

Management Alert



If Pain, Yes Gain -- Part XVII: NYC Publishes Final Amended Sick Time Rules

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After months of anticipation, New York City has adopted the final amended [Earned Sick Time Act Rules](#) (the “final amended Rules”). The final amended Rules largely substantiate the requirements and compliance burdens on employers enunciated in the [proposed amended Rules](#), which we previously wrote about [here](#) and [here](#). The final amended Rules are effective **March 4, 2016**, and will be enforced for the time being by the New York City Department of Consumer Affairs (“DCA”).¹

Some of the major substantive developments in the final amended Rules include:

- **Written sick time policy requirement (Section 7-12 of the final amended Rules)** - The written sick time policy requirement likely will have a major practical impact on employers covered under the Earned Sick Time Act (“ESTA”). Pursuant to this rule, every employer must distribute or post a written sick time policy and follow its written sick time policy in practice. Furthermore, an employer’s written sick time policy must meet or exceed all of the requirements of ESTA. The rule expressly requires that employers’ sick time policies state: (1) the method for calculating paid sick time (e.g., accrual versus “frontloading”); (2) details regarding the use of sick time, including any limitations or conditions the employer places on the use of sick time (e.g., requirements that employees provide notice of a need to use sick time, requirements that employees provide written documentation verifying proper use of sick time and the consequences for failing to provide such documentation, any reasonable minimum increment for using sick time, and any discipline for employee misuse of sick time); and (3) how the employer handles carryover of earned, unused paid sick time at year end. Employers cannot satisfy the written sick time policy requirement by simply distributing the [“Notice of Rights,”](#) rather, employers must distribute their own written sick time policies.
- **Accrual, hours worked, and carry over (Section 7-15 of the final amended Rules)** - While notably absent from the final amended Rules, the DCA’s ESTA Frequently Asked Questions (“FAQ”), specifically FAQ III.10, indicate that employers are not required to pay out earned, unused sick time at the end of the year under two circumstances: (1) if the employers front-load 40 hours of sick time at the beginning of the year AND pay out unused sick time at the end of the year; or (2) if the employer front-loaded 40 hours of sick leave at the beginning of the calendar year and will also frontload 40 hours on the first day of each new calendar year thereafter. The latter option provides a welcome reprieve for New York City employers. However, it is important to note that only the former option, which has been in place since ESTA went into effect, is codified in the final amended Rules.
- **Temporary help firms and Joint Employers (Sections 7-01 and 7-03 of the final amended Rules)** - The final amended Rules add a definition of “temporary help firm” (such as a staffing agency). Employers should conservatively analyze whether they would be covered under this definition, as well as the additional guidance on determining when

¹ As we [previously reported](#), the DCA will be transitioning its ESTA enforcement authority to the NYC Office of Labor Standards at some point this year. The Office was created when Mayor Bill de Blasio signed Bill 743A in November 2015. One of the Office’s primary responsibilities -- enforcing ESTA -- will include, among other duties, receiving complaints, conducting investigations, holding hearings, and imposing penalties.

businesses will be considered joint employers under ESTA, as other enforcement agencies, such as the National Labor Relations Board and the U.S. Department of Labor have broadly interpreted joint employer status.

- **Minimum increments of using paid sick time (Section 7-05 of the final amended Rules)** - Subject to a few minor exceptions, such as for new hires, ESTA generally allows an employer to set a minimum daily increment of up to four hours for using sick time. The final amended Rules expand this right by now permitting employers to also (1) set “fixed periods of thirty minutes or any smaller amount of time for the use of accrued sick time beyond the minimum increment,” and (2) “require fixed start times for such intervals.”

For example, an employer’s written sick time policies require a four hour minimum increment of sick time used per day, and state that employees must use sick time in half-hour intervals that start on the hour or half-hour. An employee is scheduled to work from 8:00 am to 4:00 pm, and wants to use her sick time for a morning doctor’s appointment and then return to work the same day. If the employee arrives to work at 12:17 pm, the employer can require the employee to use four-and-a-half hours of her accrued sick time and require her to begin work at 12:30 pm. Similarly, if the employee wanted to leave work at 8:40 am to go to her 9:00 am doctor’s appointment, the employer could require the employee to stop work at 8:30 am.

- **Rate of pay for sick time used under ESTA (Section 7-09 of the final amended Rules)** - The final amended Rules clarify that employers are not required to pay cash in lieu of supplements for sick time used if remuneration for employment includes supplements. For purposes of ESTA, “supplements,” may include, but are not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay life insurance, and apprenticeship training.
- **Employer recordkeeping requirements (Section 7-13 of the final amended Rules)** - Under ESTA, employers are required to maintain records documenting their compliance with the law for at least three years. The final amended Rules add a number of employee-specific records that must be maintained.
- **Enforcement of and penalties under ESTA (Section 7-14 of the final amended Rules)** - According to the amended final Rules, if an employer fails to respond to a notice of violation issued by the DCA on or before the hearing date, the employer is subject to a penalty of \$500 in addition to penalties for other violations. However, the most salient change, particularly for employers with large New York City workforces, is that a finding that an employer has an official or unofficial policy of not providing or refusing to allow use of sick time as required under ESTA constitutes a violation for *each* and *every* employee affected by the policy.
- **Employee abuse of sick time (Section 7-16 of the final amended Rules)** - The final amended Rules expressly note that if an employee improperly abuses sick leave, employers are permitted to take disciplinary action, up to and including, termination. Examples of abuse include: (1) “use of unscheduled sick time on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day,” (2) “taking scheduled sick time on days when other leave has been denied,” and (3) “taking sick time on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.”
- **Retaliation (Section 7-17 of the final amended Rules)** - Under the final amended Rules, employers are prohibited from taking *any* action that is likely to deter an employee for exercising his or her rights guaranteed under ESTA. This broadened language should cause employers to exercise caution, and document misconduct, when disciplining an employee following the use of sick time.

As always, we will continue to keep you updated with any ESTA developments. If you have any questions or concerns, please contact your local Seyfarth Shaw attorney, or [William P. Perkins](mailto:wperkins@seyfarth.com) at wperkins@seyfarth.com, [Joshua Seidman](mailto:jseidman@seyfarth.com) at jseidman@seyfarth.com, or [Samuel Sverdlov](mailto:ssverdlov@seyfarth.com) at ssverdlov@seyfarth.com.

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