

**Sick and Safe Leave:  
NYS Releases FAQs and NYC Issues Notice**

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New York State has issued guidance in the form of [Frequently Asked Questions](#) (“FAQs”) regarding the State’s Paid Sick Leave Law (“PSLL”), which became effective on September 30, 2020. As we previously [reported](#), the PSLL requires all private employers in New York State to provide an amount of sick leave that is dependent on the employers’ size and income.

As we also recently [reported](#), New York City amended the Earned Safe and Sick Time Act (“ESSTA”) to align the City’s sick leave mandates more closely with those under the PSLL. However, a number of key differences remain, such as with regard to both employee and employer notice requirements. Where conflicts exist between ESSTA and the PSLL, covered employers must comply with the law most beneficial to employees. This Advisory provides a chart comparing the two laws and highlighting their differences.

Now that the PSLL’s guidance has been released, New York City has issued its updated ESSTA [notice](#) and has determined that the notice must be distributed by January 1, 2021, to (i) domestic workers and (ii) employees of employers with 100 or more employees. The notice must also be provided to employees when they begin employment and when their rights under ESSTA change. Notice to employees must be given in English, or, if available on the NYC Department of Consumer and Worker Protection<sup>1</sup> website, in the employee’s primary language. Employers must also post the notice in the workplace in an area that is visible and accessible to employees.

**The PSLL FAQs**

The FAQs address topics including, but not limited to, definitions in the PSLL, accruals, permitted uses, eligibility, increments of leave, rates of pay for leave, interaction with other leave laws, and penalties. The FAQs clarify that employers may frontload sick leave for part-time employees, but if fewer than 40 hours is frontloaded, then accruals must still be tracked, and carryover must be permitted, as further explained below. The FAQs stress that leave provided under the PSLL is separate and in addition to benefits provided by New York State’s [COVID-19 Leave Law](#). Further, the FAQs instruct that

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<sup>1</sup> This agency was formerly the Department of Consumer Affairs.

sick leave does not accrue when an employee is telecommuting from outside of New York State. Rather, it only accrues when the employee is physically working in the State.

Notably, the FAQs do not address some key questions, including (i) whether employers need to include out-of-state employees to calculate their employee totals, although it does make clear that when counting employees to determine the number of employees in New York for purposes of determining the required number of sick days, all New York-based employees are counted (and the determination is not made on a facility-by-facility basis)), and (ii) whether employers must allow full-time employees to carry over accrued, unused sick leave if they frontload the full amount of sick time. (Rather, the FAQs merely confirm that carryover is required for part-time employees when they are frontloaded fewer than 40 hours based on the hours they are anticipated to work.)

Notwithstanding these unresolved questions, the FAQs provide clarity on a number of important aspects of the PSSL, including the following:

- Employers with multiple locations across the state should calculate their employee total by taking the sum of all their employees at each location.
- Employers may frontload accrual for part-time employees, based on the hours they are anticipated to work. However, if an employer frontloads fewer than 40 hours, the employer must still track the employee's hours worked and accrual of sick leave, and allow the employee to accrue any additional sick leave beyond the estimated amount until the total amount of frontloaded plus accrued sick leave in a calendar year equals 40 hours. Additionally, unused sick leave must carry over from year to year for part-time employees who have fewer than 40 hours frontloaded, but employers may limit an employee's use to the number of hours that the employee is entitled to use within any calendar year. We believe the same analysis would apply to employers that are required to provide up to 56 hours, such that if a part-time employee of a large employer (100 or more employees) is frontloaded with less than 56 hours, then accruals must be tracked and the employee must be permitted to accrue additional sick leave beyond the frontloaded amount. If the employer has not tracked accruals and usage, the employer cannot change its policy in the following calendar year because employees are entitled to carry over their accrued, unused sick leave.
- Employees who telecommute are covered by the PSSL only for the hours when they are physically working in New York State. This applies even if the employer is located outside New York State.
- When employees are paid on a non-hourly basis (e.g., commission or flat rate basis), accrual of sick leave is measured by the actual length of time spent performing work.
- Employers are not required to pay employees for lost tips or gratuities. Additionally, they may not take a tip credit for sick leave and must pay the greater of the employee's normal rate of pay or the applicable minimum wage.

- When an employee is paid at different rates for different tasks, he or she must be paid at the weighted average of those rates. The weighted average is the total regular pay divided by the total hours worked in the week.
- Exempt employees are assumed to work 40 hours per workweek, unless the terms of their employment specify otherwise.
- Under certain circumstances, employees apparently may use accrued sick leave when their employer has been ordered to close temporarily due to a public health emergency. The FAQs somewhat cryptically state that “the usage of sick leave in this scenario would be fact specific depending on the type of health emergency, including the risk of contagion, and other health considerations.”
- Employees can only choose to use sick leave while taking Paid Family Leave (“PFL”) if the employer allows it, but employees may not receive more than their full wages while receiving PFL benefits.
- Sick leave under the PSLL must be provided in addition to any other State or federal leave entitlements, including quarantine leave for employees subject to a precautionary or mandatory order of quarantine or isolation related to COVID-19.
- The FAQs do not specify any employee notice requirements before using sick leave, other than echoing the statute’s language that an employee may provide written or oral notice.
- Collective bargaining agreements (“CBAs”) entered into on or after September 30, 2020, may provide for different leave benefits, so long as such benefits are “comparable benefits for the employees” to those required by the PSLL, and the agreement expressly acknowledges the PSLL. Such acknowledgement should also specifically identify and label any benefits within the CBA deemed comparable to those under the PSLL to avoid any confusion.
- Failure to provide benefits mandated by the PSLL is treated as the equivalent of a failure to pay employee wages, which may subject an employer to civil/administrative actions and/or criminal penalties, including, but not limited to, an order assessing the amount of underpayment, 100 percent liquidated damages, and civil penalties up to double the total amount due.

