

Employment & Labor Alert

New York City's *Earned Sick Time Act* Requires Paid Sick Leave Beginning April 1, 2014

In New York City, employers with five or more employees or one or more domestic workers must provide *paid* sick leave. Employers with fewer than five employees must provide *unpaid* sick leave.

Introduction

Effective April 1, 2014, New York City will require sick leave of up to 40 hours annually, joining Newark (N.J.), Jersey City (N.J.), San Francisco (Calif.), Seattle (Wash.), Portland (Ore.), Connecticut and the District of Columbia in requiring some paid sick leave for private sector employees.

Employers with operations in New York City should review their sick leave policies and consult legal counsel to ensure compliance with the terms of the Earned Sick Time Act (ESTA). For your convenience, an overview of certain ESTA provisions as interpreted by the City's Department of Consumer Affairs is below. Please contact us for a more substantive analysis of how ESTA may affect your company's policies.

Which Employers Are Required to Provide *Paid* Sick Leave?

- Private employers with five or more employees who work more than 80 hours in a calendar year. ESTA's "calendar year" is a "regular consecutive twelve month period, as determined by the employer."
 - *Fluctuating Work Force*. Where the number of employees fluctuates, business size may be determined for the current calendar year based upon the average number of employees who worked per week during the preceding calendar year.

- *Chain Businesses.* For chain businesses, the total number of employees in that group of establishments within New York City (sharing a common owner or principal) will be counted.
- Employers with one or more domestic workers who works more than 80 hours in a calendar year.

Who Is Required to Receive *Unpaid Sick Leave*?

- Employers with fewer than five employees must provide unpaid sick leave for those employees who work more than 80 hours in a calendar year.
- *No Duplication Under Existing Leave Policy.* Additional unpaid sick leave is not required if the employer already provides unpaid or paid leave (including unpaid or paid time off, unpaid or paid vacation, or unpaid or paid personal days) that is sufficient to meet ESTA requirements and allows such leave to be used for the same purposes and conditions as sick leave.

How Do You Compute Sick Leave and When Can Sick Leave Be Used?

- ***For Employees (other than domestic workers)***
 - Employees accrue a minimum of one hour of sick leave for every 30 hours worked. Employers are not required to provide an individual employee more than 40 hours of sick leave per calendar year (i.e., after 1,200 work hours, paid sick leave stops accruing).
 - Paid sick leave begins to accrue at the commencement of employment *or* on April 1, 2014, whichever is later.
 - If there is a separation from employment and the employee is rehired within six months by the same employer (e.g., seasonal workers), the employer must reinstate previously accrued sick leave unless the departing employee had agreed to be paid out and was paid for unused sick leave when the employee left.
 - Employees exempt from New York's overtime requirements are assumed to work 40 hours each work week for purposes of sick leave accrual unless their regular work week is less than 40 hours, in which case sick leave accrues based upon that regular work week.
 - An employee can begin using sick leave on the 120th calendar day following the later of either: (i) the commencement of employment; *or* (ii) April 1, 2014. After that 120th day, employee may use sick leave as it is accrued.
 - *No Duplication Under Existing Leave Policy.* If an employer already provides paid leave—such as paid time off, paid vacation, paid personal days or paid days of rest that are sufficient to meet ESTA requirements (including the purpose and conditions of sick leave), the employer is not required to provide additional paid sick leave.

- *Incremental Use of Sick Leave.* Employees determine how much earned sick leave they need to use. Employers “may set a reasonable minimum increment for the use of sick leave “not to exceed four hours per day.”
- **For Domestic workers**
 - Domestic workers are entitled to two days of paid sick leave in addition to the three days of paid rest to which they are entitled under the New York State Labor Law.
 - Domestic workers are eligible to take this time as of the date they are eligible to receive other paid days off or days of rest.

Upon Departure, Must Unused Sick Leave Be Paid?

- Upon termination, ESTA does not require the employer to reimburse the employee for accrued sick leave that has not been used.

Is Accrued But Unused Sick Leave Carried Over to the Next Year?

- Unused sick leave may be carried over to the following calendar year.
- Employers are not required to allow the use of more than 40 hours of sick leave in a calendar year.
- Employers are not required to carry over unused paid sick leave if: (i) the employee is paid for any unused sick leave at the end of the calendar year the sick leave is accrued; and (ii) the employer provides the employee with an amount of paid sick leave that meets or exceeds ESTA requirements for the immediately subsequent calendar year on the first day of the immediately subsequent calendar year.

