

Nothing to Sneeze At: New York City Mayor Signs Earned Sick Time Act into Law, Effective April 1

March 24, 2014

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On March 20, 2014, New York City Mayor Bill de Blasio signed his first bill into law as mayor, amending the Earned Sick Time Act (“ESTA”), which requires the City’s private employers with *five* or more employees to provide paid sick time to their employees. Effective April 1, 2014, covered employers must guarantee up to 40 hours of paid sick time to their workers each calendar year. Upon signing the bill into law, Mayor de Blasio described the passage of the amended ESTA as “the first of many steps” to “address inequality in this city.”

As we have previously reported, the New York City Council voted to amend the ESTA after Mayor de Blasio’s inauguration. (See the [Act Now Advisory](#) titled “[Update: New York City Council Expands Scope of Paid Sick Time Law](#)”). By way of background, on June 26, 2013, the NYC Council originally passed the ESTA, overriding former Mayor Michael Bloomberg’s veto. During his mayoral campaign, de Blasio vowed to change the ESTA to expand its scope to cover more New Yorkers, including workers employed by small employers. As such, in February 2014, the NYC Council passed two amendments changing certain aspects of the ESTA, including expansion to private employers with five or more employees. Other significant changes included:

- broadening the definition of “family member” to include grandparents, grandchildren, and siblings (including half-siblings and step-siblings) with respect to allowing employees to use paid sick time to care for family members;
- eliminating the exemption for certain manufacturing-sector employers from the ESTA’s coverage;
- adding a six-month civil penalty grace period for certain manufacturing establishments and employers with fewer than 20 employees;
- repealing the “phase-in” feature of the ESTA, as originally enacted, which would have covered employers with 20 or more employees, and then 18 months later,

employers with 15 or more employees would have been covered under the ESTA;

- making the ESTA effective for all covered employers as of April 1, 2014; and
- requiring employers to provide notice of employees' rights under the ESTA to existing employees by May 1, 2014 (notice must be provided to new hires upon commencement of employment).

This *Act Now Advisory* will summarize key requirements of the ESTA, as amended, and will provide guidance with respect to compliance, including information contained in the Frequently Asked Questions ("FAQs") released concurrently with Mayor de Blasio's signing of the ESTA by the City's Department of Consumer Affairs ("DCA"), the agency tasked with enforcement of the ESTA.

In addition to the comprehensive 17-page FAQs, the DCA has released on its [website](#) the required [Notice of Employee Rights](#) ("Notice") currently available in English, as well as an abridged "[What Employers Need to Know](#)" fact sheet and a second "[What Employees Need to Know](#)" fact sheet.

Covered Employers

A covered employer under the ESTA includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" in the private sector. Moreover, the ESTA, as amended, no longer exempts certain manufacturing employers (employers classified in sectors 31-33 of the North American Industry Classification System as utilized by the U.S. Census Bureau and the Bureau of Labor Statistics). Further, all employers of at least one domestic worker are subject to the ESTA.

Covered Employees

The ESTA applies to employees (including domestic workers) who work:

- full time or part time;
- within New York City;
- for at least 80 hours in a calendar year; and
- for a covered employer.

The ESTA does not apply to public-sector employees, participants in certain work-study programs,¹ employees compensated by or through certain qualified scholarships, independent contractors, or New York State Education Department licensed “hourly professional employees,”² as defined under ESTA.

Reasons for Taking Sick Time Under the ESTA

Employees may use sick time for absence from work due to the following reasons:

- an 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 preventive care;
- care of a covered family member who needs medical diagnosis; care or treatment of a mental or physical illness, injury, or health condition; or need for preventive care; or
- closure of the employee’s place of business due to a declared public health emergency or the employee’s need to care for a child whose school or childcare provider has been closed due to a declared public health emergency.

For purposes of the ESTA, “family member” means an employee’s child, spouse, domestic partner, parent, sibling, grandparent, grandchild, or the parent or child of the employee’s spouse or domestic partner. “Parent” refers to a biological, foster, step, or adoptive relationship or legal guardian of an employee or a person who stood in loco parentis when the employee was a minor. “Sibling” is defined as an employee’s brother or sister, including half-siblings, step-siblings, and siblings related through adoption.

Accrual and Use Rules

- Sick time under the ESTA begins to accrue upon the commencement of employment or April 1, 2014, whichever is later.
- Employees must accrue at least one hour of sick time for every 30 hours worked, up to a maximum of 40 hours in an applicable calendar year.

¹ The ESTA does not apply to participants in federal work study programs developed under 42 U.S.C. § 2753 (where institutions of higher learning make federal grant money available to compensate students that gain otherwise “unpaid,” part-time employment, including internships or research assistantships in specific areas, such as public interest, government, or private nonprofit).

² For purposes of the ESTA, hourly professional employees refer to occupational therapists, speech-language pathologists, audiologists, and physical therapists licensed by New York State’s Education Department who: (i) call in for work assignments at will and determine their own work schedule, (ii) have the ability to reject or accept assignments referred to them, and (iii) receive compensation at an average hourly wage that is at least four times the federal minimum wage for hours worked.

