On May 8, 2013, the New York City Council approved a legislative amendment that would create a statutory entitlement to sick time for employees working in New York City. The amendment, entitled the “Earned Sick Time Act” (“ESTA”), modifies Section 2203 of the NYC Charter and Title 20 of the NYC Administrative Code and declares that sick time is necessary because “nearly every worker at some time during each year will need time off from work to take care of his or her health needs or the health needs of family members.” The ESTA has been sent to Mayor Michael Bloomberg for his final consideration. Sources indicate that the Mayor is prepared to veto the measure, but it is expected that there is sufficient support in the Council to override the veto.

Under the ESTA, some of which will likely become effective in April 2014,¹ certain employees will be entitled to paid sick time, while other employees will receive unpaid sick time. All covered employees (including domestic workers) will be protected from retaliation for exercising their rights under the ESTA. The statutory scheme grants powers to the Department of Consumer Affairs (“Department”) to develop appropriate mechanisms to administer and enforce the law, including the promulgation of rules.

Which Employees Are Covered?

The ESTA applies to employees who work:

- full-time or part time;
- within New York City;
- for more than 80 hours in a calendar year (this includes domestic workers); and

¹The ESTA sets forth a schedule that, pursuant to several economic indicators, will determine the effective date of various provisions of the law. Generally speaking, however, and assuming there is no economic downturn in New York City, the unpaid sick time requirements begin for every employer on April 1, 2014. With respect to the paid sick time portion, the effective date is April 1, 2014, for businesses with 20 or more employees, and October 1, 2015, for business that employ 15 or more employees. If the economic indicators do not reach the identified threshold during this year, the statute provides that, once the threshold is met, the effective dates will be the succeeding October 1 and April 1, respectively. Paid sick time for domestic workers is also expected to go into effect on October 1, 2015.
The ESTA will not apply to certain work study participants, independent contractors, and “hourly professional employees” licensed by the New York State Department of Education who call in for work assignments and receive a certain level of pay. Importantly, the ESTA also will not apply to employees covered by a valid collective bargaining agreement, provided that certain conditions are met.

How Is the Term “Employer” Defined in the ESTA?

Covered “employers” include “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business, or service.” The term “employer” does not include federal, State, and City governmental agencies and business establishments classified in sections 31-33 of the North American Industry Classification System (certain employers in the manufacturing sector).

Which “Employers” Are Covered for Paid Sick Time Purposes?

Employers that employ 20 or more employees who work more than 80 hours per year in New York City will be required to provide such employees with paid sick time as of April 2, 2015.

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2The ESTA does not apply to work study programs developed under 42 U.S.C. § 2753 (where an institution of higher learning makes federal grant money available to compensate students that gain, otherwise “unpaid,” part-time employment, including internships or research assistantships in specified areas, such as public interest, government, or private nonprofit).

3For purposes of the ESTA, “hourly professional employees” are licensed occupational therapists, speech-language pathologists, audiologists, and physical therapists who do the following: call in for work assignments at will, determine their own work schedule, have the ability to reject or accept referred assignments, and receive compensation at an average hourly rate that is at least four times the federal minimum wage.

4In the case of employees covered by a valid collective bargaining agreement that is already in effect on the effective date of the ESTA, the law will not apply until the date of termination of that agreement (at which time, the law will automatically take effect). Further, parties entering into a collective bargaining agreement are permitted to waive the provisions of the ESTA, provided that the waiver is explicit and the agreement otherwise provides for comparable benefit for the employees with respect to paid days off, whether in the form of leave, vacation time, sick time, personal time, and holiday and Sunday time pay at premium rates. In the case of the grocery and construction industries, however, the parties are permitted to expressly waive the provisions of the ESTA without regard to the nature of any comparable benefit that may or may not be provided for in the agreement.

