

New York's Sick Leave Law: What Employers Need to Know Now

Presented By:

John M. Godwin, Esq., Partner

Elizabeth D. McPhail, Esq., Partner

Kinsey A. O'Brien, Esq., Senior Associate

Andrew D. Drilling, Associate

Albany | Buffalo | Hackensack | New York City | Palm Beach | Saratoga Springs | Toronto

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Paid Sick Leave – Application

- On April 3, 2020, Governor Cuomo signed the New York State Budget Bill, which, among other things, established a new paid sick leave program.
 - Took effect September 30, 2020.
 - On October 20, 2020, the New York State Paid Sick Leave Law website went live with additional guidance, including a “FAQ” document.
- Applies to all private-sector employers, including non-profits.
- Does not apply to federal, state, and local government employers.
- Applies to all employees, including part-time employees, seasonal and temporary employees, and interns.

Paid Sick Leave – Application

Type of Employer		Employee Leave Entitlement
4 or fewer employees	Net income less than \$1 million	At least 40 hours of unpaid sick leave
	Net income more than \$1 million	At least 40 hours of paid sick leave
Between 5 and 99 employees		At least 40 hours of paid sick leave
100 or more employees		At least 56 hours of paid sick leave

Paid Sick Leave – Application

- According to the guidance, if an employer has multiple locations in New York State, it must count the total number of employees *at all such locations* when determining the amount of sick leave it must provide.
 - What about employees outside of New York?
 - What about employees outside the United States?

Paid Sick Leave – Accruals

- Employers are required to begin accruals as of September 30, 2020.
- Employees are entitled to accrue sick leave at the rate of 1 hour sick leave per 30 hours worked.
- According to NYS FAQ guidance:
 - Sick leave does not accrue on hours not worked, such as call-in pay or use of paid time off.
 - Employees earn sick leave for the hours they physically work in New York State, regardless of the location of their employer. This would include employees who are working remotely from their residence in New York State for an out-of-state employer.
 - Seasonal employees who maintain an “ongoing employment relationship” with their employer must maintain their sick leave accruals through breaks in employment.

Paid Sick Leave – Frontloading Option

- In lieu of tracking accruals, employers may choose to frontload sick leave at the beginning of the year.
- Employers may not later reduce or revoke the amount of leave frontloaded to any employee.
- Employers may frontload less than the maximum annual accrual amount (40 or 56 hours, depending on employer size) based on the hours it anticipates a particular employee will work over the calendar year.
 - But, if the employee works more hours than anticipated, the employer must award additional sick leave to meet the requirements of the law.

Use of Sick Leave

- Leave may be used starting on January 1, 2021 for:
 - A **mental or physical illness**, injury or health condition **of an employee or an employee's family member**, regardless of whether that condition has been diagnosed or requires medical care at the time the employee requests 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**; and
 - Certain absences from work due to **domestic violence, a family offense, sexual offense, stalking, or human trafficking**, of an employee or an employee's family member.
- “Family member” is defined broadly and includes:
 - Employee's child, spouse, domestic partner, parent, sibling, grandchild, grandparent, and child or parent of the employee's spouse or domestic partner.

Use of Sick Leave

- Sick leave is available for use as it is accrued, with no waiting period for new hires.
- The employer can set a reasonable minimum increment for use of sick leave, which cannot exceed 4 hours.
 - With this minimum increment, an employee has to work 120 hours before they can use accrued sick time.
- Employers may establish annual usage caps that do not exceed the following:
 - Employers with less than 100 employees: 40 hours per year.
 - Employers with 100 or more employees: 56 hours per year.

Use of Sick Leave

- Sick leave must be paid at the greater of the applicable minimum wage or the employee's normal hourly rate.
 - Even if an employee uses leave during hours that would have been overtime.
 - But, employees who are paid at more than one rate of pay must be paid for leave under the law at the weighted average of those rates. The weighted average is the total regular pay divided by the total hours worked in the week.
- Employers are not required to pay employees for tips or gratuities that would have been earned during the leave time, but cannot take a tip credit for such time.
- Employees cannot be required to find their own replacement/coverage as a condition to using sick leave.

