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New York City Adopts Final Rule Regarding Amendments to the Earned Safe and Sick Time Act

Law and the Worplace on **October 2, 2023**

On September 15, 2023, the New York City Department of Consumer and Worker Protection ("DCWP") published a Final Rule adopting amendments to portions of the city's Earned Safe and Sick Time Act ("ESSTA"). Employers will have until October 15, 2023 to update their safe and sick leave policies and come into compliance with the Final Rule.

As a reminder, the ESSTA requires employers to provide New York City employees with time off each calendar year to care for or treat illnesses, injuries or health conditions affecting themselves and their family members, and to seek services, such as legal or mental health counseling, in the event an employee or their family member is a victim of domestic violence, a family or sexual offense, stalking or human trafficking. The amount of leave to be provided depends upon the employer's size; specifically:

- employers with 4 or fewer employees and a net income of less than $1 million in the prior tax year are required to provide employees with up to **40 hours** of **unpaid** sick and safe leave;
- employers with between 5 and 99 employees and employers with 4 or fewer employees and a net income of greater than $1 million in the prior tax year are required to provide each employee with up to **40 hours** of **paid** sick and safe leave per year; and
- employers with 100 or more employees are required to provide up to **56 hours** of **paid** sick and safe leave per year.

If an employer opts to accrue an employee's ESSTA time (instead of frontloading the time at the start of the calendar year), the time must accrue at a minimum rate of 1 hour for every 30 hours worked. If using an accrual system, employees must be permitted to carry over up to 40 or 56 hours of unused time (depending on employer size) for immediate use in the following year. However, employers need not need to permit employees to use more than a total 40 or 56 hours of paid safe and sick time per calendar year.

The Final Rule brings the rule into alignment with the statutory amendments made by Local Law 97 of 2020, which we reported on here, and adds some substantive changes going beyond the current ordinance as well. The major amendments are summarized as follows:

Determination of Employer Size

The Final Rule clarifies that an employer's size for purposes of the ESSTA is calculated based on the number of its employees *nationwide*. Notably, the calculation must take into account employees under a joint-employment arrangement, even if their names do not appear on the employer's payroll. Further, employees on paid and unpaid leaves of absence are counted so long as the employer has a "reasonable expectation" that the employee will return to active employment.

Impact of an Increase or Reduction in Employee Population

Where an employer increases their number of employees from less than 5 to between 5-99 employees, the duty to provide paid ESSTA leave is prospective from the date of the increase in number, and employees are not entitled to reimbursement for previously used, unpaid ESSTA time off. Once the employer crosses this threshold, they must allow the employee to use, and receive pay for, up to 40 hours of accrued safe and sick time, minus the amount of unpaid time the employee previously used during the calendar year.

If an employer grows to exceed 100 employees in a calendar year, the employee's right to use additional paid safe and sick time up to 56 hours is prospective from the date of the increase in the workforce.

The Final Rule instructs that a reduction in the number of employees shall not reduce an employee's entitlement to safe and sick time until the *following* calendar year.

Do Virtual Workers Count As "New York City Employees"?

The COVID-19 pandemic posed several questions as to whether certain virtual workers would be entitled to ESSTA leave. The Final Rule clarifies that an employee that *only* performs work while physically outside of New York City, including virtual work, is not entitled to ESSTA leave. Therefore, an employee will be entitled to ESSTA leave only if they: (i) perform work, including virtual work, while physically located *in* New York City, regardless of the employer's location; or (ii) have a primary work location outside of New York City, but regularly perform, or are expected to regularly perform, work within New York City during a calendar year. The Final Rule provides several examples to illustrate, including one in which a Massachusetts-based employee travels to New York City and spends eight hours installing a cabinet at a client's residence. The employer did not expect the employee to return to New York City during the course of their employment in the calendar year, and thus that employee would not be considered "employed for hire within the City of New York" under the ESSTA.

Employee Notice

The amendments add that the employers' procedures for requiring an employee to provide notice of their need to take ESSTA leave must be "reasonable" when the need is not foreseeable. As was the case prior to the Final Rule, the procedures must be outlined in a written policy. The Final Rule expands the list of examples of reasonable employee notice procedures to include "send[ing] an email to a designated email address" and "submit[ting] a leave request in a scheduling software system, provided the employee has access to such system on non-work time, and has been trained on and given written instructions on how to use the system."

