

New Year, New Rules: New York Employees May Begin Taking Paid Sick Leave January 1, 2021

Article By:

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The [New York State Paid Sick Leave](#) law (“NYSPSL”) and the amendments to the [New York City Paid Safe and Sick Leave](#) law (“ESSTA”) expanding employees’ paid sick leave entitlements will go into full effect on January 1, 2021. As we [previously reported](#), NYSPSL went into effect on September 30, 2020 for accrual purposes, but employees are not able to access their accrued sick leave until January 1, 2021.

As a reminder, under both NYSPSL and ESSTA, the amount of sick leave is determined by an employer’s size and net income in a given calendar year:

- **Employers with 4 or fewer employees and a net income less than \$1 million** must provide at least 40 hours of unpaid sick leave per calendar year.
- **Employers with 5-99 employees and employers with 4 or fewer employees and a net income greater than \$1 million** must provide at least 40 hours of paid sick leave per calendar year.
- **Employers with 100 or more employees** must provide at least 56 hours of paid sick leave per calendar year.

On December 9, 2020, the New York State Department of Labor (“NYSDOL”) published [proposed regulations](#), clarifying certain issues related to NYSPSL. The key takeaways include:

Definitions

- Clarification provided for several terms used in NYSPSL, including “Confidential Information,” “Domestic Partner,” “Family Offense,” “Human Trafficking,” “Mental Illness,” “Net Income,” “Preventative Medical Care,” “Sexual Offense,” and “Stalking.”

Documentation of Eligibility for Leave

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- Employers are prohibited from requiring employees to provide “medical or other verification in connection with sick leave that lasts less than three consecutive previously scheduled workdays or shifts.” Note that, under ESSTA, employers must wait until *after* the third consecutive day of safe and sick leave to request documentation.
 - Employers are prohibited from requiring employees to pay any cost or fee associated with obtaining medical documentation. This is also mandated under ESSTA.
 - Employers are prohibited from requiring an employee to provide confidential information, including the nature of an illness, its prognosis, treatment, or other related information. Additionally, an employer cannot require an employee to disclose any details or information regarding leave taken pursuant to NYSPSL.
 - Except where prohibited by law, an employer may request documentation from an employee confirming their eligibility to take sick leave where the employee uses leave for three or more consecutive and previously scheduled workdays or shifts. Requests for documentation are limited to: (i) an attestation from a licensed medical provider supporting the existence for a need for sick leave, the amount of sick leave needed, and a date that the employee may return to work; or (ii) an attestation from an employee of their eligibility to take sick leave.

Counting Employees

- The number of employees during a calendar year is determined by counting the highest total number of employees concurrently employed at any point during the calendar year to date.
- For employers that increase the number of employees during a calendar year above any of the relevant thresholds described in NYSPSL:
 - The accrual of additional required leave is prospective from the date of the increase and does not entitle employees to reimbursement for previously used unpaid leave, or to use more than the maximum amount of leave as required under NYSPSL;
 - Prior accruals of used and unused paid leave and used unpaid leave in a calendar year may be credited by an employer toward any increased paid leave obligations under NYSPSL. Employers may not credit any prior accrual of unused unpaid leave toward any paid leave obligations; and
 - Employees must retain any existing accrued paid and unpaid sick leave, notwithstanding an increase in the number of employees during a calendar year.
- Employers are prohibited from reducing leave entitlements based on a reduction in the number of employees until the following calendar year.
- Employers are required to count employees on paid or unpaid leave, including sick leave, leaves of absence, disciplinary suspension, or any other type of temporary absence, as long as the employer has a reasonable expectation that the employee will later return to active

employment. If there is no employment relationship (as when an employee is laid off or terminated, whether temporarily or permanently), the individual need not be counted.

- Employers are required to count part-time employees as employed on each working day of the calendar week.
- Employers are required to count employees who are jointly employed, regardless of whether they are on the employer's payroll records.

Accruals

- Employee accruals of leave must account for all time worked, regardless of whether time worked is less than a 30-hour increment.
- For calculating accruals for time worked in increments of less than 30 hours, employers may "round accrued leave to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour, provided that it will not result, over a period of time, in a failure to provide the proper accrual of leave to employees for all the time they have actually worked."

The NYSDOL will accept comments on the proposed regulations until February 7, 2021. Pending the issuance of final regulations, New York State and City employers should review and update their current sick leave policies and practices to conform with the requirements of NYSPSL, ESSTA and existing guidance; communicate any changes in policies and practices to employees in advance of implementation; and train supervisory, managerial employees and human resources professionals on the requirements under NYSPSL and ESSTA.

Jamie Moelis contributed to this article.

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