

NEW YORK STATE PAID SICK LEAVE – WHAT STAFFING FIRMS NEED TO KNOW

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Earlier this year, on April 3, 2020, Governor Andrew Cuomo signed the New York State budget bill for fiscal year 2021, which, among other things, includes a statewide sick leave law. Specifically, the bill, which was enacted with virtually no notice or opportunity for public comment, adds a new Section 196-b to the New York Labor Law requiring private employers, including staffing and direct hire firms, to provide their employees with sick leave each calendar year. The law takes effect, and eligible employees will begin accruing sick leave, on September 30, 2020 – however, employers need not allow employees to use the accrued sick leave before January 1, 2021.

The amount of sick leave employees are eligible to accrue, and whether it is paid or unpaid, is determined by the employer's number of employees and net income in a given calendar year, as follows:

1. Employers with 4 or fewer employees and a net income of less than \$1 million in the previous tax year must provide employees with at least 40 hours of unpaid sick leave per calendar year.
2. Employers with 4 or fewer employees and a net income of greater than \$1 million in the previous tax year must provide employees with at least 40 hours of paid sick leave per calendar year.
3. Employers with between 5 and 99 employees in any calendar year must provide employees with at least 40 hours of paid sick leave per calendar year.
4. Employers with 100 or more employees in any calendar year must provide employees with at least 56 hours of paid sick leave per calendar year.

For purposes of determining an employer's size, a "calendar year" means the 12-month period from January 1st through December 31st. Staffing firms must count all of their employees, including temporary employees, when determining their size for purposes of this new law.

For purposes of employees' use and accrual of sick leave and all other purposes under the sick leave law, a "calendar year" means January 1st through December 31st *or* any other consecutive 12-month period determined by the employer. For example, staffing firms could implement a calendar year for sick leave purposes that is based on each employee's anniversary date of the employee's first assignment.

The following are a few key provisions of the New York State paid sick leave law:

- Employees accrue 1 hour of sick leave for every 30 hours worked, up to the calendar year caps set forth above. Alternatively, as opposed to requiring employees to accrue

sick leave, employers may front-load an employee's full annual allotment of sick leave at the beginning of each calendar year.

- Employees can carryover accrued but unused sick leave from one calendar year to the next, but employers can cap the amount of sick leave employees may actually use each calendar year in line with the annual accrual caps above (i.e., employers with less than 100 employees can limit employee use to 40 hours of sick leave per calendar year, and employers with 100 or more employees can limit employee use to 56 hours of sick leave per calendar year). In the law's current state, employers who front-load paid sick leave at the beginning of the calendar year are technically required to allow for carryover as the law does not currently include an applicable exemption. For example, New York City's paid sick leave law includes an exception to its carryover requirement for employers who front-load an employee's full allotment of sick leave at the beginning of each calendar year. We anticipate this issue will be clarified in regulations and/or guidance on the New York State sick leave law.
- Paid sick leave may be used for "sick" and "safe" leave purposes, including for (i) the employee's or the employee's family member's¹ illness, injury, or health condition; (ii) the employee's or the employee's family member's need for a diagnosis, care, or treatment of an illness, injury, or health condition, or preventive care; and (iii) an absence when the employee or the employee's family member is the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking for certain permitted purposes, such as (without limitation) to obtain services from a domestic violence shelter or other service program, to consult with an attorney or meet with a district attorney's office, to file a complaint or report with law enforcement, or to take other actions necessary to protect the health or safety of the employee or the employee's family member.
- Paid sick leave is paid at the employee's regular rate of pay. Employers are not required to pay out employees for accrued but unused sick leave at the end of a calendar year or upon termination of employment. Staffing and direct hire firms and other employers should follow best practice and ensure this is reflected in their written sick leave policy.
- Employers may set a reasonable minimum increment for the use of sick leave, but it cannot exceed 4 hours.
- Within 3 business days of an employee's request, employers must provide a summary of the amounts of sick leave accrued and used by the employee in the current calendar year and/or any previous calendar year. Employers must generally maintain sick leave accrual records and other payroll records for at least six years.

