

# Management Alert



## If Pain, Yes Gain—Part XXXVII: NYC Set to Expand Earned Sick Time Act

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**Seyfarth Synopsis:** On October 17, 2017, the New York City Council passed an amendment to the city's Earned Sick Time Act that, if signed by Mayor Bill de Blasio as expected, would allow eligible employees to use paid sick time for "Safe Time" reasons related to family offense matters, sexual offenses, stalking, or human trafficking, as well as expand the Act's definition of covered "family member."

Earlier this week, the New York City Council passed an amendment (Int. No. 1313-A) to the city's Earned Sick Time Act ("ESTA") that would align ESTA with many of the country's other existing state and local paid sick leave laws by allowing eligible employees to use paid sick time for "safe time" reasons.<sup>1</sup> In particular, eligible employees would be entitled to use paid sick time for absences related to their own or a covered family member's status as a victim of a family offense matter, sexual offense, stalking, or human trafficking. New York City Mayor Bill de Blasio is expected to sign the amendment in the coming days.

ESTA has been in effect since April 2014. Over the last three and half years, New York City employers have dealt with a number of substantive updates to the Act, whether through amended paid sick leave rules, FAQs or other administrative guidance. Despite these multiple and seemingly regular updates to employers' ESTA obligations, the current ESTA amendment would impose an additional array of substantive burdens on employers. The amendment will become effective 180 days after it is signed into law.

As a reminder, ESTA allows eligible employees to accrue one hour of paid sick leave for every 30 hours that they work, up to 40 hours of paid sick leave per year. Under an accrual system, up to 40 hours of accrued, unused paid sick leave carries over at year-end. However, regardless of carryover balances, employers are only required to allow employees to use a maximum of 40 hours of paid sick time in a given year. For more information on ESTA, please see our earlier posts [here](#), [here](#), [here](#) and [here](#).

Here are the highlights of the impending ESTA amendment:

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<sup>1</sup> There currently are eight states with paid sick leave laws that are either in effect or scheduled to go into effect in the coming months—Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington and Rhode Island. There also are paid sick leave requirements for certain federal contractors and subcontractors. In addition, there are more than 30 municipalities that have passed paid sick leave ordinances, including San Francisco, Washington DC, Seattle, Philadelphia, Los Angeles, Chicago, San Diego, and Minneapolis. Of the 44 existing paid sick leave laws and ordinances (some cities have multiple sick leave ordinances), 30 of them either explicitly or through a more generous state law permit employees to use paid sick leave for some form of "safe time."

## “Safe Time”

As stated above, the most notable amendment to ESTA is the introduction of “safe time.” In fact, assuming the amendment goes into effect as expected, the title of New York City’s paid sick leave ordinance will change to the “Earned Safe and Sick Time Act” or “ESSTA.”

The amendment would allow ESTA paid time to be used for the following “safe time” reasons for employees or their covered family members (see below for updates on ESTA’s definition of covered “family member”) who are victims of a family offense matter, sexual offense, stalking, or human trafficking:

- to obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human trafficking;
- to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee’s family members from future family offense matters, sexual offenses, stalking, or human trafficking;
- to meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding, including but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, housing or consumer credit;
- to file a complaint or domestic incident report with law enforcement;
- to meet with a district attorney’s office;
- to enroll children in a new school; or
- to take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee’s family member or to protect those who associate or work with the employee.

The amendment includes several new definitions related to “safe time,” including definitions of “family offense matter,” “human trafficking,” “sexual offense,” and “stalking.” The “family offense matter” definition is considerably broad and covers a wealth of acts or threats that may constitute any one of the following “between spouses or former spouses, [ ] parent and child or [ ] members of the same family or household”<sup>2</sup>:

- disorderly conduct;
- harassment in the first or second degree, or aggravated harassment in the second degree;
- sexual misconduct, forcible touching, or sexual abuse in the second or third degree;
- stalking in the first, second, third or fourth degree;
- criminal mischief, or menacing in the second or third degree;
- reckless endangerment;
- strangulation in the first or second degree;
- criminal obstruction of breathing or blood circulation;
- assault in the second or third degree, or an attempted assault;
- identity theft in the first, second or third degree;

