



### NYC Council Expands Sick Time Law

The Earned Sick Time Act was initially enacted by the New York City Council on June 26, 2013, when it overrode Mayor Michael Bloomberg's veto. The Act, which takes effect on April 1, 2014, requires all private employers (including employers of domestic workers) to provide a minimum of one hour of sick time for every 30 hours worked, up to 40 hours per calendar year. As originally enacted, this sick time was required to be paid by employers with 20 or more employees beginning on April 1, 2014 (and by employers with 15 to 19 employees beginning on a later date). On February 26, 2014, the City Council voted to expand the Act. This amendment, which Mayor Bill de Blasio is expected to sign, requires all employers with five or more employees to provide *paid* sick time effective April 1, 2014. Employers with fewer than five employees are required to provide sick time, but it need not be paid. In response to concerns voiced by newly covered businesses, the City Council has provided businesses with five to 19 employees a six-month grace period (until October 1, 2014), during which these businesses will not be fined for failing to provide paid sick time.

The Act has many provisions that will require most employers to revise, in at least some respects, their sick time policies and, possibly, other paid and unpaid time off policies, as well as record keeping procedures. For example, employees must be permitted to use sick time for:

- their own mental or physical illness, injury or health condition;
- the need for medical diagnosis, treatment or preventative medical care of any illness, injury or health condition;
- any of the foregoing purposes with respect to a family member; and

- the closure of an employee's place of business, a child's school, or a child care provider in connection with a declared public health emergency.

Other requirements that may cause employers to revise their policies include the following:

- sick time must be provided to part-time employees;
- accrued, unused sick time must be carried over (or paid out) from year to year;
- minimum increments for sick time can be no more than four hours; and
- all new employees must receive notice of their sick time rights in their primary language (even if it is not English).

#### Covered Employers

As of April 1, 2014, all employers with five or more employees (or one or more domestic employees) must provide paid sick time to their employees. Employers with five to 19 employees will receive a grace period tolling enforcement until October 1, 2014. Also effective April 1, 2014, all employers with fewer than five employees are required to provide *unpaid* sick time. Employees are counted under the Act if they work more than 80 hours per year. 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 in the group are counted. Whether the threshold number of employees must all be employed in New York City is not yet clear. Hopefully, regulations clarifying this aspect of the Act will be published.

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## Eligible Employees

The Act applies to employees who work:

- full or part time;
- within New York City;
- more than 80 hours per calendar year; and
- for a covered employer.

There are limited exceptions, which include independent contractors and employees covered by a collective bargaining agreement that otherwise provides for comparable benefits.

## Required Permissible Uses for Sick Time

Sick time can be used for:

- an employee's own mental or physical illness, injury or health condition;
- the need for medical diagnosis, treatment or preventative medical care of any such illness, injury or health condition;
- any of the foregoing purposes with respect to a family member; and
- the closure of an employee's place of business, a child's school, or a child care provider in connection with a declared public health emergency.

A family member includes an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of an employee's spouse or domestic partner. A "parent" means a biological, foster, step or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child. A "sibling" means an employee's brother or sister, including half-siblings, stepsiblings and siblings related through adoption.

## Accrual and Carryover of Sick Time

Sick time begins to accrue on April 1, 2014, for all existing employees and upon commencement of employment for all employees hired thereafter. At least one hour of sick time must be accrued for every 30 hours worked, up to a maximum of 40 hours. For exempt employees, the law presumes that an employee works 40 hours per week (for accrual purposes), unless an employee's regular work week is less than 40 hours, in which case the actual number of regularly scheduled work hours will control.

Employees are not entitled to begin using sick time until after 120 days following the commencement of their employment or 120 days following the effective date of the Act.

Unused sick time must carry over to the following calendar year; however, employers may limit the use of sick time to no more than 40 hours per year.

Employers may, but are not required to, pay employees for unused sick time at the end of the year in lieu of carrying over sick time to the next 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 of employment for any reason.

Employers may provide minimum increments in which sick time may be used; however, such minimum increment may not be more than four hours per day.

