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New York City's Earned Safe and Sick Time Act Updated to Comply with State Requirements

Under the amended New York City Earned Safe and Sick Time Act (ESSTA), most New York City employers are required to provide mandatory sick leave of up to 56 or 40 hours per year, paid or unpaid, depending on the size of the employer. Employers with 5 or more employees and smaller employers with a net income of \$1 MM or more in the previous 12-month period must offer paid leave. All employers must provide information about sick leave accrual and usage with each paystub. The City's Department of Consumer Affairs (DCA), the agency currently charged with enforcing the new law, maintains a website www.nyc.gov/PaidSickLeave containing an FAQ, form notice and other compliance information.

New York State has recently enacted its own Paid Sick Leave Law, effective September 30, 2020. The state law was modeled on the city's then existing ESSTA, with a few differences. New York City subsequently amended the ESSTA so that the ESSTA was at least as beneficial to employees as the new state law. The main provisions of the ESSTA, as amended, are summarized as follows:

- The current 120-day waiting period for use of accrued leave is eliminated. Accrual at a rate of one hour of leave for every 30 hours of work begins on the first day of employment.
- As of January 1, 2021, employers with 100 or more employees must provide up to 56 hours of leave, not 40 hours, which remains the requirement for employers with 99 or fewer employees.
- Employers with 5 or more employees must offer paid sick leave, while smaller employers must offer equivalent unpaid time; however, as of January 1, 2021, smaller employers which had a net income of \$1 MM or more in the previous 12-month period must provide paid sick leave.
- Effective September 30, 2020, employers must provide employees with a statement of the amount of sick leave accrued, used, and a current balance of leave on each pay stub (or "some other writing," as yet undefined).
- Employees shall be able to use sick time for a variety of "qualifying reasons," including, but not limited to, for the employee's own injury or illness and doctor visits, as well as for the employee to care for "family members" who are injured, ill or need to see a doctor.
- Employees shall be able to use safe time for consulting with social services providers, attorneys, and law enforcement in response to sexual and domestic violence against themselves or a family member, as well as taking safety measures such as relocation and enrolling children in a new school.
- "Family member" means an employee's child, spouse, domestic partner, parent, sibling, grandchild, grandparent, the child or parent of the employee's spouse or domestic partner, blood relative (any), and a person in a close relationship which is the equivalent of a family relationship.

- Employers must allow employees to carry over unused sick time. However, even with the carry-over, allowed sick time need not exceed 40 hours (or 56 hours, for larger employers) in a year.
- Employers must notify new employees of their rights under the law at the start of employment, and for employees employed prior to September 30, 2020, updated notice would need to be provided within 30 days of the effective date of the September 30 amendment.
- Employers are required to post notice of rights conspicuously at their business location in an area accessible to all employees.
<https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSafeSickLeave-MandatoryNotice-English.pdf>
- Employers must maintain records of compliance with the rules for accrual and use of sick time for three years.
- Although the Act does not allow employees to file private lawsuits over alleged violations, any person claiming a violation may file a complaint with the Department of Consumer Affairs (or other City agency charged with enforcement) within two years of the date he or she knew or should have known of the alleged violation.
- The Department has the authority to issue penalties for violations, including failure to comply with notice obligations and retaliation for using leave under the Act, in the form of monetary damages and civil penalties.

Following is a more detailed explanation of the law.

What the Law Requires

The Earned Safe and Sick Time Act mandates that private sector employers in New York City provide up to either 40 or 56 hours of paid or unpaid safe and sick time off, depending on the size of the employer, each “calendar year”. Employers with fewer than 99 employees (“employees” means all full-time, part-time and temporary employees) must provide the 40 hours of sick leave per “calendar year.” Effective January 1, 2021, employees with 100 or more employees must provide 56 hours of paid sick leave per calendar year. The “calendar year” is set by the employer so long as it is any regular, consecutive twelve-month period. Small employers with fewer than 5 employees must provide unpaid leave, subject to the same conditions and requirements as for paid leave, unless, starting as of January 1, 2021, such smaller employers have a net income of \$1 MM or more in the previous 12-month period, in which case such leave must be paid.

