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New York City Council Passes the Earned Sick Time Act

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On Wednesday, May 8, the New York City Council passed the New York City Earned Sick Time Act (the "Act"), which requires most New York City employers to provide mandatory paid and unpaid sick leave to employees working in New York City. The City Council has sufficient support to override Mayor Bloomberg's expected veto. Once enacted, New York City will join San Francisco, Washington, DC, Seattle, Portland and the State of Connecticut as localities that impose sick leave obligations on employers.

This alert highlights key provisions of the Act, which has been modified since it was first proposed based on input from labor unions and representatives of business interests.[1] All New York City employers should begin familiarizing themselves with the legislation's provisions and, if covered, begin preparing to comply with its requirements and determining whether existing leave policies satisfy the requirements of the Act. This includes considering updates to company leave policies to comply with the Act's requirements and accrual periods. Please contact your Proskauer relationship attorney or one of the lawyers listed below for guidance on how this legislation may impact your business.

Summary of Key Provisions of the New York City Earned Sick Time Act

The Act's Requirements

- Mandatory Minimum Sick Leave. The Act sets a mandatory minimum level of sick leave that must be provided by most New York City private-sector employers, including households who employ a single domestic worker. Further, for most employees, the leave provided must be *paid* leave. Special rules apply to domestic employees and employees represented by a union.

- Employers Covered. Almost all New York City private-sector employers are covered under the Act, except certain employers in the manufacturing sector (*e.g.* plants, factories and mills, as well some bakeries, candy stores, custom tailors and similar establishments that manufacture products on site), which are exempt from

providing paid sick leave. Federal, state and local governmental employers are not "employers" subject to the Act (subject to some exceptions).

- Employees Covered. With limited exceptions, any employee of a covered employer who is employed for more than eighty hours in a calendar year on a full-time or part-time basis is entitled to sick time under the Act. Thus, virtually all private sector employees are covered as well.

Employees of federal, state and local governments are generally exempted from the Act. Certain individuals who are professionally licensed by the New York state education department and who meet other specific criteria including being paid an hourly rate at least four times the federal minimum wage are excluded. Individuals who are participants in certain work study or scholarship programs and independent contractors are also expressly excluded. There are other specific narrow exemptions not included in this alert.

- Effective Date. The Act has a complex provision for when it takes effect that is tied to the New York City economy, measured by the New York Coincident Economic Index, a Federal Reserve Index. If the Index is at a certain level as of December 16, 2013, then the law will take effect on April 1, 2014. Otherwise, the effective date of the law will be delayed until the Index is above the specified level. For employees covered by a CBA in effect on the date of the Act's effective date, the Act takes effect on the CBA's termination date.

- Paid Leave Threshold. Initially the *paid* leave provisions apply to covered employers with 20 or more employees (full-time, part-time and temporary employees are included for purposes of determining coverage). The 20 employee threshold drops to 15 employees eighteen months after the law takes effect. For businesses that are part of a chain, the law aggregates the total number of employees in the group of establishments that share a common owner or principal for purposes of determining if the employer meets the applicable thresholds.

- Unpaid Leave. When the law takes effect, covered private sector employees who are not entitled to paid leave are entitled to job-protected *unpaid* leave. Thus, small employers with fewer than the number of employees required to trigger the paid leave requirements, will be required to provide unpaid leave to their covered employees.

- Domestic Employees. Commencing eighteen months after the law takes effect, it will apply to employers of one or more domestic workers. Domestic workers who work more than 80 hours in a calendar year are entitled to two days of paid sick time after one year of work with the same employer in addition to the three days of paid rest leave to which they are entitled after one year of employment under Section 161(1) of the Labor Law. Unlike other covered employees, unused sick time does not carryover for domestic employees.

- Accrual. For non-domestic workers, paid and unpaid sick leave under the Act must accrue at a minimum rate of 1 hour for each 30 hours worked, capped at 40 accrued leave hours in a calendar year. For purposes of this accrual, exempt employees are presumed to work 40 hours per week for purposes of accrual, unless their regular work week is less than forty hours, in which case sick time accrues based upon that regular work week. Employees begin to accrue sick leave at the commencement of employment and may begin to use their accrued sick leave on the 120th day after the commencement of employment or the 120th day after commencement of the Act, whichever is later.

- Qualifying Absences. Employees are entitled to use sick time for absences from work due to: (i) the employee's mental or physical illness, injury or health condition, need for medical diagnosis, care or treatment, or need for preventive medical care; (ii) care of a family member needing such medical diagnosis, care, treatment or preventive medical treatment; (iii) closure of the place of business due to a public health emergency (as declared by the commissioner of health and mental hygiene or the mayor) or to care for a child whose school or child care provider is closed due to a public health emergency. Family members include an employee's child (biological, adopted, foster or to whom the employee stands in loco parentis), spouse, domestic partner or parent (or who stands in loco parentis to the employee), or the child or parent of an employee's spouse or domestic partner.

- Usage. Employers may set a minimum increment for the use of sick time of no more than 4 hours.

