EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

New York City's Earned Safe and Sick Time Act: New Amendments Conform Statute with State's Sick Leave Law, Require Prompt Employer Action

October 6, 2020

By Susan Gross Sholinsky, Ann Knuckles Mahoney, and Corben J. Green

---

On September 28, 2020, Mayor Bill de Blasio signed Int. No. 2032-A ("Amendments") into law, amending New York City's Earned Safe and Sick Time Act ("NYC ESSTA") to align with New York State's Paid Sick Leave Law ("NY PSLL"). Like the NY PSLL, the Amendments also went into effect on September 30, 2020, and provide greater protections than previously required under NYC ESSTA in addition to offering an interpretation of some areas of the NY PSLL that remain unclear.

Of particular note, the Amendments impose (i) a new notice requirement that employers must comply with by October 30, 2020, and (ii) a requirement, effective September 30, 2020, that New York City-based employers include information about accrued and used safe and sick time on employees' pay stubs. New York City's Department of Consumer Affairs advises that employers that cannot operationalize the pay statement documentation notice requirement by September 30, 2020, but are "working in good faith" to implement it, will have until November 30, 2020, to comply without penalty.

Accrual of Sick Leave

The Amendments adopt the NY PSLL's required accrual minimums:

- **Employers with four or fewer employees and a net income less than $1 million** must provide 40 hours of *unpaid* safe and sick leave. (Previously, NYC ESSTA did not have an income limit.)

- **Employers with four or fewer employees and a net income of greater than $1 million in the previous tax year** must provide up to 40 hours per calendar year of *paid* safe and sick leave. (Previously, such employers only had to provide *unpaid* time.)

- **Employers with between five and 99 employees (or one or more domestic workers), regardless of employer income**, must provide up to 40 hours per calendar year of paid safe and sick leave. (This requirement is

unchanged by the Amendments, except as it pertains to domestic workers as explained below.)

- **Employers with 100 or more employees, regardless of employer income,** are required to provide up to 56 hours per calendar year of paid safe and sick leave. (Previously, the cap was 40 hours.)

Employees will continue to accrue safe and sick leave at a rate of at least one hour for every 30 hours worked, as they did previously under NYC ESSTA, and as required under the NY PSLL. Although New York City-based employees became eligible to accrue additional time (and/or paid time) under NYC ESSTA and the NY PSLL on September 30, as noted below, they are not entitled to use any of that additional time until January 1, 2021.

Eligibility and Waiting Period

Significantly, the Amendments eliminate NYC ESSTA's requirement that employees work for more than 80 hours in a calendar year in New York City to be eligible for sick time, thereby making many more employees eligible for NYC ESSTA leave. Additionally, the Amendments revise the definition of a "domestic worker" to include a "person who provides care for a child, companionship for a sick, convalescing or elderly person, housekeeping, or any other domestic service in a home or residence"; eliminate other distinctions between domestic workers and other employees; and provide domestic workers the same benefits as all other eligible employees, including up to 40 hours of paid safe and sick leave.

The Amendments also eliminate the option to impose a 120-day waiting period for new hires to begin using accrued time. Under the Amendments, new hires may begin using time provided under NYC ESSTA as soon as it is accrued, except that, consistent with the NY PSLL, employees of employers with new accrual entitlements (i.e., employers with four or fewer employees and a net income of $1 million as well as employers with 100 or more employees) are not required to allow use of newly accrued time[1] until January 1, 2021.

Frontloading and Carryover

One distinction between the NY PSLL and NYC ESSTA is that the Amendments do not explicitly change New York City's existing guidance (in the form of Frequently Asked Questions ("FAQs")), which indicates that employers are permitted to avoid carrying over unused leave time when the employer has frontloaded the amount of time employees are eligible to receive in the current year and will also do so in the following calendar year.[2] The NY PSLL is currently silent as to whether frontloading eliminates the carryover requirement, although the NY PSLL allows employers to cap the amount of leave that may be used in a given year at 40 or 56 hours, as applicable, regardless of how much time has been carried over from the prior year.

[1] Employers with 100 or more employees must allow use of up to 40 hours of leave as soon as it is accrued, but do not have to allow use of the additional 16 hours until January 1, 2021.
[2] Under NYC ESSTA's FAQs, if the employer has not frontloaded in the current year and wishes to do so in the following year, it must pay out employees' accrued unused leave.

Use of Safe and Sick Leave

The Amendments align the permissible uses of safe and sick time to match those under the NY PSLL by adding "domestic violence," pursuant to New York Executive Law, Section 292, subdivision 34. Notably, in addition to the permitted uses under the NY PSLL, NYC ESSTA continues to permit employees to take leave time for absences from work due to the closure of the employees' place of business arising from 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.

Rate of Pay for Sick Leave

The Amendments adopt the NY PSLL's requirement that employers must compensate employees taking leave at their regular rate of pay, provided such rate of pay is not less than the applicable minimum wage established by New York Labor Law Section 652, or any other applicable federal, state, or local law.

