

Amendments to the New York City Earned Safe and Sick Time Act

In April 2020, Governor Andrew Cuomo signed into law new paid sick/safe leave requirements for all New York State employers (the "State Law"). We provided a summary of the State Law in our previous client alert, available [here](#). On September 28, 2020, Mayor Bill de Blasio signed a bill amending New York City's Earned Safe and Sick Time Act (the "City Law"), effective as of September 30, 2020, to coordinate with the newly enacted State Law. On October 19, 2020, the New York State Department of Labor issued a set of FAQs providing additional guidance on implementing the State Law (the "State Guidance"), available [here](#) on the State's website. This alert provides an update on the current requirements of both the State Law (including the State Guidance) and amended City Law. We note that employers are not required to provide leave under both laws, but may provide the same amount of leave (40 or 56 hours per year, as applicable) as long as the conditions for using leave satisfy both laws.

Number of Sick and Safe Leave Days. The State Law and amended City Law require employers to provide sick/safe leave in the following amounts:

Category of Employer	Minimum Sick/Safe Leave Requirement
4 or fewer employees, with net income of <u>less than</u> \$1,000,000 in the previous tax year	40 Hours of Unpaid Sick/Safe Leave
4 or fewer employees, with net income of \$1,000,000 <u>or more</u> in the previous tax year	40 Hours of Paid Sick/Safe Leave
5 to 99 employees	40 Hours of Paid Sick/Safe Leave
100 or more employees	56 Hours of Paid Sick/Safe Leave

Eligibility Requirements. To be consistent with the State Law, which makes sick leave available to all employees and does not have a waiting period for use of leave, the amended City Law eliminates both the requirement that (1) an employee work a minimum of 80 hours during the year in New York City to be eligible for sick/safe leave; and (2) the 120-day waiting period for newly hired employees before they can use accrued sick and safe leave. Furthermore, employers must now provide domestic workers with sick/safe leave on the same eligibility terms.¹

The State Guidance has also clarified that employees who telecommute are covered by the State Law if they are physically working in New York State, even if the employer is physically located outside of the state. While not explicitly stated in the guidance, it would appear to follow that employees assigned to work at an employer's headquarters in New York State, but telecommuting out of state, are not eligible for paid leave under the State Law.²

¹ New York State's Domestic Workers Bill of Rights provides for up to three days leave for domestic workers, although it is not specifically tied to safety or illness.

² We note that this inference from the State Guidance would be consistent with current City guidance, which has not yet been updated to reflect the amendments to the City Law, on the applicability of the City Law to employees who work outside of New York City for an employer located within New York City.

Accrual of Leave and Carryover Expansion. Under both the State and City Laws, employees must begin accruing sick/safe time (*i.e.*, any additional sick/safe leave required by law) as of September 30, 2020. Employers must allow employees to use any such newly provided sick/safe time starting January 1, 2021, which is the same rule under the State Law.³

Under both the State and City Laws, employees must accrue sick leave at a rate of not less than one hour per every 30 hours worked. Employees who accrue sick days (*i.e.*, under an accrual method) will continue to be permitted to carry over up to a maximum of 40 hours (or, in the case of larger employers, 56 hours) of sick/safe leave to the following calendar year, although usage of sick/safe leave may be capped at 40 hours (or 56 hours, in the case of larger employers) per calendar year. It remains to be seen whether the “front-load” method⁴ of providing sick/safe leave (which was permitted under current New York City law and guidance) will continue to be available without the need to carry over unused sick/safe leave days into the following year under the amended City Law.

The State Guidance contains a broad statement that generally all unused sick leave must be carried over into future years (without any explicit exception for front-load method employers). The State Guidance also does not appear to allow employers to impose a cap on the carryover of sick days from year to year.⁵ Since it appears that, as drafted, the State Law and the State Guidance do not permit employers to avoid carrying over unused sick days by using a front-load method (which is permitted under the current New York City guidance, but which has not yet been updated to reflect the amendments to the City Law), unless there is additional guidance or clarification in the future, employers who use the front-load method to comply with the City Law should consider whether they need to revise their carryover policy.

Requests for Information/Payroll Stubs. Under the State Law, employers must, within three business days of an employee’s oral or written request, provide a summary of sick/safe leave accrued and used within that calendar year or any previous calendar year. Additionally, under the amended City Law, employers must now list on an employee’s paystub, or another written document that is issued at least as frequently as each pay period, the amount of accrued and used sick/safe leave in that pay period, and the total balance of accrued sick/safe leave. Employers working in good faith on implementing this requirement have until **November 30, 2020** to comply without a penalty.

