

State Issues Guidance for NY Paid Sick Leave Law

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As employers are well aware by now, New York enacted statewide paid sick leave requirements for employers, which took effect on September 30, 2020. We provided an overview of requirements for the new law [here](#). Under the law, New York employers must provide all employees with sick leave and grant employees the ability to use accrued sick time starting January 1, 2021. The amount of sick leave an employer must provide under the law varies depending on an employer's size and net income.

Recently, New York State issued much anticipated guidance and in a seven page FAQ document regarding the State's new paid sick leave law. That guidance can be found [here](#).

Although the guidance doesn't answer every single question employers will have, the FAQs provide clarification as to Definitions, Accruals, Permitted Uses, Who is Eligible, Leave Increments, Rate of Pay, Alternative Accrual System, and Collective Bargaining Agreement and Other Leave Laws, Employee Rights & Protections, and Miscellaneous Questions.

We have excerpted below a few key FAQs for employers to consider as they continue to work through COVID-19 and employers consider necessary revisions to their leave policies:

If employers choose an accrual based method for calculating leave under the NYPSL, they should be aware that out of state telework may impact an employee's entitlement. The FAQs suggest that employees are only eligible to accrue sick leave based on hours worked while physically within the state of New York:

DOES AN EMPLOYER HAVE TO PROVIDE SICK LEAVE TO EMPLOYEES WHO TELECOMMUTE OUTSIDE OF NEW YORK STATE?

Employees who telecommute are covered by the law only for the hours when they are physically working in New York State, even if the employer is physically located outside New York State.

With many employees already working from home, it is also important to note that, under the new law employers cannot require employees to telecommute in lieu of taking sick leave:

CAN AN EMPLOYER REQUIRE AN EMPLOYEE TO TELECOMMUTE OR WORK FROM HOME INSTEAD OF TAKING SICK LEAVE?

No. An employer cannot require an employee to work from home or telecommute instead of taking sick leave. But an employer can offer the employee the options of working from home or telecommuting. If employees voluntarily agree to work from home or telecommute, employees will retain the paid or unpaid sick leave that they have accrued.

Employers should also take note of where the new law deviates from local laws.

The New York City Paid Safe and Sick Leave Law and Westchester County's Earned Sick Leave Law each expressly provide that leave can be used for "public health emergencies," however under New York's leave law, leave for that reason is not guaranteed. The guidance provides:

IF AN EMPLOYER HAS BEEN ORDERED TO CLOSE TEMPORARILY DUE TO A PUBLIC HEALTH EMERGENCY, MAY EMPLOYEES USE ACCRUED SICK LEAVE DURING THE PERIOD OF CLOSURE?

Whether or not the usage of sick leave in this scenario would be fact specific depending on the type of health emergency, including the risk of contagion, and other health considerations. Accrued sick leave may be used by an employee for preventive care of a mental or physical illness, injury or health condition.

Sick leave under this law is separate and additional to the quarantine leave for employees subject to a precautionary or mandatory order of quarantine or isolation related to COVID-19 (Ch. 25 of the laws of 2020), and use of COVID-19 leave does not impact or otherwise utilize an employee's paid sick leave accruals or usage. More information on COVID-19 Leave is available at paidfamilyleave.ny.gov/covid19.

Under Westchester County's Earned Sick Leave Law, employees could not use sick leave until they were employed for 90 days. Now, employees can use leave as they accrue it without regard to their length of employment:

IS THERE A MINIMUM PERIOD OF EMPLOYMENT BEFORE AN EMPLOYEE CAN USE THEIR ACCRUED SICK LEAVE?

There is no minimum period of employment before an employee can use sick leave. However, unless an employer provides the required amount of sick leave up-front at the beginning of a calendar year or otherwise has a sick leave policy that exceeds the requirements of the law, an employee would have to work at least 30 hours before accruing any sick leave.

And, unlike other paid sick leave laws, there is no requirement that employees give their employers reasonable notice. As an example, Westchester's law provides that where leave is foreseeable an employee will make a good faith effort to provide advanced notice and schedule leave so that it does not unduly interrupt the employer. The state's law is silent, however, as to foreseeable leave and employers should develop flexible policies pertaining to leave requests. The guidance states:

HOW MUCH NOTICE DOES AN EMPLOYEE HAVE TO GIVE TO THE EMPLOYER PRIOR TO USING THEIR ACCRUED SICK LEAVE?

There is no specified notice or time period requirement under the law, provided, however, that there is an oral or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer.

Employers must also account for scenarios where employees will carryover sick leave affording them a sick leave balance in excess of the annual amounts prescribed by the law:

DOES LEAVE REQUIRED UNDER NEW YORK LABOR LAW SECTION 196-B EXPIRE AT THE END OF A CALENDAR YEAR?

Sick leave that is unused by an employee over the course of the year must be carried over to the

next calendar year. However, employers may limit employee use to the number of hours that the employee is entitled to use within any calendar year (i.e., 56 hours for employers with 100 or more employees and 40 hours for employers with 99 or fewer employees). This may result in an employee maintaining a leave balance in excess of the amount they are permitted to use in any calendar year.

Finally, employers can and should continue to be vigilant when it comes to tracking employee leave and enforcing policies against abuse. As the guidance provides it is permissible to discipline employees who misuse leave:

CAN AN EMPLOYER DISCIPLINE AN EMPLOYEE WHO MISUSES SICK LEAVE?

Yes. An employer may take disciplinary action, up to and including termination, against an employee who uses leave for purposes other than those provided for under the law, or who lies to their employer in connection with taking such leave.

In summary, New York employers should work with counsel to review their current leave policies to ensure alignment with State's new requirements, and take steps to train HR personnel and supervisors regarding updates to those policies.

As always, Kelley Drye is here to help employers adapting to the new laws.