

WHAT NEW YORK EMPLOYERS NEED TO KNOW ABOUT SICK LEAVE: FAQs ABOUT THE STATE'S IMPENDING NEW LAW

Insights
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With January 1, 2021 quickly approaching, it's crunch time for New York employers to prepare to comply with the [new statewide sick leave law](#). New York employers have been grappling with questions surrounding the New York Paid Sick Leave law (NYPSL) since the legislation was enacted in April. So far, guidance from the state has been limited, and comes in the form of a new [New York State sick leave website](#) and proposed regulations released on December 2, 2020. While the guidance leaves many important questions unanswered, we have rounded up employers' frequently asked questions about the NYPSL to help you prepare for implementation.

SUMMARY OF NEW YORK PAID SICK LEAVE REQUIREMENTS

In sum, the NYPSL law requires New York employers to provide employees with sick leave effective January 1, 2021. The level of obligation is keyed to the size, and in some cases, revenue of employers:

EMPLOYER SIZE

4 or fewer employees; net income \$1M or less

4 or fewer employees; net income greater than \$1M

5-99 employees

100 or more employees

AMOUNT OF LEAVE

40 hours of *unpaid* leave

40 hours of paid leave

40 hours of paid leave

56 hours of paid leave

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Sick leave must accrue at the rate of at least one hour for every 30 hours worked, and employers were obligated to begin accruals starting September 30, 2020. Employees can use sick leave for themselves or when providing care or assistance to a family member, as well as for safe leave when the need for leave is related to certain reasons related to the employee or the employee's family member being a victim of domestic violence. Full details of the NYPSL are provided in our [prior alert](#).

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FREQUENTLY ASKED QUESTIONS

Here are the most frequently asked questions we have received from employers in anticipation of the new law soon taking effect.

DETERMINING EMPLOYER SIZE

Q: HOW DOES OUR BUSINESS DETERMINE EMPLOYER SIZE FOR PURPOSES OF THE NYPSL?

A: The proposed regulations provide guidance for determining employer size. For purposes of counting number of employees, the employer must use the January 1 to December 31 calendar year. The number of employees is determined by counting the highest total number of employees concurrently employed at any point during the calendar year to date. If the employer increases the number of employees such that it crosses into a new threshold of leave required, the employer must prospectively increase the amount of leave. However, if the employer decreases the number of employees, the employer cannot reduce the amount of leave provided to employees until the next calendar year.

Employees on any type of paid or unpaid leave are counted, so long as the employer has a reasonable expectation the employee will later return to active employment.

Q: WE HAVE EMPLOYEES THAT WORK IN NEW YORK, AS WELL AS OUTSIDE OF NEW YORK. DO WE INCLUDE OUT-OF-STATE EMPLOYEES WHEN DETERMINING EMPLOYER SIZE?

A: The state has not addressed this question directly, but unofficial guidance from the state suggests that employers

need only count New York employees.

Q: WE HAVE MULTIPLE LOCATIONS WITHIN NEW YORK STATE. DO WE COUNT EACH LOCATION SEPARATELY?

A: No. To determine the number of employees in this scenario, the business would count the total number of employees across all locations within New York.

ELIGIBILITY FOR LEAVE

Q: WE ARE A NEW YORK BASED COMPANY BUT HAVE SOME EMPLOYEES WHO WORK OUTSIDE OF THE STATE. ARE THOSE EMPLOYEES ELIGIBLE FOR NYPSL?

A: No. Only employees who are physically working in New York state are eligible for NYPSL.

ACCRUAL OF LEAVE

Q: HOW DO WE CALCULATE THE ACCRUALS FOR SALARIED EMPLOYEES, SUCH AS EMPLOYEES WHO ARE COVERED UNDER THE WHITE-COLLAR EXEMPTIONS?

A: The state's guidance indicates that for employees paid any method other than on an hourly basis, accrual of sick leave is measured by the actual length of time spent performing work, including salaried employees. So, if an employer uses the accrual method, the employer is supposed to keep track of these employees' hours to ensure that accrual is in compliance with the law. We await further guidance from the state to see if employers are permitted to base accruals for exempt employees based on a 40-hour workweek, like NYC employers are allowed to do under the NYC Earned Safe and Sick Time Act.

