LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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# New York Publishes Final Paid Sick Leave Regulations

On Dec. 22, 2021, New York published its final paid sick leave regulations. These regulations are identical to the proposed regulations, initially published on Dec. 9, 2020. New York Paid Sick Leave (PSL) requires employers to provide paid leave to employees relating to an employee's or an employee's family member's medical needs, or for reasons relating to domestic violence and similar offenses. Since Jan. 1, 2021, employers have been required to provide this leave to all New York employees.

As employers may recall, the proposed regulations generated a number of questions, and the hope was that the New York Department of Labor (the Department) would address some of these questions by amending the proposed regulations. This did not occur. However, in conjunction with adopting the final rule, the Department published 27 comments and responses addressing various parts of the regulations. Some of the Department's responses to these comments, submitted by members of the public, are illuminating, while others further complicate longstanding issues.

In its response to public comments, the Department clarified that employers are to count their highest total number of concurrently employed employees nationwide when determining which category of leave applies to the employer. As a reminder, employers with fewer than 4 employees (and under $1 million net income) must provide at least 40 hours of unpaid sick leave per year; employers between 4 and 99 employees (as well as those employers with under 4 employees and over $1 million net income) are required to provide at least 40 hours of PSL per year; and employers with 100+ employees must provide at least 56 hours of PSL per year.

One of the vaguest parts of PSL was whether employers who frontload the full amount of PSL for a year's time period still must allow employees to carry over unused leave from year to year. In response to a comment setting forth this question, the Department responded that there was no limit on the number of hours to be carried over, and that to impose such a cap would exceed the Department's authority. However, the Department did clarify that employers may give employees the option to be paid out for unused leave at year's end, rather than carry over the unused leave. This response will likely be frustrating for employers, as it continues the longstanding problem of employers being forced to allow employees to carry over leave that, in many cases, cannot be used during the year in which it is carried over due to the employer's ability to place a cap (40 or 56 hours) on the amount of leave an employee can use yearly.

For employers who do not frontload, but use an accrual system, the law provides that employees must receive at least one hour of PSL for every 30 hours worked. When they were initially published, the proposed regulations raised the issue of "rounding" paid sick leave accrual increments for the first time, instructing employers that when calculating accruals for time worked in increments less than 30 hours, "employers may round accrued leave to the nearest five minutes, or to the nearest one-tenth or quarter

of an hour, provided that it will not result, over a period of time, in a failure to provide the proper accrual of leave to employees for all the time they have actually worked." This language raised many questions, not the least of which was how often employers should reconcile PSL banks to determine the amount of leave available to employees. Unfortunately, the Department did little in the way of aiding employers, instead merely affirming that incremental leave is required and employers could round the time if they desire.

Another important issue addressed by the Department in its responses was the clarification that employers could not mandate that employees use PSL for a covered reason to the exclusion of other available leave. This means that an employer who has an employee leave work for a PSL-covered reason cannot force the employee to use their PSL if the employee instead elects to use paid time off, vacation or other applicable time. Whether an employee uses PSL, then, appears to be at the employee's discretion, at least when the employee has other paid leave available that could be used for the absence. The Department does not address if an employer can mandate the use of PSL when the employee is absent for a qualifying reason, but has no other applicable paid time off available.

Finally, the Department declined to allow employers to establish a notice requirement for leave, even when need for leave is foreseeable. Regarding documentation, the Department clarifies that employers may only require documentation when an employee is absent for three or more consecutive shifts, and that such documentation must not contain the disclosure of confidential information. One method of documentation permitted by the final regulations is an attestation from the employee that their reason for leave qualifies under PSL, and the Department notes that it will publish an attestation template for use. An employer may not deny an employee leave while attempting to confirm the basis for the leave. If, however, the employer discovers the request to be false or fraudulent, disciplinary action may be taken against the employee.

The Department declined to issue commentary on the impacts of collective bargaining agreements, rate of pay, or interactions with federal leave mandates. Questions about these issues, and others, remain.

If you have any questions or need Bond's help, please contact Theresa E. Rusnak, any attorney in Bond's Labor and Employment practice or the Bond attorney with whom you are regularly in contact.

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