Notice/Posting Requirements. The City Law provides that employers must distribute to employees a written notice of their right to sick/safe time (the updated model notice can be found [here](#)), including the accrual and use of sick/safe time, the calendar year of the employer, and the right to be free from retaliation and to file a complaint with the New York City Department of Consumer and Worker Protection. Based on recent guidance published on New York City’s website (available [here](#), last visited October 27, 2020), the requirement to distribute a new written notice by **January 1, 2021** applies only to (i) employers with 100 or more employees and (ii) employers of domestic workers. For new employees, notice must also be provided at the time of hire. The updated notice must be posted in a conspicuous place in the workplace; previously, the workplace posting had only been optional.

³ Any existing sick and safe leave that has accrued or may accrue pursuant to an existing sick/safe leave policy in effect on or prior to September 30, 2020, will continue to be available in accordance with the terms of such policy. For the remainder of calendar year 2020, a New York City employer (including larger employers with 100 or more employees) may continue to allow the use of only 5 sick/safe leave days, but beginning in calendar year 2021, that employer must allow the use of 7 sick/safe leave days (which in some cases will include approximately 2 sick/safe leave days that were accrued based on an employee having worked during the period September 30, 2020 to December 31, 2020, assuming a 40 hour work week).

⁴ Under the front-load method permitted by prior New York City guidance, employers provide employees with all of the safe/sick leave to which they are entitled for the year at the beginning of the benefit year, regardless of accrual levels. Employers using the front-load method do not need to carryover (or payout) accrued but unused sick/safe leave days at the end of a calendar year.

⁵ We note that under current City guidance, which has not yet been updated to reflect the amendments to the City Law, an employer may cap the carryover of unused sick days to an amount equal to the maximum number of sick days required to be accrued in a calendar year (for example, 40 hours per year).

Supporting Documentation and Reimbursements. The amended City Law allows employers to require supporting documentation for the use of sick/safe time extending beyond three consecutive workdays. Effective September 30, 2020, employers must reimburse employees for all reasonable costs or expenses incurred for obtaining supporting documentation from a doctor or other third party as requested by the employer. This creates a potential inconsistency with the State Law, which prohibits an employer from conditioning sick leave on the disclosure of confidential information (such as information relating to a mental or physical illness, injury or health condition of the employee or the employee's family member) by the employee. We anticipate that New York State will issue guidance on how an employer can request supporting documentation, as permitted by the City Law, without violating this prohibition under the State Law.

Requests for Sick/Safe Leave. The amended City Law continues to allow employers to require up to seven days' advance notice for the foreseeable use of safe time and sick time, and notice as soon as is practicable if use is unforeseeable. The State Law does not require a specified notice or time period requirement, provided that there is an oral or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer. An employer cannot require an employee to work from home or telecommute instead of taking sick leave, but may offer the employee the option of working from home or telecommuting in lieu of using leave. If the employee voluntarily agrees to work from home or telecommute, the employee will retain their accrued sick leave.

Retaliation. The amended City Law, like the State Law, provides that employers are prohibited from taking any action against an employee that may deter an employee from using sick/safe time. The City law goes further, however, expanding the types of adverse actions that may form the basis of a retaliation claim, including, but not limited to, intimidation, discipline, demotion, suspension, harassment, discrimination, reduction in hours or pay, and adverse actions related to perceived immigration status or work authorization. Additionally, a violation can be established when an employee shows that a protected activity was merely a motivating factor for an adverse action, whether or not other factors motivated such adverse action.

Enforcement Action and Penalties. The amended City Law allows the City to investigate potential violations of the law (including the power to issue subpoenas and compel the production of documents) and to sue employers for statutory violations. An adverse finding that an employer has engaged in a pattern or practice of violations may result in civil penalties of not more than \$15,000 (as well as individual relief of up to \$500 to each employee impacted); employers may also face fines of \$500 to \$2,500 per violation of the City Law (and for some violations, penalties may be calculated on a per employee basis). Employers found to have violated the State Law may be subject to civil/administrative action and/or criminal penalties that could include, among other consequences, an order to pay the full amount of underpaid wages, 100% liquidated damages, and punitive civil penalties up to double the total amount due.

We will provide an update if more guidance from the State or City becomes available.

Next Steps.

- New York City employers should review their existing sick/safe leave policies to determine whether they meet the newly enacted requirements under the amended City Law, or otherwise amend their policies to ensure compliance.
- All New York employers, including New York City employers, should also review their policies (including, but not limited to, reviewing their carryover policy in the case of front-load method employers) to ensure that they are coordinated with the State Law.
- New York City employers with 100 or more employees or that employ domestic workers will need to provide notice to current employees of their rights under the new law by **January 1, 2021**. Newly hired employees must also receive a notice of rights. Employers should also plan to post an updated notice of rights poster in the workplace.
- In compliance with the State Law, employers must develop a process for responding to employees' oral or written requests for safe and sick leave accrual and use information. Additionally, New York City employers will need to develop a process for reimbursing any costs and fees incurred by employees with providing documentation requested by employers relating to substantiating leave requests.
- Finally, by **November 30, 2020**, employers should implement processes for providing documentation each payroll period to employees of their sick/safe leave accruals.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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