

As many may recall, New York's new "permanent" Paid Sick Leave (PSL) law went into effect on September 30, 2020. This is different than paid sick leave under the NYS Paid Family Leave ("PFL") benefit or the NYS Quarantine Law. Until recently, the NY Department of Labor has provided little guidance on the nuances of how the law operates. On October 21, 2020 it issued some guidance in the form of Frequently Asked Questions. Here is the link to FAQ - [https://www.ny.gov/sites/ny.gov/files/atoms/files/PSL\\_FAQ\\_PaidSickLeaveFAQ.pdf](https://www.ny.gov/sites/ny.gov/files/atoms/files/PSL_FAQ_PaidSickLeaveFAQ.pdf). While the FAQs answered some questions, some issues still remain open. Many thanks to Steve Foss, our newest L&E associate, for putting this together.

### **Recap - PSL Basics:**

In broad strokes, the PSL law requires employers to provide sick leave to their employees at a rate of one (1) hour for every thirty (30) hours worked, paid at their "regular rate of pay." Employees may not take leave under the PSL law until January 1, 2021. Employees began to accrue hours for purposes of PSL on the effective date of the law, September 30, 2020. The largest increment by which an employer may require employees to take leave is four (4) hours.

### **Who is covered?**

1. Employers with less than \$1 million net income in the previous tax year, and who employ less than 5 employees, must provide 40 hours of **unpaid** sick leave.
2. Employers net income for the previous tax year of greater than \$1 million, and who employ less than 5 employees, are required to provide employees with up to 40 hours of **paid** sick leave per calendar year.
3. Employers with 5 to 99 employees (regardless of net income) must provide up to 40 hours of **paid** sick leave per calendar year.
4. Employers with 100 or more employees (regardless of net income) must provide up to 56 hours of **paid** sick leave per calendar year.
5. All employees of private-sector employers are covered, regardless of industry, occupation, part-time status, and overtime exempt status. This includes employees of non-profit corporations. However, federal, state, and local government employees are NOT covered.

### **Reasons Employees Can Take Leave**

The term "paid sick leave" is somewhat of a misnomer in that it covers an absence for a non-medical reason. The PSL law actually comprises two components: paid sick leave and paid *safe* leave. Paid sick leave can be used for the diagnosis, treatment, or preventative care of any mental or physical illness, injury, or health condition of the employee or the employee's family member. Paid safe leave can be used when an employee or employee's family member has been the victim of domestic violence (as defined by the State Human Rights Law), a family offense, sexual offense, stalking, or human trafficking. When the employee or a family member of an employee is a victim of such an offense, the employee may take paid safe leave 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.

## Questions Answered by FAQ's:

1. **“Calendar Year” Defined.** Employers may set a “calendar year” to mean any twelve (12) month period for purposes of calculating use and accrual of leave. However, for determining an employer’s size based on number of employees, the twelve (12) month period from January 1<sup>st</sup> to December 31<sup>st</sup> is a “calendar year.”
2. **Telecommuting.** An employer cannot require an employee to work from home or telecommute instead of taking sick leave. But an employer can offer the employee the options of working from home or telecommuting. If employees voluntarily agree to work from home or telecommute, employees will retain the paid or unpaid sick leave that they have accrued.
3. **Do employees accrue leave for pay received for non-working time?** No. Employees do not accrue leave for payments that are not for hours worked, such as bonuses or subject-to-call time. However, time that is considered “hours worked,” including on-call time, training time, and travel time, must be counted as “hours worked” for the purposes of accruing leave.
4. **Does an employer have to provide sick leave to employees who telecommute outside of New York State?** Employees who telecommute are covered by the law but only for the hours when they are physically working in New York State, even if the employer is physically located outside New York State.
5. **Counting employees of an employer with multiple locations within New York State, with four or fewer employees at each location.** To determine the number of employees in this scenario, the employer would count the total number of employees across all locations with New York. For example, if there were 3 employees who worked at one location, and 4 employees who worked at another location, the employer would have 7 total employees, and would be required to provide up to 40 hours of paid sick time in each calendar year, for each employee.
6. **Accrual of leave for employees who are paid on commission, flat rate basis, or other non-hourly basis.** When employees are paid on a non-hourly basis, accrual of sick leave is measured by the actual length of time spent performing work. Note - This could pose problems with recordkeeping for non-hourly employees’ accrued PSL. Employers must keep payroll records for six (6) years which must include the amount of sick leave accrued and used by each employee on a weekly basis. Non-hourly employees should keep accurate records of the time they actually spend performing work. Employers should collect this information from employees and integrate it into their payroll records.
7. **Employees paid at different rates for different tasks.** Employees who are paid at more than one rate of pay must be paid for leave under the law at the weighted average of those rates. The weighted average is the total regular pay divided by the total hours worked in the week. Overtime exempt employees who are paid on an hourly basis are assumed to work forty (40) hours per workweek, when deriving their regular rate unless the terms and conditions of the employment specify or require otherwise. Employers are prohibited from reducing an employee’s rate of pay for leave time hours only.
8. **May Paid Family Leave be used concurrently with Paid Sick Leave?** Yes – by policy. An employee can only choose to use PSL during PFL if the employer allows it. Taking PSL concurrently with PFL may allow the employee to receive their full salary for all or part of the leave. However, an employee cannot receive more than their full wages while receiving PFL benefits.
9. **Interplay with other State and Federal requirements.** The PSL law operates independently from other State and Federal leave requirements and must therefore be paid in addition to any other State or Federal leave entitlements.
10. **Carry-Over.** Sick leave that is unused by an employee over the course of the year must be carried over to the next calendar year. However, employers may limit employee use to the number of hours that the employee is entitled to use within any calendar year (i.e., 56 hours for employers with 100 or more employees and 40 hours for employers with 99 or fewer employees). This may result in an employee maintaining a leave balance in excess of the amount they are permitted to use in any calendar year. This allows employees to immediately use carried over accrued leave in the next calendar year.
11. **Notice.** There is no specified advance oral or written notice lead time (or form) requirement under the law. The employee is merely required to provide some oral or written notice prior to use.

## **Remaining Questions After FAQ's:**

Unfortunately, many questions about the details of the PSL law and how it will operate in practice remain. For example:

1. How is "net income" calculated? This is very important for employers with fewer than five (5) employees.
2. How is employer's employee count or size calculated based on a work force that expands and shrinks with seasons as with construction or the hotel and resort business? Is there an averaging? If so, over what time period?
3. How is an employer's employee count or size calculated if the employer is located outside New York and only has a few employees within New York? Is it just the total number of employees working in New York? Is it the total number employed inside and outside New York?
4. What does "confidential information" mean?" If an employer is prohibited from asking about medical details, can it ask for any supporting documentation to show the PSL absence was covered? Is the employer limited to having a bland certification that the absence qualified for PSL?
5. Although no notice is required "provided that there is an oral or written request to the employer prior to using the accrued sick leave," is an employer prohibited from requiring an employee use of a form when the employee is requesting PSL?
6. May an employer set a maximum amount of accrued leave time that carries over to the next year? Does front-loading sick leave (especially front-loading sick leave that is more generous than the PSL) relieve the employer of any carry over responsibilities?

We realize this is difficult to process without additional guidance. Coughlin & Gerhart is ready to help your business navigate these uncertain legal waters. Please contact us if you have any questions about your obligations under the new PSL law.