

**Bond** August 26, 2020

New York Paid Sick Leave: Part II



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**Presenters**



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**Agenda**

- Review of the Basics
- Other than Full-time Employees
- **Integration with Other Policies**
- Documentation
- Collective Bargaining Agreements
- Calculation of Rate of Pay
  
- Answering more of YOUR Questions



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**Review of the Basics**





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**Review of the Basics**

- NYPSL requirements are based on the size/income level of the employer:

Private Employer Size	PSL Required
4 or fewer employees (net income \$1M or less)	40 hours of <u>unpaid</u> sick time
4 or fewer employees (net income <u>greater than</u> \$1M)	40 hours of paid sick time
5-99 employees	40 hours of paid sick time
100 or more employees	56 hours of paid sick time

- To determine number of employees, use the prior calendar year?



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**Review of the Basics**

- Accruals of NYPSL must begin on September 30, 2020.
- Use of NYPSL must begin on January 1, 2021.
- Job Restoration / Non-Discrimination / Non-Retaliation requirements
- NYPSL use and availability tracking required
- Still no guidance or regulations from NYSDOL



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**Review of the Basics**

- Employers can choose to have NYPSL:
  - Accrue at a rate of 1 hour earned per every 30 hours; or
  - "Front-loaded".
- Mandatory employee "carry over" between calendar years (or accrual year length):
  - Under 100 employees → up to 40 hours / year
  - 100 or more employees → up to 56 hours / year
- Maximum use increment allowable = 4 hours of NYPSL
- No payout required at separation (include forfeiture in policy).



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**Review of the Basics**

- NYPSL can be used as soon as it is earned.
- There are specific enumerated circumstances when NYPSL can be used:
  1. For a *mental or physical illness, injury, or health condition* of an employee or an employee's family member, regardless of whether the illness, injury, or health condition has been diagnosed or requires medical care at the time that an employee requests such leave;
  2. For the *diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for,* an employee or an employee's family member
  3. When an employee or an employee's family member has been the *victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking*



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**Employees Other than Full-Time**




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**Employees Other than Full-Time**

- As written, legislation does not contain an exemption for:
  - Part-time
  - Temporary
  - Casual
  - Student
  - Seasonal, or
  - Per diem employees
- If you issue an IRS Form W-2 → must currently assume the worker is a covered "employee" for purposes of NYPSL (absent contrary guidance from NYSDOL).



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**Employees Other than Full-Time**

- **Q: How do we calculate and front-load NYPSL for part-time, temporary, and seasonal employees?**
  - A: Not addressed in the statute. Potential options include: (i) proration based on number of hours worked in a set previous time period (ex. one year, six months, six weeks); or (ii) proration based on number of hours scheduled for the current year.
- **Q: Can a part-time employee still accrue up to 40 or 56 hours of NYPSL?**
  - A: Not addressed in the statute. Potential interpretation permits proration (see above), but statute can be read otherwise.
- **Q: Do part-time employees earn NYPSL in less than one hour increments? For example, if an employee works 15 hours, do they earn a half an hour of leave?**
  - A: No. The statute states that an employee only earns one hour of leave when they have worked 30 hours. It does not contemplate or require smaller accruals.



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**Employees Other than Full-Time**

- **Q: Does the 30 hours have to be worked in one week for an employee to earn 1 hour of NYPSL time?**
  - A: No. If using the accrual option, the employee earns 1 hour of NYPSL for every 30 worked by the employee, whether those 30 are within one week or not.
- **Q: What if a per diem employee never works enough hours to accrue their maximum?**
  - A: Employees are allowed to use as much leave as they have been front-loaded or have accrued.



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### Integration With Other Policies



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### Integration with Other Policies

- An employer is not required to provide additional sick leave under the new law *"if the employer has adopted a sick leave policy or time off policy that provides employees with an amount of leave which meets or exceeds the requirements of this section, and satisfies the accrual, carryover, and use requirements."*
- Existing PTO and sick leave policies may be modified to account for NYPSL, with special attention paid to accrual, carryover and use.



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### Integration with Other Policies

- Considerations:
  - Include accrual, carryover and use information.
  - Include definitions of relevant terms.
  - Policies should prohibit discrimination, harassment and retaliation for employees who use the leave or make a complaint of the same.
  - Existing policies, even if they meet the hours requirements, should explicitly be modified to include the enumerated uses of the leave.
  - Policies should reflect other leave law policies, paid or unpaid, such as federal contractor, FMLA, NYPPFL, CBAs, etc. (and those policies should be modified to reflect NYPSL, as well).



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**Integration with Other Policies**

- **Q: Can we terminate our current sick leave plan and only use the NYS model?**
  - A: Yes, but make sure to consider the following:
    - NYS assumes payout of accrued time, unless otherwise stated (no retroactive forfeiture of earned benefits)
    - Provide employees with appropriate notice
    - May need to provide time for employees to use existing leave
    - Whether other paid leave polices should be revised, too



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**Integration with Other Policies**

- **Q: We have a “good attendance” bonus, and/or we discipline employees for poor attendance; does NYPSL affect these policies?**
  - A: Leave for NYPSL qualifying reasons should not disqualify an employee for a bonus or subject the employee to discipline.
- **Q: Can an employer dictate the order in which different types of leave must be used, for example NYPSL before NYPFL or before FMLA?**
  - A: Employers can seemingly have NYPSL run concurrently with FMLA if the reason for the leave concurrently qualifies for FMLA leave. Employees can choose whether they want to use NYPSL in conjunction with NYPFL to receive full pay.



