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### **“Safe Time” Added to New York City’s Earned Sick Time Act**

The New York City Earned Sick Time Act (ESTA) requires most New York City employers to provide mandatory sick leave of up to 40 hours per year, paid or unpaid, depending on the size of the employer. Employers with 5 or more employees must offer paid leave. The City’s Department of Consumer Affairs (DCA), the agency currently charged with enforcing the new law, maintains a website [www.nyc.gov/PaidSickLeave](http://www.nyc.gov/PaidSickLeave) containing an FAQ, form notice and other compliance information.

**Effective May 5, ESTA law has recently been amended to provide for leave for “safe time,” and the definition of “family member” has been greatly expanded.**

The main requirements of current law, as amended, include the following:

- Private sector New York City employers must allow their full and part-time employees to use up to 40 hours of sick time each year beginning 120 days after the start of employment. Employers with 5 or more employees must offer paid sick leave, while smaller employers must offer equivalent unpaid time.
- Accrual at a rate of one hour of leave for every 30 hours of work begins on the first day of employment.
- 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 in a year.
- Employers must notify new employees of their rights under the law at the start of employment, and 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 40 hours of paid or unpaid sick time off, depending on the size of the employer, each “calendar year”. The Act requires that employers with 5 or more employees (“employees” means all full-time, part-time and temporary employees) provide the 40 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 less than 5 employees need to give the same amount of time off but unpaid, subject to the same conditions and requirements as for paid leave.

With very limited exceptions, any employee of private sector New York City employers who is employed for more than eighty hours in a “calendar year” 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 40 hours, or five days, 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, employees are not entitled to use sick days until 120 days after their start date. 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 hours<sup>1</sup>.

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

To the extent employees do not use all of their accrued sick time, covered employers must allow staff to carry over up to 40 hours of unused time into the following “calendar year.” However, employers are not required to allow employees to use more than 40 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.

### **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.

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 now 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” for purposes of the second category of qualifying reasons. The definition of “family member” includes 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, then 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 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 June 4, 2018.** 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/PaidSickLeave-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;
- Review absence call-in and verification procedures to ensure they do not burden employees with obligations prohibited by the Act;
- Review the process of tracking the accrual, use and carryover of paid or unpaid sick time;
- Update record retention policies and procedures to include maintenance of records relating to compliance with the Act;
- Train supervisory employees on what the law now requires (including the prohibition against retaliation) and on any related modifications to policies and procedures.

***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 (212) 219-1800 ext. 250 or visit our website at [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information.***

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