Carry Over and Payout

- Unused sick leave must be carried over from year to year.
- According to the NYS guidance, employers who frontload less than the maximum annual accrual amount (40 or 56 hours, depending on employer size) still must allow carryover.
 - What about employers who frontload the full amount?
- Employers are not required to pay out unused accrued sick leave when employment ends.
 - However, the policy should contain express forfeiture language to leave no doubt on this point.

Notice and Documentation

- The statute is silent on how much notice employees must give to use sick leave.
- According to the guidance, “[t]here is no specified notice or time period requirement under the law, provided, however, that there is an oral or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer.”

Notice and Documentation

- With respect to documentation, the statute states:

An employer may not require disclosure of **confidential information** relating to a mental or physical illness, injury, or health condition of [an] employee or [an] employee's family member, or information relating to absence from work due to domestic violence, a sexual offense, stalking, or human trafficking, as a condition of providing sick leave

(emphasis added).

- No further insights in the guidance.

Existing Policies

- Employers do not have to provide additional sick leave if they already have a sick leave or paid time off policy that provides an amount of leave that meets or exceeds the requirements of the law, and satisfies the accrual, carryover, and use requirements of the law.
- Key issues:
 - Application to newly hired, part-time, temporary, and seasonal employees and interns.
 - Monthly accrual values.
 - Explicit identification of reasons for use.
 - Carry over prohibitions/caps.
- According to NYS guidance, employers must notify employees in writing of any restrictions on their use of leave, including minimum leave increments.

Collective Bargaining Agreements

- Employees covered by a Collective Bargaining Agreement (“CBA”) are covered by the law, and sick leave benefits are a mandatory subject of bargaining.
- A CBA entered into on or after September 30, 2020 may provide for different leave benefits, so long as:
 - Such benefits are “comparable” to those required by the law; and
 - The CBA specifically acknowledges the provisions of the law (should also expressly identify the “comparable” benefits”).
- What constitutes “comparable” benefits?
 - The statute is silent.
 - The guidance states that NYSDOL “considers leave time which has fewer restrictions on its use to be comparable to that required by this law, regardless of the label of such leave (e.g., annual or vacation time) and multiple leave benefits which meet the use requirements of this law may be combined to satisfy the ‘comparable benefit’ requirement.”

Employee Protections

- “No employer... shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has exercised his or her rights afforded under the [Paid Sick Leave Law], including, but not limited to, requesting sick leave and using sick leave..”
- Per the guidance, “[e]mployees must be restored to their position of employment as it had been prior to any sick leave taken.”
- The New York State Department of Labor has established an “Anti-Retaliation Unit” to which employees can report perceived retaliation.

Employee Protections

- Sick leave absences should be treated as protected and not subjected to disciplinary penalties, including under point- or occurrence-based attendance policies.
- But, the guidance confirms that “[a]n employer may take disciplinary action, up to and including termination, against an employee who uses leave for purposes other than those provided for under the law, or who lies to their employer in connection with taking such leave.”

Recordkeeping

- Employers must include with their payroll records the amount of sick leave provided to each employee.
 - Such records must be kept for at least six (6) years.
- Within three business days of an employee's request (verbally or in writing), the employer must provide a summary of the amount of sick leave they have accrued and used in the current calendar year or any previous calendar year.

Penalties for Non-Compliance

- Employers that fail to provide their employees with the requisite sick leave may be subject to civil and administrative actions to recover:
 - The full amount of the sick leave not provided;
 - An equal amount as liquidated damages;
 - Civil penalties of up to double the total amount due;
 - Attorney's fees and costs; and
 - Interest.
- Criminal penalties may also apply.

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QUESTIONS?

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