

Important Information About Recently Issued Guidance to New York Sick Leave Law

October 23, 2020 | **CLIENT ALERTS**

New York State recently issued guidance to assist employers in implementing the state's new paid sick leave law ("PSL"). Employers must review their current sick and paid time off policies to ensure they are compliant before the start of the new year.

Effective January 1, 2021, New York State will require employers to provide sick leave to all employees, including, but not limited to, part-time, temporary, per diem, and seasonal workers. PSL applies to all businesses and organizations, with the exception of Federal, state, and local government employers.

How much PSL must be provided?

The amount of sick leave mandated is based on the size of an employer's New York State-based workforce and the net income of the business or organization.

- Employers with **4 or fewer employees** and a **net income less than \$1 million** must provide 40 hours of *unpaid* sick leave per calendar year.
- Employers with **4 or fewer employees** but a **net income greater than \$1 million** must provide 40 hour of *paid* sick leave per calendar year.
- Employers with **between 5 and 99 employees**, employees must be provided 40 hours of *paid* sick leave per calendar year.
- Employers with **100 or more employees** must provide 56 hours of *paid* sick leave per calendar year.

How is PSL provided to employees?

Employers have the choice to accrue PSL or frontload the leave by providing all of the leave at the beginning of the year. An employer who chooses to frontload PSL must provide the requisite amount mandated by law either in a regular January-December calendar year or in a 12-month period set by the employer, such as one that runs from an employee's anniversary date.

If employers choose to have PSL accrue, it must accrue at a rate of at least **one hour per 30 hours worked**. Accrual must have begun on September 30, 2020, even though employees may not utilize PSL until January 1, 2021.

Employers may also elect to use a combination of both the frontload and accrual methods. For example, employers could frontload leave for all full-time employees and base leave on accrual for part-time employees.

All employees are automatically eligible to receive PSL. Employers may not implement a minimum period of

employment requirement. In addition, employers may set a minimum increment for the use of sick leave, but it may not exceed 4 hours.

What can PSL be used for?

PSL can be used for the following reasons:

- The mental or physical illness, or health condition of an employee or employee's family member, regardless of whether the illness, injury, or health condition has been diagnosed or requires medical care at the time the employee requests the leave;
- 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
- An absence from work due to any of the following reasons when the employee or employee's family member has been a victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking:
 - To obtain services from a domestic violence shelter, rape crisis center, or other services program;
 - To participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or the employee's family members;
 - To meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
 - To file a complaint or domestic incident report with law enforcement;
 - To meet with a district attorney's office;
 - To enroll children in a new school; or
 - To take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

Family members are defined as an employee's child (biological, adopted or foster, legal ward, or child via loco parentis) spouse, domestic partner, parent (biological, adopted or foster, step, legal guardian or loco parentis parent), sibling, grandchild or grandparent, and the child or parent of an employee's spouse or domestic partner.

What protections do employees have under PSL?

While employees must submit an oral or written request for leave before the start of their shifts, employers cannot require a minimum notice period prior to granting the leave. Employers also may not require an employee to disclose confidential information relating to the reason for sick leave.

PSL is job-protected leave. Upon return from sick leave, employees must return to the same position of employment held prior to taking sick leave with the same pay and terms and conditions of employment.

Employers are also prohibited from discriminating or retaliating against any employees who exercise their rights under PSL.

What are an employer's recordkeeping responsibilities?

An employer must provide, upon employee's request, a summary of an employee's accrued and used sick leave for both the current and prior calendar years. This must be provided within 3 business days of an employee's request.

Employers also must keep as part of their payroll records the amount of sick leave provided to each employee for a six-year period.

How does PSL work with existing employer sick leave policies and collective bargaining agreements?

Employers need to make sure that their sick or PTO leave policies comply with the requirements of PSL. These requirements include the permitted use, accrual, and carry over provisions. Employers with leave policies that meet or exceed the new PSL requirements do not need to modify their policies.

Employers should also look at their other leave policies such as New York's Paid Family Leave and make sure their leave policies are coordinated.

Collective bargaining agreements that are entered into after September 30, 2020 are not required to provide the exact PSL benefits so long as the agreement provides for comparable benefits/paid days off for employees. Further, CBAs must specifically acknowledge the provisions of Labor Law 196-b.

What happens to unused PSL?

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

Employers do not need to compensate employees for unused sick leave at the end of their employment.

What should employers do now?

Employers should review current leave policies and amend them where necessary. Employers should also provide guidance and training to those responsible for receiving and managing leave requests.

Effective September 30, 2020, employers electing to accrue leave must maintain records of accrual for employees and carry over any accrued leave for use starting January 1, 2021. Employers who choose to use the accrual method but have not yet begun to track accrual should contact their payroll service providers to enact catch-up accrual as of September 30, 2020.

Violations of PSL can result in civil, administrative, and criminal penalties. Failure to provide sick leave is equivalent to a failure to pay employee wages. Should an employer fail to provide their employees with sick leave as required under the law, they may be subject to penalties, including but not limited to, an order assessing the full amount of the wage underpayment and 100% liquidated damages.

We expect New York State to issue further FAQs and regulations, which, at a minimum, are expected to clarify the criteria for determining employer size and net income and permissible employee document requests.

For any assistance with New York Sick Leave Law or the preparation of these policies, the implementation of training, or other obligations of employers as a result of these changes in the law, please contact our attorneys, [Amy Habib Rittling](#) and [Vincent Miranda](#), to help you ensure your workplace is compliant.

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