

## New York's Westchester County Enacts Earned Sick Leave Law

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Westchester County, New York, just became the latest jurisdiction to enact an [Earned Sick Leave Law](#) ("Law"). Similar in many respects to New York City's Earned Safe and Sick Time Law (although Westchester's version does not provide for "safe" time), the Law requires that covered employees of an employer with five or more employees earn, at a minimum, up to 40 hours of paid sick time in a year. Employers with fewer than five employees must provide up to 40 hours of unpaid sick leave.<sup>1</sup> The Law becomes effective on April 10, 2019 (180 days from October 12, 2018, the date it was signed by the Westchester County Executive).

### Covered Employers and Employees

In determining whether they will be considered to employ five or more employees, and thus whether employees are entitled to paid or unpaid sick time, employers must count "all employees performing work for compensation," including full-time, part-time, and temporary workers. The Law does not specify whether the employee threshold is based only on employees working in Westchester County, but the obligation to provide leave is solely for those working within the county. Where the number of employees who work per week fluctuates, employers should rely in the current calendar year on the average number of employees who worked per week during the preceding calendar year.<sup>2</sup>

The Law covers employees who work within Westchester County for more than 80 hours in a calendar year. The Law's reach includes employees who work in "subsidized private sector and not-for-profit employment programs" but excludes certain other employees, such as those participating in work-study programs. In addition, the Law becomes effective for employees currently covered by a collective bargaining agreement ("CBA") upon the CBA's expiration on or after April 10, 2019; however, the Law excludes workers covered by a CBA if the agreement explicitly waives the Law's sick time provisions *and* provides for a "comparable benefit" (e.g., paid vacation time, personal time, or sick time).

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<sup>1</sup> There is no employee threshold for employers of domestic workers. All domestic workers are entitled to earn up to 40 hours of paid sick time in a year, regardless of the number of domestic workers employed. Domestic workers accrue one hour of earned sick time for every seven days worked.

<sup>2</sup> "Calendar year" means from January 1 to December 31 in any given year. "Year" is defined as any consecutive 12-month period, as determined by the employer.

## **Accrual and Carryover of Earned Sick Time: Employer Options**

Under the Law, employees will accrue one hour of sick time for every 30 hours worked, up to a maximum of 40 hours of earned sick leave in a year. Accrual begins at the commencement of employment or 90 days after the Law goes into effect, whichever is later. However, an employer may require new employees to wait 90 days prior to using their accrued sick time. The Law also permits employers to “loan” sick time to an employee before it has accrued.

The Law sets the minimum use of sick time at four hours, but it also instructs that if an employee needs to take an additional part of a day as sick time (beyond the initial four-hour period), the employee may use “the smallest increment that the employer’s payroll system uses to account for absence or use of other time.”

Employees will be able to carry over unused earned sick time to the following year; however, an employer may limit an employee’s use of earned sick leave to a maximum of 40 hours per year. Employees who transfer from one of their employer’s locations in Westchester County to another of the employer’s facilities in the county retain all their unused earned sick time, as do employees of a successor employer. Similarly, any earned sick time accrued by a separated employee who is rehired by the same employer within nine months of separation must be reinstated.

Employers must compensate employees for earned sick time at the same hourly rate that they normally earn. However, employers are not required to compensate an employee for unused accrued sick leave upon the employee’s separation from the company, regardless of whether the termination of employment is voluntary or involuntary.

Notably, the Law provides an option for employers that would prefer not to calculate accrual of earned sick time. As an alternative, an employer can frontload an employee with a minimum of 40 hours of sick time (or other paid time off that can be used for the sick leave or other purposes) annually. For example, this can be in the form of a combination of personal and sick time. The employer can decide whether to use the calendar year or another date, such as the employee’s anniversary, for the yearly calculation. Importantly, employers that choose this option must ensure that they allow employees to take time “as needed for sick time, with no advance notice necessary and no restrictions ... on use of earned sick time” other than those permitted by the Law.

