

April 22, 2014

## **NEW YORK CITY EARNED SICK TIME ACT**

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On April 1, 2014 the New York City Earned Sick Time Act, as amended, went in to effect. The recent amendments to the Act will require most private employers in New York City to provide their employees with up to 40 hours (five days) of paid sick leave per year. While many employers provide employees with paid time off already and may be in compliance with some of the law's provisions, the Act includes several minimum mandates for all covered employees. These include the following:

### **General Coverage Provisions**

- All covered employers with five (5) or more employees and those employing domestic workers are covered by the Act. An employee is defined as an individual who works in New York City for more than 80 hours per year, whether on a full time, part time or temporary basis.
- Employers with fewer than five (5) employees, who are not entitled to paid sick leave under the Act, are nonetheless required to provide up to 80 hours of unpaid leave per year under the Act.
- The Act does not require employers to provide paid sick time to independent contractors. The Act does not apply to public employers or to employees covered by a Collective Bargaining Agreement in effect on April 1, 2014 until that agreement terminates (thereafter union employees will not be covered so long as the Collective Bargaining Agreement expressly waives the employees' rights under the Act).
- When the number of employees fluctuates above and below five persons per week over the course of the year, the size of the business will be determined from the current calendar year based on the average number of persons who worked for compensation per week during the preceding calendar year.

### **Accrual of Sick Time**

- Current employees begin to accrue sick time on April 1, 2014, while employees hired *after* that date begin to accrue sick time on their first day of employment.
- After 120 days, the employee may use accrued sick time.
- The Act requires that employees accrue sick leave at the rate of one hour per every 30 hours worked up to a maximum of 40 hours per calendar year. Employers may determine which consecutive 12 month period constitutes a "calendar year" (and may, for example, measure it by a fiscal year, tax year or contract year).
- Non-exempt employees accrue sick time based on the hours they work (*the Act is silent on whether paid vacation time or paid holiday hours count as hours worked*).
- For exempt workers, the Act directs that employers are to assume that they work 40 hours per week for accrual purposes (unless the worker typically works less than 40 hours and, in such case, sick time is based on the number of hours regularly worked by the exempt employee [thus requiring employers to track hours on such exempt employees]).

### The Act's "Carryover" Provision

- The Act requires that up to 40 hours of unused paid sick time must be carried over to the following calendar year unless the employer:
  - i) pays the employee for any unused sick leave at the end of a calendar year; *and*
  - ii) provides the employee with an amount of paid sick time that "meets or exceeds" the Act's requirement for the following calendar year "on the *first day* of the immediate subsequent calendar year."

*(At least one commentator has noted that this second requirement under the Act is ambiguous and suggested that employers who choose to pay out unused leave at the end of a calendar year should consider giving employees 40 hours of sick time as of the first day of the new calendar year.)*

- The Act expressly does not require an employer to pay an employee for accrued but unused paid sick time when an employee's employment ends, and it permits an employer to cap paid leave at 40 hours per calendar year.
- However, the Act requires reinstatement of sick time where an employee is rehired within six months of leaving the employ of an employer.
- Additionally, under the Act, when an employee is transferred to a separate division, entity or location of the same employer within New York City, that employee "is entitled to all sick time accrued at the prior [location] and is entitled to retain or use all sick time" as if s/he remained at the original location.

### Employee Use of Sick Leave

- The Act permits employees to use sick time from work due to:
  - i) the employee's mental or physical illness, injury or health condition or need for a medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care; or
  - ii) care of a family member who needs medical diagnosis or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or
  - iii) the closure of the employer for a public health emergency; or
  - iv) care for a child whose school day or daycare is closed for a public health emergency; and/or
  - v) care for the employee's "family member" who is ill or who needs preventive care.
- The definition of "family member" under the Act includes an employee's spouse, domestic partner, parent, child or parent of an employee spouse or domestic partner, sibling (including half siblings, step siblings and siblings for adoption), grandchild, and grandparent.
- Employers may set a reasonable minimum increment on employee's use of sick time so long as it does not exceed 4 hours per day.
- Employees can also choose when to use their sick time subject to specific limitations.
  - i) if the need is foreseeable, employers may require advance notice of up to seven days; and
  - ii) for unforeseen absences, employers may require notice "as soon as practicable."

### Documentation

- When an employee is absent for more than three consecutive work days, an employer may require reasonable documentation establishing the need for and duration of any sick leave.
- However, the employer cannot demand a second opinion nor require disclosure of the nature of the injury, illness or condition of the employee or his or her family member.
- Where absences are less than three consecutive work days, employers may only request “written confirmation that an employee used sick time” (an employee’s written confirmation would appear to satisfy this request).

### Regulatory Enforcement Provisions

- The Department of Consumer Affairs (“DCA”) will regulate the Act. There is no private right of action and the Act allows employees two years to file a complaint with the DCA.
- The Act provides for civil penalties and includes broad retaliation terms that provide that employers may be subject to liability for retaliatory conduct, including being liable to the employee for \$2,500 (for each instance of retaliation), lost wages and benefits, and to the City for additional penalties.

### Notice/Record Keeping

- Employers must give workers written notice of their rights under the Act including the right to file a complaint with the DCA. All existing employees must be given notice by May 1, 2014 and all new employees must be given notice when they commence employment.
- Any entity that wilfully violates the notice requirement is subject to a civil penalty not to exceed \$50 for each employee who is not given notice.
- The Act also requires the DCA to create the notice to be given. The notice must be in English and the primary language spoken by the employee (*see nyc.gov/PaidSickLeave*).
- Employers must maintain records demonstrating their compliance with the Act for three years and must allow the DCA access to such records.

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### About the Author

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