¹ For purposes of the New York State paid sick leave law, "family member" means an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse or domestic partner. "Parent" means a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child. "Child" means a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

- Use of sick leave is job-protected, and thus employers must restore employees to their same position upon returning from sick leave, with the same pay and other terms and conditions of employment. While not specifically addressed in the law, given the nature of the temporary staffing industry, restoration for temporary employees on assignment could mean placement to a comparable assignment with comparable terms, such as pay and benefits.
- Employees who request sick leave cannot be required to disclose any confidential information relating to the specific reason for the requested sick leave.

There are a number of issues not specifically addressed in the New York State paid sick leave law, but which were addressed in existing local sick leave laws, such as the New York City Earned Safe and Sick Time Act and the Westchester County Earned Sick Leave Law. For example, the New York State paid sick leave law is currently silent regarding an employer's right to require employees to provide advance notice of the need for sick leave. NYC and Westchester sick leave laws allow employers to require 7 days' advance notice if the need for sick leave is foreseeable (e.g., a planned doctor's appointment) and notice "as soon as practicable" if the need for sick leave is unforeseeable.

In addition, the New York State paid sick leave law is currently silent regarding an employer's right to request reasonable documentation from an employee to substantiate the employee's need for sick or safe leave and to show that the leave is being used for a permitted purpose under the law. NYC and Westchester sick leave laws allow employers to request documentation if an employee uses more than 3 consecutive days as sick leave.

The New York Staffing Association, through its representatives, has submitted to New York State proposed amendments and regulations to the new paid sick leave law to address such foregoing issues as well as other open issues, including, without limitation:

- clarification that sick leave can only be used for an absence from scheduled work (e.g., temporary employees can only use sick leave when actively on assignment and only for days they are scheduled to work on assignment);
- clarification that sick pay is based on the rate the employee would have earned at the time the sick leave was taken, which is particularly important for temporary employees and other workers who may have different pay rates; and
- for purposes of determining the size of an employer, incorporating a mechanism to look-back for workforces of fluctuating sizes (e.g., staffing firms), such as to take the average weekly headcount of the employer in the preceding calendar year.

Staffing and direct hire firms that already offer paid sick leave or other paid time off to employees need not provide additional leave, as long as such existing leave policies meet or exceed the requirements under the New York State paid sick leave law – i.e., such policies must provide at least the minimum amount of leave required under the new law, allow employees to use leave for the same permitted purposes under the new law, and satisfy the accrual and carryover

requirements of the new law. Accordingly, New York City and Westchester County staffing and direct hire firms that already provide employees with paid sick leave will need to ensure they are compliant with all differing obligations under the New York State law, such as accrual rates. Under the NYS law, staffing and direct hire firms with 100 or more employees must offer at least 56 hours of paid sick leave per calendar year, as opposed to 40 hours under NYC and Westchester County laws.

Temporary staffing firms may consider incorporating certain provisions into their client staffing services agreements to recoup from their clients the costs of having to pay temporary employees for sick leave. For example, the staffing firm may include a provision requiring the client to pay the staffing firm the applicable bill rate (as if the employee had worked) for any sick leave taken by the employee. Alternatively, as opposed to billing the client at the normal bill rate, the staffing firm can bill the client for the cost to the staffing firm of paying the paid sick leave. Separately, the staffing firm may increase its bill rates sufficiently to cover the sick leave payments for employees who work across multiple clients.

While the New York Department of Labor was expected to issue regulations and/or guidelines prior to the law's September 30, 2020 effective date in order to clarify open issues, it is unclear if such regulations or guidelines will be released by then. In the absence of such regulations and guidelines, staffing and direct hire firms and other employers, including those in New York City and Westchester County, should review and, as necessary, update their policies and practices to ensure compliance with the text of the New York State paid sick leave law itself. Those without a written sick leave policy will need to prepare and implement a paid sick leave policy to comply with New York Labor Law Section 195(5), which requires employers to notify employees in writing of (among other policies) the employer's policy on sick leave.

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