5Sections 31-33 of the North American Industry Classification System, as utilized by the U.S. Census Bureau and the Bureau of Labor Statistics, pertain to the manufacturing sector, which comprises establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products. The assembling of component parts of manufactured products is also considered manufacturing, except in cases where the activity is appropriately classified as construction (Sector 23). Generally speaking, this includes plants, factories, and mills, but the sector is not exclusive to those workplaces and can include any establishment that transforms raw materials or substances into new products, whether by hand or the use of power-driven machines. Examples of industries within the manufacturing sector include food manufacturing, textile mills, paper manufacturing, chemical and petroleum manufacturing, machinery manufacturing, computer and electronic product manufacturing, wood product manufacturing, and apparel manufacturing.
Employers that employ between 15 and 19 such employees will be required to provide paid sick time as of October 1, 2015.6 Also, effective October 1, 2015,8 every NYC employer employing a domestic worker who works at least 80 hours a year for the employer in New York City will be required to provide paid sick time to such domestic worker. Further, where a group of establishments engage in the same business and share a common owner or principal who owns at least 30 percent of each establishment (e.g., a restaurant or store chain), the total number of employees performing work in the group of establishments are counted for purposes of coverage under the ESTA.

Which “Employers” Are Covered for Unpaid Sick Time Purposes?

All covered NYC “employers” (as defined above) must provide unpaid sick time to employees if the employer is not required to provide paid sick time.

What Can Sick Time Be Used for Under the ESTA?

Sick time can be used for an employee’s physical or mental illness, injury, or health condition, or need for medical diagnosis, treatment, or preventative care, and for the same purposes when caring for a spouse, domestic partner, children, or parents. Sick time can also be used during declared public health emergencies (e.g., in connection with the closure of an employee’s place of business, a child’s school, or childcare provider).

Sick time is compensated at the same rate as the employee earns from his or her employment at the time that the employee uses such sick time, except that an employee who volunteers or agrees to work hours in addition to his or her normal schedule (e.g., overtime) will not receive more in paid sick time compensation than his or her regular hourly wage if the employee is unable to work the overtime hours (even if the reason for such inability is one of the reasons for which sick leave will be provided under the ESTA).

What Are the Accrual and Use Rules?9

- Sick time begins to accrue upon commencement of employment or on the effective date of the ESTA, 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.10

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6 This will be true, assuming that the economic indicators provided in the schedule are met by the December 16, 2013, measurement date. As noted above, should the economic indicators not reach the threshold until a later date, then the effective dates will be the succeeding October 1 and April 1, respectively.

7 This date is subject to economic indicators, as described in this Advisory.

8 This date is subject to economic indicators, as described in this Advisory.

9 Accrual rules for domestic workers are different from those of other eligible employees. Domestic workers are entitled to two paid sick days after one year of employment with the employer. Sick days do not carry over from year to year.
For exempt employees, it is presumed that the employee works 40 hours in a week (for accrual purposes), unless the employee’s regular work week is less than 40 hours, in which case the actual number of regularly scheduled hours will control.

Regardless of when the time accrues, an employee is not entitled to begin to use sick time until the later of the 120th calendar day following commencement of his or her employment or the 120th calendar day following the effective date, whichever is earlier.

Unused sick time will carry over to the following calendar year; however, employers need not permit employees to use more than 40 hours of sick time in a given year.

Instead of permitting employees to carry over sick time, employers may opt to pay an employee for unused sick time at the end of the year, so long as payment is made on or before the first day of the next calendar year.

There is no entitlement for payment for accrued, unused sick time upon termination (or resignation) of employment for any reason.

The ESTA further provides that employers are permitted to establish, within identified parameters, requirements for the use of sick time, including the minimum increments of time that must be utilized when exercising sick time. An employer may not establish a minimum increment that is larger than four hours per day.

What if an Employer Already Has a Sick Day, PTO, or Other Paid Leave Policy?

Many NYC employers already provide paid leave for employees. If the existing policy provides for vacation, sick days, personal days, paid time off (“PTO”), or any other paid leave that can be used for the reasons set forth under the ESTA, the paid leave offered under those policies will be sufficient to comply with the ESTA, regardless of whether the employee chooses to use the leave for “sick time” purposes.

