

# PROPOSED NEW YORK STATE PAID SICK LEAVE REGULATIONS PROVIDE SOME ANSWERS BUT STILL LEAVE MANY QUESTIONS UNANSWERED

*Hodgson Russ Labor & Employment Alert*  
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On April 3, 2020, Governor Cuomo signed into law the New York State Paid Sick Leave (“NYPSL”) Law, which requires all private employers in New York State to provide sick leave. This law took effect on September 30, 2020, which is when employees were required to begin accruing sick leave, though employees are not entitled to use sick leave until January 1, 2021. Our prior alert regarding the NYPSL Law can be found [here](#), and our alert on NYPSL guidance issued by New York State on October 20, 2020, can be found [here](#). Notably, both the law and guidance left a number of questions unanswered for employers.

New York State has now posted to its website a set of proposed regulations related to the NYPSL. Notably, these proposed regulations have not yet been published in the New York Register, which is the first step in the rulemaking process. Once published in the New York Register, the proposed regulations will be subject to public comment and potential revision before taking effect.

The proposed regulations offer some important answers and clarifications for employers, but still leave a number of key questions unanswered. We highlight some of the important aspects of the proposed regulations below:

## Documentation Issues

- Employers may not require medical or other verification in connection with sick leave that lasts less than three consecutive scheduled workdays or shifts.
- Employers are permitted to request documentation from an employee who uses sick leave for three or more consecutive scheduled workdays or shifts, with the following caveats:
  - This documentation is strictly limited to: (1) an attestation from a licensed medical provider supporting the existence of a need for sick leave, the amount of leave needed, and a date that the employee may return to work; or (2) an attestation from an employee of their eligibility to leave.

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- Employers may not require an employee to pay any costs or fees associated with obtaining medical or other verification of eligibility for use of sick leave.
- Employers may not require an employees to provide “confidential information,” which include “individually identifiable health or mental health information, including but not limited to, diagnosis and treatment records from emergency services, health providers, or drug and alcohol abuse prevention or rehabilitation centers,” as well as “information that is treated as confidential or for which disclosure is prohibited under another applicable law, rule, or regulation.”
- Employers may not require an employee to provide information as to the nature of the illness or details related to domestic violence, sexual offense, family offense, human trafficking, or stalking that necessitates the use of safe leave.

### Employee Headcount Issues

- As detailed in our prior alerts, the amount of leave an employer must provide depends on the number of employees it employs in the calendar year. The proposed regulations offer some important clarifications as to when and how headcount should be determined.
- The number of employees employed by an employer during a calendar year shall be determined by counting the **highest total number of employees concurrently employed at any point during the calendar year to date**.
- Increases in Employees: If an employer’s headcount increases during a calendar year such that they move into a higher “bracket” of coverage, the employer must comply with the requirements of the higher bracket starting from the date of the headcount increase.
  - For example, if an employer with 4 employees hires a 5<sup>th</sup> employee, it must allow employees to accrue up to 40 hours of paid sick leave (rather than the 40 hours of unpaid sick leave for certain smaller employers) starting as of the date it hires the 5<sup>th</sup> employee.
  - Likewise, if an employer with 99 employees hires a 100<sup>th</sup> employee it must allow employees to accrue up to 56 hours of paid sick leave (rather than the 40 hours of paid sick leave for mid-size employers) starting as of the date it hires the 100<sup>th</sup> employee.
  - The accrual of such additional required is prospective from the date of the headcount increase and, therefore, employees are not entitled to reimbursement for previously used unpaid leave or to use more than the maximum amount of leave set by the employer in accordance with the NYPSL Law.
  - Notably, an employer may count prior accruals of used and unused paid leave and used unpaid leave in the calendar year toward satisfying increased obligations resulting from a headcount increase. However, employers may not count any prior accrual of unused unpaid leave toward any paid leave obligations.
- Reductions in Employees: On the other hand, reductions in employee headcount will not result in a reduced employee leave entitlement until the start of the next calendar year.

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- Employees on paid or unpaid leave, including sick leave, leaves of absence, disciplinary suspension, or any other type of temporary absence, must be included in determining employer headcount so long as the employer has a reasonable expectation that the employee will later return to active employment. An individual need not be counted if there is no employment relationship, as when an employee is laid off or terminated, whether temporarily or permanently.
- Part-time employees are considered to be employed each working day of the calendar week.
- Employees jointly employed by more than one employer must be counted by each employer, whether or not they are on the employer's payroll records.
- Notably, the proposed regulations fail to address whether employees working outside of New York State count towards an employer's headcount for purposes of determining coverage.

### Accrual Issues

- All hours worked must result in accrued time, even if the employee works less than 30-hour increments.
- If an employee works less than a 30-hour increment, employers may round accrued leave to the nearest 5 minutes or the nearest one-tenth or one-quarter of an hour, provided that the rounding mechanism "will not result, over a period of time, in a failure to provide the proper accrual of leave to employees for all the time they have actually worked."

If you have any questions on the NYPSL law or the new proposed regulations, or need assistance developing or revising your policies to comply with the New York Paid Sick Leave Law requirements, please contact Kinsey O'Brien (716.848.1287), John Godwin (716.848.1357), or any member of our Labor & Employment Practice.

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