How May Eligible Employees Use Their Sick Leave?

- An employee is entitled to use sick leave for absence from work due to:
 - Employee’s 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 preventative medical care; or
 - 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
 - Closure of employer’s place of business by order of a public official due to a public health emergency; or

- 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.
- An employer may require reasonable notice of the need to use sick leave.
 - Where the need is foreseeable, an employer may require seven days notice.
 - Where the need is not foreseeable, an employer may require notice as soon as practicable.
- For an absence of more than three consecutive work days, an employer may require reasonable documentation regarding the use of sick leave, signed by a licensed health care provider under certain circumstances.
- As a condition of taking sick leave, an employer may not require that an employee find a replacement worker to cover hours during which the employee is using sick leave.
- An employer may take disciplinary action, up to and including termination, against an employee who uses sick leave for other (non-statutory) purposes.
- Upon mutual consent, an employee can voluntarily agree to work additional hours or swap shifts within the seven days before taking sick leave (if the leave was foreseeable), or within the seven days after taking sick leave. An employer cannot require an employee to work additional hours to make up sick leave. Adjunct professors who work at an institute of higher education may work such additional hours at any time during the academic year.

Which Employees Are Not Covered by ESTA?

- Employees who work 80 hours or less in a calendar year;
- Work-study students;
- Employees compensated by a qualified scholarship;
- Participants in work experience programs;
- Employees subject to a collective bargaining agreement with certain overlapping coverage;
- Hourly professional employees, including physical therapists, occupational therapists, speech/language pathologists and audiologists who: (i) are licensed by the New York State Department of Education, Office of the Profession; (ii) call in for work assignments at will determining their own work schedule with the ability to reject or accept any assignment referred to them; and (iii) are paid an average hourly wage that is four times the federal minimum wage;

- Independent contractors; and
- Employees of government agencies.

Must Employers Give Notice?

- Employers must provide both new and current employees written notice of their rights under ESTA at the commencement of employment or by May 1, 2014, whichever is earlier.
- The notice may also be posted in the workplace in an area accessible to employees. An employer cannot post the notice instead of providing notice directly to the employee.
- The New York City Department of Consumer Affairs has posted a sample “Notice of Employee Rights” on its [website](#).

Other Details

- *Recordkeeping.* Employers must retain records showing ESTA compliance for three years.
- *Is Employer Retaliation Banned? Yes.*
 - No employer may penalize an employee for exercising or invoking his or her ESTA rights.
 - ESTA rights include: requesting and using sick leave; filing a complaint for alleged violations; communicating with any person about any violation; participating in any action regarding an alleged violation; or informing any person of his or her ESTA rights.
- *Statute of Limitations.* Employees must file a complaint with the New York City Department of Consumer Affairs within two years from the date the employee knew or should have known of the alleged violation. Employees have no independent private right of action in court.
- *Penalties For an Employer’s Noncompliance with ESTA.*
 - Payable to the employee:
 - For each instance of sick leave taken by an employee but *not compensated*: three times the wages that should have been paid *or* \$250, whichever is greater.
 - For each instance of sick leave requested by an employee but *denied* and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, or for each instance an employer requires an employee to work additional hours without mutual consent: \$500.
 - For each instance of *retaliation* (not including discharge): full compensation including lost wages and benefits lost, \$500 and equitable relief as appropriate.

- For each instance of *discharge* from employment: full compensation including lost wages and benefits lost, \$2,500 and equitable relief, including reinstatement, as appropriate.
- Payable to New York City:
 - First violation: \$500.
 - Subsequent violations (within two years of any previous violation):
 - Second violation: not to exceed \$750.
 - Succeeding violations: not to exceed \$1,000.
 - If an employer willfully violates the notice requirements, the employer will be subject to a civil penalty of \$50 for each employee.
- *Penalty Grace Period for Certain Employers.* Employers with fewer than 20 employees or certain manufacturing sector employers (those classified in sector 31, 32 or 33 of the North American Industry Classification System) will not be subject to a civil penalty for violations *before* October 1, 2014. However, the New York City Department of Consumer Affairs may order any other remedy authorized under ESTA (including equitable relief).

The New York City Department of Consumer Affairs provides additional guidance on its [website](#). See generally “[Paid Sick Leave: What Employers Need to Know](#).”

Contact Us

For advice in applying ESTA to your particular business practices, please contact us.

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