

NEW YORK STATE ISSUES SICK LEAVE GUIDANCE BUT IMPORTANT QUESTIONS REMAIN

Hodgson Russ Labor & Employment Alert
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On April 3, 2020, Governor Cuomo signed into law the New York State Paid Sick Leave Law, which requires all private employers in New York State to provide sick leave to their employees. This law took effect on September 30, 2020, which is when employees were required to begin accruing sick leave, though employees are not permitted to use sick leave until January 1, 2021. We reviewed the provisions of the Paid Sick Leave Law in a previous alert available [here](#).

Since the Paid Sick Leave Law was passed, employers have been waiting for guidance from the State on a number of important open issues, including questions related to coverage, employee notice obligations, carryover, frontloading, integration with other types of leave, and documentation requirements, to name a few. On October 20, 2020, the New York State Paid Sick Leave Law website went live with additional guidance, including a Frequently Asked Questions document, which is available [here](#). We have reviewed the State's guidance and have the highlights for you below.

Use and Accrual

- If an employer has multiple locations in New York State, it is required to count the total number of employees at *all such locations* when determining the amount of sick leave it must provide. The guidance does not address whether employers must count employees outside of New York or outside the United States in determining their size, and by extension, the amount of sick leave they must provide.
- Employees begin accruing sick leave immediately upon hire and may use leave once it is accrued. There are no waiting periods and new hires are able to use sick leave as soon as they have accrued it.
- Employees accrue sick time based on their hours actually worked; not when using sick leave or other non-working time.
- Employees earn sick leave for the hours they physically work in New York State, regardless of the location of their employer. This would include employees who are working remotely from their residence in New York State for an out-of-state employer.

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- Seasonal employees who maintain an “ongoing employment relationship” with their employer must maintain their sick leave accruals through breaks in employment.

Frontloading and Carryover

- Employers are permitted to frontload less than the maximum annual accrual amount (40 or 56 hours, depending on employer size) based on the number of hours it anticipates a particular employee will work in a given calendar year. Employers who elect this option, however, must still track the employee’s hours worked and accruals. If the employee works more hours than anticipated, the employer must award additional sick leave to the employee to meet the requirements of the law. If an employee works fewer hours than anticipated, the employer cannot recoup the frontloaded leave.
- Employers who frontload less than the maximum annual accrual amount (40 or 56 hours, depending on employer size) at the start of each year must allow employees to carryover unused sick leave into the new calendar year.
- The guidance does not expressly address whether carryover is required for employees who receive a frontloaded accrual at the maximum annual accrual amount at the beginning of each year.
- Sick leave that is unused must be carried over from one year to the next. Employers can, however, restrict an employee’s use of sick leave to 40 or 56 hours per calendar year, depending on employer size. As a result, employees may accrue leave balances well in excess of the amount they are permitted to use in any calendar year.
- The guidance suggests that employers that frontload the maximum annual amount of leave and do not calculate employee use and accrual of leave cannot change to an accrual-based approach in the new calendar year because employees are entitled to carry over unused sick leave and use those hours at the beginning of the new year.

Notice and Documentation Requirements

- The law is silent on whether and to what extent employers may require employees to provide advance notice of the need for leave stating only: “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.”
- The guidance is silent on whether and to what extent employers may request documentation from employees to validate their use of sick leave.
- Employers must notify employees in writing of any restrictions on their use of leave, including minimum leave increments.
- Employers must retain records which include the amount of sick leave accrued and used by each employee on a weekly basis for six years.

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Penalties

- Employers that fail to provide their employees with the requisite sick leave may be subject to civil and administrative actions to recover the full amount of the sick leave not provided, an equal amount as liquidated damages, civil penalties of up to double the total amount due, plus 16% interest, as well as potential criminal sanctions.

Now that the State has issued this sick leave guidance, employers should review the guidance and revise their paid time off policies to ensure they are in compliance. If you have any questions or need assistance developing or revising your policies, please contact Andrew Drilling (716.848.1412), John Godwin (716.848.1357), or any member of our Labor & Employment Practice.

Hodgson Russ will be hosting a webinar on this topic on Tuesday, October 27, at 8:30 a.m. Please click [here](#) to register.

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