

## New York Releases Guidance on Paid Sick Leave

On October 20, 2020, the New York State Department of Labor released its long-awaited [Guidance](#) (the Guidance) on Paid Sick Leave (PSL). Although the Guidance provides some clarity for employers, it also leaves many questions unanswered. The following is a summary of some the information provided by the Guidance.

**Employee/Employer:** For purposes of PSL, the Guidance defines employee as “any person employed for hire by an employer in any employment.” Per the Guidance, this includes employees who work less than full-time, and encompasses seasonal and likely temporary and per diem employees as well. The Guidance also clarifies that all employers, including nonprofit entities and employees of domestic workers, must comply with PSL. The only types of employers not required to comply with PSL are federal, state and local government employers.

**Frontloading PSL for Part-Time Employees:** The Guidance provides that employers may frontload PSL for a part-time employee based on the hours the employee is anticipated to work in the upcoming year at an amount that equals at least the amount the employee would have received if the employee was granted one hour of leave for every 30 hours worked. Importantly, unless an employer frontloads all 40 or 56 hours for a part-time employee, the employer continues to be obligated to track the part-time employee’s hours of work after the leave is frontloaded. Per the Guidance, employers must continue to track an employee’s hours so that the employer can allow the employee to accrue leave if the employee works more hours than initially anticipated by the employer. In this scenario, an employee would be able to accrue leave until reaching 40 or 56 total hours.

**Accrual:** The Guidance establishes that employers need only grant their employees up to 40 or 56 hours of sick leave (dependent upon employer size), even if the employee would accrue more than that amount during the course of a year using the one hour granted for every 30 hours worked accrual method set up by the statute.

**Carryover:** Unfortunately, the Guidance does not allow employers to cap the number of unused PSL hours an employee may carry over between calendar years. Rather, the Guidance states that employees may carry over any available, unused PSL between years. However, regardless of the amount of leave carried over, employers may restrict employees from using more than 40 or 56 hours of leave per calendar year. The Guidance recognizes that this may result in the employee maintaining a sick leave balance in excess of the amount the employee is permitted to use in a given calendar year. The Guidance does not address whether employers who frontload leave are exempt from the carryover requirement, as is the case under the New York City Earned Sick and Safe Time Act.

**Use:** The Guidance states that employees may use PSL for routine medical, dental or vision appointments, whether or not a medical condition has been diagnosed. Employers, per the Guidance, do not have to allow employees to use PSL for bereavement purposes.

**Rate of Pay:** Per the statute, an employee must be paid at the employee’s “regular rate” for PSL. The Guidance does not define this term, but does provide that lost tips/gratuities do not have to be included in the regular rate calculation as long as employees are paid their normal rate of pay or the applicable minimum wage, whichever is greater.

**Other Leave Laws:** The Guidance provides that if an employer allows employees to use PSL while using Paid Family Leave (PFL), employees may elect to do so. Electing this option may allow employees to receive full wages during this period, but employees cannot receive more than their full wages while receiving PFL benefits. Moreover, PSL and Westchester County leave for domestic workers will accrue both PSL and the county leave.

**Miscellaneous:** The Guidance also sets forth the following:

- Employers may not impose a waiting period for accrual or use of PSL.
- Seasonal employees who “maintain an ongoing relationship with their employer maintain their leave accruals through such breaks in employment.”
- Employees who telecommute only accrue sick leave for the hours that they physically work in New York.
- Employers who are physically located outside the state must provide sick leave to employees who telecommute for the hours those employees work in New York.
- Employers may have a policy that allows employees to donate leave to other employees, as long as making the donations is voluntary.

The Guidance leaves many questions unanswered. Among them, the Guidance does not precisely address how employers are to count their employees for purposes of determining whether they must provide 40 or 56 hours of leave, although it does state that employees at multiple facilities located within New York are to be counted as part of one company. The Guidance also does not address whether employers can require documentation from an employee sufficient to justify the employee’s need for the leave. Furthermore, while the Guidance does allow employers to require notice prior to the use of PSL, it does not set forth parameters for the notice time period. The Guidance also leaves unanswered questions regarding incorporation of PSL into existing collective bargaining agreements and existing paid leave policies.

Bond will continue to keep you updated as information regarding PSL develops. You are also invited to join us for a 30-minute complimentary webinar on this topic on October 26, 2020, at 12:00 p.m., and [may sign up here](#).

Please contact [Kerry Langan](#), [Theresa Rusnak](#), or any attorney at Bond Schoeneck & King for more information.



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