

## 6 Key Areas Of Compliance Change For NY Employers In 2021

By **Leni Battaglia and Ashley Hale** (January 15, 2021, 5:58 PM EST)

As if managing a workforce through a pandemic wasn't hard enough, employers in New York are beginning the new year with the challenge of adapting their policies and practices to comply with a host of new and revised employment laws.

The state's employment laws are becoming ever more employee-friendly, and employers should be on the lookout for that trend to continue into the new year.

From new sick leave laws that vary depending on city and state laws, to an increase in minimum wage in certain locations, to laws that will specifically affect the fast food industry, employers should update their formal policies to stay compliant and avoid potential enforcement actions and/or lawsuits.



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### **New York State Paid Sick Leave Law**

As of Jan 1, employees could start using the leave they began accruing on Sept. 30, 2020 — up to 56 hours per year at large employers.

Employees only accrue sick leave after working 30 hours, and "only for the hours when they are physically working in New York state, even if the employer is physically located outside New York state."



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This requirement requires special attention now, as employees who are typically based out of state may be living in New York while working remotely during the COVID-19 pandemic.

Similarly, those previously working in New York would not accrue additional hours now if they are working remotely from a location outside the state.

Sick leave accrues at the rate of one hour for every 30 hours worked, but employers can front-load the maximum amount at the beginning of the year. By front-loading the maximum, unused time can be forfeited without pay at the end of the year.

Employees can use leave to take care of themselves or to care for a family member for physical or mental illness, diagnostic care, or safe leave when an employee or his or her family member has been the victim of domestic violence, a sexual offense, stalking, or human trafficking.

## **New York City Earned Safe and Sick Time Act**

New York City employers must also consider the amendments to the New York City Sick Leave Law, including the increase in the amount of leave available for some employees — up to 56 hours for employers with 100 or more employees.

Like the state's sick leave law, newly required leave began to accrue on Sept. 30, 2020, and employees could start using this leave as of Jan. 1.

Other important changes include the fact that the law applies to all individuals employed within New York City — not just those who work for 80 hours in New York City, which was a previous requirement.

Additionally, employees can use the leave as it accrues and no longer need to wait 120 days from their start date.

Under a requirement that went into effect Jan. 1, employees must receive written documentation for each pay period that includes the amount of leave accrued and used during the applicable pay period as well as the total accrued leave balance.

Finally, as of Jan. 1, employers with 100 or more employees were to have posted and distributed the city's updated Notice of Employee Rights.

Employers should review their policies to ensure they provide the required amount of leave and remove provisions from prior policies that no longer are compliant with these laws. Employers should also consider adding language to their current sick leave policies to make clear that city and state sick leave run concurrently and that employees are not entitled to separate allotments of leave under each law.

Both sick leave laws provide benefits that can run together, but generally run separate and apart from those provided by other state laws, such as New York State COVID-19 Paid Sick Leave and New York Paid Family Leave.[1]

## **Increase in Paid Family Leave Available to Employees**

The Paid Family Leave Law, or PFL, provides eligible employees with job protected, paid time off to bond with a new child, care for a family member with a serious health condition, or to assist loved ones when a family member is deployed abroad on active military service.

As of Jan. 1, some employees were eligible for increased amounts of paid family leave under the PFL.

Leave for eligible employees increased from 10 weeks to 12 weeks.

As of Jan. 1, the wage replacement benefits under the law also increased to 67% of the employee's average weekly wage (capped at \$971.61).

These increased PFL benefits only apply to new leaves beginning on or after Jan. 1 and do not apply to leaves that began in 2020 and continue into 2021, for example, where an employee had a new child in December 2020.

Employers should ensure that any applicable payroll deductions are appropriately updated. The 2021 contribution is 0.511% of an employee's gross wages each pay period. The maximum annual contribution is now \$385.34.

### **Increase in Minimum Wage**

On Dec. 31, 2020, the minimum wage in Long Island and Westchester County increased to \$14 per hour, and the statewide minimum wage has increased to \$12.50 per hour.

There was no increase to the New York City minimum wage of \$15 per hour that was already in effect.