With very limited exceptions, any employee of a private sector New York City employer, including a nonprofit, is entitled to sick time under the law. Of particular note to Lawyers Alliance clients, **one of the few categories of employees exempt from the law is therapists, including physical therapists, occupational therapists, speech language pathologists, and audiologists who are licensed by the New York State Department of Education.** To be exempt, these therapists must call in for work assignments at will; determine their own work schedules; have the ability to reject or accept any assignment referred to them; and be paid an average hourly wage, which is at least four times the federal minimum wage. Furthermore, the Act does not apply to employees covered by a collective bargaining agreement that expressly waives the law’s provisions and provides comparable time-off benefits. Upon expiration of the collective bargaining agreement, the Act takes effect immediately.

Accrual and Use of Sick Time

The Act contains detailed requirements for the accrual and use of sick time. Employees accrue sick time under the Act beginning on the first day of employment at a rate of 1 hour for every 30 hours worked, up to a maximum of (i) 40 hours for employers with 99 or fewer employees and (ii) 56 hours for employers with 100 or more employees, in a “calendar year.” The law presumes that exempt employees work 40 hours per week. The statute further states, however, that an exempt employee whose work week is less than forty hours accrues sick time “based upon that regular work week.” DCA’s FAQ clarifies this provision to mean that an exempt employee whose work week is based on less than forty hours per week, accrues sick time based on actual hours worked, while an exempt employee working in excess of forty hours in a work week accrues sick time as if he or she worked forty hours. Although sick leave accrues immediately at the start of employment, and employees may use sick days as they accrue. Employees may use earned sick time in less than full-day increments if they choose; however, employers may set a minimum amount of time that can be used for any one absence of up to four hours¹.

To the extent employees do not use all of their accrued sick time, covered employers must allow staff to carry over up to 40/56 hours of unused time into the following “calendar year.” However, employers are not required to allow employees to use more than 40/56 hours of sick time in a “calendar year.” The Act does not require employers to pay out accrued unused sick time upon termination or resignation of employment.

Employers must provide employees with information concerning their leave accruals, usage, and balances on each paystub. The law provides for an alternative written statement, but no guidance has been issued as to what alternatives to the paystub are acceptable.

Other Requirements

The Act prohibits employers from mandating that workers find a replacement to cover their work hours as a condition of taking sick time. Additionally, if an employer and employee agree, the employee may choose to work extra hours to make up for time off of work due to a “qualifying reason” (discussed below) rather than using accrued sick time. The additional hours may be worked during the seven days immediately before the time off if the need for leave was foreseeable, or during the immediate subsequent seven days.

If an employer already has a leave policy that provides time off which may be used for the same purposes and under the same conditions as sick time under the law, such a policy fully satisfies the employer’s obligations under the Act. These policies are sometimes referred to as “no-fault” attendance policies or “paid time-off” policies and allow employees to bank time for use as either vacation, personal days, or sick days as needed. The new law does not require employers to provide additional sick time even if the employee exhausted the leave for purposes other than sick leave.

¹ Remember, however, that an employer may not make partial-day deductions from an exempt employee’s salary except for intermittent FMLA leave.

Finally, the Act specifically prohibits employers from retaliating or threatening retaliation against an employee for exercising or attempting to exercise any right provided by the Act, or from interfering with an investigation into a violation of the Act. Rights under the Act that are protected by the anti-retaliation provisions include but are not limited to the right to request and use sick time, file a complaint for an alleged violation of the Act with the enforcement agency, participate in an administrative proceeding over an alleged violation of the Act, or inform any person of his or her potential rights under the Act.

Qualifying Reasons for Taking Sick Time

Employees can take sick time under the Act for various reasons beyond their own illness. The Act specifies the following **health-related qualifying reasons** for which an employee can use accrued sick time: (1) an employee's own 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; or (2) 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; or (3) 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.

