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FAQs Released for New York State Sick Leave Law

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As described in our [prior alert](#), New York enacted the New York State Sick Leave Law (NYSSL) imposing sweeping paid sick leave requirements for New York employers. Under the NYSSL, employees begin to accrue paid sick leave on September 30, 2020, and may begin to take accrued leave on or after January 1, 2021. Recently, the New York Department of Labor (DOL) published Frequently Asked Questions ([FAQs](#)) in conjunction with the launch of a [webpage](#) concerning the NYSSL.

While the FAQs are helpful in providing the DOL's interpretation of the NYSSL, they merely provide guidance, do not have the force of law and leave some questions unanswered. Employers should speak to counsel to consider issues not specifically addressed in the text of the law.

Below is an overview of the portions of the NYSSL addressed by the FAQs:

Amount of Sick Leave

- The amount of paid sick leave that employers are required to provide depends on the employer's size:
 - Employers with four or fewer employees must provide 40 hours of unpaid sick leave per calendar year, if the employer reported a net income of \$1 million or less in the prior tax year.

- If an employer's net income was greater than \$1 million in the prior tax year, 40 hours of paid sick leave must be provided.
- Employers with five to 99 employees shall provide employees with a minimum of 40 hours of *paid* sick leave each calendar year, regardless of their net income.
- Employers with 100 or more employees shall provide employees with a minimum of 56 hours of *paid* sick leave each calendar year.
- Under the New York Labor Law, "employer" includes any person, corporation, limited liability company or association employing any individual in any occupation, industry, trade, business or service, and does not include government agencies.
- The FAQs explain that an employer with multiple business locations in New York must count employees from all locations when determining the employer's size. It is still an open question whether an employer should count employees working outside New York state to determine the number of employees it has. Although not addressed in the FAQs, the NYSSL will likely treat several companies acting

under the same control group as one employer for the purposes of counting employees.

- **Usage Cap:**
 - An employer can set a usage cap at 40 hours per calendar year if the employer has fewer than 100 employees.
 - An employer can set a usage cap at 56 hours per calendar year if the employer has fewer than 100 employees.
- **Increments of Use:** Employers can set a reasonable minimum increment for use of sick leave which may not be greater than 4 hours.

Employees Entitled to Sick Leave

- The FAQs highlight the broad scope of the NYSSL, which covers all industries and New York employees who are full-time, part-time, exempt, non-exempt, temporary and seasonal.
- The FAQs are clear that an employee must be physically located in New York to accrue sick leave. Employees working remotely from another state, including telecommuters who live outside New York, are not entitled to accrue sick leave while physically working outside New York.

Earning Sick Leave

- **Accrual:** Employees can accrue sick leave at the rate of no less than one hour for every 30 hours worked up to the applicable cap of 40 or 56 hours. Employees begin to accrue sick leave at the start of employment. There is no waiting period after an employee is

hired for accrual or use (except employees cannot use time until January 1, 2021).

- **Frontloading:** Employers may choose to frontload sick leave by providing the total amount of sick leave at the beginning of the calendar year (meaning either January 1 or the beginning of a regular and consecutive 12-month period, as determined by an employer).
 - An employer may not reduce or revoke leave, so if the employer frontloads more than an employee earns, the employer will need to allow the employee to take the leave. For example, if the employer frontloads reduced hours for part-time employees or employees hired in the middle of the calendar year based on what the employer believes these employees will accrue, the employer must ensure that the amount frontloaded is not less than what the employees would have earned if they had accrued leave at the rate of one hour for every 30 hours worked. If the employee would have earned less than the amount the employer frontloaded, the employer cannot reduce or revoke any sick time.
 - Employers must track hours worked and sick leave accrued for employees who were frontloaded less than the maximum amount of sick leave.
- **Carryover:** The FAQs have not clarified whether frontloading a sufficient

amount of sick leave at the start of each year would remove an employer's year-end carryover obligations. The text of the law requires carryover of *any* unused sick leave. This may lead to an employee maintaining a leave balance in excess of the amount they are permitted to use (See Usage Cap above). However, if an employer maintains a written policy providing that unused sick leave will not be paid upon separation, then employers are not required to pay employees for accrued but unused sick leave. Absent such a written policy, accrued but unused sick leave must be paid out upon separation of employment.

- Seasonal employees who maintain an ongoing employment relationship with their employer maintain their leave accruals throughout breaks in employment.