The Final Rule also defines a need as "foreseeable" where the employee is "aware of the need to use safe/sick time seven days or more before such use."

Reasonable Documentation

The Final Rule clarifies what constitutes reasonable documentation supporting an employee's request for ESSTA leave. In addition to written documentation from a licensed health care provider, written documentation from licensed clinical social workers, licensed mental health counselors or other types of licensed health care providers are to be considered reasonable forms of documentation. The amendments also add that the employer cannot require disclosure of details regarding the domestic or other violence in connection with an employee's use of safe time (other than the dates of leave needed), which is consistent with sections 20-914 and 20-921 of the city's Administrative Code.

If the employer does request such documentation, they must give the employee at least seven days to submit the documents, and must reimburse the employee for any reasonable expenses incurred to obtain the requested documentation. If an employee is unable to obtain required documentation due to associated costs, the employer may not withhold payment of that employee's safe and sick time in response. In addition, the employer cannot require such documentation be provided *prior to* the employee's return to work, nor where the use of safe and sick time lasts *three or fewer* consecutive work days.

Finally, employers who require employees to provide reasonable written documentation supporting their need for leave must have a written policy which includes, among other things, the types of reasonable written documentation the employer will accept and instructions on how employees can submit their documentation. Importantly, the Final Rule requires the written policy to include a specific statement that the employer will not "ask the employee to provide details about the medical condition that led the employee to use sick time, or the personal situation that led the employee to use safe time" and that any information the employer receives about the employee's use of safe or sick time will be kept strictly confidential absent the employee's permission or in accordance with applicable law.

Notice of Safe and Sick Time Accrual on Pay Statement

The Final Rule adds a section titled “Notice of Safe/Sick Time Accruals and Use on Pay Statement,” which reiterates the ESSTA’s requirement that employers notify employees on their pay statements of the amount of accrued and used sick and safe time during a pay period, and the remaining available balance. An employer may use an electronic system to comply with the balance notification requirements if the following three requirements are met: (i) employees are alerted each pay period electronically that their ESSTA accrual, use and balance information is available to review; (ii) this content is readily accessible by the employee outside of the workplace within the electronic system; and (iii) the accrual, use and balance information is maintained for any past pay period in the electronic system.

Rate of Pay

The Final Rule clarifies that the employee’s “regular rate of pay” for purposes of the ESSTA means such rate *at the time* the safe and sick leave is taken, provided that the rate of pay is not less than the highest applicable rate of pay to which the employee would be entitled under applicable law, rule, contract or agreement.

Business Sales/Transfers

The Final Rule provides that an employee’s safe and sick time balances will not be affected by the sale or transfer of a business, or by the change in a subcontracting relationship among corporate entities. If the employer(s) fail to properly transfer the employee’s safe and sick leave balance, both the original and successor employer, and any joint employer, can be held individually and jointly liable for such violations, regardless of any agreement between the original and successor employer to the contrary.

Enforcement and Penalties

The Final Rule expands the range of possible penalties for violations of the ESSTA by creating a "reasonable inference" that the employer "does not provide or refuses to allow the use of accrued safe/sick time" in violation of the ESSTA *if*: (1) it fails to distribute a compliant earned sick and safe time policy that accords with the law's specific written policy requirements; or (2) it fails to maintain adequate records of the employees' accrued safe and sick time use and balances in accordance with the law's recordkeeping requirements. Moreover, every year in which an unlawful policy or practice is in effect shall constitute a separate violation of the law.

The amendments further provide examples of evidence the City may use to support that an employer violated the ESSTA, including but not limited to: (1) imposing unlawful barriers to employees' use of ESSTA leave, whether written or unwritten, such as requirements that workers find replacement workers to cover shifts missed due leave and unreasonable notice requirements; (2) instituting a probation period, waiting periods or blackout days; (3) failing to carry over safe and sick time hours if the employer does not use the frontloading system; and (4) failing to inform employees of available safe and sick time.

If the City determines that an employer committed a violation, the fines may range from $250 per violation to $500 per covered employee per calendar year that the unlawful policy or practice was in effect. Back pay may also be imposed if an employee is retaliated against for their lawful use of ESSTA leave.

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