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**Integration with Other Policies**

- **Q: Can an employer mandate that employees use their PTO before their NYPSL?**
  - A: Not likely. Generally, employees must be able to use NYPSL for qualifying reasons, at the employee’s election. But... you may be able to set up your PTO policy, such that PTO is used to satisfy NYPSL obligations.
- **Q: If an employee is on furlough as of January 1, 2021, how does NYPSL work for them?**
  - A: Not addressed in the statute. A reasonable interpretation would entail the employee receiving front-loaded NYPSL when they return to work, or accruing leave using the 1/30 method when they begin work.



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### Integration with Other Policies

- Hypothetical #1:
  - A manufacturer has 250+ employees and a PTO policy in place, providing paid leave for workers to use in all circumstances (vacation, sick, personal, etc.).
  - Employees are eligible for PTO after one year of service.
    - Employees with 1 to 3 years of service receive 40 hours.
    - Employees with 3-5 years receive 80 hours.
    - Employees with 5 or more years receive 120 hours.
  - All time is front-loaded at the start of the calendar year, and must be used in "full day" increments.
  - Unused PTO is forfeited at the end of the year, absent special circumstances, and not paid out at separation.



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### Integration with Other Policies

- Hypothetical #2:
  - A business has 45 employees and currently provides a combination of paid vacation, personal, and sick time.
  - Employees are eligible to accrue vacation and personal time after one year of service; they are eligible to accrue paid sick time immediately upon hire.
    - Sick time = 24 hours
    - Vacation time = 40 hours (after one year, more with seniority)
    - Personal time = 8 hours (after one year)
  - All paid time accrues at a rate of 1 hour for every 2 days worked.
  - All accrued, unused time is paid-out at end of year (no roll-overs, absent special circumstances) and at termination, unless termination is "for cause."



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### Documentation

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**Documentation**

- Employers must track how much NYPSL their employees have used and accrued.
  - In the current calendar year; and/or
  - In **any** previous calendar year
- This information must be provided upon oral or written request of the employee, within three days of the employee's request.



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**Documentation**

- **Q: Does the accrued number of NYPSL hours need to be displayed on an employee's paycheck?**
  - A: The statute does not contain such a requirement. The statute only requires that employers inform employees of how much NYPSL is used/available within 3 days of the oral or written request.
- **Q: When NYPSL is combined / included with PTO, does an employer still have to tell an employee how much NYPSL they have available?**
  - A: Yes, but it may be sufficient to just specify how much PTO is left (since that could be used for qualifying NYPSL reasons).



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**Documentation**

- **Q: Do employees have to provide notice to use NYPSL?**
  - A: No. The statute does not mandate that employees provide notice of any kind before using NYPSL?
- **Q: Can an employer require medical documentation before granting NYPSL?**
  - A: Not likely. Also, employers may not require the disclosure of confidential information relating to a mental or physical illness, or information relating to absence due to domestic violence, stalking, etc. as a condition of providing sick leave. "Confidential information" is not defined.



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**Collective Bargaining Agreements**

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**Collective Bargaining Agreements**

- Under the statute, nothing in the law should be read to:
  - Prohibit a CBA – entered into, **on or after** September 30, 2020 – from, in lieu of NYPSL, providing a comparable benefit for bargaining unit employees in the form of paid days off, and such paid days off can be in the form of leave, compensation, other employee benefits, or some combination of those pay/benefits; or
  - Impede the ability of the parties to negotiate the terms and conditions of sick leave different from those in the NYPSL legislation.
  - **But**, if either of these options is exercised, the CBA "must specifically acknowledge the provisions" of NYPSL (to be codified at NYLL Sect. 196-b.)

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**Collective Bargaining Agreements**

- **Q: What should an employer do about an existing CBA and NYPSL?**
  - A: It depends. Work with your labor attorney to identify a plan of action.
- **Q: What if our CBA does not expire until June 30, 2021; can we wait until then to address NYPSL?**
  - A: It depends. Here too, consult with your labor attorney.

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Calculation of Rate of Pay



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Calculation of Rate of Pay

- **Q: Employees must be paid for NYPSL at their “regular rate of pay.” What does this term mean?**
  - A: Not addressed in the statute. Under other state and federal wage and hour laws, “regular rate” has a very particular legal meaning. Pending guidance from NYS, it could be that commissions, shift differentials, and other non-discretionary incentives need to be included for non-exempt employees.

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Answering Your Questions



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### Answering Your Questions

- A company has New York-based employees who work in Vermont part of the year. How do we calculate their NYPSL?
- If an employee accrues the max 40/56 hours of leave, do accruals stop until an employee uses some of the leave?
- May an employee use NYPSL to care for a child with COVID-19?
- May an employer use the employees "anniversary date" to front-load leave?



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### Answering Your Questions

- Can an employer pay out sick time at the end of the year, or must it be carried over?
- How does an employer track sick leave for exempt employees?
- Can an employer discipline an employee for using more than 40/56 hours of time for a qualifying reason under NYPSL?
- Do vacation or unpaid hours "count" towards NYPSL accrual?



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### Answering Your Questions

- When determining employer size for amount of leave qualification, are employees outside of NYS "counted?"
- May we payout NYPSL at retirement, but not at separation?
- May an employer front-load NYPSL for existing employees, but have all new employees accrue the leave?
- How does NYPSL interact with short-term disability?



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Other Questions?



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