

# LAW ALERT

## HEALTH CARE

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By Ellen F. Kessler, Esq.



## Mandatory Sick Leave Law in New York City

Did you know that New York City has a law that requires employers to give their employees paid sick leave if they meet certain requirements?

Under New York City's "Earned Sick Time Act"[1] ("Paid Sick Leave Law") employers with five (5) or more employees who work more than 80 hours in a calendar year in New York City ("NYC") are required to provide paid sick leave to each such employee. The amount of paid sick leave required under the law is up to 40 hours[2] per calendar year[3], to be paid at the employee's regular hourly rate, which can be no less than the minimum hourly wage. If an employer has fewer than five (5) employees who work more than 80 hours a calendar year in NYC, then up to 40 hours of unpaid sick leave must be provided.[4]

The purpose of the Paid Sick Leave Law is to ensure that employees in NYC can use sick leave for any illness, injury, health condition or preventive care for themselves or a family member. Sick leave can also be used to care for a child whose school is closed due to a public health emergency, or if the employee's workplace is closed due to a public health emergency. Providing paid sick leave is intended to have a positive impact on the public health by fostering a healthier and more productive work environment.

The employer cannot ask the employee for the reason the employee is out sick, or require the employee or a health care provider to disclose details of the employee's or family member's illness that required the use of sick leave. However, the employer can require the employee to submit written verification that the employee used the sick leave for proper sick leave purposes. The employer can also require the employee to produce a note from a licensed medical provider to attest to the need for sick leave and for the number of sick days or hours used, provided that more than three (3) consecutive days of sick leave are taken, and such documentation requirement is part of the employer's written policy. The employee is responsible for any cost associated with providing the documentation and must produce it within seven (7) days after returning to work.

One way an employer in NYC can avoid the requirement of having a paid sick leave policy is to provide other "paid time-off" under policies that meet or exceed the requirements of the Paid Sick Leave Law, provided that such other paid time-off can be used for sick leave. For example, if an employer provides its employees with at least 40 hours per calendar year of paid vacation time, which the employee may use for sick leave purposes, the employer is not required to provide additional paid sick leave time.

In addition, the Paid Sick Leave Law does not apply to certain employees, including those who work 80 hours or less in a calendar year, employees of government agencies, individuals who are independent contractors and do not meet the definition of an “employee” under New York State Labor Law, or to certain employees subject to a collective bargaining agreement, among others. Whether an individual is an employee or an independent contractor depends on several factors including, but not limited to, how much supervision, direction and control the employer has over the individual and the services provided. Workers may actually meet the legal definition of “employee” and be entitled to paid sick leave, even though they are classified by the employer as “independent contractors”. Just because an employer issues a 1099 tax form to a worker, or has the worker sign a contract stating that he/she is an independent contractor does not mean the worker would actually be considered so by the Departments of Labor or Taxation and Finance. Employers should be wary of this potential problem and consult their legal advisors for advice on this issue.[5]

Employers in NYC must provide each employee with written “Notice of Employee Rights” with respect to sick leave, explaining the accrual process, the use of sick leave, and the employee’s rights under the law. It is recommended, although not required, that employers keep a copy of the Notice of Employee Rights signed by each employee as evidence that the employer gave all employees the required notice. Employers must also distribute to the employees, or post, a written copy of the employer’s policies on sick leave. Records documenting compliance with the Paid Sick Leave Law’s requirements must be maintained by employers, including a copy of employer policies and records of the use of employee sick leave and accrual, for a period of at least three years.

Employers may establish policies requiring employees to provide “reasonable notice” before using sick leave, or setting a minimum daily amount of leave up to four (4) hours that must be taken for the use of sick leave, as long as such policies are in writing and given to the employees. Employers may also maintain a written policy permitting employees to donate unused sick leave to other employees, provided such donation is voluntary.