Keep in mind, however, that all ESTA requirements must be satisfied by an existing policy, including the right to carry over sick time from year to year. So, for example, if a current PTO policy is “use it or lose it,” such that all accrued days are forfeited at the end of the applicable year and, come the beginning of the next, employees must accrue additional time, such that the employee may not take three sick days until he or she again accrues such time, this will not be in compliance with the ESTA if the employee could have carried over accrued, unused sick time from the prior year. This is true unless the employer has paid the employee for accrued, unused sick days at the end of the prior year. Further, many employers’ policies exclude part-time employees from eligibility. This is not permissible under the ESTA.

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10 A “calendar year” is defined as a regular and consecutive 12-month period, as determined by the employer (e.g., anniversary year).
Notice and Recordkeeping Requirements

- Employers must provide an employee, at the commencement of employment, with written notice of the employee’s right to sick time, as well as other aspects pertaining to accrual and the right to be free from retaliation. The notice must also be posted in an area accessible to employees.

- The notice must be in English and the primary language spoken by that employee, provided that the Department has made available a translation of such notice in that language.\(^{11}\)

- Employers are obligated to retain records documenting compliance with the law for a period of two years.

- In terms of employee notice, employers may require up to seven days’ notice of foreseeable leave and, with respect to a leave that is not foreseeable, employees can be required to provide notice as soon as practicable.

- For leaves of more than three consecutive work days, employers can require documentation from a licensed health care provider confirming the need for that amount of leave. Employers may not, however, require documentation that specifies the nature of the medical condition.

- Finally, employers may require employees to provide written confirmation that they used the sick time for the purposes permitted by the ESTA.

Additional Rules and Prohibitions

Employers may not:

- retaliate against an employee for exercising rights under the ESTA;
- interfere with an employee’s right to exercise rights under the ESTA;
- require that an employee work additional hours to make up for the exercise of sick time;
- condition the use of sick time on an employee’s ability to obtain a replacement; or
- require that an employee disclose the specific details related to the medical condition as a prerequisite of utilizing sick time (indeed, information so obtained must be treated as confidential and may not be disclosed without the permission of the affected employee or as required by law).

\(^{11}\)The ESTA provides that the languages must include Chinese, English, French-Creole, Italian, Korean, Russian, Spanish, and any other language deemed appropriate by the Department.
Enforcement

Aggrieved individuals have the right to raise a complaint with the Commissioner of the Department within 270 days of the date that the individual knew or should have known of the alleged violation. The Department is granted the power to investigate, render decisions and orders, and impose civil penalties for violations, and has the ability to order equitable relief and the payment of monetary damages.

The ESTA establishes civil penalties payable to the City, but which must not exceed $500 for the first violation (with increased penalties for additional violations). Additionally, the ESTA provides schedules for determining appropriate monetary relief that may be awarded to an aggrieved employee for various violations (including failure to compensate for sick time, denial of sick time, retaliation, or unlawful termination, among other violations). The ESTA contemplates that the remedies and penalties that may be promulgated by the Department will not necessarily be to the exclusion of other remedies, including civil or criminal actions or proceedings. The ESTA does not, however, specifically proscribe a private right of action in court.

What Employers Should Do Now

Since the ESTA has not been signed into law, it is not effective yet. Employers should wait to see whether and, if so, when each applicable portion of the ESTA becomes effective.

In anticipation, however, employers may wish to:

- determine if the paid or unpaid leave components of the ESTA will apply to them;
- determine how many individuals they employ in New York City for more than 80 hours in a calendar year;
- consider whether any existing arrangements with seasonal or other short-term employees should be revised in anticipation of the effective date of the ESTA;
- review existing paid and unpaid leave policies to see if they encompass all requirements set forth in the ESTA;
- revise any non-compliant policies; and
- if entering into a collective bargaining agreement, consider whether and, if so, how the ESTA should be addressed in that agreement.

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