thousand or greater population 'rural areas' means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein."

The following 44 counties have an estimated population of less than 200,000 based upon the 2019 United States Census county populations projections:

| | | |
|---|---|---|
| Allegany County | Greene County | Schoharie County |
| Cattaraugus County | Hamilton County | Schuyler County |
| Cayuga County | Herkimer County | Seneca County |
| Chautauqua County | Jefferson County | St. Lawrence County |
| Chemung County | Lewis County | Steuben County |
| Chenango County | Livingston County | Sullivan County |
| Clinton County | Madison County | Tioga County |
| Columbia County | Montgomery County | Tompkins County |
| Cortland County | Ontario County | Ulster County |
| Delaware County | Orleans County | Warren County |
| Essex County | Oswego County | Washington County |
| Franklin County | Otsego County | Wayne County |
| Fulton County | Putnam County | Wyoming County |
| Genesee County | Rensselaer County | Yates County |
| | Schenectady County | |

The following counties of have population of 200,000 or greater, and towns with population densities of 150 person or fewer per square mile, based upon the 2019 United States Census population projections:

| | | |
|---|---|---|
| Albany County | Monroe County | Orange County |
| Broome County | Niagara County | Saratoga County |
| Dutchess County | Oneida County | Suffolk County |
| Erie County | Onondaga County | |

Reporting, Recordkeeping, and other Compliance Requirements; and Professional Services:

These regulations provide that testing may be required under certain circumstances and in certain settings, as determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread. As part of a Commissioner's testing-related determination, this regulation permits the Commissioner to request information/data related to the elements set forth in the determination. Lastly, these regulations also set forth specific COVID-19 testing and positive test reporting requirements for schools, carrying forward the reporting requirements in place during the 2020-2021 school year.

Costs:

In imposing testing requirements pursuant to a Commissioner's determination, the Commissioner, in consultation with the Department, will consider costs and how they may be offset. For example, testing for certain populations is supported by federal grant funding. The State has received approximately 335 million dollars in federal Epidemiology and Laboratory Capacity for Infectious Diseases Cooperative (ELC) Agreement School Reopening Funding through at least July 31, 2022 with the possibility for future funding periods. The New York City Department of Health and Mental Hygiene has received an award for this purpose of approximately 251 million dollars. These amounts are believed to be sufficient to offset any costs associated with any school-related testing in New York State that may be required pursuant to this regulation, such that the fiscal impact on Local Health Departments and schools is minimized. Costs for testing can also be offset by testing that is offered under Operation Expanded Testing which is free testing in K-12 schools and other congregate settings which is funded by the Department of Health and Human Services (HHS) and Department of Defense (DoD).

With regard to the COVID-19 school reporting requirement, schools had to submit daily reports related to COVID-19 testing and diagnoses for the 2020-2021 school year. These regulations carry forward this reporting requirement and is not expected to generate any additional cost.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule requirements.

Minimizing Adverse Impact:

Any adverse impacts related to school reporting requirements are expected to be minimal, as it carries forward reporting requirements that schools were required to implement last year. The Department, however, will work with schools to ensure they are aware of the new regulations and have the information necessary to comply.

With regard to minimizing adverse impacts related to the Commissioner's authority to issue test-related determinations, many settings have been increasingly implementing COVID-19 prevention strategies, with testing being one such example. Specifically, schools became familiar with COVID-19 testing last year when the Department provided no cost antigen test cards as part of the microcluster testing initiative. Some schools have already implemented regular pooled surveillance testing to give communities confidence in the safety of their schools. Where the Commissioner issues a testing-related determination, the Department will work with the entities subject to such determination to provide the guidance necessary to comply.

Rural Area Participation:

Due to the emergent nature of COVID-19, parties representing rural areas were not consulted.

***Job Impact Statement***

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no impact on jobs and employment opportunities. The primary purposes of this rule is to carry forward COVID-19 related reporting and to permit the Commissioner to impose COVID-19 testing requirements in certain settings based on specified criteria.

# Department of Labor

## NOTICE OF ADOPTION

### Sick Leave Requirements

**I.D. No.** LAB-49-20-00012-A
**Filing No.** 1233
**Filing Date:** 2021-12-08
**Effective Date:** 2021-12-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

***Action taken:*** Addition of Part 196 to Title 12 NYCRR.

***Statutory authority:*** Labor Law, sections 21(11), 196-b(13) and 199

***Subject:*** Sick Leave Requirements.

***Purpose:*** To provide definitions and standards for the sick leave requirements contained in section 196-b of the Labor Law.

***Text or summary was published*** in the December 9, 2020 issue of the Register, I.D. No. LAB-49-20-00012-P.

***Final rule as compared with last published rule:*** No changes.

***Text of rule and any required statements and analyses may be obtained from:*** Michael Paglialonga, NYS Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY 12240, (518) 485-2191, email: regulations@labor.ny.gov

***Initial Review of Rule***

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2024, which is no later than the 3rd year after the year in which this rule is being adopted.