When Employees Can Take Sick Leave

- Employees may take sick leave as soon as they earn it (which might be the first day of working for the employer, if the employer frontloads).
- Employees are not required to provide notice within a certain number of days prior to using sick leave, but they are required to provide written or oral notice prior to using sick leave.
- The FAQs note that employers cannot require an employee to work from home in lieu of taking paid sick leave. However, an employer may offer an employee the option of working from home and retaining the sick leave time.
- The FAQs note that employees may not use sick leave as bereavement leave, but employees may take sick leave for

mental or physical illness, injury or health condition, regardless of whether the employee is diagnosed with such a condition. Practically speaking, this may result in employees taking leave for mental distress associated with the death of a family member.

Payment for Sick Leave

- **Rate of Pay:** Employers must pay an employee their normal rate of pay, which is the wage rate the employee would have been paid had they worked and not taken sick leave. If an employee is paid at different rates for different tasks, the employer must pay the employee sick leave at the weighted average of those rates (i.e. Total Weekly Regular Pay/Total Weekly Hours Worked).
- Employers cannot reduce an employee's normal rate of pay for leave time.
- Employers are not required to pay employees for lost tips or gratuities, but employers cannot take a tip credit. Therefore, employees for whom the employer takes a tip credit must be paid the applicable minimum wage when they take sick leave under the NYSSL.
- Employees who are paid solely on a piece rate or commission basis must also be paid at least the minimum wage for any sick leave taken under the NYSSL.

Doctor's Note

- NYSSL does not address whether an employer may request a note from a health care professional.

- New York City's Earned Safe and Sick Time Act (ESSTA) provides that an employer may require an employee to provide a note from a licensed healthcare provider after *more* than three days of sick time. Employers must reimburse the employee for the costs of the note.
- **Confidentiality:** An employer cannot compel the employee to disclose any confidential health or domestic violence-related information.

Disciplining an Employee for Misusing Sick Leave

- An employer may discipline or terminate an employee who uses leave for purposes other than those provided for under the law, or who lies to their employer in connection with taking such leave. Employers must be careful when disciplining employees for this reason because retaliation for requesting or using leave properly is prohibited under the law and carries severe penalties.

Employer Penalties for Failing to Provide Sick Leave

- According to the FAQs, failure to provide sick leave as required under the NYSSL is equivalent to a failure to pay employee wages, which under New York Labor Law allows aggrieved individuals to seek the amount of the wage underpayment, liquidated damages equal to the underpayment and, in some cases, civil and criminal penalties.

Interaction with Other Sick Leave Laws

- The FAQs specifically provide that the provisions of the Westchester and New

York City sick leave laws that provide more benefits to employees than the NYSSL remain in effect.

- Westchester's Earned Sick Leave Law provides domestic workers one hour of *paid* sick leave for every seven days worked up to 40 hours regardless of employer size. These benefits will continue to be available for domestic workers in Westchester.
- In addition, New York City ESSTA provisions that meet or exceed the NYSSL standards will remain in effect.

Employers' Next Steps

- **Review Policies:** Employers must ensure that any existing sick leave or paid time off policies are at least as generous as the law with regard to amount of leave, accrual, carryover and use requirements. Employers should also review attendance, conduct, anti-retaliation and discipline policies to ensure they reflect the anti-discrimination and anti-retaliation provisions of the law.
- **Provide Notice:** While the NYSSL does not have a notice provision, New York City employers are reminded that ESSTA requires employers to notify all employees of the changes in the law by January 1, 2021.
 - Notice must include the right to safe/sick time, the accrual and use of safe/sick time, the calendar year of the employer (when accrual begins or

frontloading occurs), and the right to be free from retaliation and to file a complaint with the Department of Consumer Affairs. Such notice must be in English and the primary language spoken by that employee (if the translation has been provided by the New York City Department of Consumer Affairs).

- Employers must conspicuously post the notice at their place of business in an area accessible to employees.
- New York City Department of Consumer Affairs has not published an updated notice.
- **Update Pay Statement:** NYSSL requires the amount of sick leave provided to each employee to be included on the employee's pay statement.
 - New York City's ESSTA requires that (1) the amount of safe/sick time accrued and used during a pay period and (2) an employee's total balance of accrued safe/sick time shall be included on the employee's pay statement or other form of written documentation provided to the employee each pay period. Whether this requirement is enforceable or exceeds the city's authority is unclear at this time.
 - Employees must retain pay records including sick leave amount provided for six years in accordance with Section 195 of the NYLL.

Please contact counsel to review your paid time off policy or sick leave policy to ensure that it complies with the NYSSL and amended ESSTA.

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