Updated 10/30/2020

Summary of the Law

Starting January 1, 2021 nearly all New York employers must offer paid sick leave to their employee under the recently enacted New York Labor Law. Even the smallest employers must offer at least *unpaid* leave. Sick Leave under this law is job protected and begins to accrue as of September 30, 2020, three months before it can be used. The law defines the conditions for use, eligibility based upon number of employees, accrual and Carryover of accrued and unused time.

*NEW GUIDELINES ISSUED BY NYSDOL ON October 20TH*

New York Paid Sick Time Frequently Asked questions

1. Does this law apply to Not for Profit employers?

1. The law applies to all New York State employers.

2. Are Part time and Per Diem employees covered by this law?

A. The law is clear if you issue a W-2 for the employee they are subject to the law. This includes Part Time, Seasonal, Temporary and Per Diem employees.

3. What is the accrual?

1. One hour for each 30 hours worked. We suggest that between now and January 1, 2021 you track hours worked so the accrued bank can be available for use on January 1st and the accrual for 2021 is in place.
2. **UPDATE from NYSDOL**

Employees may only accrue for “hours worked”. It does not include sick leave, but could include on call time, training time and travel to the extent such time is considered “hours worked”

Employers need only grant or allow employees to accrue up to 40 or 56 hours of PSL (dependent on employer size), regardless of whether the employee would otherwise accrue more leave using the 1 hour accrued for every 30 hours worked method.

If Employee A works 52 weeks at this rate, he will accrue over 60 hours of leave. However, the guidance allows an employer to cap his leave for the year when he reaches 40 hours.

4. Can I treat exempt and nonexempt differently?

A. You can set up accruals for both if you choose. The exempt employee is considered to work the number of hours under the exempt category. In most cases it considered 40 hours worked.

You can front load for exempts and have accruals for nonexempt as long as you follow the 1 hour per each thirty hours worked. I would suggest you work with your payroll provider to set up the accruals capped at 40 or 56 hours depending upon the size of the workforce.

5. Can Employers require medical documentation for use.

1. Yes, but the medical documentation must exclude information protected by law. The NYS DOL has said they will issue more clarification, but none has come in as of yet.

**UPDATE FROM NYSDOL**

In addition to the stated statutory purposes, PSL may be used for routine medical and dental appointments. Regardless of whether the employee has a medical condition. Employers do not have to allow employees to use PSL for bereavement purposes. PSL may be available in public health emergencies, depending on the nature of the emergency.

6. Can employers allow intermittent leave under this law?

1. Yes, the EEOC has said that intermittent leave is allowable with the employer consent under FFCRA and EFMLA portions of FFCRA. This determination has been challenged in the Southern District Court of NY.

B**. UPDATE FROM NYSDOL**

No guidance from the DOL

7. How does the law “dovetail” with NY Paid Family Leave and how?

1. The State has said they will issue more guidance on how these two laws work together, but as of today no additional guidance has been given.

**B. UPDATE FROM NYSDOL**

Employer may elect to allow employees to choose to use PSL concurrently with Paid Family Leave. o However, employees may not receive more than 100% of their wages.

PSL will not be read in a way to interfere with federal law.

8. Is a “return to work” note from a provider required?

1. If you have a policy that if someone is out of work for 3 days or more, you require a return to work clearance then yes you can follow that policy. The request must be reasonable and not violate the employee’s privacy.

9. If an employee is employed by a NYS employer but works in another state does this law apply?

1. Yes, it does according to the NYS law.

10. Does the law apply to interns or students?

1. Yes, as long as you issue a W-2 for those types of employees.

11. With Schools reopening how does this law apply to employees who have childcare issues?

1. This is currently a shifting landscape and more guidance is supposedly coming from the Department of Heatlh and the Department of Education. However, we have had experience with employers who are concerting to the leave and allowing intermittent leave based upon the published school schedules. For example: a school has a hybrid learning schedule and the students are doing three days per week at school and two days per week in home learning. If the school is effectively closed to that student on those days, is a qualifying event. However, if a parent chooses to have remote learning and the school is open and available is not experiencing a qualifying event. The employer is consenting to those two days of in home to be intermittent leave.