***Assessment of Public Comment***

The Department of Labor ("Department") received comments from interested stakeholders. Some comments support the rule, while other comments request changes to or clarification of the rule.

Carry Over

Comment 1: Commenters suggested a limitation on the number of hours that employees can carry over to the following year, particularly when employers "front load" leave time.

Response 1: No limitation is contemplated in Labor Law Section 196-b ("the statute") and imposing such would exceed the permissible scope of this rulemaking.

Comment 2: Commenters suggested employers that currently pay for unused paid time off would be harmed by the requirement to carry over unused sick leave and could create confusion amongst other paid time off practices.

Response 2: Nothing in the Labor Law or this rule affects the practice of paying for unused paid time off. Employers are not required to integrate this sick leave with their existing paid leave policies, as other forms of leave are not subject to the statute's requirements or this rule.

Comment 3: Commenters suggested the ability pay out accrued sick leave time rather than carrying over hours.

Response 3: While the statute requires that employers carry over unused sick leave to the next calendar year, employers may do one of the following: (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.

Employee Rights

Comment 4: A commenter suggested that allowing employees to immediately use sick leave upon accrual will result in newer employees abusing the use of sick leave.

Response 4: Nothing in the statute limits applicability to full-time or long-term employees, and imposing such would exceed the permissible scope of this rulemaking.

Comment 5: Commenters suggested the rule include information on the rights of employees to file administrative complaints and court actions, and to be free from retaliation.

Response 5: Such provisions already exist in the Labor Law and are outside of the scope of this rulemaking. Relevant information is also available within existing Department guidance.

Other Leave Usage

Comment 6: A commenter suggested employees be required to use sick leave when taking time off for one of the covered reasons under the statute, to the exclusion of other available leave.

Response 6: Such a requirement may conflict with other statutory or collectively bargained employee leave options and therefore will not be included in this rulemaking.

Comment 7: Commenters suggested clarification on how employers should treat any conflict between the statute's requirements and other leave policies, and questioned whether shared accrual banks are permissible under the statute.

Response 7: While the Department understands there may be occasional conflicts between an employer's existing leave policies and the statute, the statute permits such alternative compliance so long as the standards set in the accrual, use, and carryover provisions are met.

Comment 8: A commenter suggested flexibility for employers when required to provide summaries of used leave.

Response 8: The statute requires that employers provide a summary of the amounts of sick leave accrued and used by employees in the current and/or any previous calendar year. The use and documentation of other leave types is outside of the scope of the present rule.

Comment 9: A commenter suggested changing the references in § 196-1.4(a) from "paid leave" and "unpaid leave" to "paid sick leave" and "unpaid sick leave" to eliminate any confusion with other employer offered leave.

Response 9: The statute allows employers to adopt "a sick leave policy or time off policy" (emphasis added) that meets or exceeds the requirements of the law. As such, no clarification is necessary.

Comment 10: Commenters suggested clarification on how the statute interacts with other state and federal statutes.

Response 10: The Department declines to opine on any potential conflict with existing state or federal statutes, apart from asserting that none are believed to exist.

Collective Bargaining Agreements ("CBAs")

Comment 11: Commenters suggested that additional language governing CBAs be added to the rule, and several commenters posed interpretation questions related to CBAs.

Response 11: These comments are outside of the scope of this rulemaking, which does not directly address CBAs.

Employee Count

Comment 12: Commenters asked whether the employee count used to assess the statute's requirements includes only employees who work within New York State.

Response 12: While not addressed in this rulemaking, for the purpose of determining an employer's number of employees, the Department interprets the statute to include all employees of the employer nationwide. However, the statute's requirement for sick leave applies only to employees in New York State.

Comment 13: Commenters expressed both concern and approval regarding the proposal to use the highest number of concurrently employed employees to establish employers' obligations under the statute. Commenters suggested that employee counts should not include employees who are not reasonably expected to return to active employment.

Response 13: Alternative language proposed by commenters was considered and not included. The Department may provide additional guidance for clarity as necessary.

Comment 14: Commenters requested clarification on joint employment relationships under the law.

Response 14: The rule defers to existing and settled law, court decisions, and guidance on joint employers and does not create new standard.

Documentation and Attestations

Comment 15: Commenters suggested that the Department produce a template for employee attestations.

Response 15: The Department will publish a template.

Comment 16: Commenters asked whether employers could refuse an employee's initial attestation or statements and deny leave, and suggested that documentation be permitted to be required for shorter leave requests, including situations where abuse of leave is suspected. Commenters also suggested that no documentation should be required to use leave, and that documentation requirements should only apply for periods longer than three days.

