

Employee Benefit ■ Plan Review

New York Releases Guidance on the State's New Sick Leave Law

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New York employers waiting for clarification on the newly effective New York State Sick Leave Law (“Sick Leave Law”) need wait no longer: on October 20, 2020, the state issued initial guidance – titled the New York State Paid Sick Leave FAQ¹ (the “Guidance”) – interpreting the law.

The Sick Leave Law applies to all private sector workers in the state and became effective September 30, 2020. Although employees were entitled to begin accruing paid sick leave on the effective date, employers are not required to allow employees to use such leave until January 1, 2021.

In adopting the new law, New York joins several other states – and some localities, including New York City, which has its own sick leave ordinance – in requiring employers to provide paid sick leave for employees beyond the temporary leave requirements relating to the pandemic.

Key provisions from the Sick Leave Law and newly released Guidance follow below.

LEAVE ACCRUAL AND AMOUNT

The total amount of hours that can be accrued – and whether those hours are paid – depends on the number of employees in any calendar year who are physically working within the State of New York:

- *Employers with 1 - 4 employees:* Employees are provided with up to 40 hours of unpaid sick leave, unless the employer had a net income of more than \$1 million in the prior tax year, in which case the leave is paid;
- *Employers with 5 - 99 employees:* employees are provided with up to 40 hours of paid sick leave; or
- *Employers with 100 or more employees:* employees are provided with up to 56 hours of paid sick leave.

However, while employers may opt to cap leave accrual based on their size, this is not required; employers who wish to provide paid or unpaid sick leave in excess of the Sick Leave Law’s requirements may do so. Likewise, employers may adopt a paid leave policy that provides benefits to employees that exceed the Sick Leave Law’s minimum standards.

The state’s new Guidance clarifies that employees do not continue to earn sick leave while using paid sick leave under this law, but rather, must be credited with leave time only for hours worked. Similarly, employees do not accrue leave for pay received for non-working time, such as bonuses or subject-to-call time. However, on-call time, training time, and even travel time must be counted for leave accrual purposes.

USES FOR LEAVE

After January 1, 2021, employees who request leave orally or in writing are entitled to use their accrued leave for the following purposes:

The state's new Guidance clarifies that employees do not continue to earn sick leave while using paid sick leave under this law, but rather, must be credited with leave time only for hours worked.

- For the employee's own mental or physical illness, injury, or health condition, regardless of whether such illness, injury, or condition has been diagnosed or requires medical care at the time of the request;
- For the mental or physical illness, injury, or health condition of the employee's family member, regardless of whether such illness, injury, or condition has been diagnosed or requires medical care at the time of the request;
- For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventative care for, an employee or an employee's family member; or
- For specified reasons due to domestic violence, a family offense, sexual offense, stalking, or human trafficking regarding the employee or the employee's family member.

The maximum increment an employer may set for the use of sick leave is four hours. The Guidance clarifies that an employee may use

four hours of accrued sick leave as needed, or less, if an employer allows for smaller increments such as one or two hours.

The Guidance clarifies circumstances under which sick leave may be used. For example, the Guidance notes that usage of sick leave under this law is separate and in addition to quarantine leave for employees subject to a precautionary or mandatory order of quarantine or isolation related to COVID-19. Use of COVID-19 leave does not impact or otherwise utilize an employee's paid sick leave accruals or usage. Employees may use sick leave for doctors, dentists, and other routine appointments when they require treatment for a condition or for preventative medical care.

ELIGIBILITY FOR LEAVE

The Guidance also clarifies various eligibility issues that remained open following the passage of the Sick Leave Law. For example:

- *No Minimum Period of Employment:* There is no minimum period of employment before an employee can use sick leave. However, unless an employer provided the required amount of sick leave up front at the beginning of a calendar year, or otherwise has a sick leave policy that exceeds the law's requirements, an employee would still have to work at least 30 hours before accruing leave.
- *Seasonal Part-Time Workers:* If a business with 15 full-time, year-round employees also hires seasonal part-time workers, the employer must provide sick leave to those part-time seasonal workers as well. If an employer has five or more employees but fewer than 100, all employees, including part-time seasonal workers, are entitled to accrue one paid sick hour for every 30 hours they work.

- *Telecommuting Employees:* An employer cannot require an employee to work from home or telecommute instead of taking sick leave, but it can offer the employee the option. If employees opt to work from home or telecommute, they retain the sick leave they have accrued. Also, employees who telecommute are covered by the law only for the hours when they are physically working in New York State, even if the employer is physically located outside of the state.
- *Domestic Workers:* Domestic workers are eligible for leave protections under the law depending on the employer's size, as set forth above.
- *No Exemptions for Nonprofits:* Nonprofit employers are not exempt from the Sick Leave Law.

RATE OF COMPENSATION

Employees are entitled to receive compensation at their regular rate of pay, or at the applicable minimum wage, whichever is greater. The Guidance clarifies that, for employees who are paid on a non-hourly basis (e.g., commission or flat-rate), accrual is measured by the actual length of time spent performing work. Accordingly, an employer should track hours for such non-hourly employees, unless the paid leave time is all granted up front.

Employees are entitled to receive compensation at their regular rate of pay, or at the applicable minimum wage, whichever is greater.

If an employee is paid at different rates for different tasks, the employee must be paid for leave at

the weighted average of those rates, which is the total regular pay divided by the total hours worked in the week.