## **Covered Uses of Earned Sick Time**

An employee may use earned sick time for:

- the employee’s or a family member’s<sup>3</sup> mental or physical illness, injury, or health condition, or for preventive medical care;

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<sup>3</sup> “Family member” is broadly defined as “an employee’s child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee’s spouse, domestic partner or household member.” A “household member” means “(i) persons related by consanguinity or affinity; (ii) persons legally

- the care of the employee or a family member with a communicable disease where a public health official has determined that the person’s presence in the community presents a danger to others; and
- the closure of the employee’s place of business, or school or care center attended by the employee’s child, due to a public health emergency.<sup>4</sup>

### **Procedures Concerning Requests to Use Earned Sick Time**

The Law instructs that an employer must provide an employee with earned sick time upon the request of the employee, in accordance with the following procedural rules:

- The employer may determine the proper method for requesting the use of earned sick time, e.g., orally, in writing, and/or electronically.
- When possible, the employee’s request should state how long the employee will be absent from work.
- If the need for sick time is foreseeable, the employee must make “a good faith effort” to give the employer notice and make “a reasonable effort” to schedule his or her sick leave so as to not “unduly disrupt” the employer’s operations; however, an employer may not require the employee to secure a replacement as a condition of using earned sick time.
- If the employee is absent for more than three consecutive days, the employer may require the employee to provide “reasonable” documentation that the sick leave was used for a covered purpose (e.g., a note signed by a health care professional), but the employer may not demand information in violation of the Health Insurance Portability and Accountability Act (or “HIPAA”).

In fact, the Law mandates that health information about an employee or family member “obtained solely for the purposes of utilizing sick time” must be treated as confidential and may not be disclosed unless the employee consents in writing to disclosure or disclosure is required by law. Further, employers must maintain any

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married to or in a domestic partnership with one another; (iii) persons formerly married to or in a domestic partnership with one another regardless of whether they still reside in the same household; (iv) persons who have a child in common, regardless of whether such persons have been married or [are] domestic partners or have lived together at any time; and (v) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.”

“Child” means, “regardless of age, a biological, adopted, foster child, legal ward or a person to whom the employee stands in loco parentis or to whom the employee stood in loco parentis when that person was a minor.”

“Parent” is defined as “a biological, foster, step- or adoptive parent, a legal guardian of an employee or a person who stood in loco parentis when the employee was a minor.”

<sup>4</sup> Additionally, the Law permits an employer to allow an employee to use sick time, even if it is not specifically requested, if the employer believes that the reason the employee is seeking time off is for medical purposes.

health or safety information concerning an employee or the employee's family member "on a separate form and in a separate file from other personnel information."

Importantly, if an employer requires employees to provide notice of the need to use earned sick time, the employer must have a *written policy*, communicated to employees, that sets forth the process for employees to provide such notice. The Law prohibits an employer from denying earned sick time to an employee because the employee failed to comply with an oral policy.

### **Non-Retaliation Provision**

The Law contains a broad non-retaliation provision that, among other things, prohibits employers from taking adverse employment actions against employees for requesting or using earned sick time. Further, the Law creates a rebuttable presumption of unlawful retaliatory action "whenever an employer takes adverse action against an employee within 90 days of the filing of a complaint regarding an employer's alleged violation of [the Law]."

### **Notice, Posting, and Recordkeeping Requirements**

Employers must provide employees with a copy of the Law, along with "written notice of how the law applies to that employee," at the commencement of employment or within 90 days of the effective date of the Law, whichever is later. Additionally, 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, in a conspicuous location accessible to the employees. An employer that willfully violates these notice and posting requirements may incur a fine of up to \$500.

Employers are also required to retain records for three years documenting (i) the number of hours worked by each employee, (ii) the amount of earned sick time accrued, and (iii) the amount of earned sick time taken by each employee. The failure to retain such records will create a rebuttable presumption that the employer has violated the Law.

### **Enforcement, Civil Action, and Penalties**

Within one year of an alleged violation of the Law, an employee may either file a complaint with the Weights and Measures Division of the Westchester County Department of Consumer Protection, or bring a lawsuit. The Law provides for a wide range of remedies if either a hearing officer or court finds that the employer violated the Law, including the payment of three times the wages due to an employee whom the employer unlawfully failed to compensate for the use of earned sick time, as well as attorney's fees and litigation costs.

## What Westchester County Employers Should Do Now

- Employers that already provide their employees with paid sick leave benefits that meet or exceed the Law's requirements need not change their current program, as long as the program complies with all of the Law's mandates, including the notice and posting obligations discussed above.
- Employers that do not currently have a paid sick leave policy or have one that falls short of the Law's requirements should begin to develop a compliant program now.
- Employers that have a unionized workforce in Westchester County should review any applicable CBAs to determine if changes will be necessary when the agreements are renewed or renegotiated.
- Finally, employers with employees in both New York City and Westchester County should determine if their New York City-compliant program could be adapted for their Westchester County employees. As the laws are quite similar, this may be a viable option.

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