-attesting forms for purposes of paid COVID sick leave. While infected or exposed employees should be provided with the necessary time off from work, the question of who pays for that time off is a separate issue. As we have discussed in the past, COVID sick leave is an independent standalone sick leave benefit that must be paid out to an isolating or quarantining employee, and the employer cannot utilize the employee’s vacation or other PTO accruals for COVID sick leave.

If you have any questions about paid time off requirements related to employees who have been exposed or who are infected with COVID, please let us know.

Telephone and Video Nursing Supervision Visits Allowed to Continue for LHCSAs

Recently, Governor Hochul extended an Executive Order that has been providing waivers from certain regulatory requirements for LHCSAs. Specifically, as relevant to home care, the Executive Order allows:

- Initial patient visits for CHHAs to be made within 48 hours of receipt and acceptance of a community referral or return home from institutional placement;
- CHHAs and LHCSAs to conduct in-home supervision of aides as soon as practicable after the initial service visit, or to permit in-person and in-home supervision to be conducted through indirect means, including by telephone or video communication; and
- Nursing supervision visits for personal care services to be made as soon as practicable.

This Executive Order is effective until March 1, 2022.

Changes to Independent Assessor Procedures Postponed until May 1

By way of background, in 2020, the State amended the law to authorize the New York Department of Health (“DOH”) to contract with one entity to conduct independent assessments for individuals seeking personal care services, either in a LHCSA or a CDPAP setting. Subsequently, New York´s regulations were amended to require that individuals seeking these services under the Medicaid State Plan (including those individuals under the MLTC program) obtain an independent assessment and be evaluated and have a Medical Review and Practitioner´s Order form completed by an independent clinician that does not have a prior relationship with the individual seeking services. The State has contracted with Maximus Health Services, Inc. (“Maximus”) to

perform the foregoing independent assessments. Upon full implementation of these amendments, the independent assessor (through Maximums) will conduct all initial assessments and all routine and non-routine reassessments for individuals seeking personal care.

The foregoing changes to the independent assessment have been postponed now until May 1. In view of significant opposition to this independent assessor process, there is some possibility of the State repealing the law, but that is not yet certain.

No-Hire Agreements are a No Go

Last week, a grand jury indicted four managers of home health care agencies for allegedly conspiring to "suppress wages and restrict the job mobility of" essential workers. The indictment alleges that the four individuals conspired to eliminate competition for the services of personal support specialists (i.e., aides) by agreeing to fix the rates paid to the workers and by agreeing not to hire each other's aides. The indictment alleges that, among other actions, the individuals "participated in conversations and communications regarding MaineCare's rate increases," including communications "using an encrypted messaging app," attended virtual and in-person meetings and "engaged in discussions to collectively fix the hourly rates for workers and refrain from hiring each other's workers, and exchanged a series of group messages agreeing to fix rates at $15 per hour for workers. The indictment follows on the heels of a statement by a representative of the U.S. Department of Justice ("DOJ"), announcing that the DOJ will continue to "target[] excessive concentration and abuses by employers in labor markets."

In a tight market, employers that are considering pacts or agreements with other employers whereby each employer abstains from hiring the other employer's workers are not uncommon. Indeed, the New York State Attorney General is investigating certain healthcare employers under this theory of violations. Employers should speak with counsel before entertaining or entering into these types of agreements, whether they are written or unwritten agreements.

Congress Passes Law that would Limit Use of Confidential Arbitration to Resolve Sexual Harassment Claims

Congress yesterday passed a bill that would make pre-dispute arbitration agreements and class action waivers covering sexual assault and sexual harassment claims invalid and unenforceable. The bill is headed to President Joe Biden's desk, and he is expected to sign it. Here, we explain the bill and implications if it becomes law.

By way of background, the bill is titled "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" (the "Act") and it amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers **the option** of bringing their claims of sexual assault or sexual harassment in arbitration **or** in court. Employers who routinely use arbitration agreements with class action waivers to cover all claims arising out of or related to employment will know that such waivers generally state that any sexual harassment-type claims must be resolved through individual, confidential, arbitration. The agreements, thus, generally require the employee to utilize arbitration. If enacted, the Act would allow an employee claiming harassment to avoid going through arbitration to resolve their claims. Rather, the employee would have a choice as to whether to pursue claims against their harasser in court or through arbitration.

Employee advocate groups argue that confidential arbitration proceedings limit employees' abilities to expose abusive employers through public court proceedings. In the wake of the MeToo movement, there have been significant efforts to repeal agreements and laws that, advocates argue, allow employers to "get away with" and

cover up harassment claims made against harassing managers.

States like New York have tried to make agreements mandating confidential arbitration unenforceable, but such state restrictions conflicted with the FAA and, thus, are not enforceable. The Act seeks to cure that conflict between the FAA and state laws.

The Act adds a section to the FAA that states, "[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute …. no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."

The Act defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact" and "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." The term "joint-action" waiver includes class and collective action waivers.

The Act further provides that the validity or enforceability of an agreement will be determined by a court rather than an arbitrator, despite the existence of a contractual term to the contrary. Finally, the Act states that it shall apply with respect to any dispute or claim that arises or accrues on or after the date of the Act's enactment.

Takeaways for Employers
As enacted, the Act seems to apply only to claims that relate to sexual harassment or assault claims, meaning that other types of claims (e.g., wage and hour) could continue to be arbitrated, and that class action waivers of those claims would continue to be valid. Employers should not abandon arbitration agreements with class action waivers as a result of the Act's anticipated passage.

Employers with arbitration agreements should anticipate more sexual assault and sexual harassment claims being filed in court, rather than arbitration. Employees will likely choose to pursue their sexual harassment claims in a public forum like the courts, in order to exert pressure on the employer to settle early on. While arbitration is not entirely confidential, it is inherently more confidential than litigation in court because of the absence of a public record. However, the new law makes clear that, with respect to sexual assault and sexual harassment claims, it is up to the employee, not the employer, to decide whether the case is tried in court or in arbitration, regardless of what an arbitration agreement says.

As always, employers should implement risk mitigation efforts aimed at reducing their exposure to harassment claims, including sexual harassment claims. The likely passage of this Act will only raise the stakes for employers who are sued for alleged harassment.

Visit our Website

STAY IN TOUCH
emina@poricaninlaw.com
315.269.1125
518.676.0192

Poricanin

Practical Counsel. Industry Insight.