- For purposes of the ESTA, a “calendar year” means a regular and consecutive 12-month period, as determined by an employer. In the FAQs, the DCA explains that employers may find it helpful to use the calendar year that they use for calculating wages and benefits (i.e., January 1 – December 31, tax year, fiscal year, contract year, or anniversary year). The FAQs also state that employers must include the definition of “calendar year” in the Notice.
- Regardless of when the time accrues, an employee is not entitled to *use* sick time until the later of July 30, 2014, or the 120th calendar day following the employee’s commencement of employment.
- Exempt employees are presumed to work 40 hours in each work week for purposes of sick time accrual unless their regular work week is less than 40 hours, in which case sick time accrues based on the number of hours in their regular workweek.
- For employees who are not exempt from overtime, paid sick leave accrues during all hours worked, including overtime hours worked.
- If the need for sick time is foreseeable, employers can require up to seven days’ advance notice of an employee’s intention to use sick time. If the need is unforeseeable, employers may require an employee to give notice as soon as practicable.
- Employers may require employees to provide a note from a health care provider confirming the need for the amount of sick time taken only if the employee uses *more than three consecutive workdays* of sick time. The ESTA prohibits employers from requiring the health care provider to specify the medical reason for sick leave, although disclosure may be required by other laws (e.g., the Family and Medical Leave Act). Further, the FAQs also clarify that employers may not ask for second opinions to verify that the medical documentation provided is valid.
- Unused sick time will carry over to the following calendar year (except for domestic employees); however, employers need not allow employees to use more than 40 hours of sick time in a given year.
- Employers may choose to pay an employee for unused sick time at the end of the calendar year, in lieu of carry over, so long as (i) payment is made on or before the first day of the following calendar year, and (ii) the employee is provided with the amount of paid sick leave that meets or exceeds the requirements under the ESTA on the first day of the next calendar year. (This provision is confirmed in the FAQs.)
- Employees are not entitled to payment for accrued, unused sick time upon termination or resignation of employment.

- Employers may set a reasonable minimum increment for the use of sick time, not to exceed four hours per day (i.e., it would be impermissible for a policy to deny employees the ability to take sick time in increments of less than a full day).

Existing Employer Sick, PTO, or Paid Leave Policy

In the FAQs, the DCA acknowledges that many employers in New York City already provide paid leave, sick time, or other paid time off (“PTO”) policies, and confirms that such policies will be sufficient to comply with the ESTA, so long as each requirement of the ESTA is satisfied by such policy, including allowing employees to use sick time for the purposes set forth above. Further, employers must ensure that their policies do not exclude part-time employees since the ESTA provides paid sick time for part-time employees who work at least 80 hours per year. Employers must also allow employees to carry over unused sick days, unless at least 40 hours of sick leave is provided in a lump sum (i.e., front loaded) on the first day of the following year, and the provisions of the ESTA are otherwise followed.

Beginning April 1, small employers with five or more employees that previously never provided sick time must comply with the ESTA. Employers with fewer than 20 employees, as well as certain employers in the manufacturing industry, have a six-month grace period, where such employers will not be subject to a civil penalty if they are not in compliance with the ESTA.³

Notice and Recordkeeping Requirements

- Upon commencement of employment, employers must provide new employees with the Notice, which is available on the DCA website.
- By May 1, 2014, employers must distribute the Notice to existing employees.
- The Notice sets forth information pertaining to the employees’ right to sick time, the accrual and use of sick time, the employer’s definition of “calendar year,” and the right to be free from retaliation and to bring forward a complaint to the DCA.
- The Notice is currently available in English, and employees have the right to receive the Notice in their primary language, if it is made available on the DCA’s website.

³ With respect to the six-month grace period for certain manufacturing employers and employers with fewer than 20 employees, a first-time violation that occurs prior to October 1, 2014, will not serve as a predicate for purposes of imposing penalties for subsequent violations occurring on or after October 1, 2014. A second or subsequent violation of the ESTA occurring during the grace period will serve as a predicate for purposes of imposing penalties for subsequent violations that occur after the grace period.

- Although not available at the time of this Advisory's publication, the DCA indicates in its FAQs that translations of the Notice are available on its website in Chinese, French-Creole, Italian, Korean, Russian, and Spanish.
- The FAQs clarify that the ESTA encourages, but does not require, the Notice to be posted in the workplace. The FAQs also confirm that posting the Notice will not replace individual distribution of the Notice to employees.
- Employers must retain records documenting their compliance with the ESTA for three years.
- The FAQs confirm that employers may maintain such records electronically, so long as the documents can be produced in a manner in which they can be readily inspected or examined and any health information is maintained confidentially unless disclosed by the employee or the disclosure is required by law.
- Confidentiality of medical records must be maintained in accordance with applicable law.

Additional Rules and Prohibitions

Employers are prohibited from:

- retaliating against an employee for exercising rights under the ESTA;
- interfering with an employee's right to exercise rights under the ESTA;
- requiring that an employee work additional hours to make up for an absence due to the use of sick time; or
- conditioning the use of sick time on an employee's ability to obtain a replacement.