Additionally, the minimum salary that employers must pay exempt employees classified as executive or administrative employees to maintain the exemption from New York's overtime requirements increased to \$1,050 per week for employees in Nassau, Suffolk and Westchester Counties, and increased to \$937.50 per week for the remainder of the state outside of New York City — where the minimum required salary did not change and remains \$1,125 per week).

Employers should take a careful look at their payroll to make sure that employees who have been classified as exempt pursuant to the executive or administrative exemption are earning enough per week to maintain the exemption.

### **New York City Just Cause Legislation for Fast Food Workers**

On Jan. 5, Mayor Bill de Blasio signed two laws that will greatly impact fast food employers in New York City.

Taken together, the Fast Food Employee Layoffs and Just Cause Termination laws eliminate at-will employment for fast food employers in New York City, create additional evidentiary burdens on employers and provide additional remedies and means of redress for potentially aggrieved employees.

The laws will largely take effect July 4, except that the city's Department of Consumer and Worker Protection's authority to enforce the laws and issue fines and remedies is to begin on Sept. 2.

The arbitration provisions, discussed below, will take effect Jan. 1, 2022.

The Just Cause Termination law prohibits a restaurant from terminating an employee without just cause, which includes a requirement to use a progressive discipline policy.

Employers have the burden to meet the standard by a preponderance of the evidence.

An employer can terminate an employee for "just cause" without applying progressive discipline in the event of "an egregious failure by the employee to perform their duties, or for egregious misconduct."

There is also a 30-day probationary period during which new employees are not covered by the law.

The layoff law prohibits fast food employers from laying off employees without a bona fide economic reason.

When they occur, economic layoffs must be done in reverse order of seniority. An employer is also

required to make "reasonable efforts" to offer reinstatement to any employee laid off based on a bona fide economic reason within the previous 12 months before hiring any new employees.

Allegedly aggrieved employees can pursue one of three options: (1) an administrative charge through the city, (2) a private lawsuit, or (3) binding private arbitration.

The Department of Consumer and Worker Protection can also designate a representative party to bring a class arbitration. Further guidance is expected in the coming months.

### **Amendment to New York City's Fair Chance Act**

The New York City Council has passed legislation to expand New York City's Fair Chance Act, and further restrict New York City employers from taking adverse actions against applicants or employees based on their criminal history. The law is to go into effect in July 2021.

Employers will now be required to go through the fair chance process before taking any adverse action against a current employee for pending arrests or criminal accusations.

Additionally, because of the changes to the New York City Human Rights Law to expand protections to independent contractors, employers must ensure that they are applying the Fair Chance Process to those individuals as well.

The amendment also prohibits any inquiries or adverse actions based upon an applicant or employee's violations and noncriminal offenses, nonpending arrests or criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications, or convictions sealed pursuant to certain sections of the criminal procedure law.

The law also establishes factors, which are similar to the Article 23-A factors, that employers must consider to assess any pending arrests, criminal charges, or convictions that occur prior to or during employment.

### **Key Takeaways**

Employers should conduct reviews of sick leave policies, wage statements, employee notices, hiring and discipline practices, and COVID-19 protocol to ensure compliance with these new laws and amendments to old laws.

As we have seen, even minor or technical violations can quickly lead to potential liability, enforcement actions and/or lawsuits.

Additionally, New York City employers should provide appropriate training to human resource and hiring departments to ensure that application questions and recruiting processes, as well as payroll policies and practices, are in compliance with these new requirements.

Finally, employers should monitor forthcoming guidance from state and city agencies regarding critical interpretations of these new laws as they continue to come into effect in 2021.

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[1] Further, while not a new requirement, unlike the federal Families First Coronavirus Response Act and many other jurisdictions' COVID-19 sick leave laws, the New York State COVID Sick Leave Law did not expire at the end of 2020, and employees are still entitled to use this leave when eligible (i.e., eligible employee subject to a quarantine order can use up to two weeks of paid sick leave depending on employer size). Relatedly, while also not a new requirement, the New York State and City annual sexual harassment training requirements remain in effect.