October 30, 2020

Sick Time in New York: What Employers Need to Do Now Under New and Amended Laws

On September 30, a new New York State sick time law and amendments to New York City's Earned Safe and Sick Time Act (ESSTA) became effective. Such laws require employers in New York State and City to take immediate action and, depending on the size of the employer, to potentially provide more paid or unpaid time off to employees in 2021.

NYC's ESSTA Amendments

Since ESSTA has been in place for years, New York City employers have already been providing their employees with at least one hour of paid sick time for each 30 hours worked, up to a maximum of 40 hours per year. ESSTA was amended recently to mirror the requirements of the new New York State law, including as follows:

- **More paid time:** Employers with four or fewer employees with more than $1 million net income in the prior tax year must provide up 40 hours of **paid** leave per year (previously unpaid), and employers with 100 or more employees must provide up to 56 hours per year (up from 40 hours). This extra time is to have started accruing for employees on September 30, 2020, at the rate of one hour for every 30 worked, but cannot be used until January 1, 2021. The accrual and use amounts for NYC employers between five and 99 employees will not change.
- **Required notice to employees:** Employers must furnish written notice of the updates to ESSTA to all existing employees by October 30, 2020, and to new hires at the start of employment. This same notice must also be conspicuously posted in an area accessible to employees. In addition, for each pay period, employers must now include the following information on employee pay stubs or via another form of writing each pay period to each employee: the amount of leave accrued and used by the employee during the applicable pay period and his/her leave balance. The pay stub requirement was effective September 30, but employers have, for good cause, until November 30 to comply with this provision without penalty.
- **Elimination of minimum hours worked:** All employees, regardless of the amount of time they work in NYC, are entitled to accrue and use leave up to the specified cap based on the size of their employer (previously an employee had to work at least 80 hours per calendar year in NYC to be entitled to such benefits).
- **Elimination of waiting period:** Accrued time can be used as soon as it is accrued (no waiting period) except for any "new" amendment, meaning for those with four or fewer employees and a net income of $1 million or more that are now required to offer 40 hours of paid leave, and those with 100 or more employees that are required to provide an additional 16 hours. For these employers, the amendments will be effective January 1, 2021, and moving forward, employees will be able to use this paid time as it is accrued.
- **Reimbursement for documentation charges:** Employers are now required to reimburse employees for any charge to employees for requested medical documentation for leaves of more than three days.
- **Increased penalties for non-compliance and retaliation:** In addition to new prohibitions on adverse actions against employees for exercising their rights under ESSTA, there is a new $500 penalty per employee for an employer's failure or refusal to allow use of accrued paid sick leave.

New York State Law

Those New York State employers outside New York City are newly required, ***as of the September 30 effective date of the law***, to start accruing one hour of sick time for each 30 hours worked, up to a certain maximum based on the size and net income of the employer, for use starting on January 1, 2021. Employers with four or fewer employees in a calendar year and net income of less than $1 million are required to provide up to 40 hours of *unpaid* time, while those with more than four employees and a net income of more than $1 million, and employers with five to 99 employees, must provide up to 40 hours of paid time. Employers with 100 or more employees must provide up to 56 hours of paid time. The number of employees is determined based on a calendar year (January 1 to December 31), but employers can set their benefit year as any consecutive 12-month period for employees' accrual, use, and rollover of paid sick leave. Employers must retain records of each employee's accruals and use on a weekly basis for six years.

Employees are entitled to use their sick time for the following reasons:

- for their own or their family members' mental or physical illness, injury, or health condition, regardless of whether it has been diagnosed or requires medical care at the time of the request for leave;
- for the diagnosis, care, or treatment of a mental or physical illness, injury or health condition, or the need for medical diagnosis or preventive care, for themselves or their family member; and
- when they or their family members have been the victim of domestic violence as defined by the State Human Rights Law, a family offense, sexual offense, stalking, or human trafficking.

Family member is defined as child, spouse, domestic partner, parent, sibling, grandchild, grandparent, and the child or parent of an employee's spouse or domestic partner. Employees must be permitted to use accrued time in reasonable increments, set forth in writing by the employer, up to a maximum of four hours.

Existing leave policies that meet the accrual, use and carryover requirements of the new law satisfy employers' obligations under the new law. If operating under a collective bargaining agreement, employers and the unions representing their employees may agree to waive or modify the entitlements under certain circumstances. Employers are prohibited from retaliating against employees for exercising their right to use sick time. More specific information about this new law can be found in the newly issued guidance.

Differences Between the New York State Law and ESSTA

It is worth noting that the New York State law and the amended ESSTA have some nuanced differences that may cause them not to entirely overlap. For example, the reasons for use of paid sick leave are broader under ESSTA and include "closure of employee's place of business … due to public health emergency or such employee's need to care for a child whose school or childcare provider is closed due to public health emergency." Further, the definition of family member under ESSTA additionally includes "any other individual related by blood to the employee, and any other individual whose close association with the employee is the equivalent of a family relationship."

With regard to notice, the New York State law, unlike the more onerous requirements under ESSTA, merely requires employers to provide an accounting of time employees have accrued and used within three days of a written request.

Given New York State's new law and the amendments to ESSTA, employers should review their paid time off policies to ensure that they meet the requirements of these laws, and to immediately ensure compliance with ESSTA's new notice and pay stub requirements if applicable.

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