

Management Alert



NYC Council (Re)Approves Sick Leave Law

Less than a month from now, the snow will (hopefully) be gone from New York City and flu season will be over, but employers will face a new legal obligation that may still leave them cold: the City's mandatory sick leave law takes effect April 1.

The Earned Sick Time Act ("ESTA") has followed a torturous path to enactment, but the saga of its approval, revision, and re-approval is almost over. On February 26, the City Council approved amendments to the Act by a 46-5 vote. All that remains is Mayor Bill de Blasio's signature, which is imminent. (de Blasio has said the Act "is the first law I will have the privilege of signing as mayor.")

As we have reported previously [here](#) and [here](#), the Act was first passed in mid-2013 – over the veto of then-Mayor Michael Bloomberg – but before it could take effect, de Blasio proposed a significant expansion. As a result, the Act was effectively shelved while the Mayor and City Council drafted and deliberated on a new version. Some revisions were passed in early February, then more last week.

The final version of the Act requires most private employers to give up to 40 hours of sick leave a year to their employees working in New York City. In the key revision from the earlier version, the Act requires employers with *five* or more employees to provide paid leave; at smaller employers, the leave may be unpaid. (The previous version had a threshold of 20 employees for paid leave, which later would have dropped to 15. Domestic employees are subject to different rules as well.)

Although the law takes effect on April 1, employers with fewer than 20 employees, and certain manufacturing employers, will not be subject to civil penalties for any violations that occur before October 1, 2014, although other remedies (discussed below) will be available starting in April.

Coverage and Exceptions

ESTA applies to most private employers that employ any workers in New York City. Its definition of "employee" is broad and includes anyone "employed for hire" who works "within the city of New York for more than eighty hours in a calendar year." "Calendar year" is defined as "a regular and consecutive twelve month period, as determined by an employer."

The previous version of the ESTA also expressly exempted certain manufacturing employers, but that has been removed. The current version exempts only federal, state and local government employers, individuals performing work under certain work study programs, those compensated for the hours they work by qualified scholarships, independent contractors and certain hourly professional employees.

For purposes of the five-employee threshold, the Act includes part-time and temporary employees, but permits using an annual average where the number of employees fluctuates. Where an employer is a "chain business," all employees in the group of establishments must be counted.

Accrual of Earned Sick Time

Sick leave starts to accrue on April 1, 2014, or at the start of employment if an employee is hired after that date. Covered employers are required to provide a minimum of one hour of sick time for every 30 hours worked. The maximum required accrual is 40 hours per calendar year.

Employers can allow eligible employees to accrue time faster or can provide 40 hours of sick leave up front. Exempt salaried employees are assumed to work 40 hours a week for purposes of sick time accrual, or the amount of hours in their regular work week if less than 40 hours per week. If an employee is rehired within six months by the same employer, the employee is entitled to maintain his or her previously accrued unused sick time (unless it was paid out, by agreement, to the employee).

Unused accrued sick time up to 40 hours must be carried over to the next calendar year. An employer can also pay an employee for unused accrued time at the end of the calendar year, but the employer must then allow accrual to restart on the first day of the new calendar year. As noted above, calendar year does not necessarily mean January 1 to December 31; it can be any "regular and consecutive twelve month period, as determined by an employer."

The law does not require any employer to pay out accrued sick time that has not been used upon the employee's separation from employment, whether by involuntary termination, resignation, retirement or otherwise.

Use of Sick Time

Covered employers must allow their City employees to start using accrued sick time 120 days after the start of their employment, or by July 30, 2014 if they are employed when the law goes into effect on April 1.

Employees are eligible to use accrued sick time for any of the following reasons:

- An employee's mental or physical illness, injury, or health condition, or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care.
- Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition, or who needs preventive medical care. "Family member" means an employee's child, spouse, domestic partner, parent, sibling, grandchild, grandparent, or the child or parent of the employee's spouse or domestic partner. (The previous version of the ESTA had a shorter list.)
- Closure of an employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

Employers can set a reasonable minimum increment for the use of sick time, but this increment cannot exceed four hours per day. Employers can also require reasonable notice of the need to use sick time. Where the need is foreseeable, like a doctor's appointment scheduled weeks in advance, the notice requirement may not exceed seven days before the sick time is to begin. But where the need to use sick time is not foreseeable, the notice period is limited to "as soon as practicable."

