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THE NEW YORK STATE SICK LEAVE LAW TAKES EFFECT SEPTEMBER 30TH

Effective September 30, 2020 all employers will now be required to provide sick leave to all New York employees. However, whether the leave entitlement is paid or unpaid is determined by employer size and net income. While the law takes effect on September 30, employees may not begin using any accrued sick leave until January 1, 2021.[1] As further discussed below, employers should assess their current sick leave policies to ensure compliance with the new law.

I. **Availability and Accrual**

- Employers with four (4) or fewer employees in any calendar year with a net income of more than one million dollars "in the previous tax year" must provide up to **forty (40) hours** of **paid** sick leave in each calendar year. An employer's net income of less than one million renders the forty (40) hour leave entitlement **unpaid**.

- Employers who employ between 5 and 99 employees in any calendar year, must provide up to **forty (40) hours** of **paid** sick leave in each calendar year;

- Employers who employ 100 or more employees in any calendar year must provide up to **fifty-six (56) hours** of **paid** sick leave in each calendar year.

For purposes of determining an employer's size under the law, a calendar year is defined as the twelve (12) month period from January 1 to December 31.

For all other purposes (i.e. accrual), a calendar year means the twelve (12) month period from January 1 through December 31, or a consecutive twelve-month period, as determined by the employer.

Employers can elect to adopt an accrual or "frontloading" paradigm in its allocation of leave. Where the employer elects an accrual method, the law requires employees to accrue sick leave at a rate of at least **one (1) hour for every thirty (30) hours worked**. Alternatively, if an employer elects to frontload, it must do so at the beginning of its designated calendar year. Note that an employer that frontloads cannot reduce employee leave based on the number of hours actually worked by the employee.

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[1] See NYLL § 196-b.

II.   Permitted Uses and Restrictions

Sick leave may be taken for:

- An employee's or employee's family member's mental or physical illness, injury, or health condition,

- The employee's or employee's family member's diagnosis, care, or treatment of a mental or physical illness, injury or health condition, or for preventive care; or

- Certain needs related to the employee or the employee's family member being the victim of domestic violence, sexual offenses, stalking, or human trafficking.

Section 196-b also provides for certain restrictions on the use of sick leave:

- Employers may set a "reasonable" minimum increment for the use of sick leave, but that incremental use cannot exceed four (4) hours.

- Unused but accrued sick leave may be carried over to the following year, though employers can limit the amount of sick leave an employee may use in a given calendar year.

- Employers need not pay out accrued sick leave upon an employee's separation or termination of employment.

- Employers cannot "discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because that employee has exercised his or her [sick leave] rights" under the law, and must return employees to the same position as held before the leave with the same pay and terms and conditions.

III.   Existing Policies and Collective Bargaining Agreements

The law does not preempt or affect existing city or county level paid sick leave laws. To that effect, employers who are covered by the New York City Earned Safe and Sick Time Act (the "ESSTA") or the Westchester County paid sick leave law must continue to provide employees with leave that meets the requirements of both the state and local laws.

For union employees, collective bargaining agreements entered into on or after September 30, 2020 may provide for a comparable benefit in the form of leave, compensation, other employee benefits (or some combination thereof), so long as the agreement "specifically acknowledge[s]" the provisions of the law.

IV.   Conclusion and Recommendations

Significant portions of the new law remain unclear and are open to interpretation. For example, whether employers should count out-of-state employees in determining the leave entitlement for its New York workforce remains unclear. Furthermore, how the law should align with current PTO policies is also not addressed by the statute. The law grants the New York State Department of Labor ("NYSDOL") the authority to adopt regulations, which may address these issues. However, to date, regulations have not been promulgated.

Nevertheless, employers should begin to review their existing sick leave policies to determine if they comply with the new law and should certainly begin tracking hours for accrual purposes starting September 30, 2020. Meltzer Lippe will continue to monitor and report on all developments regarding the new law. Until then, please do not hesitate to call your Meltzer Lippe contact with any further questions.

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