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## NY Department of Labor Proposes Regulations for New Paid Sick Leave Law

By Glenn S. Grindlinger

The New York State Department of Labor (DOL) published proposed regulations on December 9 that provide more details on the recently enacted New York State Sick Leave Law (NYSSL), which imposes sweeping paid sick leave requirements on New York employers (as described in our [prior alert](#)). 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.

These proposed regulations, even if they become final, coupled with the [DOL's Frequently Asked Questions on the NYSSL](#) (FAQs) still leave some important questions unanswered. Employers should consult with counsel to consider how these proposed regulations affect their business. Below is an overview of the proposed regulations to the NYSSL:

### Definitions

The NYSSL allows employees to take leave for a variety of reasons that are not traditionally thought to be "sickness/illness," including to:

1. Obtain services from a domestic violence shelter, rape crisis center or other services program;
2. Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
3. Meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
4. File a complaint or domestic incident report with law enforcement;
5. Meet with a district attorney's office;

6. Enroll children in a new school; or
7. 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.

The proposed regulations define some of the more "ambiguous" reasons for which an employee can take leave. Specifically, they define the terms "domestic partner," "family offense," "human trafficking," "sexual offense" and "stalking" in a manner consistent with New York's Public Health Law, Penal Law and the Family Court Act.

Further, the proposed regulations define two key terms that are used throughout the text of the NYSSL: "Confidential Information" and "Preventative Medical Care."

- **Confidential Information** is defined to mean "individually identifiable health or mental health information, including but not limited to, diagnosis and treatment records from emergency services, health providers, or drug and alcohol abuse prevention or rehabilitation centers [as well as] information that is treated as confidential or for which disclosure is prohibited under another applicable law, rule, or regulation."
- **Preventative Medical Care** is defined to mean "routine health care including but not limited to screenings, checkups, and patient counseling to prevent illnesses, disease, or other health problems."

## Accruals

The NYSSL mandates that employees accrue sick leave at the rate of one (1) hour of leave for every 30 hours worked; exempt employees are assumed to work 40 hours per week. The proposed regulations specifically state that if an employee works less than 30 hours, the employee accrues sick leave at a proportional rate (*e.g.*, if the employee only worked 15 hours during the week, the employee will have accrued 0.5 hours of sick leave). Further, the proposed regulations allow employers to use rounding with respect to the number of hours (or partial hours) that an employee has worked for sick leave accrual purposes. This means employers may round to the nearest 5 minutes, one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes) when determining how much sick leave an employee has accrued.

## Employer Size

Under the NYSSL, the amount of paid sick leave that employers are required to provide depends on the number of employees that they have during each calendar year.

- Employers with four (4) or fewer employees and a net income of \$1 million or less in the prior tax year shall provide employees with a minimum of five (5) days of *unpaid* sick leave each calendar year.
- Employers with four (4) or fewer employees and a net income greater than \$1 million in the prior tax year shall provide employees with a minimum of five (5) days of *paid* sick leave each calendar year.
- Employers with five (5) to 99 employees shall provide employees with a minimum of five (5) days of *paid* sick leave each calendar year.
- Employers with 100 or more employees shall provide employees with a minimum of seven (7) days of *paid* sick leave each calendar year.

The law, as written, is unclear about whether the employee threshold counts employees who work solely within the state of New York or if the

calculation is determined on some other basis. Unfortunately, the proposed regulations do not shed light on this important question.

However, in determining the number of employees an employer has, the DOL will look at the highest number of employees at any one time during the calendar year. For example, if an employer has a seasonal business and employs 50 individuals during most of the year, but increases the number of employees to 200 individuals during peak season, for NYSSL purposes, the employer will be deemed to have 200 employees and therefore must provide up to seven days of paid sick leave to each employee per year. This is significant as it is expected that many New York employers will ramp up their employment levels as more and more individuals are inoculated against COVID-19.

On the other hand, if an employer's size decreases during the calendar year, the impact of such a reduction does not affect employees' leave amount for the current year; it only impacts the amount an employee will be entitled to in the following year. For example, if an employer has 110 employees on January 1, 2021, employees are entitled to up to seven days of sick leave during 2021 even if the employer reduces staff bringing the headcount down to 85 employees. In 2022, however, the employees would be entitled to only five days of sick leave unless the employer increased its headcount beyond 99 employees.

The proposed regulations also state that when determining the number of employees, the employer needs to include all part-time employees, seasonal employees, employees on leave and any other employee who has a reasonable expectation of returning to active employment with the employer.

## Documentation

The text of the NYSSL does not address if, or under what circumstances, an employer can request documentation from an employee that supports the employee's need to take leave under the NYSSL. The proposed regulations do address this issue.

Consistent with New York City law, the proposed regulations prohibit an employer from requesting documentation from an employee's health care provider supporting the employee's need to take sick leave **unless** the employee has taken leave **for more than three** consecutive previously scheduled workdays or shifts. If an employer is permitted to request such documentation, the employer has to pay all costs/fees incurred by the employee in obtaining the documentation. Further, the documentation can only state that the employees needed to take sick leave, the duration of the leave, and when the employee can return to work; it cannot provide confidential information about the employee or any family member.

However, in contrast to New York City law, the employer can request a written statement from the employee that the employee needed to take leave for an eligible reason only when the employee has taken leave **for more than three** consecutive previously scheduled workdays or shifts.

The full text of the proposed regulations is available [here](#). Once finalized, the regulations will have the force of law. The proposed regulations are subject to a comment period until February 7, 2021, which means that the NYSSL will be in full effect before these regulations are finalized. Comments on the proposed regulations may be submitted via email to [comments@labor.ny.gov](mailto:comments@labor.ny.gov).

The proposed regulations are fairly rudimentary and it would not be surprising if the DOL added to these proposed regulations in the near future. Until that time, New York employers should remain vigilant and continue to update their policies and protocols to reflect changes in New York law.

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