

New York Statewide Paid Sick Leave is Here to Stay

Effective January 1, 2021, the majority of workers in New York will receive paid sick leave. On April 2, 2020, as part of New York's budget approval process, the New York legislature and Governor Cuomo enacted a permanent paid sick leave program, for which Governor Cuomo had begun to advocate before the spread of COVID-19. It is separate and apart from the COVID-19 paid sick leave, which we covered [here](#).

What Leave Must Employers Provide?

Under the new law, all employers must provide job-protected sick leave. The amount of leave time and whether it is paid or unpaid is dependent on employer size:

- Employers with fewer than five employees and a net income of less than \$1 million must provide at least 40 hours (or five days) of protected *unpaid* leave;
- Employers with between five and ninety-nine employees, or employers with fewer than five employees with a net income of more than \$1 million must provide at least 40 hours (or five days) of protected *paid* sick leave; and
- Employers with 100 employees or more must provide at least 56 hours (or seven days) of protected *paid* sick leave per year.

How Must Employers Calculate Leave?

The statute outlines in detail the manner of accrual, rate of pay, and carryover of sick leave.

Employees will accrue sick time at a rate of at least one hour per 30 hours worked.¹ From the law's text, it appears that employees may begin accruing this sick time as early as September 30, 2020, or when their employment begins, whichever comes later. However, subject to guidance from the Department of Labor, it appears that employers are not required to provide the leave until January 1, 2021.

Employers must pay sick leave at the employee's regular rate of pay or minimum wage, whichever is greater. Employers are also required to allow employees to carryover unused leave time to the following year, permitting employees to use their unused sick leave from the prior year during the early part of the new year, before they have accrued sick leave for the current calendar year. However, employers may still limit the amount of paid leave that employees may actually use: (1) employers with fewer than 100 employees may limit the use of sick leave to forty hours, or five days, per year, and (2) employers with more than 100 employees can limit the use of sick leave to fifty-six hours or seven days per year.

Guidance on how this new sick leave interacts with other forms of leave (e.g., New York Paid Family Leave, Family and Medical Leave Act, and, if available, COVID 19-related sick leave) is not yet available, but in the meantime, employers should assume that this sick leave will operate independently of other forms of applicable leave. The exception is for local city and municipal sick leave laws: to the extent that a local paid sick leave program provides greater benefits than the new program, an employee will be entitled to leave under the more generous program only.

¹ The statute also expressly permits employers to "front-load" the total amount of sick leave available for employees at the beginning of the year, but does not expressly address whether carryover of unused sick leave would be required in this situation. Similar rules under the New York City Earned Safe and Sick Time Act generally do not require employers who use a "front-load" method to carryover unused sick leave. We will closely monitor whether the NYS Department of Labor issues additional guidance on this point.

When Can an Employee Take Sick Leave?

The statute identifies several bases for an employee to take sick leave, including reasons related to domestic violence. An employee may take leave due to:

- Mental or physical illness of the employee or an employee's family member,² regardless of whether there is a diagnosis;
- For diagnosis, care, or treatment of a mental or physical illness, or preventative care of the employee or employee's family; or
- Conditions of domestic violence, sexual offense, stalking, or human trafficking affecting the employee or employee's family, and if the leave is necessary to obtain crisis services; participate in safety planning, relocation, or meetings with social services; file a complaint or meet with prosecutors; or to enroll children in a new school.

The statute includes a robust anti-retaliation and non-discrimination provision, preventing employers from threatening, penalizing, or terminating an employee for requesting or using sick leave. Employers also may not condition sick leave on the disclosure of confidential information relating to an employee's illness, family member's illness, or information relating to absence from work due to domestic violence.

What Steps Should Employers Take?

This new state-wide law shares many similarities with the New York City Earned Safe and Sick Time Act such that many New York City employers should be able to comply with the law (likely with only minor adjustments to their existing policies). However, larger employers—those with more than 100 employees—should note that they must now provide ***two more days of paid sick leave*** under the state requirements for a total of seven days (the New York City law only requires five days).

Employers should carefully review workplace manuals to ensure that they accurately reflect the new State paid sick leave requirements. The statute allows for some customization of employer policies, particularly where the policy is more generous than the statute. In particular, employers will need to determine whether to permit employees to carry over sick leave above the applicable five or seven day minimum under the statute, and whether to limit the amount of paid sick leave that an employee can actually use in a calendar year. Employee handbooks should clearly outline the employer's policy on carryover and accrual. Leave policies should also make clear that job-protected sick leave is available for an employee's own illness or that of a family member.

The new law also imposes on employers a record-keeping requirement to maintain and preserve records of sick leave provided to each employee for up to six years. The New York Labor Law already imposes a requirement for maintaining payroll records, but employers should have in place a procedure, by the start of 2021, to keep these additional records.

In addition, employers should:

- Ensure that employees have access to a summary of the sick leave time they have accrued (the statute requires that employers provide summaries *within three business days of an employee's request*);

² A "family member" means 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.

- Ensure that human resources professionals are familiar with the different reasons for paid leave, including reasons relating to domestic violence, sexual offense, stalking, and sexual trafficking that may affect the employee or a family member; and
- Avoid asking employees to reveal specifics concerning the reasons why they need to take leave.

We will continue to monitor developments affecting the statewide sick leave legislation and follow up with further information when the Department of Labor issues clarifying guidance.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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