

> Client Alert

Reminder to New York State Employers: Paid Sick Leave Takes Effect on September 30, 2020

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As a reminder to all New York employers, even though they are not entitled to begin using paid sick leave until January 1, 2021, employees start to accrue such paid sick leave on September 30, 2020. We previously addressed the enactment of this statewide job-protected sick leave law in a [prior client alert](#) at the time it was signed into law by Governor Cuomo as part of the State Budget (Senate Bill S7506B), and as separately codified in [New York Labor Law §196-b](#).

Because the New York State Paid Sick Leave (“PSL”) law is effective as of September 30, 2020, employers must start tracking paid sick leave accrual time for each employee and provide data confirming an employee’s accrual of sick leave to employees upon request. Employers must also be equipped to track sick leave accruals carried over from 2020 for use commencing on January 1, 2021. This client alert discusses the details of the PSL and provides steps employers can take now to prepare for its implementation now and in the new year.

Accrual, Amount, and Carryover of PSL

The amount of sick leave an employer is required to provide and the status of such sick leave as paid or unpaid varies based on the size of the employer’s workforce in any calendar year and the employer’s net income in the previous tax year, broken down as follows:

- All New York employers with four or fewer employees are required to provide their employees with up to 40 hours of sick leave per year (based on such employees’ accrual of such leave) as follows:
 - Those employers with net income of \$1 million or less in the previous tax year are required to provide up to 40 hours of unpaid, *i.e.*, protected, sick leave per calendar year.
 - Those employers with net income of greater than \$1 million in the previous tax year are required to provide 40 hours of paid sick leave per calendar year.
 - Employers with five to 99 employees must provide up to 40 hours of paid sick leave per calendar year.
 - Employers with 100 or more employees must provide up to 56 hours of paid sick leave per calendar year.

- All such leave entitlement is based on employees' actual accrual of such leave as outlined below.
 - Employees accrue sick leave at the rate of one (1) hour of leave for every 30 hours worked, unless an employer elects to front-load all sick leave time at the beginning of the year by providing employees with the total amount of sick leave that could accrue during that calendar year. Employees must also be allowed to carry over any unused sick leave into the following calendar year; however, employers are not required to allow employees to use more sick leave than the accrual limits as noted above, (*i.e.*, 40 or 56 hours per calendar year) and payout of any unused sick leave upon termination of employment is not required.
 - For purposes of calculating an employer's employee census, a "calendar year" is defined as the 12-month period from January 1 through December 31. For purposes of using and accruing leave, however, a "calendar year" means either January 1 through December 31 or any regular and consecutive 12-month period determined by the employer.

To date, New York State has not provided further guidance on whether the employee thresholds under the PSL includes only employees working in New York State or includes employees nationwide; this may become an area of future litigation if guidance is not provided prior to January 1, 2021. Although the New York State Department of Labor is authorized to issue regulations to assist in implementing the PSL, it has not done so as of this writing.

The PSL, of course, does not prohibit or prevent an employer from providing an amount of sick leave—paid or unpaid—which exceeds the requirements set forth in the statute, or from adopting a paid leave policy that provides additional benefits to employees.

Use of Sick Leave

Employees must be permitted to take sick leave under PSL for any of the following purposes:

- The employee's own mental or physical illness, injury, or health condition, including diagnosis, care, preventive care, or treatment.
- The mental or physical illness, injury, or health condition of the employee's family member, including diagnosis, care, preventive care, or treatment.
- Enumerated reasons related to domestic violence, a family offense, sexual offense, stalking, or human trafficking regarding the employee or employee's family member. An employee who is the perpetrator of the offense is not entitled to take leave, regardless of the family relationship.

The new law defines "family member" as the employee's child, spouse, domestic partner, parent, sibling, grandparent, or grandchild, or the child or parent of the employee's spouse or domestic partner. "Child" and "parent" are defined broadly. Like New York's Paid Family Leave Benefits Law ("PFL"), there is no age limit on the definition of "child."

Employers may set "a reasonable minimum increment" for the use of sick leave, not exceeding four (4) hours. This minimum increment allows employers to provide the required sick leave to employees while reducing disruption to business operations.

Recordkeeping

Effective September 30, 2020, employers must start retaining records of sick leave accrual and usage for each employee and maintain such records for a minimum of 6 years.

In addition, upon the oral or written request of an employee, an employer shall provide a summary of the amounts of sick leave accrued and used by such employee in the current calendar year and/or any previous calendar year. The employer must provide such information to the employee within three (3) business days of such request.

Job-Protected Leave and Protection of Confidential Information

Employers should be reminded that PSL provides employees with job-protected leave. In other words, an employee returning from taking leave under the PSL, whether paid or unpaid, must be restored to the same position of employment, with the same pay and other terms and conditions of employment. Retaliation against employees for taking such sick leave is also strictly prohibited.

The law also restricts the information employers may request if an employee asks to use sick leave. Specifically, employers may not require disclosure of confidential information about a medical condition or a domestic situation as a condition of providing sick leave. The law does not define “confidential information,” but employers should err on the side of caution when requesting support for requested leave. Absent further guidance from the state, we recommend employers follow practices in place for application of the Americans with Disabilities Act (ADA). For example, an employer may request supporting documentation for an employee’s need for sick leave; however, the employer cannot require the employee to disclose the specific medical condition or family situation. Moreover, any medical information disclosed by the employee to support requested leave must be kept confidential and separate from an employee’s personnel file.

Interaction with Other Laws

The law makes clear that any paid sick leave benefits provided by a sick leave program enforced by a municipal corporation in effect as of September 30, 2020, shall not be diminished or limited as a result of the enactment of the PSL. As such, employers already covered by the New York City Earned Safe and Sick Time Act or the Westchester County paid sick leave law must continue to provide employees with leave that meets or exceeds the requirements of both the statewide and local laws, meaning for example, employers with 100 or more employees must provide 56 hours – not 40 hours – of paid sick leave per calendar year for employees working in New York City.

In addition, the PSL is separate and distinct from the [New York State COVID-19 Paid Leave Law](#), which went into effect March 18, 2020, and as such leave entitlements under each law do not run concurrently.

Next Steps

Employers should immediately proceed with reviewing and updating their employee handbooks and policies to provide sufficient notice to employees regarding: (1) the amount of PSL employees can anticipate accruing and using, depending on employer size and whether the leave is front-loaded or accrued, capped up to 40 or 56 hours, as applicable; (2) the minimum increment of leave that must be taken at any time, not to exceed 4 hours; and (3) confirming for employees that they will not be paid out for any unused sick leave upon termination. Employers should also convey that such sick leave is job-protected, retaliation is prohibited, and any medical information shared with the employer shall be kept confidential.

And, to reiterate, employers must have proper recordkeeping systems in place (i) to track accrual of PSL (if not front-loaded), (ii) to convey such information to employees within 3 days of such a request, and (iii) to retain such records of accrual and usage for at least 6 years.

The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice on sick leave entitlements and related information discussed herein or such other employment law issues as needed.