12. **Can an employer set a minimum use requirement?**

1. Employers may set a reasonable increment for use, which cannot exceed four hours.
2. **UPDATE FROM DOL**

Employees may use Paid Sick Leave for routine medical, dental and vision appointments even though there is no diagnosis.

13. **What is the definition of “Family Member” referred to in the law?**

1. The term “Family Member “is broadly defined un the New York State Sick Leave Act to include:
   1. Employee’s Child (biological, adopted, or foster child, legal ward or a child of an employee standing in loco parentis)
   2. Spouse, Domestic Partner
   3. Parent (Biological, foster, step adoptive legal guardian or person who stood in loco parentis when the employee was minor child)
   4. Sibling, Grandchild or Grandparent
   5. Child or parent of the employee’s spouse or Domestic Partner

14. **Is the employer responsible for tracking leave, unused and taken?**

1. Yes and in addition , the employee may request in writing or verbally that the employer provide a summary of he amount of sick leave accrued and used by the employee, which the employer must provide within three (3) business days.
2. **UPDATE FROM DOL**

Employers must continue to track an employee’s hours so that the employer can allow the employee to accrue leave if the employee works more hours than initially anticipated by the employer. This includes and especially applies to Part Time employees even if you frontload for Part Time Employees

15. **What are the rules for carrying over unused sick leave for one year to the next?**

1. Unused sick leave is carried over from one yar to the next. The law does not limit the among of this carryover. However, the use of sick leave during any year can be limited to the amount legally required (56 if 110 employees or more or 40 for employers with fewer than 100 employees)

**B. UPDATE FROM NYSDOL**

Employers must allow employees to carry over any available, unused PSL.

Employees may carry over leave even if it leads to them having leave bank greater than 40 or 56 hours.

An employer may still limit use to 40 or 56 hours per year.

16. **Is there a cap on the Carry over Accrual?**

1. There is a cap on usage but not currently a cap on the carryover. We are still waiting for guidance from NY DOL.

17. **I have a PTO policy that includes vacation, sick and holiday times what should I do with respect to the law?**

1. If your current leave policy meets or exceeds the law, you are not required to provide additional leave. However, make sure your policy satisfies the accrual, carryover and use requirements as well as outlining the protected activities associated with Domestic Violence. Employers who have existing policies that are equal to this sick leave policy do not have to provide any additional hours.
2. Some employers are choosing to carve out Sick leave from their PTO policy and use the new Law as a paid sick leave policy.
3. We already provide 40 hours of sick time annually and if we have employees who don’t use all their time, it can be rolled over but we can still limit the amount of sick time taken to 40 hours. Really important that our handbook policy caps our limit of sick time each year.

18. **What are the Accruals for this law?**

A. The amount of sick leave accrued each year depends on the employer’s size and net income:

* **Employers with four or fewer employees and a net income of $1 million or less in the previous tax year:** Employees may accrue up to 40 hours of *unpaid* sick leave each calendar year.
* **Employers with four or fewer employees and a net income greater than $1 million in the previous tax year**: Employees may accrue up to 40 hours of *paid* sick leave each calendar year.
* **Employers with between five and 99 employees:** Employees may accrue up to 40 hours of *paid*sick leave each calendar year.
* **Employers with 100 or more employees:** Employees may accrue up to 56 hours of *paid* sick leave each calendar year.

**19. How do employers count their employees for purposes of determining how much PSL to offer employees?**

A. Still more guidance is necessary, however there is guidance on multiple locations.

**20. If an employer has multiple locations within NY are all employees counted towards the employer size?**

* 1. All employees within NY must be counted. A company with three (3) employees in Utica, eighty (80) employees in Syracuse and thirty (30) employees in Albany, then they would have to provide ALL employees with fifty-six hours of paid sick time.
  2. **UPDATE FROM NYSDOL**

Open question remains whether out of state employees should be counted for purposes of determining the amount of PSL the employer must offer.