Response 16: An employer may not deny an employee leave while attempting to confirm the basis for the leave. If, however, the employer discovers the request to be false or fraudulent, disciplinary action may be taken against the employee. Employers are cautioned to not penalize or otherwise retaliate against an employee for submitting such a request or attestation, as may be prohibited by Section 215 of the Labor Law. The Department does not believe a documentation requirement for leave less than three days is necessary for investigation into potential employee abuse of sick leave and otherwise believes documentation requirements are sufficient.

Comment 17: One commenter stated that Section 196-1.3(b) of the regulations exceeds the Department's authority.

Response 17: The regulation clarifies that employers are not permitted to deny sick leave when requested medical documentation or other verification is unattainable due to associated costs.

Comment 18: One commenter suggested removing references to employee "eligibility", as it infers that employees bear the burden of proving they earned their sick leave.

Response 18: The statutory authority for this rulemaking specifically refers to "employee eligibility."

Notice to Employers and Scheduling

Comment 19: Commenters suggested clarifying that employees are not entitled to sick leave for non-workdays.

Response 19: The Department is unaware of any Labor Law provisions wherein paid leave includes days not scheduled as workdays, and therefore it is unnecessary to address this issue.

Comment 20: Commenters suggested adding an advance notice requirement for foreseeable events, or conversely a limitation on the amount of notice required for the same, and others suggested a limit on the number of times employees can "call-in" for any leave reason. Last minute changes in schedules can present operational difficulties for employers.

Response 20: As it would be difficult to create separate categories governing and classifying foreseeability, the Department declines to create a separate notice requirement for foreseeable leave.

Notice to Employees

Comment 21: Commenters suggested requiring employers to provide notice of the statute's requirements to employees. Commenters also requested the Department provide an approved notice for this purpose.

Response 21: Imposing such a mandatory requirement on employers would exceed the scope of this rulemaking.

Part-time/Per Diem/Substitute Employees

Comment 22: Commenters stated that part-time, per-diem, or substitute employees present a significant expense to employers and suggested revisions to account for per diem or replacement employees with indeterminate shift lengths, so that leave time used is consistent with the hours worked by a replacement employee.

Response 22: Adopting such a requirement would be outside the permissible scope of this rulemaking. As the statute only requires leave accruals at the rate of one hour per 30 hours worked, it is not anticipated that part-time or substitute employees will present a greater proportionate financial burden than their fulltime counterparts. The Department disagrees that used leave time should align with hours worked by another employee.

Rate of Pay

Comment 23: Commenters asked how to determine an employee's regular rate of pay, and sought to codify existing guidance.

Response 23: Methods for determining an employee's regular rate of pay already exists within the Labor Law, the regulations of the Department of Labor, relevant case law, and guidance.

Frequency/Timing of Pay

Comment 24: A commenter suggested the rule specify when employers are required to pay for used sick leave.

Response 24: Failure to provide employee benefits such as sick leave is equivalent to a failure to pay employee wages.

Incremental Accruals

Comment 25: A commenter expressed concerns with the requirement to account for sick leave accruals in increments below 30 hours.

Response 25: As the rule allows employers to round time, the language strikes the proper balance between the rights of employees and obligations of employers. Employers may elect to front load leave to employees at the beginning of the year to avoid added complexity.

Additional Regulations and Guidance/FAQs

Comment 26: Commenters suggested including additional topics that have been covered in guidance and frequently asked questions (FAQs) (as well as edits to such guidance).

Response 26: The current guidance and FAQs are sufficient in the areas referenced and as such topics are outside of the scope of the rule, no further response is appropriate.

New Definitions

Comment 27: Commenters suggested changes and additions to the rule's definitions.

Response 27: The rule's definitions, in addition to other statutory definitions found in the Labor Law, are sufficient to effectuate the purposes of the rule.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Workplace Safety Committees

**I.D. No.** LAB-51-21-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

***Proposed Action:*** Addition of Part 850 to Title 12 NYCRR.

***Statutory authority:*** Labor Law, sections 27-d(8), 21(11) and 29

***Subject:*** Workplace Safety Committees.

***Purpose:*** To comply with Labor Law section 27-d(8) which requires that the department adopt regulations.

***Public hearing(s) will be held at:*** 11:00 a.m., Feb. 9, 2022, location to be announced on Department of Labor's website.