- Additional Work Hours Instead of Leave. An employee cannot be required to cover the hours during which s/he utilizes sick time but, upon mutual agreement, may work additional hours without using sick time to make up the missed hours. Such additional hours must be worked during the seven days immediately preceding or following the employee's sick days, except that an adjunct professor at an institute of higher education may work such additional hours at any time during the

applicable academic term. Employers are advised to document any such agreement and must follow applicable overtime rules if the additional work hours cause the employee to work more than forty in the applicable work week.

- Carryover. Employees may carry over unused sick time into the following year, but the Act does not require more than forty hours of paid sick time to be provided to an employee in a calendar year. Further, the law permits employers and employees to agree to eliminate carry over if the employer pays the accrued unused sick leave at the end of the calendar year and permits the employee to use 40 hours of paid sick time commencing on the first day of the following year.

- Payment for Accrued Unused Time. The Act does not require any payment for unused accrued sick time.

- Employee Notice and Documentation Obligations. Reasonable notice of the need to use sick time may be required. Where the need for sick time is foreseeable, an employer may require the employee to provide up to seven days of notice. For unforeseeable notice, an employee may be required to provide notice as soon as practicable. An employer can require an employee to provide written confirmation that the employee used sick time pursuant to the Act. In addition, reasonable documentation signed by a licensed health care provider may be required but only for absences of more than three consecutive work days. No matter the length of the absence, the law restricts employers from seeking information about the nature of the illness, except as required by other laws, such as the FMLA. Employers should note that sick leave can run concurrently with the FMLA.

- Comparable Policies. The Act does not require employers to provide additional sick time for their employees if they already provide comparable or better paid leave as provided by the bill. Thus, an employer that provides an amount of paid and unpaid leave (including vacation and personal days) sufficient to meet the requirements of the Act and allows such leave to be used for the same purposes and conditions as provided for in the Act is not required to provide any additional sick time for its employees.

Nonetheless, many covered employers may need to expand paid leave coverage to temporary and part-time employees who work 80 or more hours during the year and modify policies to allow for a broader array of absences. Employers also will need to put processes in place to track the mandated accrual. They also may need to modify their policies to provide *unpaid* leave to those employees who are entitled to it.

- No Retaliation. Adverse employment actions or retaliation based on an employee's good faith exercise of rights protected by the Act are prohibited. All employees will be protected by anti-retaliation provisions when exercising their right to take sick leave under the Act, whether leave is paid or unpaid.

- Public Disasters. The mayor may suspend the Act for the duration of any public disaster.

Collective Bargaining Agreements

- The Act does not apply to any employee in the construction or grocery industry covered by a valid CBA that expressly waives the Act's provisions.

- In all other industries, the Act does not apply to any employee covered by a valid collective bargaining agreement ("CBA") that (i) expressly waives the Act's provisions and (ii) provides comparable benefits for the employee in the form of paid days off. Such paid days off can be in the form of leave, compensation, employee benefits or a combination thereof. Comparable benefits include, but are not limited to, vacation time, personal time, sick time, holidays, and Sunday premium rates.

- As discussed above,for employees covered by a CBA in effect on the date of the Act's effective date, the Act takes effect on the CBA's termination date.

Notice and Record Keeping Requirements

- At the commencement of employment, employees must be provided with written notice that they are entitled to sick time under the Act. The notice also must describe the accrual and use of sick time, the employer's calendar year, and the right to be free from retaliation and to file a complaint. The Department of Consumer Affairs is charged with making available appropriate notices. Notice must be provided in English and any other primary language spoken by the employee if the Department of Consumer Affairs has posted on its Web site a version of the notice in that language.

- Notices about sick leave also may be posted in an area accessible to employees. Again, such notices may need to be in languages other than English.

- Records documenting the employer's compliance with the Act must be maintained for at least two years.

Enforcement

- The Department of Consumer Affairs is charged with enforcing the Act. The Commissioner of the Department shall take such measures necessary for the Act's implementation, including the promulgation of rules.

- Any person alleging a violation of the Act may file a complaint with the Department within 270 days of the date they knew or should have known of the alleged violation. The Department will conduct investigations and attempt to resolve the complaint through mediation. If the Department believes a violation has occurred, it will issue a notice of violation to the offending person or entity. The notice of violation is returnable to the administrative tribunal charged with adjudicating violations of the Act.

- Penalties for violating the substantive provisions of the Act are: (i) the greater of 3 times the wages that should have been paid for each instance of sick time taken but unlawfully not compensated, or $250; (ii) $500 for each instance of unlawfully denied sick time not taken by the employee or that the employee is required to work additional hours without mutual consent; (iii) for each instance of unlawful retaliation (not including termination), full compensation including lost wages and benefits, $500 and appropriate equitable relief; and (iv) for each instance of unlawful discharge, full compensation including lost wages and benefits, $2,500 and appropriate equitable relief, including reinstatement.

- For substantive violations of the Act, employers will incur civil penalties payable to the City not to exceed $500 for the first violation, $750 for a second violation within two years of a prior violation, and $1,000 for subsequent violations that occur within two years of any previous violation.

- Willful violations of the Act's notice requirements will cause employers to incur a fine not to exceed $50 for each employee who was not provided with appropriate notice.

- Significantly, an employee's right to bring a private civil action to remedy alleged violations of the Act has been removed from the final version of the Act approved by the Council. Thus, an employee's sole remedy for a violation of the Act is

through the Department of Consumer Affairs complaint process.

[1] View the full text of the Act.