If an employee is out for more than three consecutive work days, an employer may require certification from a health care provider that the use of sick time was for a covered reason. Employers may also require employees, regardless of the length of the absence, "to provide written confirmation that an employee used sick time pursuant to" the Act. Employers are explicitly permitted to discipline employees who use sick time for unauthorized purposes.

An employer and employee may also agree to allow the employee to work additional hours, during the immediately preceding seven-day period, if the use of sick time is foreseeable, but the agreement must be voluntary.

PTO Policies

The ESTA does not require covered employers to provide paid leave in addition to an already established paid time off (“PTO”) policy, provided two criteria are met. First, the employer’s PTO policy must offer the same or more generous paid leave as provided for in the ESTA. Second, the PTO policy must allow employees to use paid leave in the same manner and under the same conditions as the ESTA.

Notice and Recordkeeping Requirements

Covered employers must provide their City employees with a written notice of their right to sick time under the law at the commencement of employment or within 30 days of the Act’s effective date (*i.e.*, by May 1, 2014). This notice must explain how sick time is accrued and how it can be used, identify the employer’s calendar year for which the sick leave applies, and inform the employee of the right to be free from retaliation and to bring a complaint regarding a violation of the law.

This notice must be in English and the primary language spoken by that employee, provided the agency responsible for enforcement of the Act (currently the New York City Department of Consumer Affairs (“DCA”), but that may change) has made a translation of such notice available, which it is to post on its website. The agency is also charged with creating template notices.

In addition to providing the mandatory written notice, employers may (but need not) post a notice conspicuously in an area accessible to employees.

Employers covered by the ESTA are required to keep records documenting compliance with the law’s provisions for at least three years. This includes records that track the accrual and use of sick time.

Impact on Collective Bargaining Agreements

In general, the ESTA does not apply to valid collective bargaining agreements if the law’s provisions are expressly waived in the collective bargaining agreements and the agreements provide comparable benefits, such as vacation time, personal time and sick time. Unlike the ESTA’s application to nonunion workers, the law becomes effective upon the termination date of the collective bargaining agreement, not necessarily on April 1, 2014.

Enforcement

There is no private right of action under the ESTA. The responsible City agency has sole enforcement responsibility, but the Mayor is permitted to designate any agency other than the DCA to assume that role. Whether it is the DCA or another agency, it will have the power to investigate violations, decide employee complaints, and impose civil penalties, money damages and equitable relief.

An employee claiming a violation must file a complaint with the enforcing agency within two years of the date he or she is aware, or should have been aware, of the alleged violation. (The limitations period under the pre-de Blasio version was 270 days. A subsequent version of the Act increased that to three years, but the final version provides for two years.) Only the agency’s final determination can be challenged in court.

Penalties

Penalties owed to an employee for violating the ESTA vary depending on the conduct that caused the violation.

Penalties for sick time taken but not lawfully compensated range from \$250 to three times the wages that should have been paid, whichever is greater. Sick time requested but unlawfully denied and not taken can result in a \$500 penalty. The latter includes conditioning approval of an employee's use of sick leave upon searching for, or finding, a replacement worker or requiring an employee to make up the time that he or she used on a valid sick leave.

Retaliating against an employee for exercising or attempting to exercise a right created by the ESTA, or interfering with any investigation, proceeding or hearing under the law, can result in a fine (\$500 to \$2,500 depending on whether the employee was discharged), along with full back pay and equitable relief as appropriate.

An employer found to have violated any provisions of the ESTA relating to retaliation or the accrual and use of sick time can also be liable for a civil penalty between \$500 to \$1,000 per violation depending on the timing and number of prior violations committed by the employer. Employers found to have violated the notice provisions of the ESTA can be subject to a civil fine not to exceed \$50 for each employee who was not given appropriate notice.

Preparations

In anticipation of the April 1 effective date, covered New York City employers should review their sick leave and other PTO policies to determine whether they are in compliance with ESTA's provisions or need to make adjustments in order to come into compliance. Employers should also work with counsel to prepare compliant notice materials and recordkeeping forms where necessary.

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Seyfarth Shaw LLP Management Alert | March 3, 2014

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