Reminder to New York Employers:
Paid Sick Leave Goes into Effect on September 30

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On September 30, 2020, New York's Paid Sick Leave Law ("Law" or "PSLL") will take effect. The Law applies to all private employers and employees, and as we have previously reported, starting September 30, 2020, employees in the state of New York will begin accruing sick leave at a rate of at least one hour for every 30 hours worked. We are still awaiting guidance from the State on key issues, such as coordination with the New York City and Westchester County sick leave laws, the impact of frontloading leave on carryover, and managing sick leave during the last quarter of 2020.

Accrual or Frontloading of Sick Leave

The amount of sick leave accrued each year depends on the employer's size and net income:

- **Employers with four or fewer employees and a net income of $1 million or less in the previous tax year:** Employees may accrue up to 40 hours of unpaid sick leave each calendar year.

- **Employers with four or fewer employees and a net income greater than $1 million in the previous tax year:** Employees may accrue up to 40 hours of paid sick leave each calendar year.

- **Employers with between five and 99 employees:** Employees may accrue up to 40 hours of paid sick leave each calendar year.

- **Employers with 100 or more employees:** Employees may accrue up to 56 hours of paid sick leave each calendar year.

Employers must calculate the size of their workforce based on the calendar year—from January 1 to December 31. At this moment, it is unclear if employers must calculate their total number of employees during this period, or take an average. It is also not clear from the Law whether only New York State employees are counted to determine
the appropriate threshold, or if all employees of the company are counted, regardless of location.

While accrual begins on September 30, 2020, employees are not entitled to take sick leave under the Law until January 1, 2021.

As an alternative to accrual, employers may frontload sick leave by providing employees with the required amount of sick leave at the beginning of the calendar year (or any other 12-month period). When frontloading sick time, the full allotment must be provided, and an employer may not later reduce an employee’s sick leave entitlement because an employee did not work enough hours to accrue the frontloaded sick time (e.g., decreasing the amount of sick leave if an employee switches to a part-time role midyear).

It also is not yet clear whether employers that frontload sick leave must add additional frontloaded time during the last quarter of 2020 to account for new accrual requirements under the Law, even if employees may not use sick leave under the PSLL until January 1, 2021.

Accrued, unused sick leave must be carried over from one year to the next, but employers may limit the amount of sick leave employees may use in a given year. Employers with fewer than 100 employees may limit employees to 40 hours per calendar year, and employers with 100 or more employees may limit the use of sick leave to 56 hours per calendar year. The Law is silent on whether there is a cap on the amount of time that may be carried over.

Sick leave does not need to be paid upon separation for any reason.

**Use of Sick Leave**

An employee may use accrued sick leave for:

- the employee’s, or a family member’s, mental or physical illness, injury, or health condition, regardless of whether the illness, injury, or health condition has been diagnosed or requires medical care at the time of the leave request;

- the diagnosis, care, or treatment of an employee’s, or a family member’s, mental or physical illness, injury, or health condition; and

- an absence from work when an employee, or an employee’s family member, who has experienced domestic violence, a sexual offense, stalking, or human trafficking receives assistance or attends to related matters after such an event, such as counseling, legal proceedings, or relocation, or “take[s] 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.”
Employers may set a reasonable minimum increment for the use of sick leave, but the increment cannot be greater than four hours.

Unlike the New York City and Westchester County sick leave laws, there is no waiting period for new employees to use sick leave.

**Employee/Employer Notice and Recordkeeping**

An employee may request sick leave either orally or in writing, but the PSLL does not expressly require that an employee provide reasonable notice of the need for leave or that notice be provided as soon as practicable. The PSLL does not contain a notice requirement for employers, but does mandate that, upon an employee’s oral or written request, the employer must provide the employee with a summary of the sick leave the employee has accrued. Employers must respond to these inquiries within three business days of the request. Additionally, employers must maintain records of the amount of sick leave provided to each employee for each week worked for six years.

**Confidentiality, Non-Retaliation, and Job Protection**

The Law prohibits employers from requiring an employee to disclose the nature of any medical condition (either the employee’s or that of a family member) or of any domestic violence/sexual offense matter necessitating the need for leave. The Law is silent as to whether employers may ask employees for a doctor’s note to confirm the need for leave.

Employers may not retaliate against an employee for asserting any right granted under the PSLL, including taking or requesting leave. Upon their return from paid sick leave, employees must be restored to their former position with the same pay and other terms and conditions of employment.

**Interaction with Employer Paid-Time-Off Policies, Local Laws, and Collective Bargaining Agreements**

The Law does not require an employer to provide additional sick leave if the employer’s existing sick leave or time-off policy (including a policy created to address a city or county sick time law) provides employees with an amount of leave and compensation that meets or exceeds the statutory minimums, and satisfies the statutory requirements with respect to accrual, carryover, and uses. The Law also does not prevent localities with a population of at least one million people from enacting or enforcing local laws that meet or exceed the PSLL’s minimum requirements; thus, New York City’s and Westchester County’s sick leave laws are still applicable to the extent that they provide employees with greater benefits and/or rights.

Collective bargaining agreements (“CBAs”) entered into on or after the effective date of the PSLL must provide paid sick leave benefits that are at least “comparable” to those provided for under the Law. Such benefits may be in the form of paid time off, or other
leave, compensation, or benefits. Further, the CBA must “specifically acknowledge” the provisions of the Law.

The PSLL directs the New York Department of Labor to provide guidance regarding the Law. As of the publication of this Advisory, such guidance has yet to be issued, but we will provide an update upon the guidance’s release.

What New York Employers Should Do Now

- Employers that do not currently have a paid sick leave policy or have one that falls short of the Law’s statutory requirements\(^1\) should begin to develop a compliant policy that will be ready to implement by September 30, 2020, which is the date that employees begin to accrue sick leave benefits.

- Employers that already provide employees with paid sick leave benefits that meet or exceed the Law’s requirements need not change their current policy, as long as the policy meets all of the PSLL’s mandates on use, accrual, and carryover.

- Employers that have a unionized workforce should keep in mind the Law’s mandates when negotiating a CBA that will go into effect on or after September 30, 2020.

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\(^1\) Note that other policies, such as vacation or paid-time-off policies may be sufficient to satisfy the requirements of the Law.