The DCA confirms in the FAQs that, upon mutual consent, an employee can agree to work additional hours or swap shifts so long as the additional work hours are worked during the seven days immediately preceding or following the sick time usage. If such additional hours are fewer than the number of hours that the employee was originally scheduled to work, the employee must be able to use sick time provided for the difference. (Adjunct professors employed at institutions of higher education, however, may work such additional hours at any time during the semester.)

Employees Subject to Collective Bargaining Agreements

ESTA does not apply to employees covered by a valid collective bargaining agreement ("CBA") in effect on April 1, 2014. Such employees will not be subject to the ESTA until the expiration date of the CBA. When renegotiating a CBA or entering into a new CBA, the CBA should comply with the ESTA, or alternatively, the requirements of ESTA will

be deemed satisfied if (i) the provisions of the ESTA are expressly waived, and (ii) such CBA provides comparable benefits to the employees in terms of compensable time off. Comparable benefits include, but are not limited to, vacation, personal and sick time, and holiday and Sunday time pay at premium rates. Finally, the ESTA does not apply to any employee in the construction or grocery industry covered by a valid CBA, if such provisions are expressly waived in such CBA. The FAQs indicate that CBAs covering employees in the construction or grocery industry need not provide comparable benefits.

Domestic Employees

Effective April 1, 2014, domestic employees who are employed for more than 80 hours in a calendar year working in New York City are covered by the ESTA. Domestic employees are entitled to two paid sick days in addition to the three paid days of rest to which domestic employees are entitled under Section 161(1) of New York's Labor Law, following one year of employment. Unlike other covered employees, domestic employees are not permitted to carryover unused sick time. The FAQs state that the DCA will be providing further guidance regarding accrual rules for domestic employers at www.nyc.gov/PaidSickLeave.

Enforcement and Penalties

Aggrieved individuals have the right to file a complaint with the DCA within *two* years of the date that the individual knew or should have known of the alleged violation. (The ESTA, as originally enacted, permitted individuals to file a complaint within 270 days of the date of the violation.) Penalties for violations of the ESTA include:

- for each instance that an employee is not compensated in violation of the ESTA, the greater of (i) three times the wages that should have been paid, or (ii) \$250;
- for each instance that sick time is requested but denied by the employer or when unlawfully conditioned upon searching for a replacement worker, or for each instance an employer requires an employee to work additional hours without mutual consent, \$500;
- for each instance of unlawful retaliation not including termination of employment: full compensation, including wages and benefits lost, \$500 and equitable relief, as appropriate; and
- for each instance of unlawful termination of employment, full compensation, including wages and benefits lost, \$2,500 and equitable relief, including reinstatement, as appropriate.

The ESTA also establishes civil penalties payable to the City, not to exceed \$500 for the first violation, \$750 for a second violation within two years of the initial violation, and \$1,000 for subsequent violations. Finally, employers that violate the notice provision will be subject to a penalty of \$50 for each employee not provided with the Notice.

The ESTA does not provide individuals with a private right of action in court.

Other Important Information

- NYC employers with fewer than five employees must provide unpaid sick time under the ESTA.
- The FAQs indicate that for coverage purposes, employees who telecommute from locations *within the City* for employers located *outside the City* are covered by the ESTA for the hours that they work in the City.
- Employees who telecommute from locations *outside the City* for employers located *inside the City* limits are not covered by the ESTA for the hours worked outside the City.
- To ensure compliance and in accordance with the ESTA, the DCA will offer paid sick leave training sessions and forums open to the public.

The DCA's website, www.nyc.gov/PaidSickLeave, provides several methods of communication to connect with the DCA: by email at PaidSickLeave@dca.nyc.gov, by calling 311, via the DCA's Facebook page, or via Twitter @nycda and by using the hashtag #paysickleave. Employers may also use the DCA's online Live Chat feature during normal business hours.

What Employers Should Do Now

- Review your existing sick, PTO, and other time-off policies to ensure that they comply with the requirements of the ESTA, including the new provision covering additional family members (grandparents, grandchildren, and siblings).
- Prior to May 1, 2014, distribute the Notice to all existing employees (you may wish to consider sending the Notice together with the [poster](#) or [info card](#) addressing the amendment to the New York City Human Rights Law requiring employers to accommodate pregnant employees, which must be provided to current employees by May 30, 2014).
- Beginning on April 1, 2014, distribute the Notice to all new hires upon commencement of employment.
- Await the DCA's release of additional Notices in languages other than English, and review your files regarding the language employees have identified as their "primary language" in connection with the distribution of Wage Theft Prevention Act wage notices, since Notices must be provided in English and in that primary language, if a notice is available in such language.

- Allow employees to begin to accrue paid sick time under the ESTA beginning April 1 or 120 days after commencement of employment, whichever is later.
- Prepare for employees to begin using accrued sick leave on July 30, 2014, or 120 days after the start of employment, whichever is later.

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