Employee Notice

Notwithstanding the NY PSLL's silence on employee notice, the Amendments keep NYC ESSTA's employee notice mandate, which provides that if the need for safe or sick leave is foreseeable, employers may require employees to provide up to seven days' written notice of the need for NYC ESSTA leave. If the need for safe or sick leave is unforeseeable, the employer may require an employee to give notice as soon as practicable.

Employer Notice

While there are no employer notice requirements under the NY PSLL, under the Amendments, employers are required to provide notice of the changes made by the Amendments to current employees no later than October 30, 2020. As previously required under NYC ESSTA, notice of employee rights under the law must also be distributed to all new hires. The notice must be provided in English and the primary language spoken by the employee, if the City has made available a translation of the notice in such language. The City is in the process of updating its model NYC ESSTA notices to satisfy this requirement. Employers must also conspicuously post the notice by October 30, 2020, in an area accessible to employees.[3]

Further, and significantly, the Amendments mandate that employers note on employee pay statements (i.e., pay stubs), or on a separate writing provided to the employee each pay period, the amount of safe and sick time accrued and used by the employee during the applicable pay period, as well as the employee's total balance of safe and sick time.[4]

---

[3] The Amendments do not address electronic posting, but for employers whose workers are primarily working remotely during the pandemic, we also recommend posting the notice electronically, such as on the employer's intranet.

[4] As a reminder, NYC ESSTA requires every employer to maintain written safe time and sick time policies in a "single writing." This policy must be distributed to employees upon commencement of employment, within 14 days of the effective date of any change to the policy, and upon request by the employee. For more information on the written policy requirements, please see Epstein Becker Green's *Act Now*

Documentation

While the NY PSLL does not address documentation concerning the need for leave, under NYC ESSTA, employers may require employees to submit documentation verifying the need to use safe or sick time when the employee has taken more than three consecutive workdays of safe or sick time. Adding a new obligation, the Amendments now mandate that employers reimburse employees for all fees charged by a health care provider or other service provider for obtaining such documentation.

Prohibition on "Adverse Action"

The Amendments remove the previous definition of "retaliation" and instead provide that it is unlawful to (i) interfere with any investigation, proceeding or hearing pursuant to NYC ESSTA or (ii) take any "adverse action against an employee that penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights under [NYC ESSTA] or interfere with an employee's exercise of rights under [NYC ESSTA] and [its] implementing rules." According to the Amendments, "adverse actions" include, but are not limited to, "threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee's exercise of rights under [NYC ESSTA], blacklisting, and *maintenance or application of an absence control policy that counts protected leave for safe/sick time as an absence that may lead to or result in an adverse action*" and any actions related to perceived immigration status or work authorization. (Emphasis added.)

Enforcement

Under NYC ESSTA, the New York City Department of Consumer and Worker Protection ("DCWP") is charged with investigating and remedying claims of violations of the law. The Amendments grant the Corporation Counsel of the City of New York ("Corporation Counsel") authority to institute legal proceedings to enforce a DCWP order. The Amendments also permit the Corporation Counsel to initiate a legal action against an employer that is alleged to have engaged in a pattern or practice of committing NYC ESSTA violations, for which the Corporation Counsel may seek such remedies as injunctive relief, civil penalties, and any other appropriate relief. The Amendments allow for civil penalties of up to $15,000 when the employer has engaged in a pattern or practice of violations, and an additional award of up to $500 to each employee covered by an employer's official or unofficial policy or practice of not providing, or refusing to allow the use of, safe and sick time granted by NYC ESSTA.

What New York City Employers Should Do Now

- If you do not currently have a paid safe and sick leave policy, or have one that falls short of the Amendments' new accrual, notice, and other requirements, develop or revise your policy as necessary.

Advisory titled "NYC Issues Amended Rules and FAQs on the Earned Safe and Sick Time Act," available here.

- Even if your policies already satisfy the Amendment's accrual and other requirements, review and revise certain other practices to ensure compliance with NYC ESSTA and the NY PSLL, including taking the following actions:

    - Make sure that pay statements comply with the new requirements to provide the amount of the employee's accrued and used NYC ESSTA leave during the pay period, and the employee's available balance of safe and sick leave. If you use a payroll vendor, work with the vendor to confirm compliance.

    - Monitor the City's website for an updated NYC ESSTA notice, and be sure to distribute and post the notice by October 30, 2020.

    - Except for the limitations on the use of new NYC ESSTA entitlements until January 1, 2020, allow employees to use leave as it is accrued (i.e., eliminate any waiting period).

    - Reimburse employees who have to pay to obtain documentation to substantiate safe and sick leave after three or more consecutive workdays of leave.

- Finally, anticipate that guidance on the NY PSLL, which the State is expected to release shortly, may impose additional obligations. (Epstein Becker Green will continue to monitor and report any developments on this matter.)

****

For more information about this Advisory, please contact:

Susan Gross Sholinsky	**Ann Knuckles Mahoney**	**Corben J. Green**
New York	Nashville	New York
212-351-4789	629-802-9255	212-351-4583
sgross@ebglaw.com	aknuckles@ebglaw.com	cgreen@ebglaw.com