

NEW YORK STATE'S FINAL PAID SICK LEAVE REGULATIONS ADDRESS 5 LINGERING QUESTIONS FOR EMPLOYERS

Insights
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The New York State Department of Labor (NYSDOL) recently issued its highly anticipated final regulations regarding [New York State Paid Sick Leave \(PSL\)](#), which allowed employees to start using sick leave at the start of 2021. The sick leave law and guidance from the State [left many important questions unanswered](#). The proposed regulations to the sick leave law were recently adopted with no changes. However, the [NYSDOL's responses to comments](#) following its issuance of proposed regulations provide clarity on at least five key outstanding issues regarding the sick leave law. Here's what employers need to know.

Summary Of New York Paid Sick Leave Requirements

In sum, the PSL 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:

- **Four or fewer employees:** 40 hours *unpaid* sick leave per calendar year.
- **Four or fewer employees with a net income of greater than \$1 million in the previous tax year:** 40 hours paid sick leave per calendar year.
- **Between five and 99 employees:** 40 hours paid sick leave per calendar year.
- **100 or more employees:** 56 hours paid sick leave per calendar year.

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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 PSL are provided in our [prior alert](#).

1. Determining Employer Size: Employee Count is Nationwide

Though the amount of sick leave is premised on employer size, the statute itself and subsequent state guidance provided little information as to how to determine employer size, particularly whether out-of-state employers need to be included in the headcount. The now-final regulations provide guidance for determining employer size.

For purposes of counting number of employees, an 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.

While the regulations do not address whether out-of-state workers count towards employer size, the NYSDOL stated in commentary to the regulations that it interprets the statute to require employers to count *all employees nationwide*, even though only New York employees are eligible for sick leave.

This interpretation may expand the amount of sick leave employers must provide to its New York employees.

2. All Accrued Sick Leave Is Carried Over into the Following Year, even if Leave is Frontloaded

The sick leave law requires employers to carry over unused sick leave to the next calendar year, but employers can limit the amount of sick leave an employee can use in any calendar year to 40 or 56 hours (depending on employer size). Employers were left wondering whether there was a limit on the amount of sick leave the employers must carry over, particularly when an employer frontloads the full amount of sick leave at the start of a calendar year. The NYSDOL clarified that there is no limit on the number of hours that employees can carry over into the following year, *even when an employer frontloads leave time*.

Specifically, employers may do one of the following:

- give employees the option to voluntarily elect to use and receive payment for PSL prior to the end of a calendar year or carry over unused sick leave; or
- only allow employees to carry over unused sick leave.

Employers cannot implement a “use it or leave it” policy when it comes to accrued PSL. New York City employers should note that this is a departure from [New York City's Paid Safe and Sick Leave](#), which allows employees to only carry over to the next calendar year up to 40 or 56 hours of unused safe and sick leave and does not permit employers who accrue sick leave to offer employees the option of cashing out their leave instead. For employers who frontload the full amount of leave an employer may use, this carryover requirement presents a pointless administrative hassle. Employers must carry over unused PSL leave that the employee will never be eligible to use, since employers can limit use of sick leave to the statutory level of 40 or 56 hours and the employer will be frontloading that amount of leave at the start of the calendar year.

3. Leave Cannot Be Denied While Awaiting Documentation

The regulations provide that an employer can only require documentation or verification of sick leave if the sick leave lasts for three or more consecutively scheduled workdays. Only after the third day that an employee is absent from work may an employer request that an employee provide documentation supporting the need for PSL. This certification requirement is limited to 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. Employers cannot require the employee or medical provider to disclose the reason for the PSL usage. 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.

In its recently issued commentary, the NYSDOL reiterated that employers are not permitted to deny sick leave while attempting to confirm the basis for the leave or when requested medical documentation or other verification is unattainable due to associated costs. If an employer discovers a sick leave request is fake or fraudulent, the employer can take disciplinary action against the employee.

The NYSDOL announced that it will produce a template for employee attestations, which is forthcoming.

4. No Advance Notice Needs to Be Made by Employees

The sick leave statute permits employees to use PSL upon a verbal or written request to their employer. Strikingly absent from the statute and previous guidance is whether employers can require a certain amount of notice prior to use of sick leave, particularly for foreseeable uses of leave, like routine medical appointments. The NYSDOL rejected comments by employers to implement an advance notice requirement for employees to take PSL for foreseeable events or to limit the number of times employees can “call-in” for any leave reason. Accordingly, employers cannot require a certain amount of advance notice even when the need for PSL is foreseeable.

The NYSDOL’s guidance is a departure from many other jurisdictions’ sick leave laws, including the New York City Paid Safe and Sick Leave statute. That law allows employers to require employees to give advance notice of a foreseeable use of safe and sick leave.

5. Notice to Employees of Their Rights Is Not Required

If there’s any silver lining to these clarifying regulations, it’s that the NYSDOL rejected comments urging a

requirement that employers provide notice of the PSL statute's requirements to employees.

New York City employers should note that this is a stark contrast from the New York City Paid Safe and Sick Leave statute that requires employers to provide [notice to employees](#) of their rights.

What Should You Do Next?

The NYSDOL regulations are now final. The final regulations also confirmed that failure to provide employee benefits such as sick leave is equivalent to a failure to pay employee wages, signaling to employers that the same penalties apply under the New York Labor Laws. Accordingly, failure to comply with sick leave obligations can lead to significant penalties and you will want to ensure your company's compliance.

You should immediately revisit your written PSL policies and update them as necessary to conform with these recent developments, including that you are providing the right type of leave (whether paid or unpaid) and number of hours to your employees based on your company's nationwide count.

Your managers and HR staff must be well-versed to handle PSL requests. You should also ensure that your company is properly tracking paid leave accruals and usages and properly reporting these to your employees in a timely manner, such as at each pay period.

To the extent you employ employees in New York City, you should also ensure proper compliance with both the State and City laws, particularly when it comes to carrying over or paying out accrued sick or safe leave and providing proper notice to employees.

Conclusion

For more information about compliance with the updated laws, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [New York City](#) office. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to receive the most up-to-date information.