## Required Notices by Employer

An employer must provide an employee at the commencement of employment with written notice of the employee's right to sick time, including the accrual and use of sick time, the calendar year of the employer, and the right to be free from retaliation and to bring a complaint to the New York City Department of Consumer Affairs. This notice must be in English and, if other than English, the primary language spoken by the employee, provided the Department of Consumer Affairs has made available a translation of such notice in such language (such other languages shall include Chinese, French-Creole, Italian, Korean, Russian and Spanish). These notices are expected to be, but are not yet, available on the Department of Consumer Affairs' website.

An employer may, but is not required to, post a similar notice in an area accessible to employees.

Employers must keep records of compliance with the Act for a period of three years. If an employer fails to maintain such records, a presumption arises that the employer has violated the Act.

## Use of Sick Time; Required Notices by Employee

Employers may require up to seven days' notice of foreseeable sick time, and with respect to unforeseeable sick time, employees can be required to provide notice as soon as practicable.

For sick time of more than three consecutive workdays, employers can require documentation from a licensed health care provider confirming the need for that amount of sick time. Employers may not, however, require documentation that

specifies the nature of the medical condition and must treat all health care information provided as confidential.

Employers may require employees to provide written confirmation that they used the sick time for the purposes permitted by the Act.

Employees who use sick time for other purposes may be subject to disciplinary action, including termination of employment.

### **Additional Rules and Prohibitions**

Employers may not:

- retaliate against an employee for taking sick time under the Act;
- interfere with an employee's right to take sick time under the Act;
- require an employee to work additional hours to make up for sick time taken under the Act;
- condition the use of sick time on an employee's ability to obtain a replacement; or
- require an employee to disclose the specific details related to the medical condition at issue as a prerequisite for taking sick time (but, if any such information is obtained, the employer must keep it confidential).

### **Employers with Existing Leave Policies**

An employer that has existing policies that provide an employee with an amount of paid or unpaid leave (whether as paid vacation, personal days or other paid time off) sufficient to meet the requirements of the Act, need not provide additional paid or unpaid sick time under the Act. However, even if an employer provides employees with at least 40 hours of leave time, taking into account multiple paid time off policies, these policies may not be an adequate substitute for sick time under the Act. To be an adequate substitute, up to 40 hours of time off (paid or unpaid, depending on the employer's size) must be available for all the required reasons for which sick time under the Act may be used. Additionally, such paid or unpaid time off must meet all the other requirements of the act, including, without limitation, that it is available to full- and part-time employees, it must be carried over (or paid out) from year to year and may be taken in increments as small as four hours.

### **Enforcement and Penalties**

Currently, the New York City Department of Consumer Affairs is responsible for handling complaints and otherwise enforcing the Act. The Mayor, however, may designate an agency other than the Department of Consumer Affairs to handle complaints and enforce the law. In addition to investigating employee complaints, the Department of Consumer Affairs may conduct investigations of violations on its own initiative.

Notably, employees do not have a private right of action for violations of the Act.

Employees claiming to be aggrieved by a violation of the Act may file a complaint with the Department of Consumer Affairs within two years after the date the person knew or should have known of the alleged violation. (The February 2014 amendment increased the time for filing a complaint from 270 days to two years.)

The Department may award penalties:

- not to exceed \$500 for the first violation;
- not to exceed \$750 for a second violation within two years after the first violation; and
- not to exceed \$1,000 for subsequent violations. The Department may also order lost wages, other damages and equitable relief, including reinstatement.

A penalty not to exceed \$50 may be assessed for each employee who has not received the required notice under the Act.

### **Conclusion**

In light of the Act, employers should:

- determine whether the Act applies to them; and if so,
- determine whether their paid and unpaid time off policies fully comply with the Act (the likelihood is they do not);
- revise any noncompliant policies; and
- be mindful of the Act's record keeping, notice and anti-retaliation requirements.

If you have any questions regarding the Act or your organization's obligations thereunder, please contact [Mark J. Goldberg](#).

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