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<sup>2</sup> The ESTA amendment also includes a definition of “member of the same family or household.” Notably, this term is defined to cover an extensive list of individuals, such as (i) persons related by consanguinity or affinity, (ii) persons legally married to or in a domestic partnership with one another, (iii) persons formerly married to or in a domestic partnership with one another regardless of whether they still reside in the same household, (iv) persons who have a child in common, regardless of whether such persons have been married or domestic partners or have lived together at any time; and (v) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

- grand larceny in the third or fourth degree; or
- coercion in the second degree as set forth in subdivisions 1, 2 and 3 of section 135.60 of the penal law.

As noted above in Footnote 1, a majority of other existing paid sick leave laws also contain some form of “safe time” protected absences. However, the scope of “safe time” under the ESTA amendment is more detailed and cumbersome than the “safe time” provisions under most other paid sick leave laws. Accordingly, New York City employers with standalone ESTA policies or paid sick leave policies that cover ESTA and additional sick leave laws and ordinances would be wise to review their policies in the coming months to ensure compliance with ESSTA’s new “safe time” component.

## Covered Family Members

Another significant development that employers must be aware of is that the ESTA amendment would expand the definition of covered “family member” for both sick and safe time. In particular, the expanded definition of “family member” not only includes the current list of (a) child, (b) spouse, (c) domestic partner, (d) parent, (e) sibling, (f) grandchild, (g) grandparent, and (h) the child or parent of an employee’s spouse or domestic partner, but it also includes **(i) any other individual related by blood to the employee, and (j) any other individual whose close association with the employee is the equivalent of a family relationship**. The term “equivalent of a family relationship” is not defined by the amendment.

This amendment is noteworthy because it goes beyond just “safe time” and expands the coverage for the use of sick time as well. Specifically, when eligible employees use paid sick leave under ESSTA for non-safe time reasons (i.e., the original reasons for use under ESTA, such as to care for 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), they will now be able to use the leave to care for any blood relative and anyone who the employee claims has a close enough relationship with the employee such that they are like family.<sup>3</sup>

## Reasonable Documentation

As with uses of ESTA leave for “sick time” reasons, the ESTA amendment would allow employers to require reasonable documentation that the use of safe time was for a permitted purpose when an employee has been absent for more than three consecutive work days.

Reasonable documentation for purposes of “safe time” would include: (a) documentation signed by an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider from whom the employee or that employee’s family member has sought assistance related to the absence; (b) a police or court record; or (c) a notarized letter from the employee explaining the need for such time.

Additionally, the ESTA amendment expressly prohibits employers from requiring that any such documentation specify the details of the family offense matter, sexual offense, stalking, or human trafficking.

## Notice Requirement

The City will create an updated model notice addressing “safe time” for employers to use in satisfying their notice obligations under ESSTA. Employees hired on or after the effective date of ESSTA (again, 180 days after the amendment is signed into law) must be provided a notice that, among other things, informs them of their right to “safe time” under ESSTA. Furthermore, the amendment requires employers to give existing employees an updated ESSTA notice about their right to “safe time” within 30 days of the amendment going into effect.

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<sup>3</sup> Several recently passed paid sick leave laws and ordinances, including the laws in Arizona, Chicago and Los Angeles, contain similar “blood or close association” family member definitions.

## What Should Employers Do Now?

New York City employers should track whether the ESTA amendment is formally signed into law, as expected, and once confirmed take steps to ensure that they will be able to achieve full compliance by the amendment's effective date, likely in mid-Spring 2018. These are among the specific actions to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the ESTA amendment.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the ESTA amendment.
- Monitor the New York City Department of Consumer Affairs website for information on the amendment, including proposed and final regulations.
- Train supervisory and managerial employees, as well as HR, on the new requirements.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list.

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