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Does your PTO policy comply with New York's new paid sick leave law?

By Stephanie M. Caffera and Michael J. Caputo

Starting January 1, 2021, nearly all employers in New York must offer paid sick leave to their employees under recently enacted New York Labor Law § 196-b. Even the smallest employers must offer at least *unpaid* leave. Sick leave under the law is job-protected and begins to accrue on September 30, 2020, three months before it can be used. Many employers will need to revisit and expand their sick leave or PTO programs to comply with the new law.¹

Leave amount, accrual, and carryover

Employers must allow employees to accrue paid sick leave during a calendar year at a rate of at least one (1) hour of leave for every thirty (30) hours worked, based on the number of employees:

- 1–4 employees: Up to 40 hours of *unpaid* leave, unless the employer had net income of more than \$1 million in the prior tax year, then leave must be paid.
- 5–99 employees: Up to 40 hours of paid leave.
- 100+ employees: Up to 56 hours of paid leave.

Employers may award leave as it is accrued, or they may frontload leave at the beginning of each calendar year by providing employees with the total amount of sick leave that would accrue during the year.

In an odd twist, employees must be allowed to carry over 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 noted above (i.e., 40 hours for employers with fewer than 100 employees, and 56 hours for employers with 100 or more employees). In other words, employees must be allowed to

¹ The paid sick leave statute originally was proposed by New York Governor Andrew Cuomo as part of emergency legislation providing paid leave to employees diagnosed with COVID-19 or quarantined by a public health official. The general paid sick leave provisions were removed from that emergency bill and later enacted as part of the State budget.

carry over the unused time, but employers can't be forced to allow them to use it. Payout of unused sick leave upon termination also is not required. The result of these two provisions may be a bank of sick time that the employee perhaps is not allowed to use and will not be paid out when employment ends. Given the ambiguity in the statute, employers who want to limit the use of banked time should affirmatively state in their policies that employees may not use more than 40 or 56 hours of paid sick leave per year.

Permitted uses of paid sick leave

Employees must be permitted to take leave under N.Y. Labor Law § 196-b 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.
- For a number of 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 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.² Like New York's Paid Family Leave Benefits Law ("PFL"), there is no age limit on a "child."

Employers may set "a reasonable minimum increment" for the use of sick leave, not exceeding four (4) hours. In other words, an employer does not need to allow employees to take five minutes of paid leave. Employers may require employees to use at least a minimum amount of leave (such as one or two hours), but cannot require employees to take more than four hours as the minimum. Employers should take advantage of this option to set a minimum as a way to reduce disruption to business operations.

Exemptions

An employer need not provide additional sick leave if the employer's existing paid sick leave policy or PTO policy meets or exceeds the law's requirements for the amount of leave, use of leave, accrual, and carryover.

The parties to a collective bargaining agreement may negotiate a different "comparable benefit" in the form of paid leave, compensation, and/or other employee benefits, as long as the CBA expressly acknowledges the requirements of the paid sick leave law.

The law does not preempt New York City municipal laws that meet or exceed the State paid sick leave requirements.

² A "child" includes the biological, adopted, step, or foster child, legal ward, or a child of an employee standing *in loco parentis*. A "parent" includes the employee's biological, adoptive, step, or foster parent, legal guardian, or person who stood *in loco parentis* to the employee when the employee was a minor child.

Posting, notice, and recordkeeping

Existing provisions of the New York Labor Law require employers to notify employees about their sick leave policies in writing. Under the new law, employers also must provide a summary of the amounts of sick leave accrued and used in any calendar year within three (3) business days of an employee's request.

Effective September 30, 2020, employers must retain records of leave accrual and usage for each employee for a minimum of six (6) years.

Job-protected leave, retaliation, and disclosure of confidential information

Leave taken under the new law is job-protected. An employee returning from taking sick leave under Section 196-b must be restored to the same position of employment, with the same pay and other terms and conditions of employment. Retaliation is prohibited. This likely means that leave taken under Section 196-b must be treated in a manner similar to leave under the PFL or FMLA: employees cannot be disciplined for taking it, and it must be excluded from attendance calculations.

The law also restricts the information employers can request if an employee asks to use paid sick leave. Employers may not require disclosure of confidential information about a medical condition or a domestic situation as a condition of providing leave. The law does not define "confidential information," but the general concepts of the Americans with Disabilities Act likely apply to employee or family member medical information. This limitation does not mean an employer can't require supporting documentation of the need for leave; however, the employer cannot require the employee to disclose the medical condition or the specific family situation.

What should employers do now?

Review existing leave policies

All New York employers should carefully review their existing sick leave or PTO policies to determine whether the existing policy already meets the law's requirements. Many policies will contain some but not all of the elements required by Section 196-b.

With most employers having abandoned separate "buckets" of vacation, sick, and personal time in favor of a general PTO policy, the new law will force a choice: whether to apply the new rules to all PTO hours, or to separate out sick time and redefine PTO to cover vacation and personal time (and any excess sick time), with the new rules applied only to the separate sick leave.

If you don't have a written sick leave policy, now is the time to write one.

Assess attendance tracking

Be sure your attendance tracking systems account for protected sick leave as a designated category, and make sure that supervisors and managers understand they may not count such leave against employees when evaluating their attendance.

Be ready for September 30, 2020

Paid leave must begin to accrue on that date, to be used effective January 1, 2021, and after. Employers must have systems in place and communications to employees ready to go.

Plan for more absences

Employees who were not economically able to take time off from work (such as new employees not eligible for PFL) will now have the ability to take leave without affecting their pay. Employees with dangerous domestic situations also will have the ability to take paid leave.

As part of this planning, consider how paid sick leave will interact with PFL. Employees taking leave to care for a family member may choose to use paid sick leave and receive their full pay, rather than apply for PFL and receive partial pay—leaving their PFL entitlement untouched and available for use at another time.

The Commissioner of Labor is authorized to issue regulations to implement the new law. If regulations are forthcoming, perhaps they will clarify some of the unanswered questions.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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