



October 22, 2020

## New York State Department of Labor Issues Guidance on Paid Sick Leave Law

On April 3, 2020, Governor Andrew Cuomo signed into law a statewide sick leave requirement, mandating that employers provide sick leave to all employees (“NYS Sick Leave Law”). The NYS Sick Leave Law took effect on September 30, 2020. See our previous [Client Alert](#).

On October 21, 2020, the New York State Department of Labor (“DOL”) issued guidance on implementing the new law, through answers to common FAQs, including the following.

### Employees Covered

All private sector workers in the state are covered by the NYS Sick Leave Law, regardless of industry, occupation, part-time status, overtime exempt status, seasonal status, or immigration status.

### Covered Employers

The law requires employers with five (5) or more employees to provide their employees with paid sick leave, depending on the size of the employer. Businesses with fewer than 5 employees and a net income of \$1 million or less must provide *unpaid* sick leave to employees.

Number of Employees	Sick Leave Requirements
0 - 4	If net income is \$1 million or less in the previous tax year, the employer must provide up to <b>40</b> hours of <b>unpaid</b> sick leave per calendar year.
0 - 4	If net income is more than \$1 million in the previous tax year, the employer must provide up to <b>40</b> hours of <b>paid</b> sick leave per calendar year
5 - 99	Up to <b>40</b> hours of <b>paid</b> sick leave per calendar year.
100 +	Up to <b>56</b> hours of <b>paid</b> sick leave per calendar year.

In addition, the DOL clarified the following:

- Nonprofit employers. Nonprofit employers are not exempt and must comply with the law.
- Joint Employers. The term “employer” includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service. If a business is jointly owned by two individuals, and the business fails to provide sick leave as required under the law, both owners would be jointly and severally responsible.
- Mergers. If a company changes ownership or merges with another entity, the obligation to provide sick leave by either of both companies depends on the status of the workers as employees of the companies.
- Multiple Locations. To determine the size of the employer, employers must count the total number of employees across all locations. If an employer has multiple business locations within the state, with 3 employees at one location, and 4 employees at another location, the employer would have 7 total employees, and would be required to provide each employee with up to 40 hours of paid sick time in each calendar year.
- Employees Telecommuting Out-of-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 the state.

## Use of Sick Leave

- Teleworking. An employer cannot require an employee to work from home or telecommute instead of taking sick leave. However, an employer can offer the employee the option of working from home or telecommuting. If the employee voluntarily agrees to work from home or telecommute, the employee will retain the sick leave accrued.

- Temporary Closure Due to Public Health Emergency. Sick leave under this law is separate from, and in addition to, leave related to COVID-19. Accrued sick leave may be used by an employee for preventive care of a mental or physical illness, injury or health condition. Whether or not sick leave under the NY Sick Leave Law can be used for the temporary closure of a business due to a public health emergency would depend on the facts.
- Bereavement Leave. Permissible uses of accrued sick leave under this law does not include a period of bereavement. However, employees must be permitted to use sick leave for a mental or physical illness, injury or health condition, regardless of whether they have been diagnosed or require medical care.
- Notice. There is no specific notice or time period required under the law to use accrued sick leave. However, employees must make an oral or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer.
- Discipline. An employer may take disciplinary action against an employee who uses leave for purposes other than those provided for under the law, or who lies to the employer in connection with taking such leave, up to and including termination.

## **Rate of Pay**

- Overtime Pay. Employees are required to be paid their normal pay for leave time under the law. If an employee uses leave during hours that would have been overtime, if worked, the employer does not have to pay the overtime rate of pay.
- Different Rates of Pay. Employees who are paid at more than one rate of pay must be paid for leave under the law at the weighted average of those rates. The weighted average is the total regular pay divided by the total hours worked in the week. Overtime exempt employees who are paid on an hourly basis are assumed to work 40 hours per week unless the terms and conditions of their employment specify otherwise. Employers may not reduce an employee's rate of pay for leave time hours only.
- Tips and Gratuities. Employers are not required to pay employees for lost tips or gratuities, but employers may not take a tip credit for leave time and must pay the employee his or her normal rate of pay, or the applicable minimum wage, whichever is greater. Moreover, any employer who normally utilizes a tip allowance as a credit against the minimum wage requirements of their industry cannot do so for employees' accrued sick leave. The rate of pay must be consistent with the applicable statutory minimum wage applicable to the employee.

## Accrual Requirements

- No Accrual During Sick Leave. Employees are only required to be credited with leave time for hours worked. Employees do not continue to accrue sick leave while using paid sick leave under the law.
- No Accrual During Non-Working Time. Employees also do not accrue sick leave for non-working time, such as time subject-to-call. However, on-call time, training time, and travel time are considered “hours worked.”
- Commissioned Employees. When employees are paid on a non-hourly basis, including on a commission or flat rate basis, accrual of sick leave is measured by the actual length of time spent performing work.
- Seasonal Employees. Employers are not required to pay employees for unused sick leave at the end of an employment relationship. However, seasonal employees who maintain an ongoing employment relationship with their employer maintain their leave accruals through such breaks in employment.

## Carryover Requirements

- No Limit on Carryover. All sick leave that is unused by an employee at the end of the year must be carried over to the next calendar year. This may result in an employee maintaining a leave balance in excess of the amount they are permitted to use in any calendar year. Employers may still limit the use of sick leave to 56 hours per calendar year for employers with 100 or more employees, and 40 hours per calendar year for employees with less than 100 employees.
- Donating Unused Leave. An employer may have a policy allowing employees to donate unused leave to other employees, as long as the policy is entirely voluntary.
- Transfers. Leave accruals may not be reduced or otherwise restricted if an employee changes positions, roles or locations within the same employer. Paid sick leave must be paid out at the employee’s rate of pay at the time the leave is taken.

## Collective Bargaining Agreements

- Requirements. Collective bargaining agreements entered into on or after September 30, 2020 may provide for different leave benefits, as long as the benefits are “comparable” to those required by the law, and the agreement must specifically acknowledge the provisions of New York Labor Law Section 196-b. The DOL recommends that the “comparable

benefits for the employee” be explicitly identified and labeled as such in the agreement to avoid confusion or misunderstanding.

## **Other Leave Laws**

- Paid Family Leave. An employee can only use sick leave under the law during Paid Family Leave (PFL) if allowed by the employer. However, employees cannot receive more than their full wages while receiving PFL benefits with paid sick leave.
- Overlapping State and Federal Leave. The NYS Sick Leave law is in addition to, and operates independently from, other state and federal leave requirements.

## **Penalties**

- Failure to provide employee benefits such as sick leave, is equivalent to a failure to pay employee wages. Employer may be subject to civil and/or administrative actions and/or criminal penalties, including but not limited to, or order to pay the full amount of underpayment of wages, 100% liquidated damages, and civil penalties in an amount up to double the total amount due.

## **Takeaway**

Employers in New York should review their current sick leave policy to determine whether it meets the requirements as clarified in the DOL guidance.

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If you have any questions regarding this alert, please do not hesitate to contact us.

**[PUTNEY, TWOMBLY, HALL & HIRSON LLP](#)**

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