



New York Finalized Its Paid Sick Leave Rules: Is Your Policy in Compliance?

By Bryn Goodman, Carolyn D. Richmond and Glenn S. Grindlinger

The New York State Department of Labor has issued final regulations for the New York Paid Sick and Safe Leave Law (NYSSL), which has been in effect since September 30, 2020. The final regulations contain no changes to the proposed rules issued in December 2020 and discussed in our [prior alert](#). However, the Department has clarified a few critical issues that had not previously been addressed. Below is a summary of the Department's responses to common questions.

Employers should review their paid time off and sick leave policies to ensure they comply with the New York law and consult counsel.

Carry Over

All accrued sick leave hours must be carried over into the following year under the NYSSL. Previously the law had been silent as to carry over requirements where an employer front-loaded paid sick leave at the beginning of the calendar year. However, the final rules now clarify that employers cannot cap unused sick leave "carryover." An employer has two options: (1) give employees the option to voluntarily use and receive payment for paid sick leave prior to the end of a calendar year or carry over unused sick leave; or (2) only allow employees to carry over unused sick leave.

Timing for Use of Sick Leave

Employees are allowed to use sick leave immediately upon hire. The law does not permit

employers to impose a waiting period for use of sick leave. This means that new hires who are front-loaded all of their sick time shall be permitted to use it immediately. Employers may impose a waiting period for use of other PTO, such as vacation time or personal time, so employers should consider separating their sick leave and PTO policies and requiring employees to accrue sick time (instead of front-loading). This provides some minimal protection against new hires using sick leave and quitting because employees can only use as much sick leave as they have accrued, which is limited to 1 hour for every 30 hours worked.

Amount of Sick Leave to Provide

An employer's size determines the amount of annual paid sick leave it must provide. To determine its size, an employer is required to count all employees nationwide. However, only employees located in New York are required to receive sick leave under the New York State Sick and Safe Leave Law.

Employers with four employees or fewer, if net income is \$1 million or less, must provide up to 40 hours of unpaid sick leave. If net income is greater than \$1 million, the employer must provide up to 40 hours of paid sick leave. Employers with five to 99 employees must provide up to 40 hours of paid sick leave. Employers with 100 or more employees must provide up to 56 hours of paid sick leave.

Rate of Pay for Sick Leave

Sick leave must be paid at the employee's regular rate of pay. An employer is not required to pay the employee at their overtime rate for sick time for scheduled hours that if worked would be paid at an overtime rate. For employees with multiple pay rates, sick leave must be paid at a weighted average of those rates. 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 their normal rate of pay or the applicable minimum wage, whichever is greater.

Requesting Supporting Documentation

Only after the third day absent from work may an employer request that an employee provide documentation supporting the need for safe or sick leave. An employer may not deny an employee leave while attempting to confirm the basis for the leave. However, if the employer discovers the request to be false or fraudulent, the employer may take disciplinary action against the employee. In addition, the Department made clear that employers may not require employees to pay any costs or fees

associated with obtaining verification of the employee's eligibility to use sick leave. Accordingly, an employer cannot deny sick leave when an employee is unable to obtain documentation.

No Advanced Notice Requirement

The Department explained that employers cannot require that employees provide advanced notice for sick leave for foreseeable events, such as a pre-scheduled doctor's appointment. As such, employers should not discipline employees who request time off for a doctor's appointment at the last minute. The rule and law make no distinction between regular appointments or emergencies when requesting safe/sick leave. The request only needs to be as soon as possible.

For more information about this alert, please contact Carolyn D. Richmond at crichmond@foxrothschild.com, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com, or Bryn Goodman at bgoodman@foxrothschild.com, or any member of the firm's national Labor & Employment Department.