

## New York State's Permanent Paid Sick Leave Law Now in Effect

October 14, 2020

An amendment to the New York Labor Law, which went into effect September 30, will permit employees to use paid sick leave (PSL) for certain designated purposes, including for treatment, care, preventative care and diagnosis for an employee's or employee's family member's illness, injury or health condition.

Under New York State's amended paid sick leave law, employees who work for a covered New York employer began accruing leave on September 30. However, employees may not begin to use their accrued PSL until January 1.

### Reasons for PSL

PSL is available to employees to cover certain defined situations, specifically:

- For a mental or physical illness, injury or health condition of an employee or an employee's family member, regardless of whether such illness, injury or health condition has been diagnosed or requires medical care at the time the employee requests such leave
- For the diagnosis, care or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, an employee or such employee's family member
- For an absence from work when an employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking or human trafficking for certain permitted purposes, including, but not limited to, obtaining services from a domestic violence shelter, consulting with an attorney or meeting with a district attorney's office, filing a complaint or report with law enforcement or taking other actions necessary to protect the health or safety of the employee or the employee's family members

### Eligibility and amount of PSL

The law does not distinguish between full-time and part-time employees. *All* New York-based employees are eligible for PSL. The amount of PSL an employee may be entitled to accrue and carry over from year to year varies based on (1) the size of the employer's workforce in any calendar year and (2) the employer's net income in the previous tax year.

Private Employer Size in Calendar Year	Sick Leave Entitlement	Employer Required to Pay for Sick Leave?	PSL Carryover Cap Permitted**
1–4 employees (≤\$1M in net income)*	≤ 40 hours	No	40 hours

Private Employer Size in Calendar Year	Sick Leave Entitlement	Employer Required to Pay for Sick Leave?	PSL Carryover Cap Permitted**
1–4 employees (\$1M+ in net income)	≤ 40 hours	Yes	40 hours
5–99 employees	≤ 40 hours	Yes	40 hours
100+ employees	≤ 56 hours	Yes	56 hours

\* The employer's net income is measured based on the previous tax year.

\*\* There is no noted exception for front-loaded paid leave with respect to the carryover. Generally, an employer can provide sick leave either (1) as the employee accrues the time or (2) frontload the leave at the beginning of each calendar year (but the employer cannot reduce frontloaded leave if employees reduce their hours worked).

For the purposes of calculating the number of employees, a “calendar year” is defined as the 12-month period from January 1 through December 31. For the purposes of using and accruing leave, a calendar year means either January 1 through December 31 or any regular and consecutive 12-month period.

## Accrual and usage

The law requires employees to accrue PSL at a rate of at least one hour per 30 hours worked and this accrual begins immediately upon starting a job. Employees began to accrue PSL on September 30, 2020, or the date on which they are hired, whichever is later. Alternatively, employers may instead: (1) allow employees to frontload PSL at the beginning of each calendar year (as long as the frontloaded leave is not reduced if an employee's hours are also reduced, as noted above) or (2) offer a more generous sick leave or time off policy, such as an unlimited paid time off policy, as long as it otherwise complies with the law.

Employers may set a reasonable minimum increment for PSL use not exceeding four hours. Payout upon termination or end of year is not required. PSL is paid at the employee's regular rate of pay.

## Obligation to provide summary of PSL accruals and usage

One notable aspect of the law is that New York employers now must provide a summary of the amounts of PSL accrued and used in any calendar year within three business days of an employee's oral or written request. Employers must retain records of leave accrual and usage for each employee for six years.

Currently, it is unclear what an employer's obligations would be if it offered unlimited paid time off and therefore does not track employees' usage of paid time off.

## Interplay with local laws

To the extent an employee already accrues PSL under a local sick leave law or ordinance, such as those in New York City or Westchester County, the law provides that the accruals can overlap such that the employee will not accrue in excess of 40 or 56 hours of total PSL, as applicable under the new state law. Prior to New York State's enactment of mandatory PSL, Westchester

County and New York City had only required employers to allow workers to accrue 40 hours of sick leave per year. Although New York City has already edited some of its sick leave laws to comply with the more generous state law, employers in New York City and Westchester County should be mindful of difference between local and state laws. For instance, New York City extends sick leave to employees to consult an attorney for a much more expansive list of reasons – not just for domestic violence, as the state law provides. Specifically, an employee in New York City can use sick leave to consult with an attorney for advice concerning a variety of matters, such as immigration, custody, housing, discrimination and consumer credit.

In contrast to New York City and Westchester County sick leave laws, as written, PSL does not explicitly allow employers to require employees to provide advance notice of the need for sick leave. Similarly, while New York City and Westchester County sick leave laws allow employers to request employee documentation in certain situations (i.e., three consecutive days of leave) to substantiate that the leave is being used for a permitted purpose, PSL does not explicitly allow employers to make such a request.

Additionally, New York employers should be aware that New York State’s COVID-19 paid leave law will still remain in effect in 2021. Therefore, if an employee becomes sick with COVID-19, a New York employer must still provide COVID-19 paid leave to cover “any mandatory or precautionary order of quarantine or isolation” for the employee.

## Action steps for employers

New York employers should review their existing paid time off policies to determine if they meet or exceed the new PSL requirements, including with respect to amounts, accrual and carryover. To the extent they have not done so under another local paid sick leave law, employers offering sick leave on an accrual basis should immediately begin tracking and maintaining a record of the amount of PSL employees accrue and use.

As of October 13, the New York State Department of Labor has not released any regulations or guidance with respect to this new law, but we expect that it will produce such guidance prior to January 1 when employees may begin using PSL. We will issue updates as necessary.

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