USE OF LEAVE

Q: CAN WE IMPOSE A WAITING PERIOD ON AN EMPLOYEE'S ABILITY TO USE SICK LEAVE BENEFITS AT THE BEGINNING OF THE EMPLOYEE'S EMPLOYMENT?

A: No. Regardless of whether an employer uses the accrual or front-load method (discussed below), the employer cannot impose a waiting period on an employee. Employees can use the sick leave benefits available to them immediately with the front-load method, or as they accrue sick time with the accrual method.

Q: HOW MUCH NOTICE IS AN EMPLOYEE REQUIRED TO GIVE BEFORE USING LEAVE?

A: There is no specified notice or time period requirement under the NYPSL. The employee just needs to make an oral or written request prior to using leave. The law does not distinguish between notice for foreseeable and unforeseeable use of leave, so it is not clear if an employer can require a certain amount of advance notice even when the need for leave is foreseeable. Hopefully this gets addressed in future guidance.

Q: CAN WE REQUIRE AN EMPLOYEE TO WORK REMOTELY INSTEAD OF TAKING SICK LEAVE?

A: No. An employer cannot require that an employee work remotely instead of taking sick leave, but the employer can offer the employee the option of working from home if they are able to. If the employee voluntarily agrees to work remotely, their sick leave bank will not be charged for the time out of the worksite.

Q: CAN WE REQUIRE AN EMPLOYEE PROVIDE A DOCTOR'S NOTE WHEN THEY TAKE NYPSL?

A: The proposed regulations address the circumstances in which an employer can request documentation of the need for leave and what documentation can be required. An employer can only require documentation or verification if the sick leave lasts for three or more consecutively scheduled workdays. The only documentation an employer can get is 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 an attestation from an employee of their eligibility for leave. Such documentation cannot disclose any confidential information, such as the nature of the illness, its prognosis, its treatment, or details related to a domestic

violence incident. Finally, an employer cannot require the employee to pay any costs or fees associated with obtaining medical or other verification of eligibility for use of sick leave.

Q: Can an employer require an employee to use sick leave benefits for an absence due to COVID-19?

A: No. [State law provides for leave related to COVID-19](#), and an employer cannot make an employee utilize their accrued but unused sick leave benefits instead of those COVID-related benefits.

POLICIES

Q: WE ALREADY PROVIDE SICK LEAVE/VACATION LEAVE/PAID TIME OFF THAT MEETS OR EXCEEDS THE 40 OR 56 HOURS OF SICK LEAVE REQUIRED UNDER THIS LAW. ARE WE REQUIRED TO PROVIDE ADDITIONAL LEAVE?

A: An employer is not required to provide additional sick leave to employees if the employer has adopted a sick leave policy or other time off policy that provides employees with an amount of leave which meets or exceeds the requirements of the law and satisfies the accrual, carryover and use requirements. You will need to review your existing policy to make sure it complies with all aspects of the NYPSL.

Q: We have a PTO policy that does not separate out sick leave. Is this sufficient?

A: Yes, assuming it meets or exceeds the 40- or 56-hour of leave obligation and otherwise complies with the NYPSL. Sick time does not need to be separated out from other paid time off.

Q: Can an employer have different leave policies for different categories of employees (e.g. part-time vs. full-time, exempt vs. non-exempt, temporary vs. regular)?

A: Yes. So long as each policy is compliant with the minimum requirements of the NYPSL, employers can have different policies for different categories of employees.

Q: We have an unlimited PTO policy. Does this comply with the requirements of the NYPSL?

A: Yes, this would comply with the requirements of the NYPSL because the business would be providing more generous leave than required by the statute. You should make clear in your policy that the unlimited PTO can be used for all the reasons permitted by the NYPSL and confirm that the policy complies in all respects with statutory requirements.

FRONTLOADING LEAVE

Q: WE DON'T WANT TO HAVE TO TRACK ACCRUAL OF SICK LEAVE. IS THERE ANOTHER METHOD WE CAN USE?