### **Comparison of the PSLL and ESSTA**

As noted above, the ESSTA amendments more closely align the City’s leave law mandates with the PSLL, but significant differences remain. The following chart<sup>2</sup> summarizes the similarities and differences between the two laws.

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<sup>2</sup> This chart reflects entitlements for employers with 100 or more employees. Lesser entitlements exist for smaller employers.

	<b>PSLL</b>	<b>ESSTA &amp; ESSTA Amendments</b>
<b>Amount of Leave</b>	Up to 56 hours per calendar year	Up to 56 hours per calendar year (previously was 40 hours)
<b>Accrual</b>	1 hour of leave for every 30 hours worked	1 hour of leave for every 30 hours worked
<b>Eligibility and Waiting Period</b>	<ul style="list-style-type: none"> <li>• No minimum number of hours worked mandate</li> <li>• No waiting period (after January 1, 2021)</li> </ul>	<ul style="list-style-type: none"> <li>• Eliminates 80+ hour work requirement for eligibility</li> <li>• Eliminates optional 120-day waiting period for use of accrued leave (except that no more than 40 hours may be used this year; if additional hours—up to 16—accrued this year, may use beginning January 1, 2021)</li> </ul>
<b>Uses</b>	<ul style="list-style-type: none"> <li>• Employee’s, or family member’s, mental or physical illness, injury, or health condition, regardless of whether the illness, etc., has been diagnosed or requires medical care at the time of the leave request;</li> <li>• Diagnosis, care, or treatment of employee’s or family member’s, mental or physical illness, injury, or health condition; and</li> <li>• Absence from work for various reasons related to employee or family member who has experienced domestic violence, a sexual offense, stalking, or human trafficking</li> <li>• FAQs suggest PSLL leave, under certain circumstances, may be available for business/school closures due to a public health emergency</li> </ul>	<ul style="list-style-type: none"> <li>• All uses allowed under PSLL</li> <li>• Amendments adopt State’s broader definition of “domestic violence”</li> <li>• ESSTA expressly permits leave due to closure of employees’ place of business arising from a declared public health emergency or employee’s need to care for a child whose school or childcare provider has been closed due to a declared public health emergency</li> </ul>
<b>Carryover/ Frontloading</b>	<ul style="list-style-type: none"> <li>• Must allow carryover of unused accrued leave, but law is silent on whether carryover can be capped</li> </ul>	<ul style="list-style-type: none"> <li>• Must allow carryover unless benefit frontloaded</li> <li>• Appears frontloading eliminates carryover or pay-out</li> </ul>

	<b>PSLL</b>	<b>ESSTA &amp; ESSTA Amendments</b>
	<ul style="list-style-type: none"> <li>• However, use can be capped to 56 hours per year</li> <li>• Frontloading is allowed, but may not be reduced if employee fails to accrue all the leave time</li> <li>• Unclear if frontloading eliminates carryover requirement</li> </ul>	<p>requirement when employer frontloaded in current year<sup>3</sup></p>
<b>Notice by Employee of Need for Leave</b>	<ul style="list-style-type: none"> <li>• No express requirement that employee provide notice of need for leave</li> </ul>	<ul style="list-style-type: none"> <li>• Retains ESSTA requirement, i.e., if need for leave is foreseeable, may require up to seven days' written notice; if not foreseeable, then as soon as practicable</li> </ul>
<b>Notice by Employer of Leave Available to Employees</b>	<ul style="list-style-type: none"> <li>• No express requirement that employer provide notice of rights, but, upon employee request, within 3 days, must provide summary of amount of leave accrued</li> </ul>	<ul style="list-style-type: none"> <li>• Provide an updated ESSTA notice: <ul style="list-style-type: none"> <li>○ by January 1, 2021, to (i) domestic workers and (ii) employees of employers with 100 or more employees</li> <li>○ to employees when they begin employment and when their rights under ESSTA change</li> </ul> </li> <li>• Provide for each pay period, on pay stub or other statement, (1) amount of leave accrued and used during that pay period and (2) employee's total balance of leave</li> </ul>
<b>Other Requirements</b>	N/A	<ul style="list-style-type: none"> <li>• Documentation: If required, must reimburse employee for cost, if any</li> <li>• Existing ESSTA written policy requirement remains in effect</li> </ul>

### What New York Employers Should Do Now

- Ensure your sick leave policies comply with the PSLL, and, where applicable, the ESSTA.

<sup>3</sup> See ESSTA FAQs, available [here](#), at pp. 19-20.

- With regard to questions left unanswered by the PSSL FAQs, such as whether carryover is required when the sick leave benefit is frontloaded, consider taking a cautious approach until the State (hopefully) provides further guidance.
- Keep in mind that, even if your current sick leave benefits or paid-time-off policies meet or exceed the mandated amounts, you must still comply with the laws' other requirements, such as recordkeeping and, if subject to the ESSTA, notice obligations.
- If you have a totally or partially unionized workforce, ensure that you comply with the PSSL's, and if applicable the ESSTA's, requirements when negotiating a new CBA.

### **What New York City Employers Should Do Now**

- Provide the updated ESSTA notice to all new NYC-based employees going forward, and, by January 1, 2021, to all domestic workers and to employees of employers with 100 or more employees.
- Post the updated ESSTA notice in an area that is visible and accessible to employees.

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