***Interpreter Service:*** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

***Accessibility:*** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

***Text of proposed rule:*** A new Subchapter B, and a new Part 850 therein, is added to Title 12 of the Official Compilation of Codes, Rules, and Regulations of the state of New York to read as follows:

*Section 850.1 Purpose*

*This part establishes rules and regulations for workplace safety committees, as required by Section 27-d of the Labor Law.*

*§ 850.2 Definitions*

*As used in this Part and for the purposes of Section 27-d of the Labor Law:*

*(a) "Employee" means any person suffered or permitted to work for, at, or by an employer, in the State, except for employees of the State, any political subdivision of the State, a public authority, or any other governmental agency or instrumentality.*

*(b) "Employer" means any person, entity, business, corporation, partnership, limited liability company, or association employing at least ten employees. The term shall not include the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.*

*(1) The number of employees employed by an employer shall be determined by counting the total number of employees employed within the State by the employer.*

*(2) Employees on paid or unpaid leave, including sick leave, leaves of absence, disciplinary suspension, or any other type of temporary absence, are to be counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employment relationship (as when an employee is laid off or terminated, whether temporarily or permanently), such individual is not counted.*

*(3) Part-time, newly hired, temporary, and seasonal employees, like full-time employees, are considered to be employees. Employees jointly employed by more than one employer shall be counted by each employer, whether or not they are on the employer's payroll records, in determining employer coverage and employee eligibility to participate in the Workplace Safety Committee.*

*(c) "Geographically distinct worksites" means two or more worksites operated by the same employer that do not constitute a single worksite.*

*(d) "Non-Supervisory Employee" means any employee who does not perform supervisory responsibilities, which includes but is not limited to the authority to direct and/or control the work performance of other Employees. "Non-Supervisory Employee" excludes managerial and executive Employees.*

*(e) "Notice" shall mean a written, posted, or electronic method of providing information to an individual that is reasonably calculated to provide actual notice but shall not require acknowledgement of receipt.*

*(f) "Temporary worksite" means a work location at which no Employee works for fewer than twenty working days.*

*(g) "Worksite" means a single, physical location where services, operations or other activities are performed, provided that:*

*(1) Several worksites within a single location or building may exist if separate employers conduct activities within the building. For example, an office building housing 50 different businesses may contain 50 worksites, and a construction site with employees of several different employers may contain several different worksites.*

*(2) A worksite may refer to either a single location or a group of contiguous locations in proximity to one another even though they are not directly connected to one another. For example, groups of structures which form a campus or industrial park or separate facilities across the street from one another owned by the same employer may be considered a single worksite.*

*(3) Separate buildings or facilities which are not physically connected or are not in proximity to one another may be considered a worksite if they are in reasonable geographic proximity, are used by the employer for the same purpose, and share the same staff or equipment. Where an employer has two separate locations in the same geographic area and the purpose of one location is to support the operations of the other location, and this support requires travel between the two locations, the two locations will be considered a worksite.*

*(4) Contiguous buildings or sites occupied by the same employer that have separate management, produce different products or provide different services, and have separate workforces do not constitute a single worksite. However, all operations of an Employer within the same building will be considered a single worksite. For example, an Employer that operates offices on numerous floors of a single building is operating a single worksite.*

*(5) Non-contiguous sites in the same geographic area that have separate management, produce different products or provide different services, and have separate workforces do not constitute a single worksite.*

*(6) The worksite of employment for employees whose primary duties require travel from point to point, who telecommute, are out stationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad employees, bus drivers, salespersons), shall be the worksite to which they are assigned as their employer's home base, from which their work is assigned, or to which they report.*

*(7) The term "Worksite" shall not include a Temporary worksite as defined in this section.*

*§ 850.3 Workplace Safety Committees*

*(a) Establishment:*

*(1) Workplace safety committees may be established for each worksite following a written request for recognition by at least two non-supervisory employees who work at the worksite. Multiple requests for committee recognition shall be combined and treated as a single request to form a committee. For example, two separate written requests by individual non-supervisory employees who work at the worksite shall be considered a qualifying written request for recognition by at least two non-supervisory employees.*

*(2) Upon the receipt of a request for recognition, employers shall respond to such request with reasonable promptness. Requests for committee recognition received after a committee has been recognized by an employer shall be denied and referred to the committee. Requests for committee recognition where an employer already has a workplace safety committee that is otherwise consistent with the requirements of Section 27-d and this Part may be denied and referred to said committee.*

*(3) Within five days of recognition, employers shall provide notice to all employees at the worksite of the recognition.*

*(4) Employers shall not interfere with the selection of the non-supervisory employees of a workplace safety committee.*

*(5) Workplace safety committees representing geographically distinct worksites may also be formed by non-supervisory employees in accordance with the provisions set forth in this section, including by non-supervisory employees who regularly work in multiple or different geographically distinct worksites. For example, non-supervisory employees of a traveling show may form a committee to represent the geographically distinct worksites the show travels within the State.*

*(6) Workplace safety committees shall be authorized to perform the functions set out in Section 27-d.*

*(b) Composition:*

*(1) Workplace safety committees shall be comprised of not less than two non-supervisory employees and not less than one employer representative. The ratio of non-supervisory employees to employer representatives shall not be less than two non-supervisory employees to one employer representative at any given time.*