A: As an alternative to sick leave accruals, an employer can choose to provide employees with the full amount of sick leave at the beginning of the calendar year. This is referred to as "frontloading" the leave. If an employer frontloads sick leave, they cannot later revoke or reduce the leave if, for instance, the employee works fewer hours than originally anticipated.

Q: IF WE FRONTLOAD SICK TIME LEAVE AT THE START OF THE YEAR, ARE WE ABLE TO PRO-RATE THE LEAVE FOR A NEW HIRE DURING THE YEAR?

A: Yes, an employer can frontload a pro-rated amount of sick leave for a new employee, based on the amount of sick leave the employee would be expected to accrue based on the hours they are anticipated to work, using the accrual rate of one hour of sick leave for every 30 hours worked. However, if you frontload less than the full amount of leave, you must still track the employee's hours worked and accrual of sick leave because the employee may work more hours than anticipated, in which case, they would be entitled to additional sick leave.

Q: WHAT ABOUT PART-TIME EMPLOYEES? DO WE HAVE TO FRONTLOAD PART-TIME EMPLOYEES WITH THE FULL AMOUNT OF LEAVE?

A: Similarly, an employer can front load a pro-rated amount of sick leave to part-time employees, based on the number of hours the employee is anticipated to work. The employer must continue to track the employee's hours worked and accrual of sick leave and provide any additional sick leave should the employee work more than originally anticipated.

Q: If we front load the entire amount of sick leave, are we required to carry over accrued but unused sick leave benefits to the next year?

A: The unofficial guidance provided by the state so far is that even employers who frontload the full amount of sick leave must allow carry-over of accrued unused leave, but that the employer can limit the amount of sick leave an employee can use in any calendar year to 40 or 56 hours (depending on the size of the employer). Therefore, practically speaking, the carry-over requirement will likely have little effect on an employer utilizing the front-load method.

Termination

Q: Are we required to pay an employee for unused leave when their employment ends?

A: No. Employers are not required to pay employees for unused sick leave upon termination. If it is not your policy or practice to pay out unused leave upon termination, the employer should make clear in the policy that employees will not be entitled to be paid for unused leave at the end of the employment relationship.

OTHER LEAVE LAWS

Q: WE ARE A NYC EMPLOYER AND ALREADY PROVIDE SICK LEAVE IN ACCORDANCE WITH THE NYC EARNED SAFE AND SICK TIME ACT. ARE WE REQUIRED TO PROVIDE ADDITIONAL LEAVE UNDER THE NYPSL?

A: The NYPSL does not supersede the NYC Earned Safe and Sick Time Act (ESSTA) and both laws remain in effect. But employers are not required to have separate leave banks or provide more than 40 or 56 hours of leave — one leave bank can satisfy both laws. The [NYC law was recently amended](#) to align certain aspects of the ESSTA law to the NYPSL, including the amount of leave required. Whenever the ESSTA provides broader provisions or greater benefits to your workers than the NYPSL, you must comply with the more generous requirements.

Q: WHAT ABOUT WESTCHESTER COUNTY'S SICK AND SAFE LEAVE LAWS?

A: Westchester County's sick leave law has been preempted by the NYPSL. NYPSL now governs the use of sick leave in

Westchester County. However, the [Westchester County Safe Time Leave Law](#) has not been preempted by the NYPSL, so covered employers must continue to comply with obligations of that law.

Q: CAN WE REQUIRE OUR EMPLOYEES TO USE NYPSL WHILE OUT ON NEW YORK PAID FAMILY LEAVE (PFL)?

A: An employer cannot require an employee to use NYPSL while on PFL. If you allow it, employees can choose to use NYPSL while on PFL, which would allow the employee to receive their full salary for any PFL leave used concurrently with NYPSL. An employee cannot receive more than their full wages while receiving PFL benefits.

WHAT EMPLOYERS MUST DO NEXT

Even though many key questions remain, you must be prepared to let employees begin using NYPSL come the new year. You must review your company's current leave policies and ensure compliance with the law. Additionally, you should continue to monitor developments to ensure compliance with any future guidance or regulations from the state.

We will continue to monitor developments impacting New York employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our [New York City](#) office.

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