CONFIDENTIAL INFORMATION

Employers cannot require disclosure of confidential information as a condition of providing leave. For example, such confidential information might relate to a mental or physical illness, injury or health condition of an employee or employee's family member, or information relating to absence from work due to domestic violence, a sexual offense, stalking or human trafficking. Both the law and the Guidance are silent on what documentation an employer can require.

LEAVE TRACKING

An employer must keep an ongoing record of accrued and used leave. If an employee makes a request (whether verbally or in writing) for a summary of sick leave accrued and used in the current calendar year and/or any previous calendar year, an employer must provide the information within three business days.

CARRYOVER

Unused sick leave is to be carried over to the following calendar year. However, employers with fewer than 100 employees may limit use of sick leave to 40 hours per calendar year, and an employer with 100 or more employees may limit the use of sick leave to 56 hours per calendar year.

PAYOUT ON SEPARATION OF EMPLOYMENT

Unless required by another agreement or policy, including the employer's own written leave policy, employers are not required to pay employees for unused sick leave upon the employee's termination, resignation, retirement, or other separation from employment. However, since unused sick leave must be carried

over across calendar years, employers would be wise to review their existing policies relating to payout of accrued sick leave on termination, lest they inadvertently commit themselves to a large payout of carried over but unused time.

Unused sick leave is to be carried over to the following calendar year.

Seasonal employees who maintain an ongoing relationship with their employer maintain their leave accruals through breaks in employment.

RETALIATION PROHIBITED

The Sick Leave Law prohibits an employer from retaliating against an employee for exercising his or her rights under the Sick Leave Law. An employee returning to work following sick leave taken under the law must be restored to his or her original position, with the same pay and other terms and conditions of employment.

EXEMPTIONS FOR COLLECTIVE BARGAINING AGREEMENTS

The Sick Leave Law does not prevent employers and employees from entering into a collective bargaining agreement that provides a comparable benefit for employees in the form of paid days off. To do so, however, the collective bargaining agreement must specifically acknowledge the Sick Leave Law and its requirements. The Guidance clarifies that the collective bargaining agreement must specifically reference Labor Law Section 196-b, and notes that the Department of Labor recommends that the "comparable benefits for the employees" be explicitly identified and labeled as such. This provision applies to agreements entered into on or after September 30, 2020.

PREEMPTION / INTERACTION WITH OTHER LAWS

The Sick Leave Law allows cities with a population of one million or more (such as New York City) to enact and enforce local laws or ordinances which meet or exceed the standards set forth in the state-wide law. Thus, New York City's Earned Safe and Sick Time Act, and Westchester County's Paid Sick Time Ordinance, remain in effect.

The Guidance confirms that employees can only choose to use sick leave while taking Paid Family Leave ("PFL") if the employer allows it.

The Guidance confirms that employees can only choose to use sick leave while taking Paid Family Leave ("PFL") if the employer allows it. Taking sick leave at the same time as PFL may allow the employee to receive his or her full salary for all or part of the leave; however, an employee cannot receive more than his or her full wages while receiving PFL benefits.

POSTING AND NOTICE

Although the Sick Leave Law does not address posting and notice requirements, the New York Labor Law, Section 195(5), requires employers to notify employees about their own sick leave policies in writing or by posting. Accordingly, employers should be sure that their written notifications relating to their sick leave policies are updated to reflect the provisions in the new Sick Leave Law.

RECORD REQUESTS AND RETENTION

Upon an employee's oral or written request, the Sick Leave Law

requires that the employer must provide a summary of the amounts of sick leave accrued and used by the employee in the current and/or any previous calendar year within three business days. Under Section 195 of the New York Labor Law, employers must retain such records for six years.

Employers should be sure that their written notifications relating to their sick leave policies are updated to reflect the provisions in the new Sick Leave Law.

LEAVE DONATION

The Guidance provides that employers can have a policy that allows employees to donate unused leave to other employees, as long as this policy is completely voluntary.

DISCIPLINE FOR MISUSE OF SICK LEAVE

The Guidance also provides that employers can take disciplinary action, up to and including termination, against employees who use leave for purposes other than those allowed under the law, or for employees who lie to their employer in connection with taking such leave.

PENALTIES

Failure to provide the required sick leave is the equivalent of failure to pay wages, subjecting employers to penalties which include payment of the unpaid wages, 100 percent liquidated damages and civil penalties in an amount up to double the total amount due.

TAKEAWAY FOR EMPLOYERS

Employers are advised to review the Sick Leave Law and the new Guidance, and to update their policies as necessary. Employers should also ensure that supervisors are trained or otherwise informed on the requirements of the Sick Leave Law and accompanying Guidance. Importantly, employers should

recognize that the law's requirements are not limited to full-time employees, and that they should still be tracking hours for commission-based and flat fee employees who do not receive fully frontloaded sick leave time. They should coordinate with their payroll administrators and ensure their recordkeeping is updated. Once again, employers should remember that employee should be accruing sick leave now, and can start using their accrued leave on January 1, 2021. Employers should also keep abreast of any further future regulations or guidance issued by the state. 🌐

NOTE

1. https://www.ny.gov/sites/ny.gov/files/atoms/files/PSL_FAQ_PaidSickLeaveFAQ.pdf.

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