

New York's Westchester County Issues FAQs and Notice of Employee Rights as Earned Sick Leave Law Goes into Effect

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Westchester County, New York's [Earned Sick Leave Law](#) ("ESLL" or "Law") went into effect on April 10, 2019. To assist employers with implementing their obligations under the Law, and advise employees of their rights, the county has published on its [website](#) [Employer FAQs](#), [Employee FAQs](#), and a [Notice of Employee Rights](#), which employers may download and use to fulfill part of the ESLL's notice requirement. Employers must comply with the Law's notice obligations by July 1, 2019. The required workplace poster does not yet appear on the ESLL website.

As we previously [reported](#), the ESLL requires that covered employees of an employer with five or more employees earn up to 40 hours of paid sick time in a consecutive 12-month period. Employers with fewer than five employees must provide up to 40 hours of unpaid sick leave. However, pursuant to the 90-day delay period built into the Law, covered employees do not begin to accrue earned sick leave—one hour of leave for every 30 hours worked—until July 10, 2019 (or on the date of first employment, if hired after July 10, 2019).

The Employer and Employee FAQs are useful as a quick review of the basics, but they do not provide a great deal of detail, and the information that is provided is not always clear. The Employer and Employee FAQs also leave unresolved an important coverage question, as described below.

Employer FAQs

(Note: The following analysis of the information contained in the Employer FAQs also applies to the Employee FAQs and Notice of Employee Rights, unless otherwise stated.)

The Employer FAQs reiterate a number of important aspects of the ESLL, including the following:

- Employees may use ESLL time to care for their own or a family member's illness or medical condition, or when their place of employment or their child's school

closes dues to a public emergency. The definitions of “family member” and “child” are quite broad (as we describe [here](#), at footnote #3).

- To avoid the work involved in calculating the accrual of earned sick time for each covered employee, an employer can instead “frontload” leave benefits, that is, provide for sick time and personal time equal to 40 hours or more at the beginning of “the employer’s year.” Though most employers begin their benefits year on January 1, the Employer FAQs reiterate that they are not mandated to do so, and may use any consecutive 12-month period (e.g., the employee’s anniversary). (This information is included only in the Employer FAQs.)
- An employer may require employees to provide notice of the need to use accrued sick time, but only if the employer has provided them with a *written* policy describing the procedure they must follow to provide such notice. The Employer FAQs further state that an employer’s policy may direct employees to give advance notice when the need to use ESLL leave is foreseeable. When the need is not foreseeable, the employer may require that notice be given “as soon as practicable.”
- Employers may require documentation from a health care provider if an employee uses more than three consecutive workdays as sick leave. However, an employer may not require the health care provider to specify the medical reason for sick leave.
- Employers must keep records “clearly documenting the hours worked by employees, earned sick time accrued, and earned sick time used, for a period of three years.” An employer’s failure to maintain proper records creates a “rebuttable presumption” that the employer has violated the ESLL. (This information is included only in the Employer FAQs.)
- Employees may file a complaint with the Westchester County Department of Consumer Protection if their employer fails to comply with any aspect of the Law.

Incomplete and Confusing Information Contained in the Employer and Employee FAQs

In their brevity, the Employer and Employee FAQs and Notice of Employee Rights provide incomplete and, as a result, confusing information on several issues. To wit:

- **Employee Coverage:** The Law covers employees who work within Westchester County for more than 80 hours in a calendar year, and excludes participants in certain work study and scholarship programs. Although this information is contained in the Employer and Employee FAQs (which many employees probably will not read), it is not included in the Notice of Employee Rights and, thus, may lead some unqualified employees to mistakenly believe that they are covered by the ESLL.

- **Notice to Employees:** Consistent with the Law, the Employer FAQs advise that employers must provide their employees with a copy of the ESLL, *in addition to* the written Notice of Employee Rights. However, the Notice of Employee Rights reiterates that employers must give employees the Notice, but then states that employers need only “display” a copy of the Law, along with a poster (which apparently is not yet offered by the county) in a conspicuous location available to all employees.¹ The Employee FAQs merely advise that the employer must provide the Notice of Employee Rights.

Unless and until the county reconciles the conflicting documents, employers may wish to err on the side of caution and provide employees with a copy of the ESLL, along with the Notice of Employee Rights.²

- **Carryover:** While the Employer FAQs advise that an employee may carry over a maximum of 40 hours of unused sick leave to the next calendar year, they—and the Employee FAQs—fail to add that an employer need not allow employees to use more than 40 hours per year of ESLL leave. Fortunately, this information is included in the Notice of Employee Rights, but employers may receive employee inquiries on this point.
- **Waiting Period:** Under the Law, an employer may require new employees to wait 90 days prior to using their accrued sick time. While the Employer and Employee FAQs advise that accrual begins on July 1, 2019, they do not mention the 90-day waiting period for new workers. Although this information is contained in the Notice of Employee Rights, its absence from the other informational materials may cause confusion for employers.
- **Retaliation:** Oddly, the Employer FAQs do not reference the Law’s broad ban on retaliation, although such information is contained in the Employee FAQs and the Notice of Employee Rights. Employers should ensure that they fully understand the Law’s extensive prohibition on retaliation.
- **Employee Threshold:** As noted above, the ESLL mandates that employers with five or more employees provide paid sick leave, while those with fewer than five employees must grant their employees unpaid leave. However, the Law does not address whether the employee threshold is based only on employees working in Westchester County, or if, instead, employers must also count employees at

¹ The Notice of Employee Rights states that employers must display a copy of the Law and a poster “in English, Spanish and any other language deemed appropriate by the County of Westchester.” As of this writing, the county has not yet provided a version of the Notice of Employee Rights in Spanish or any other language.

² An earlier version of the Employer FAQs released on April 10, 2019, advised that new hires starting after April 10, 2019, would need to receive the Notice of Employee Rights immediately. The Employer FAQs have subsequently been updated to reflect that the earliest any employee (whether that employee is newly hired or not) needs to receive the Notice of Employee Rights is July 10, 2019.

other locations in New York State—or nationwide—in determining whether they meet the threshold for triggering the paid leave mandate.

Unfortunately, neither the Employer and Employee FAQs nor the Notice of Employee Rights addresses this issue. Accordingly, until the county clarifies this matter, employers may wish to consult counsel if they have any questions about whether they satisfy the threshold for paid leave.

What Employers in Westchester County Should Do Now

Aside from the specific suggestions offered herein, the most important takeaway for employers with employees in Westchester County is this: Do *not* rely solely on the Employer and Employee FAQs and Notice of Employee Rights when determining rights and obligations under the ESLL! As discussed, the county’s informational materials could be clearer and appear to be inconsistent on certain points. Instead, employers should do the following:

- Rely on trusted, comprehensive resources, e.g., read the ESLL or [a detailed explanation of the Law](#), and/or seek the advice of counsel.
- If you are not already offering sick time to employees, provide it, and/or if you do not yet have a compliant policy, create one, as the Law is now in effect.
- Be mindful that if your existing sick time policy applies only to full-time employees, you’ll need to maintain a separate policy for any part-time or temporary employees.
- Ensure that all relevant staff, including supervisory and human resources personnel, understand the company’s rights and responsibilities under the ESLL, including the various notice and detailed recordkeeping requirements.

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