Even if an employer is located outside of NYC, but has at least five (5) employees who work for the employer within NYC, the employer is required to provide paid sick leave to those employees who work in NYC more than 80 hours a year. For example, a Home Health Care Company located in Westchester County that employs nurses who are assigned to work in patients’ homes in the Bronx, must provide paid sick leave to those who work more than 80 hours a calendar year in NYC, if there are at least five (5) such employees, and unpaid sick leave if there are fewer than five (5) employees. Only the hours worked in NYC count towards the 80 hour requirement, and the employer is only required to provide sick leave for hours the employee spends working in NYC. The law applies equally to employees who are full-time, part-time, temporary, probationary, “per-diem”, on-call, undocumented[6], family members of the business owner, supervisors, or managers, regardless of where the employee lives, or where the employer’s business is located. Application of the law depends on whether the employee physically works in NYC more than 80 hours per calendar year. Thus, if Jane works 50 hours in Nassau County and 60 hours in NYC in a calendar year, Jane is not covered under the Paid Sick Leave Law and is not entitled to paid sick leave since the 50 hours worked in Nassau County do not count towards the required minimum of 80 hours.[7]

An employee (except for a domestic worker) who is entitled to sick leave can start to use accrued sick leave 120 days after the start of employment. Up to 40 hours of accrued but unused sick leave can be carried over to the next calendar year, or the employer can choose, but is not required, to pay the employee for the accrued and unused sick leave up to 40 hours, at the end of the calendar year, instead of carrying it forward. The employer cannot agree to pay the employee for sick leave on an “as-accrued” basis, only at the end of a calendar year. If an employer allows carry-over, the employee can begin to use the accrued sick leave hours immediately without any waiting period, up to 40 hours per calendar year. If an employee resigns, retires or is terminated for any reason, the employer is not required to pay the employee for unused sick leave under the Paid Sick Leave Law.

An employer may provide more generous sick leave to its employees than the law requires. The employer may also provide more generous sick leave to only some employees and not others[8]; provided that at least the minimum sick leave requirements are provided to all employees who are eligible.

Employees are entitled to file a complaint with the NYC Department of Consumer Affairs (DCA) if an employer fails to comply with the Paid Sick Leave Law, provided such complaint is filed within two (2) years from the date the employee knew or should have known of the violation. The DCA will investigate and attempt to resolve the complaint through mediation and settlement. If not resolved to the DCA's satisfaction, the DCA may issue a Notice of Violation to the employer and seek appropriate remedies in an administrative tribunal. The law also provides that the DCA may impose substantial monetary penalties on employers for violation of the Paid Sick Leave Law, payable to the DCA. In addition, employees may be entitled to receive certain monetary relief where the employer has violated the law.

The Paid Sick Leave Law is an important benefit for employees and although it may be costly to employers, it also provides potential benefit to employers in the form of a more healthy and productive work force. Employers would be wise to consult with their legal advisors and familiarize themselves with the requirements of the Paid Sick Leave Law so that they are in full compliance and do not suffer adverse consequences.

[1] Chapter 8 of Title 20 of the Administrative Code of the City of New York.

[2] Paid sick leave is accrued at the rate of one hour of sick leave for every 30 hours worked, up to a maximum of 40 accrued hours in a calendar year.

[3] Under the Paid Sick Leave Law, "calendar year" means any consecutive 12 month period as determined by the employer. For example, it may be the employer's fiscal year, a tax year, a contract year or a year from January 1st to December 31st.

[4] Employers with one or more domestic workers who work more than 80 hours a calendar year in NYC and who have worked for the employer for at least one year must provide two (2) days of paid sick leave for each such domestic worker. This is in addition to the three (3) days of paid rest to which domestic workers are entitled under New York State Law.

[5] In addition to the sick leave issue, employers may face other challenges for misclassifying workers as "independent contractors" instead of "employees".

[6] The Paid Sick Leave Law applies to all employees irrespective of their immigration status.

[7] Currently, Nassau County does not have a mandatory sick leave law in effect.

[8] The employer must, however, be certain not to run afoul of any other law or regulation

**For more information please contact  
Ellen F. Kessler, Esq. at [ekessler@rmfpc.com](mailto:ekessler@rmfpc.com) or 516-663-6600**

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