

Management Alert



If Pain, Yes Gain — Part 62: Westchester County, NY Officially Infected With Sick Leave; Law in Effect and FAQs and Notice of Rights Released

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Seyfarth Synopsis: *The Westchester County Earned Sick Leave Law went into effect as of yesterday, April 10, 2019. In the hours leading up to the effective date, the County Human Rights Commission launched an Earned Sick Leave Law webpage featuring employer and employee FAQs as well as a Notice of Employee Rights.*

Background

Last year, Westchester County became the second New York State locality — and first county — to pass a mandatory paid sick leave ordinance. After some uncertainty about when the County sick leave mandate, known as the Earned Sick Leave Law (“ESLL”), would begin, the ESLL officially went into effect yesterday, April 10, 2019. As noted in our [prior alert](#), although a lengthy mandate, questions about certain ESLL requirements remained based on the text of the law.

To some extent, Westchester County employers’ long wait is over — less than a day before the ESLL’s April 10, 2019 effective date, the Westchester County Human Rights Commission’s (“Commission”) ESLL webpage went live. Notably, the [webpage](#) contains sets of FAQs, a “[Notice of Employee Rights](#),” and a copy of the ESLL. Despite offering employers clarity on select paid sick leave symptoms, certain questions remain.

Here are some of the highlights from the Commission’s ESLL materials.

FAQs & Notice of Rights

- **Start of Accrual:** As previously reported, eligible employees begin to accrue sick leave under the ESLL at the commencement of their employment or 90 days **after** the ESLL’s effective date, whichever is later. The FAQs confirm that as of **July 10, 2019**, employers must allow eligible existing employees who work in Westchester County to begin accruing sick leave.
- **Note:** While this language seemingly provides covered employers with a 90-day vaccine before they need to begin providing employees with compliant sick leave benefits, the FAQs *also* confirm that employers must begin complying with the ESLL starting April 10, 2019. In practice, this means that covered employers are now bound by certain ESLL requirements, for example, posting (discussed below) and anti-retaliation provisions not directly related to providing sick leave benefits.

- **Year-End Carryover:** The ESLL establishes a 40-hour annual sick leave usage cap. However, the ESLL is unclear if employers can cap the amount of earned, unused sick leave an employee can carry over from one year to the next. The new ESLL FAQs resolve the carryover ambiguity and note that “an employee can carry over a maximum of 40 hours of unused sick leave.”
- **Frontloading and PTO Policies:** Although unclear, it is likely that employers can frontload eligible employees at least 40 hours of sick leave at the start of each year in order to satisfy the ESLL’s accrual obligations. Like the actual ESLL, the FAQs state that “an employer can provide for sick time and personal time equal to 40 hours or more at the beginning of the employer’s year” and that such a practice, assuming there otherwise are no limits on employees’ ability to take the leave, will be considered compliant. The FAQs also do not resolve whether a frontloaded grant of leave gets rid of employers’ year-end carryover obligations.
- **Notice to Employer:** While the ESLL provides that employees must in good faith “attempt” to provide advanced notice to the employer when the need to use sick leave is foreseeable, the FAQs note that employers can require advance notice of an employee’s intention to use sick leave when the need is foreseeable. In addition and significantly, while the ESLL is silent as to what notice standards apply in the event of an unforeseeable absence, the FAQs state that if the employee’s need for sick leave is unforeseeable, employers can require employees to give notice as soon as practicable. The FAQs also remind employers that if they require employees to provide notice of a sick leave absence, the employer’s notice procedures must be communicated to employees in writing.¹
- **Notice and Posting:** Employers’ notice and posting obligations under the ESLL include: **(1)** providing employees both a copy of the ESLL **and** written notice of how the ESLL applies to the employee; and **(2)** displaying both a copy of the ESLL and a poster in English, Spanish, and any other language deemed appropriate by the County in a conspicuous location accessible to employees.² The FAQs clarify that employers must provide the necessary notice to **(a)** existing employees by July 10, 2019 and **(b)** employees hired after July 10, on their first date of employment. It is unclear if the Commission’s recently published “Notice of Employee Rights” is intended to serve as the written notice employers must provide to employees, the poster, or both. We will continue to monitor the webpage for developments regarding the appropriate written notice and poster, and update employers accordingly.

Employer Takeaways

As the County prepares to enforce the ESLL, employers should begin and/or continue taking steps to comply with the requirements of the new law. Here are some steps to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the ESLL;
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the ESLL;
- Monitor the Commission’s website for information on the ESLL, including updates on the model poster/notice; and
- Train supervisory and managerial employees, as well as HR, on the new requirements.

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¹ Employers should keep in mind that the ESLL allows a request for sick leave to be made orally, in writing, electronically, or by any other means acceptable to the employer.

² At this time, only the English version of the “Notice of Employee Rights” has been published.

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