

New York Employers Get Ready for Statewide Paid Sick Leave

by Laura M. Lestrade

Beginning January 1, 2021, all employers with employees in New York, regardless of size, will be required to provide job protected sick leave to all New York employees. The amount of required leave depends on the size of the employer, with employers at the highest level (100 or more employees) required to provide up to 56 hours of paid sick leave per calendar year.

New York has enacted one of the most generous sick leave laws in the United States, in terms of the scope of affected employers and the amount of leave to be provided by the largest employers. Under newly added section 196-B of the New York Labor Law, all New York employers, regardless of size, will be required to provide job-protected sick leave to all employees beginning January 1, 2021. For all but the smallest of employers, the leave must be paid. Sick Leave under the new law is separate from, and in addition to, COVID 19-related sick leave mandated under the Federal Families First Coronavirus Response Act (which is currently set to expire December 31, 2020) and New York's COVID-19 Paid Sick Leave law.

EMPLOYER COVERAGE

The law applies to all private sector employers with employees in New York.

EMPLOYER'S EXISTING LEAVE POLICY MAY SUFFICE

An employer whose existing sick leave or PTO policy meets or exceeds the requirements of the new law with respect to amount of leave and satisfies the accrual, carryover and use requirements of the new law is not required to provide any additional sick leave. The state-wide law is similar in many respects to the existing New York City Earned Safe and Sick Time Act, such that many New York City employers should not be required to make significant adjustments to their existing policies. However, employers with 100 or more employees must now provide up to 16 more hours of paid sick leave annually under the state requirements for a total of up to 56 hours (the New York City law only requires up to 40 hours).

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LEAVE ACCRUAL

Employees must accrue sick leave at a rate of not less than 1 hour for every 30 hours worked, up to the annual caps set forth below. Employees begin to accrue leave time as of September 30, 2020, or upon commencement of employment, whichever date is later. However, employers are not required to provide the leave until January 1, 2021.

Employers who do not opt to frontload sick leave at the start of each calendar year (see below), must calculate each employee's accrual from September 30, 2020 and make that time available to employees beginning January 1, 2021. For example, employees who work 40 hours each week for the remainder of 2020 will start 2021 with approximately 18 hours of accrued sick leave.

ANNUAL CAPS ON LEAVE ACCRUAL

The law provides a tiered system of accrual caps, depending on the size of the employer.

Size of Employer	Annual Cap
1 to 4 employees and net income less than \$1 million in previous tax year	Up to 40 hours of UNPAID sick leave per calendar year
1 to 4 employees and net income more than \$1 million in previous tax year	Up to 40 hours of PAID sick leave per calendar year
5 to 99 employees	Up to 40 hours of PAID sick leave per calendar year
100 or more employees	Up to 56 hours of PAID sick leave per calendar year

The law does not indicate whether employer size is determined on a state or nationwide basis.

FRONTLOADING OF LEAVE

The statute gives employers the option of providing employees with "the total amount of sick leave required to fulfill its obligations pursuant to subsection one of this section [i.e., the annual caps] at the beginning of the calendar year." However, leave that is granted in a lump sum at the beginning of a calendar year may not be reduced or revoked based on the number of hours actually worked by an employee during the calendar year.

The option to frontload sick time removes some administrative headaches and is consistent with the existing leave policies of many employers. There is some ambiguity, however, concerning whether less than the annual caps may be frontloaded for part-time employees who are not expected to meet the annual accrual caps.

CARRYOVER/ANNUAL USAGE

Employees may carryover unused sick leave from year to year. The law imposes no limit on amount of carryover, but allows employers to limit the number of hours of sick leave an employee may take in each calendar year to the caps set forth above (40 hours for

employers with less than 100 employees and 56 for employers with 100 employees or more).

Employers may set minimum increments for use of sick leave, not to exceed 4 hours.

REASONS FOR TAKING SICK LEAVE

Employees must be permitted to use sick leave for the following reasons:

- (i) for a mental or physical illness, injury, or health condition of such employee or such employee's family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
- (ii) for the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
- (iii) for an absence from work due to any of the following reasons relating to the employee or employee's family member being the victim of domestic violence (as defined in NY Executive Law), a family offense, sexual offense, stalking, or human trafficking:
 - (a) to obtain services from a domestic violence shelter, rape crisis center, or other services program;
 - (b) to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
 - (c) 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;
 - (d) to file a complaint or domestic incident report with law enforcement;
 - (e) to meet with a district attorney's office;
 - (f) to enroll children in a new school; or
 - (g) 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 Member" is defined as an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse or domestic partner. "Parent" is defined as a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child. "Child" is defined as a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

NOTICE AND DOCUMENTATION

The law imposes no specific notice or documentation requirements on employees, stating that employers shall provide sick leave for the required reasons “upon the oral or written request of an employee.” Employers may not require the disclosure of confidential health information relating an absence from work due to domestic violence sexual offense, stalking or human trafficking as a condition of providing sick leave.

RECORDKEEPING AND EMPLOYEE INFORMATION REQUESTS

Beginning October 1, 2020, employers are required to maintain, as part of their weekly payroll records, “the amount of sick leave provided” to each employee and to retain such records for a period of six years. It is unclear whether the records must include both the amount of sick time accrued (or frontloaded) and the amount of sick time actually used by the employee. Until further guidance is received, employers should assume that payroll records should include both.

Employers are also required to provide to any requesting employee a summary of the amounts of sick leave accrued and used by such employee in the current calendar year and/or any previous calendar year. The employer must provide such information to the employee within three business days of a request.

JOB PROTECTION

Upon return from sick leave, the employee must be restored to the same position with the same rate of pay and terms and condition of employment.

NO RETALIATION/DISCRIMINATION

Employers may not discriminate or retaliate against any employee for exercising his or her rights under the statute, including requesting or using sick leave.

EMPLOYER TAKEAWAYS

Employers should take the following steps to comply with the new law:

- Review existing sick leave or PTO policies to ensure that it provides employees with an amount of leave that meets or exceeds the new requirements and satisfies the accrual, carryover and use requirements set forth above;
- Ensure that payroll records include the amount of sick leave accrued (or frontloaded) and used by each employee.