

## **NEW YORK STATE'S NEW PAID SICK LEAVE LAW TAKES EFFECT ON SEPTEMBER 30, 2020**

To Our Clients and Friends:

Earlier this year, New York State enacted a comprehensive new law, N.Y. Labor Law § 196-B, requiring employers to provide sick leave to all employees. The law takes effect on September 30, 2020, and employees will begin accruing leave as of that date, but employees may not use any paid sick leave until January 1, 2021. As summarized below, the law mandates that all employers provide a minimum amount of sick leave to employees, with different requirements depending on employer size and income.

### **Summary of the New York State Sick Leave Law**

*Amount of Leave.* The New York State Sick Leave law requires that all employers must provide sick leave to employees, but the amount of leave varies based on employee headcount and employer income level. The leave requirements are as follows:

- Employers with at least 100 employees in a calendar year must provide 56 hours of paid sick leave;
- Employers with between five and 100 employees in a calendar year must provide 40 hours of paid sick leave;
- Employers with fewer than five employees and a net income in excess of \$1 million in the previous tax year must provide 40 hours of paid sick leave; and
- Employers with fewer than five employees and a net income of less than \$1 million in the previous tax year must provide 40 hours of unpaid sick leave.

Importantly, an employer that already has a sick leave policy or time off policy in place that provides employees with an amount of leave which meets or exceeds all requirements of the New York State Sick Leave law is not required to provide employees with any additional sick leave in order to comply with the law. So, for example, if an employer already provides 2 weeks of paid vacation (80 hours), the employer does not need to provide any additional sick leave. However, even when an employer's existing time off policy provides for a sufficient amount of leave, employers must also be sure their policy satisfies the accrual, carryover, and use requirements of the new law.

Employers who enter into collective bargaining agreements on or after September 30, 2020 must provide benefits comparable to those provided under the law.

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*Rate of Accrual.* The law provides that leave must accrue at a rate of at least one hour per every 30 hours worked, but an employer can choose to provide the entire amount of leave at the beginning of the year. If an employer chooses to frontload leave time, it cannot later reduce the amount of leave if the employee does not work sufficient hours to accrue the amount provided.

*Use of Sick Leave.* While employees will start to accrue leave as of September 30, 2020, when the law takes effect, employees may not use leave until January 1, 2021. Upon the oral or written request of an employee after January 1, 2021, an employer must permit an employee to use accrued sick leave for the following reasons:

- mental or physical illness, injury, or health condition of the employee or the employee's family member (regardless of receiving a diagnosis);
- 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, the employee or the employee's family member; or
- an absence when the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking, including absences to seek services from shelters, crisis centers, social services, attorneys, or law enforcement, or "to take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee."

A covered family member includes an employee's child (including biological, adopted, or foster child, a legal ward, or "a child of an employee standing in loco parentis"); spouse; domestic partner; parent (including biological, foster, step-, adoptive, legal guardian, or a "person who stood in loco parentis when the employee was a minor child"); sibling; grandchild or grandparent; and the child or parent of an employee's spouse or domestic partner. An employer may not require the disclosure of confidential information relating to the employee's reason for using sick leave.

An employer may choose to set a reasonable minimum increment for the use of sick leave. This minimum increment, however, may not exceed four hours. An employee who uses paid sick leave is entitled to receive compensation at his or her regular rate of pay, or the applicable minimum wage, whichever is greater.

*Carry Over.* The law also provides that an employee's unused sick leave must carry over to the following calendar year, with some limitations on the use of leave. An employer with fewer than 100 employees may limit the use of sick leave to 40 hours per calendar year; an employer with 100 or more employees may limit the use of sick leave to 56 hours per calendar year. Employers are not required to pay employees for unused sick leave upon separation from employment, whether voluntary or involuntary.

*Prohibition on Discrimination or Retaliation.* Pursuant to Section 196-B(7), an employer must not discriminate or retaliate against any employee for exercising the right to request or use sick leave. Under Section 196-B(10), any employee who returns from sick leave must be restored to the position of

employment held by such employee prior to any sick leave taken, with the same pay and other terms and conditions of employment.

## **Interaction with Other Laws**

The New York State Sick Leave law is the first permanent sick leave law in New York State, but similar sick leave laws are already in place in certain municipalities and counties in New York, and employers must continue to comply with all applicable laws. For example, New York City's Earned Safe and Sick Time Act requires employers with five or more employees to provide up to 40 hours of paid sick and safe time, and employers with fewer than five employees to provide up to 40 hours of unpaid safe and sick time. Similarly, Westchester County's Earned Sick Leave Law requires employers with five or more employees to provide up to 40 hours of paid sick time and employers with fewer than five employees to provide up to 40 hours of unpaid sick time, and the Safe Time Law requires up to 40 additional hours for safe leave. Both local laws only apply if the employee has worked more than 80 hours in a calendar year, and offer expanded reasons for use. Additionally, the New York State Sick Leave law is separate and distinct from the New York State Quarantine Leave law, which went into effect March 18, 2020 and provides sick leave, family leave, and disability benefits for individuals who are subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19.

## **Takeaways for Employers**

- Employers with employees in New York State should review their employment handbooks and leave policies to ensure compliance with the new law. Critically, large employers (more than 100 employees) who are currently subject to the existing New York City or Westchester County sick leave laws will need to *increase* the amount of sick leave from 40 hours to 56 hours.
- Employers should prepare to accrue and track accrual of sick time for employees beginning September 30, 2020.
- Employers should put a process in place for employees to request and use sick leave, which employees can use starting January 1, 2021.
- Internal processes and procedures for tracking accrual and leave used are critical, because the new law provides that employers must provide a summary of the amount of sick leave accrued and used by an employee within three business days of an employee's request.
- While the law does not require employers to pay out unused sick time upon termination of employment, employers should ensure their written policies are clear on this issue.
- The new law does not contain any notice requirements, but the New York Department of Labor will conduct a public outreach campaign, and employers may receive questions from employees on their sick leave policies.
- The New York Department of Labor has not yet adopted regulations or issued guidance to effectuate any provisions of the New York State Sick Leave law, but may do so in the future.

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Employers should continue to monitor for developments in order to ensure they are aware of, and comply with, any future regulations and guidance promulgated by the Department.



*Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Labor and Employment practice group, or the following authors in New York:*

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