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NYC Issues Amended Rules and FAQs on the Earned Safe and Sick Time Act

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Since its passage in 2013, New York City's Earned Sick Time Act ("ESTA") has been amended twice, first in 2014 and again in 2017, when its mandates were expanded and its name was changed to the Earned Safe and Sick Time Act ("ESSTA" or "Act") (effective on May 5, 2018).[1] In response to the most recent amendments to the Act, the Department of Consumer Affairs Office of Labor Policy and Standards ("OLPS")[2] has amended some of its rules ("Rules") to clarify various provisions of ESSTA. The City also issued amended Frequently Asked Questions ("FAQs") on the Act to reflect changes made by the Rules. The most significant revisions in the amended Rules, which took effect on September 20, 2018, concern an employer's compliance obligations with respect to ESSTA's written policy requirement.

As a brief review, ESSTA requires covered employers to provide eligible employees with up to 40 hours of paid time off ("PTO") each calendar year[3] to use in connection with (i) the employee's or a family member's[4] mental or physical illness or injury; (ii) the closure of the employee's workplace, or the school or care facility attended by the employee's child, due to a declared public health emergency; or (iii) matters related to a sexual offense, stalking, and human trafficking involving the employee or the employee's family member, such as obtaining a protective order or securing safe housing ("safe time"). Employees are eligible to accrue PTO at the rate of one hour for every 30 hours worked

[1] For a detailed analysis of ESTA and ESSTA, please see the following Epstein Becker Green *Act Now* Advisories: "New York City Publishes Revised Notice of Employee Rights"; "NYC Mayor de Blasio Signs Law Expanding Earned Sick Time Act to Include 'Safe Time'"; "Update: New York City Council Expands Scope of Paid Sick Time Law"; and "Nothing to Sneeze At: New York City Mayor Signs Earned Sick Time Act into Law, Effective April 1."

[2] The OLPS was established by a New York City law passed in 2015. The OLPS is responsible for several New York City employment laws, including ESSTA, the Freelance Isn't Free Act, the Temporary Schedule Change for Personal Events Law, the Fair Workweek Laws, and the Commuter Benefits Law.

[3] The FAQs state that a "calendar year" is any consecutive 12-month period of time, as selected by the employer. The calendar year will be designated on the ESSTA notice provided to all employees.

[4] According to the FAQs, the definition of "family member" for ESSTA purposes includes a child (including biological, adopted, or foster child; legal ward; or child of an employee standing *in loco parentis*), spouse, domestic partner, parent, grandparent, grandchild, sibling (including half-sibling, adopted sibling, and step-sibling), any individual whose close association with the employee is the equivalent of family, or any other individual related by blood to the employee.

if they work at least 80 hours (full-time or part-time) in a calendar year *within New York City* for a covered employer. This includes work by telecommuting from New York City, regardless of where the employer is located.

New Written Sick and Safe Time Policy and Notice Requirements

Under ESSTA, employers must maintain a written sick and safe time policy. The Rules clarify and, in some respects, amend and/or expand the written policy requirements,[5] as follows:

- It is no longer sufficient merely to post the policy and other required notices. Employers now must *distribute* the policy and notices to employees (i) when a new hire commences employment, (ii) if the employee requests a copy, and (iii) within 14 days before a change to the policy becomes effective. This requirement also applies to employees who "perform work off-site or at dispersed job-sites, such as in private homes, building security posts, or on delivery routes."

    - As a reminder, covered employers were required to provide covered employees with a new notice of their rights under ESSTA by June 4, 2018 (with the new information relating to safe time), and must distribute the notice to new hires when they commence employment. Employers may use the Notice of Employee Rights created by the New York City Department of Consumer Affairs.

    - If the notice was not provided earlier this year, the notice should be provided to current employees, along with an updated policy, if changes are necessary in light of the Rules.

    - Notice may be provided via email to employees.

- The following information must be included in the written policy:

    - *Method of Calculation and Carryover*: The policy must state whether safe and sick time is accrued throughout the year or frontloaded at the beginning of the year. If accrued, the policy must specify when the accrual starts, the rate of accrual, and the maximum number of hours an employee may accrue in a year. The policy also must state whether sick leave is carried over.

