

LEGAL ADVISORY

FROM: Paul H. Pincus
TO: Clients and Friends
DATE: August 20, 2020
RE: New York Enacts Statewide Sick Leave Law



Following enactment of New York’s COVID-19 sick law, Governor Cuomo signed into law on April 3, 2020 a separate and permanent statewide sick leave law (the “Law”). The Law adds a new Section 196-b to the New York Labor Law that requires private employers, regardless of size, to provide sick leave to their employees who physically work in New York State. Employers must provide paid or unpaid leave to their covered employees, depending on their size and net income.

The Law will go into effect on September 30, 2020, although employers need not provide sick leave to covered employees until January 1, 2021.

Amount of Sick Leave Required

Number of Employees¹	Paid/Unpaid Sick Leave
Employers with 4 or fewer employees in any calendar year ² and whose net income was \$1 Million or less in the prior tax year.	Up to 40 hours of unpaid sick leave each calendar year. ³

¹ The Law does not indicate whether the number of employees is calculated only on New York-based employees or all employees (wherever situated). Pending guidance from the New York Department of Labor on this issue, we assume the calculation is determined by New York-based employees. The Law also does not indicate whether the number of employees is calculated on the highest number of employees at any time during the calendar year, the average number of employees per week during the calendar year, or some other methodology.

² For purposes of determining the number of employees, “calendar year” means the twelve-month period from January 1 through December 31.

³ For purposes of accruing and providing sick leave, employers can choose either the January 1 through December 31 calendar year or an alternate consecutive twelve-month period.

Employers with 4 or fewer employees in any calendar year and whose net income was more than \$1 Million in the prior tax year.	Up to 40 hours of paid sick leave each calendar year.
Employers with between 5 and 99 employees in any calendar year.	Up to 40 hours of paid sick leave each calendar year.
Employers with 100 or more employees in any calendar year.	Up to 56 hours of paid sick leave each calendar year.

Covered employees accrue one hour of sick leave for every 30 hours of work in a calendar year. Employers may front-load employees’ sick leave at the start of a calendar year; but, if they do so, they may not reduce or revoke such sick leave based on the number of hours actually worked by the employees.

Paid sick leave must be at the employee’s “regular rate” of pay when the sick leave is used.

Employees can take leave in partial-day increments, but employers can set a minimum amount of sick leave to be used (not to exceed four hours).

Unused sick leave is carried over to the following calendar year, but employers may limit the use of sick leave to 40 or 56 hours per calendar year (56 hours if the employer has 100 or more employees).

The Law does not require employers to pay employees for unused sick leave upon the termination of their employment.

Use of Sick Leave

Covered employees may use sick leave for themselves or their family members (a child, spouse, domestic partner, parent, sibling, grandchild, grandparent, or the child or parent of a spouse or domestic partner) for the following purposes:

- mental or physical illness, injury, or health condition, of the employee or the employee’s family member (whether or not a diagnosis has been obtained or medical care is required at that time);
- 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, the employee or the employee’s family member; or
- where the employee or the employee’s family member has been the victim of domestic violence, a sexual offense, stalking, or human trafficking, and seeks to obtain related services or assistance.

Employers may not, as a condition of providing sick leave, require covered employees to disclose confidential information relating to mental or physical illness, injury, health conditions, domestic violence, sexual offenses, stalking, or human trafficking, of the employee or the employee's family member.

Documentation

Employers must track accrual and use of sick leave required by the Law. Employers also must, within three business days after oral or written request by an employee, provide the employee with a summary of his or her accrued and used sick leave in the current calendar year or any previous calendar year.

Interplay with Existing Paid Time-off Policies

The Law does not require employers to provide any additional sick leave if they have adopted sick leave or time-off policies that provide covered employees with leave that meets or exceeds the Law's requirements.

Interplay with Other Laws

The Law does not repeal existing sick leave laws in New York City and Westchester County. However, it imposes additional obligations to the extent it exceeds the requirements of those local laws.

New York City and Westchester County employers should note these additional obligations:

- Employers may have to provide additional paid sick leave to employees who physically work in those counties if employers have 100 or more employees (up to 56 hours per year versus up to 40 hours per year).
- Employers with 4 or fewer employees must provide **paid** sick leave to employees who physically work in those counties if their net income was more than \$1 Million in the prior tax year.
- There is no 80 hours per calendar year threshold before employees become entitled to sick leave.
- After January 1, 2021, there is no waiting period before employees can use accrued sick leave.

Job Restoration and Protection from Retaliation

Employers must restore employees who take leave under the Law to their former positions (with the same pay and other terms and conditions of employment) upon return from leave. Employers may not retaliate against employees because they request or take leave under the Law.

Although the Law does not address the issue, we assume that the Law does not prohibit employers from taking employment actions for legitimate business reasons, such as layoffs that would have occurred whether or not an employee took leave under the Law.

Enforcement

The Law does not authorize covered employees to file private lawsuits for claimed violations.

Next Steps

Employers should review their existing sick leave policies to ensure they comply with the Law, and update them if necessary.

Also, employers who bill for the services of their employees should review their customer contracts to determine if they can pass on to their customers any increased costs they will incur under the Law. If employers' contracts do not permit them to pass on such costs, they should use this opportunity to negotiate provisions allowing billing rate increases based on future legally mandated costs.

We anticipate that the New York Department of Labor will soon issue regulations or guidance regarding the Law, and we will update this Advisory with any new information.

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For more information about this Legal Advisory or assistance with compliance, please contact Paul Pincus at (212) 588-0022 or php@orllp.legal.

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