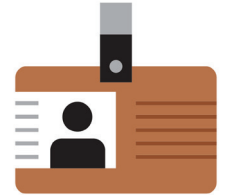




**PHILLIPS LYTLE LLP CLIENT ALERT**  
**FOR BNHRA MEMBERS**  
**LABOR & EMPLOYMENT**

**JANUARY 2022**



## *New York State Department of Labor Adopts Sick Leave Law Regulations*

**On December 22, 2021, the New York State Department of Labor (DOL) issued final regulations (“Regulations”) regarding the New York State Sick Leave Law (“NYSSLL”), which took effect over a year ago on September 30, 2020. The Regulations do not contain any changes to those initially proposed on December 9, 2020. In adopting the Regulations, the DOL also provided insight on its interpretation of the NYSSLL by responding to public comments it received about the law, which in some cases is contrary to its previous guidance.**

### **DOCUMENTATION**

The Regulations allow an employer to request that an employee provide documentation substantiating sick leave where the employee uses leave for three or more consecutive and previously scheduled workdays or shifts. Employers may require either:

- 1.** An attestation from a licensed medical provider supporting the need for leave which identifies the amount of leave needed and a date the employee may return to work; or
- 2.** An attestation from the employee of their eligibility for leave.

Employers cannot require that the reason for leave be disclosed, except as otherwise required by law, and cannot require that an employee pay any costs or fees associated with obtaining medical or other verification of the need for leave. The DOL has stated that it will be issuing a template attestation form.

### **EMPLOYEE COUNT**

An employer’s obligation to provide leave and whether leave is paid or unpaid depends on the size of the employer’s workforce and annual revenue as follows:

- 1.** Employers with four or fewer employees must provide 40 hours of leave, which may be unpaid if annual revenues are less than \$1 million;
- 2.** Employers with between five and 99 employees must provide 40 hours of paid leave; and
- 3.** Employers with 100 or more employees must provide 56 hours of paid leave.

Contrary to prior DOL guidance, in its response to comments, the DOL stated that it “interprets the statute to include all employees of the employer nationwide [in the workforce count],” but that only employees working in New York State must be provided with leave under the NYSSLL. This means, for example, that an employer with 100 employees nationwide but with only five working in New York State would have to allow the five employees in New York State to accrue 56 hours of paid leave, instead of only 40 hours.

Employers must include employees on paid or unpaid leave, leaves of absence, disciplinary suspension, or any other type of temporary absence in their employee count, as long as the employer has a reasonable expectation that the employee will return to active employment. An employer’s employee count is determined by counting the highest total number of employees employed at any point during the calendar year to date.



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#### LEAVE ACCRUAL

The NYSSLL provides that employees accrue one hour of leave for every 30 hours worked. In its December 2020 FAQs, the DOL stated that “an employee would have to work at least 30 hours before accruing any leave,” suggesting that leave is accrued on a whole-hour basis. However, the Regulations state that “[e]mployee accruals of leave must account for all time worked, regardless of whether time worked is less than a 30-hour increment” and that in calculating an employee’s accrual for time worked in increments of less than 30 hours, “employers may round accrued leave to the nearest 5 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.” In response to public comments about having to account for leave accrual in increments below 30 hours, the DOL stated that the Regulations allow employers to round time and “strikes the proper balance between the rights of employees and obligations of employers.” In light of the Regulations and the DOL’s reference to rounding in its response to public comments, it appears that the DOL’s position is that sick leave is accrued on a fractional hour basis.

#### CARRYOVER OF UNUSED LEAVE

In response to public comments, the DOL confirmed that employers cannot limit the number of accrued but unused sick leave hours an employee can carry over from one calendar year to the next, even when an employer frontloads sick leave. Thus, although frontloading an employee’s sick leave on January 1 of each year may provide an employee with the maximum amount of leave an employee can use in any calendar year, an employer that nonetheless fails to carryover an employee’s unused sick leave from the prior year will not be in compliance with the NYSSLL.

#### PAYOUT OF UNUSED LEAVE

The DOL also stated, in response to a public comment, that although unused sick leave must be carried over to the next year regardless of how it is accrued, employers have discretion to:

1. Give employees the option to voluntarily elect to use and receive payment for paid sick leave prior to the end of a calendar year or carry over unused sick leave; or
2. Only allow employees to carry over unused sick leave.

The NYSSLL does not require that unused sick leave be paid out at termination.

#### ADVANCED NOTICE

In response to public comments, the DOL confirmed that employees are entitled to use sick leave as soon as it is accrued and that advanced notice of leave is not required, even for foreseeable absence, such as a scheduled doctor’s appointment.

#### FAILURE TO PAY SICK LEAVE

Also in response to public comments, the DOL stated that failure to pay sick leave under the NYSSLL is equivalent to a failure to pay wages. Thus, an employer that fails to pay an employee for a covered sick leave absence would be subject to the same penalties that apply for a failure to pay wages.

Employers should review their sick leave policies to ensure they comply with the NYSSLL in all respects and consider training managers and supervisors about the law.

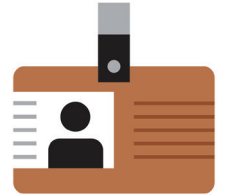
#### Additional Assistance

*For further assistance, please contact any of the attorneys on our [Labor & Employment Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■*



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