    - *Restrictions on Use*: The policy must state any requirement to provide notice to the employer for foreseeable safe and sick time use, which may be no more than seven days prior to the leave. Additionally, the policy must state any requirement for written documentation, which may only be

[5] The Rules clarify that "written" "means a hand-written or machine-printed or printable communication in physical or electronic format, including a communication that is maintained or transmitted electronically, such as a text message."

requested after three consecutive days of absence. Finally, the policy must state the minimum increments of use. Employers may set the initial minimum increment at four hours, with 30-minute increments thereafter.

- *Statement on PTO Policy (where applicable)*: If an employer provides PTO for use as safe and sick time, or uses another term besides "safe/sick time" or "safe and sick time"[6] to describe leave provided pursuant to ESSTA, the Rules now require that the employer's policy must state that such leave may be used by an employee for any of the purposes set forth under ESSTA without any condition prohibited by ESSTA. Thus, if an employer uses a PTO policy, or allows employees to use vacation to satisfy ESSTA, the policy now needs to clarify that PTO or vacation can be used for any of the ESSTA purposes and under the same circumstances (e.g., increments of use, notice, and documentation).

- *Statement on Confidentiality*: Adding another new requirement to the policy mandates, the Rules instruct that the policy must include, at a minimum, details of the confidentiality requirements of Section 20-921 of ESSTA, including a statement that information provided to support safe time will not be disclosed without the employee's permission or unless disclosure is required by law.

- *"Single Writing" Requirement*: The Rules mandate that "every employer shall maintain written safe time and sick time policies in a single writing." The Rules provide no further explanation of this requirement, but it appears to mean that an employer that, for example, maintains a general sick leave (or PTO) policy and a separate, supplemental ESSTA policy must ensure that both policies are contained in one document, which is distributed to employees as discussed above.

- Employers may not use any government-issued notice or other writing to satisfy the requirement that they provide their own written ESSTA policy to employees. The ESSTA notice requirement is separate from the requirement to have a written policy establishing a safe and sick time policy containing the specific provisions applicable to the employer.

Joint Employers

A covered employer under ESSTA includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" in the private sector. The Rules clarify a number of issues pertaining to joint employers, including the following:

- The term "joint employers" is defined as two employers, each of whom exercises "some control over the work or working conditions of an employee or employees."

[6] Other possible terms include "vacation time," "personal days," or "days of rest."

Employers may be joint employers even "if they are separate and distinct individuals or entities with separate owners, managers, and facilities." A determination of joint-employer status rests on analyzing the totality of the relationship between the employee and each of the employers.

- Generally, joint employers are individually and jointly liable for compliance with all applicable provisions of ESSTA, including satisfying fines and making restitution. However, in discharging their joint obligations, joint employers may decide among themselves how they will allocate responsibility for complying with ESSTA's requirements.[7]

- With respect to determining the number of employees a joint employer has, every employee whom the joint employer "employs for hire or permits to work, whether joint or not," must be counted. Thus, as the Rules illustrate, "a joint employer who employs three workers from a temporary help firm and also has three permanent employees under its sole control has six employees for purposes of the OLPS laws and rules."

- If two or more joint employers employ an employee, all of the employee's work for each of the joint employers must be considered as a single employment for purposes of accrual and use of ESSTA time.

Calculating Rates of Pay

The Rules delete provisions about how to calculate payment for safe and sick time when an employee is paid on a piecework basis, and they add a provision on how to calculate payment for safe and sick time when an employee is paid a flat rate.

What New York City Employers Should Do Now

- Employers should ensure that their current ESSTA policy and distribution process comply with the new Rules, such as the inclusion of a confidentiality statement and, where applicable, a statement concerning the company's PTO or other sick leave policy that acknowledges employees' rights under ESSTA. Further, employers that currently maintain sick leave and ESSTA policies in separate documents should create a single document and distribute that one document as required.

- Employers that may be "joint employers" (as defined by the Rules) should make sure that they are complying with their ESSTA obligations with respect to any individual who may be the employee of joint employers.

[7] With regard to temporary employees placed in an organization by a temporary help firm, the Rules state that the temporary help firm is *solely* responsible for compliance with all of the provisions of ESSTA for those temporary employees, regardless of the number of employees placed or the size of the company where the employees are placed.

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