

One Minute Memo[®]



NYC Agency Offers Guidance on Earned Sick Time Act

By Robert S. Whitman and Joshua D. Seidman

As we [previously reported](#), the New York City Department of Consumer Affairs (“DCA”) received 245 complaints alleging violations of the Earned Sick Time Act (“ESTA”) between April and October 2014. To help employers better comply with the ESTA, the DCA recently issued [guidance](#) designed for employers when writing their sick leave policies.

Although styled as “Rules for Sick Leave Policies,” the DCA document is more interpretive than prescriptive in style, in contrast to the [“Notice of Adoption of Final Rules”](#) that the agency issued in July 2014. Nonetheless, as a statement of the views of the agency responsible for enforcing the ESTA, the Rules could be given considerable deference in future interpretations of the Act’s requirements.

The DCA publication contains several provisions of interest to employers:

- **Medical documentation.** Under the ESTA, an employer can require an employee to provide a doctor’s note or other medical documentation after the employee uses paid sick time for more than three consecutive workdays. The employee has at least seven days to submit such documentation, which must be limited to stating the need for the amount of leave used and that the leave was used for an authorized purpose. The DCA now explains that if an employer imposes this requirement, it must also recite the consequences for employees who fail to do so.
- **Advance notice.** The ESTA states that an employer can require seven days’ advance notice if an employee’s need for sick leave is foreseeable. However, if the need for sick leave is unforeseeable, the employer may require an employee to give notice as soon as practicable. The DCA now points out that the procedures for employees to give advance notice must be stated explicitly in the employer’s written leave policy.
- **Vacation, personal leave, or other PTO policies.** Employers with such policies do not have to provide additional time designated for sick leave as long as employees can use that time off for sick leave and the employer’s policies adhere to the other ESTA requirements (*i.e.*, record retention, confidentiality, requesting medical documentation, etc.). The DCA now states that employers with a PTO or other leave policy must still “provide employees with the Notice of Employee Rights and may want to attach a memo that explains how employees can use their time off for sick leave.”
- **Additional Topics.** The Rules also provide guidance for employers that choose to follow various optional approaches available under the Act, including setting a minimum amount of sick leave that employees must use in a day, requiring employees to confirm that they used sick leave for one of the ESTA’s authorized purposes (the DCA’s website contains a model form for employers to use), electing to front-load sick leave at the start of the employer’s calendar year, paying out unused sick leave at the end of the employer’s calendar year, and permitting employees to donate unused sick leave to other employees. The agency states that for these employers, their written sick leave policy must expressly include a statement of the minimum amount of leave available for daily use, the procedures for employee verification of authorized use (including any required form), instructions on how to donate unused leave, and notice that leave will be front-loaded at the start of the year and that leave will be paid out at the end of the year.

Although the DCA guidance reflects what many practitioners have already understood to be best practices, it is nonetheless a helpful illustration of the agency's views on navigating the nuances of the ESTA and a welcome reminder that "an ounce of prevention" will go a long way toward avoiding costly liability under the Act.

Robert S. Whitman is a partner in Seyfarth's New York office and *Joshua D. Seidman* is an associate in the firm's New York office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Robert S. Whitman at rwhitman@seyfarth.com, or Joshua D. Seidman at jseidman@seyfarth.com.

www.seyfarth.com



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