

Management Alert



If Pain, Yes Gain—Part 57: Paid Sick Leave Bug Spreads to Westchester County, NY

By Ryan B. Schneider, Joshua D. Seidman, Marlin Duro, Tracy M. Billows, and William P. Perkins

Seyfarth Synopsis: Last month, Westchester County became the second New York State municipality - and first county - to pass a mandatory paid sick leave ordinance. The ordinance is expected to take effect on or about March 30, 2019.

New York City was the first municipality in New York State and one of the first municipalities in the country to catch the nation's paid sick leave bug.¹ Since New York City's diagnosis in 2014, municipalities elsewhere in the state, [including Westchester County](#), have shown symptoms of sick leave infection. Last month marked the end of Westchester County's sick leave immunity when, on October 12, County Executive George Latimer signed a sick leave bill into law.

While the Westchester County Earned Sick Leave Law ("ESLL") comes with a 180-day waiting period until it goes into effect, it is unclear if this date runs from October 1 or 12. The ESLL states that it "shall take effect 180 days after its **adoption**." A corresponding October 12, 2018 [certification](#) from the Clerk of the Westchester County Board of Legislators² states that the ESLL "was **duly adopted** by the County Board of Legislators, of the County of Westchester on October 1, 2018, and **approved** by the County Executive on October 12, 2018." Based on the ordinance and certification language, and pending further clarification from the County, it appears that the ESLL's effective date is March 30, 2019. We will continue to track developments on the specific effective date in the coming months.

In the meantime, here are some of the key highlights of the ESLL.

- **Obligation to Provide Paid Sick Time:** Employers with 5 or more employees as defined by the ESLL must allow employees to earn and use paid sick leave, whereas employers with fewer than 5 employees are only required to allow employees to earn and use unpaid sick leave under the ESLL.³
- **Employee Eligibility:** Employee is broadly defined, and means "any person employed for hire by an employer in any employment within Westchester County for more than 80 hours in a calendar year who performs work on a full-time or part-time basis." Employees covered by a collective bargaining agreement (CBA)⁴ are not eligible for sick leave as provided by the ESLL if (a) the ESLL's provisions are waived in the CBA, and (b) the CBA provides "comparable" ESLL benefits "in the form of paid days off," including but not limited to vacation, holiday, personal, sick time, and Sunday premium pay.

¹ In May 2018, the "safe time" amendments to the New York City paid sick leave ordinance went into effect. For more information on this and other recent New York City sick leave developments, please see our prior alerts [here](#), [here](#), [here](#), and [here](#).

² A copy of the Certification can be found on page 19 in the County's [certified copy](#) of the ESLL.

³ The ESLL notes that in determining the number of employees performing work for an employer, all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted. However, the ESLL does not specify whether this calculation includes only Westchester County employees or employees who work for the employer both inside and outside of the County.

⁴ Although not assigned a section number within Chapter 585 of the Laws of Westchester County, a provision is contained in the certified version of the ESLL that states that the ESLL will not apply to employees covered by a CBA that is in effect on the ESLL's effective date. Instead, the ESLL will begin to apply to such employees upon the stated expiration date in that CBA.

- **Covered Employer:** “Employer” is also defined broadly to include any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service.
- **Accrual, Usage, and Carryover:**
 - **Start of Accrual:** Eligible employees will begin to accrue sick leave at the commencement of their employment or 90 days after the ESLL’s effective date, whichever is later. This language provides covered employers with a 90-day buffer **after** the effective date of the ESLL before they need to begin providing employees with compliant sick leave benefits.
 - **Usage Waiting Period:** Under the ESLL, employers can delay an employee’s ability to use sick leave until the employee has worked for the employer for 90 days.
 - **Accrual Rate and Cap:** Eligible employees will be entitled to accrue a minimum of 1 hour of sick leave for every 30 hours worked, up to a maximum of 40 hours of sick leave in a given year.⁵
 - **Usage and Carryover Caps:** Under the ESLL, employees may use up to 40 hours of available sick leave in a year. The ESLL does not provide a clear cap on the amount of earned, unused sick leave that an employee may carry over from year to year; however, it does vaguely note that unused sick leave can be carried over at year-end “provided that the maximum amount of sick leave for any given year remains at forty (40) hours.” While this language likely serves to reinforce that the ESLL’s 40-hour annual usage cap exists regardless of carryover balances, we expect further clarification from the County in the coming months.
- **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. Specifically, the ESLL provides “[i]n lieu of calculating the accrual of earned sick time, an employer shall have the option to provide an employee with sick time and personal time which if combined equals forty (40) hours or more per calendar year or the year as determined by the employer . . . Such an employer shall be in compliance with this law, provided that the employee is permitted to take time as needed for sick time, with no advance notice necessary and no restrictions are placed on use of earned sick time other than those contained in this Chapter.” While frontloading seems to be a likely, although not certain, alternative to accrual under the ESLL, it is unclear what, if any, impact a frontloading setup would have on an employer’s year-end carryover obligations. We will monitor and provide updates on any developments involving frontloading under the ESLL.
 - Relatedly, the ESLL frontloading provision suggests that non-sick paid leave programs (i.e., PTO, personal time, vacation, etc.) can be used for ESLL compliance.
- **Reasons for Use:** Sick leave under the ESLL may be used for the following reasons: **(a)** an employee’s mental or physical illness, injury or health condition, need for medical diagnosis, care, or treatment, or need for preventive medical care; **(b)** the care of a family member with a mental or physical illness, injury or health condition, who needs medical diagnosis, care, or treatment, or who needs preventive medical care; **(c)** any employer who is willing to pay for the use of an employee’s earned sick leave, may authorize an employee to utilize sick leave if the employer reasonably determines that an employee’s mental or physical illness, injury or health condition or an employee’s need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition requires immediate attention;⁶ **(d)** the care for an employee or family member when it has been determined by the public health authorities having jurisdiction that the employee’s or family member’s presence in the community may jeopardize the health of others because of his or her exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease; **(e)** closure of the employee’s place of business by order of a public official due to a public health emergency; and **(f)** closure of a day care or elementary or secondary school attended by an employee’s child where such closure was due to a public health emergency. Notably, there is no “safe time” reason for use as exists under the NYC Earned Safe and Sick Time Act and many other existing paid sick leave laws and ordinances.

⁵ Under the ESLL, a “year” is defined as a regular and consecutive 12-month period as determined by the employer, other than a “calendar year,” which is defined as January 1 to December 31 in any given year.

⁶ Employers following this ESLL reason for use in practice are reminded to proceed cautiously as doing so could be construed as perceived disability under the Americans with Disabilities Act (ADA), as well as New York State law. We will update employers if any guidance is released on potential friction between these laws.

- **Covered Family Member:** “Family member” is expansively defined, and includes an employee’s **(a)** child (regardless of age and includes a biological, adopted, foster child, legal ward or a person to whom the employee stands in loco parentis or to whom the employee stood in loco parentis when that person was a minor), **(b)** spouse, **(c)** domestic partner (as defined by New York State law), **(d)** parent (biological, foster, step or adoptive parent, a legal guardian of an employee or a person who stood in loco parentis when the employee was a minor), **(e)** sibling, **(f)** grandchild, **(g)** grandparent, and **(h)** the child or parent of an employee’s spouse, domestic partner or “household member.”
 - **Household Member:** The ESLL defines “Household Member” to include: **(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.
- **Payment of Sick Leave:** Paid sick leave must be compensated at the same hourly rate as the employee normally earns but cannot be less than the New York State minimum wage.
- **Increments of Use:** The ESLL provides that where an employee needs to use sick leave for a portion of a day, as opposed to the entire day, “an employee may use a minimum of four hours” of sick leave. If more time is needed to cover the absence, then the increment of use must be set at “the smallest increment that the employer’s payroll system uses to account for absence or use of other time.”
- **Notice to Employer:**
 - **Foreseeable Absences:** Where an employee’s need to use sick leave is foreseeable, the employee must in good faith attempt to provide advanced notice to the employer and make reasonable efforts to schedule the leave in a way that does not unduly disrupt the employer’s operations. Notably, the ESLL does not address notice standards for unforeseeable absences.
 - **Acceptable Forms of Notice and Employer Policies on Notice:** The ESLL provides that a request for sick leave may be made orally, in writing, electronically, or by any other means acceptable to the employer. In addition, employers who require notice of the need to use sick leave must provide employees with a written policy containing the procedures an employee must follow when providing notice.
- **Documentation:** In the event of a sick leave absence of more than three consecutive work days, an employer may require the employee to provide “reasonable documentation” that the sick leave was used for a covered reason.
- **Retaliation:** Among other things, the ESLL prohibits employers from **(a)** interfering with or restraining an employee’s exercise or attempt to exercise ESLL rights, **(b)** counting sick time as an absence that may lead to adverse employment action, and **(c)** retaliating or discriminating against an employee for requesting to use or using sick time, filing a complaint alleging ESLL violations, or informing other employees of their ESLL rights.
- **Notice and Posting:** Employers’ notice and posting obligations include: **(1)** provide employees both a copy of the ESLL **and** written notice of how the ESLL applies to the employee at the commencement of the employee’s employment or within 90 days of the ESLL effective date, whichever is later; and **(2)** display 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.
- **Recordkeeping:** Employers’ records must clearly document eligible employees’ hours worked and earned sick time accrued and taken, over a three year period.
- **Termination of Employment:** The ESLL makes clear that employers are not required to reimburse employees for earned, unused sick leave upon separation of employment. However, where an employee is separated from employment and rehired within nine months, previously earned, unused sick leave must be reinstated.

- **Reverse Preemption:** The ESLL provides that it shall be null and void on the effective date of any future statewide or federal legislation incorporating the same or substantially similar provisions as those contained in the ESLL. The ESLL gives the County Board of Legislators the authority to determine whether or not the same or substantially similar legislation has been enacted, triggering reverse preemption, via resolution.

Employers should take steps now to comply with the requirements of the ESLL before its likely March 30, 2019 effective date. 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 Westchester County Board of Legislators' and County Executive's websites for information on the ESLL, including a model poster/notice; and
- Train supervisory and managerial employees, as well as HR, on the new requirements.

We will continue to monitor and provide updates on Westchester County paid sick leave developments as the effective date approaches and on any changes that take place thereafter.

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

If you would like further information, please contact Ryan B. Schneider at rschneider@seyfarth.com, Joshua D. Seidman at jseidman@seyfarth.com, Marlin Duro at mduro@seyfarth.com, Tracy M. Billows at tbillows@seyfarth.com, or William P. Perkins at wperkins@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | November 7, 2018

©2018 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.