

NEW YORK STATE DEPARTMENT OF LABOR ADOPTS PAID SICK LEAVE REGULATIONS

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In December 2020, the New York State Department of Labor (“NYSDOL”) issued proposed regulations on the New York State Paid Sick Leave (“NYSPSL”) Law. We reported on the proposed regulations [here](#). By way of summary, the proposed regulations addressed the manner in which employees are to be counted for purposes of determining employer coverage under the NYSPSL Law, the extent to which employers can request documentation in connection with an employee’s use of sick leave, and sick leave accrual issues.

Over a year later, on December 22, 2021, NYSDOL issued a Notice of Adoption by which it adopted the proposed regulations with no substantive changes. As a result, the proposed regulations are now final and effective as of December 22, 2021.

In its Notice of Adoption, NYSDOL discussed over 25 categories of public comments it received in response to the proposed regulations, but declined to revise the regulations based on those comments. While NYSDOL disposed of most of the public comments in summary fashion, employers should take note of a few key points:

- For purposes of determining an employer’s headcount and therefore its obligations under the NYSPSL Law, NYSDOL “interprets the statute to include all employees of the employer **nationwide**. However, the requirement for sick leave applies only to employees in New York State” (emphasis added).
- NYSDOL is not creating a different “joint employer” standard for NYSPSL purposes and will defer to “existing and settled law, court decisions, and guidance on joint employers.”
- Under the regulations, employers can request documentation from employees who use sick leave for three or more consecutive scheduled workdays or shifts. However, 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.” NYSDOL intends to publish a template employee attestation form.
- In response to comments suggesting that NYSDOL clarify “that employees are not entitled to sick leave for non-workdays,” NYSDOL stated that it “is unaware of

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any Labor Law provisions wherein paid leave includes days not scheduled as workdays, and therefore it is unnecessary to address this issue.”

- NYSDOL refused to revise the regulations to require employees to provide advanced notice for foreseeable use of sick leave. NYSDOL felt that “it would be difficult to create separate categories governing and classifying foreseeability.”
- Interestingly, one of the most helpful portions of NYSDOL’s Notice of Adoption addressed a topic not even covered in the regulations: carry-over of paid sick leave. NYSDOL confirmed that there is “[n]o limitation” on the number of hours employees can carry over to the following year, even where the employer frontloads leave time at the start of each year. However, NYSDOL stated: “[w]hile the statute requires that employers carry over unused sick leave to the next calendar year, employers may do one of the following: (1) give employees the option to voluntarily elect to use and receive payment for paid sick leave prior to the end of a calendar year or carry over unused sick leave; or (2) only allow employees to carry over unused sick leave.” Thus, employers may avoid carry over for employees who exercise an option to receive a payout of unused accruals at the end of the year. And of course, even where employees carry over unused sick leave, the NYSPSL Law allows employers to cap sick leave use at 56 hours or 40 hours, as applicable, per year based upon the employer’s size.

If you have any questions on the NYPSL law, NYSDOL’s adopted regulations, or how they may affect your business, please contact [John Godwin](#) (716.848.1357), [Kinsey O’Brien](#) (716.848.1287), or any member of our [Labor & Employment Practice](#).