The Act also includes the following **"safe time" qualifying reasons** for using accrued sick time: obtaining services for relief from a family offense matter, sexual offense, stalking or human trafficking; participating in safety planning or relocation for the safety of the employee or a family member in response to such offenses; meeting with attorneys or social services providers in connection with such offenses as well as family and matrimonial matters, immigration, housing, or discrimination in employment, housing, or consumer credit; filing a report with law enforcement; meeting with a district attorney; enrolling children in a new school; or other actions for the mental and physical health of the employee, the employee's family member, or those associated or working with the employee.

The **law broadly defines "family member"** to include an employee's child, spouse, domestic partner or parent, or the child or parent of an employee's spouse or domestic partner, grandchild, grandparent, and sibling, including half-siblings, step-siblings, and siblings related through adoption; any blood relative; any other person in the equivalent of a family relationship.

Employee Notice Obligations

The Act permits employers to require reasonable notice by employees of the need to use sick time. Where the need for leave is foreseeable, an employer may insist on advance notice of up to seven days prior to the start of the leave. If the need for leave is not foreseeable, staff members can be required to give notice "as soon as practicable." Employers may ask for documentation of the need for leave in the form of a doctor's note, but only for absences of more than three consecutive days. **The employer must cover any fees charged** to the employee in connection with obtaining the documentation. The Act specifies that documentation signed by a "licensed health care provider" verifying the need for the amount of time taken shall be sufficient and that employers may not require the note to specify the nature of the employee's or the employee's family member's condition to justify leave under the Act.

Employer Notice and Recordkeeping

Employers must provide employees with written notice that they are entitled to sick time under the Act and maintain records showing compliance. The notice must be given at the start of employment.

Current employees must be given an updated notice by October 30, 2020. The notice should describe the accrual and use of sick time, the employer's "calendar year," and the right to be free from retaliation and to file a complaint. The City's Department of Consumer Affairs, which is currently charged with enforcing the Act, published a form Notice of Employee Rights, which can be found by clicking here: <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSafeSickLeave-MandatoryNotice-English.pdf>

The law does not require a workplace poster but states that a notice of rights also may be posted. Records documenting compliance with the Act's requirements must be maintained for at least three years.

Enforcement and Penalties

The Department of Consumer Affairs is responsible for enforcing the Act; however, the Mayor now has the authority to designate any other city agency to do so. Although the Act does not allow employees to file private lawsuits over alleged violations, any person claiming a violation may file a complaint with the Department within two years (which the amendments increased from 270 days) of the date he or she knew or should have known of the alleged violation. The Department will conduct an investigation and attempt to resolve the complaint through mediation. If the Department believes a violation has occurred, it will issue a notice of violation, which shall be returnable to the authorized administrative tribunal. The Department has the authority to investigate violations of the Act upon its own initiative even if no formal complaint was filed.

Penalties for violations of the Act include: (1) the greater of three times the wages that should have been paid for each instance of sick time taken but unlawfully not compensated, or \$250; (2) \$500 for each instance of unlawfully denied sick time not taken by the employee or that the employee was required to work additional hours without mutual consent; (3) for each instance of unlawful retaliation (not including termination), full compensation including lost wages and benefits, \$500 and appropriate equitable relief; and (4) for each instance of unlawful discharge, full compensation including lost wages and benefits, \$2,500 and appropriate equitable relief, including reinstatement. In addition, employers found to be in violation of the Act will incur civil penalties payable to the City of up to \$500 for the first violation, \$750 for a second violation within two years of a prior violation, and \$1,000 for subsequent violations within two years of any previous violation. Willful violations of the Act's employer notice obligations will result in a fine of up to \$50 per employee who did not receive a required notice.

Best Practices for Employers

To comply with the new law, employers should:

- Update the paid or unpaid (depending on the size of the employer) sick leave policy to comply with the amended Act;
- Verify that all new hires and current employees receive the Notice of Employee Rights that complies with the Act's employer notice obligations;
- Train supervisory employees on what the law now requires and on any related modifications to policies and procedures.

- Work with your payroll company to provide leave accruals, usage, and balances on each paystub.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at jmoldover@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information.

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