Out of state employees who commute are only covered for the hours when they are physically working in NY.

Still some confusion if this applies even if the employer is physical located outside NY.

**21. How do we handle telecommuting?**

1. An employer cannot require an employee to telecommute or work from home instead of taking sick leave. However, employers may offer this option to employees. If employees elect to telework or work from home, they retain their PSL.

22. **How do I calculate rate of pay for employees, commission, flat rate or non-hourly basis and any traditional additions to pay?**  **UPDATED FROM NYSDOL**

1. The PSL statute mandates that an employee be paid at the employee’s “regular rate” of pay but does not define that term.
   * 1. The Guidance also does not define “regular rate.” It may include shift differentials and other non-discretionary bonuses. This includes On Call Time, training time and travel time (as long as it’s paid travel time under the law.
     2. Employers are not required to pay overtime rates if the PSL time would have been overtime if worked by the employee. Rate of Pay (Cont’d)
     3. When employees are paid on a commission, flat rate basis, or non-hourly basis, they accrue sick leave based on the actual length of time they spend performing work.
     4. Employers do not have to include tips/gratuities in the regular rate calculation (as long as employee is paid at least minimum wage).
     5. 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 (or if they are paid different rates of pay)

**23. What are the recordkeeping requirements for this law?**

1. Employers must keep payroll records for six years, and those records must include the amount of sick leave accrued and used by each employee on a weekly basis.
2. Upon request of an employee, employers are required to provide a summary of the amounts of sick leave accrued and used by the employee in the current calendar year and/or any previous calendar year within 3 business days of the request.

Employers must provide a summary of hours accrued, used and balance to the employee within three (3) days of the request.

**24. Are there Notice and Posting REQUIREMENTS?**

A. **E**mployees must provide oral or written notice “prior” to use of PSL, but the Guidance does not specify how far in advance employers may require notice.

The Guidance mandates that employers provide employees with either a policy or posting regarding PSL if the leave can only be used in certain increments of time (max of 4 hours), or if the employee will restrict use of leave to 40 or 56 hours per year.

“Any limitations permitted by law must be put into writing and either posted or given to employees.”

**25. If an employee is out for three (3) days for a Paid Sick Leave qualifying reason, but does not want to use the leave, can the employer force them to use Paid Sick Leave time?**

A. No guidance at this time.

**26. Can an employee who has given notice be prohibited from using Paid Sick Leave so they can leave prior to their exit date?**

A. No guidance at this time.

**27. How do I handle “seasonal employee” and can I impose a waiting period for use for new employees?**

A. An employer cannot impose a waiting period for use of accrued time for new employees.

B. Seasonal employees who maintain and ongoing relationship with the employer must maintain their accruals.

**28. Can an employee “donate” their leave to another employee?**

A. Yes, as long as that donation is voluntary.

**29. Are there other paid sick leave laws or regulations I should be aware of?**

A. Yes, some other states have paid sick time and both New York City and some counties (Westchester for example) have separate paid sick leave laws or ordinances.

The New York City Department of Consumer Affairs, Office of Labor Policy & Standards in in charge of enforcement New York City’s Paid Safe and Sick Leave.

On September 28, 2020, Mayor DeBlasio singed two amendments to the law in order to add additional protection and help align with the NY State Paid Sick Leave Act and they will take effect in two phases.

Effective September 30th employers must: provide domestic workers with 40 hours of paid sick leave, allow employees to use leave as it’s accrued, reimburse employees for cost of required documentation, list on paystubs amounts of accrued, used and balance of leave.

On January 1st, Employers of 100 or more must provide 56 hours of paid leave, employers with four or fewer and net income of one million or more must provide PAID leave.

A helpful resource for NY City Paid Safe and Sick Leave is:

<https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf>