

Management Alert



New York City's Earned Sick Time Act Becomes Law

On June 27th, the New York City Council voted to override the Mayor's veto of the Earned Sick Time Act. Now officially on the books, the Act requires all City employers to start providing *unpaid* sick leave to their employees—and requires certain City employers to provide *paid* sick leave—as early as April of next year.

This law is likely to require many companies to modify their policies. This alert responds to some key questions we have heard from employers about the Act.

WHEN DOES THIS LAW GO INTO EFFECT?

The effective date of the Earned Sick Time Act is April 1, 2014, but the law includes an unusual provision that may delay the effective date depending on the condition of the New York City economy. If the City's Independent Budget Office determines that the City economy is in the same or better shape than it was in January 2012, then the law will go into effect on April 1, 2014. If the City economy is worse than it was in January 2012, then the law will not go into effect until it recovers to at least the January 2012 level.

The Office will make this determination on December 16, 2013 and, if necessary, every six months thereafter. Once the Office determines that the economy is at or above the January 2012 level, the effective date of the law will be the next October (if the determination is made in December) or the next April (if the determination is made in June).

DOES THIS LAW APPLY TO MY BUSINESS?

Yes, if you have *any* employees who are employed within New York City for more than 80 hours in a calendar year. This includes full-time, part-time, and temporary employees.

HOW MUCH SICK LEAVE MUST BE PROVIDED?

Once the law goes into effect, employers with 20 or more City employees must provide at least one hour of *paid* sick time for every 30 hours worked by the employee (this number drops to 15 employees 18 months after the law goes into effect). City employers that do not have the minimum number of employees to trigger the *paid* sick leave requirements must still provide their employees with the same amount of *unpaid* sick leave, which is earned at the same rate. Employers are not required to provide more than 40 hours of sick time for an employee in a calendar year.

HOW DO EMPLOYEES ACCRUE SICK TIME UNDER THE ACT?

Sick leave accrues at the commencement of employment or the effective date of the Act, whichever is later. An employee is entitled to begin using sick leave on the 120th day following the commencement of his or her employment, or on the 120th day following the effective date of the Act, whichever is later.

MAY I SET A MINIMUM INCREMENT FOR THE USE OF SICK TIME?

Yes, but employers may not require that employees use sick time in increments of more than 4 hours.

HOW ARE SALARIED EMPLOYEES TREATED?

Salaried employees are assumed to work 40 hours per week for purposes of sick time accrual. If a salaried employee's regular workweek is less than 40 hours, sick time will accrue based on the hours worked during a regular workweek.

DO I HAVE TO PROVIDE PAID SICK LEAVE IN ADDITION TO MY CURRENT PTO POLICY?

Not if your current PTO policy provides the same (or more generous) paid leave as the new law and allows employees to use paid leave in the same manner and under the same conditions as provided by the Act. A covered employer with the required minimum number of employees whose PTO policy provides at least 40 hours of paid sick leave per year and permits employees to use PTO for all the reasons enumerated in the Act is not required to provide additional paid sick leave.

DOES UNUSED SICK LEAVE CARRY OVER TO THE NEXT CALENDAR YEAR?

Yes. As a general rule, unused sick leave carries over to the following calendar year, but employers are not required to provide more than 40 hours of sick leave per year. Put another way, an employee with unused sick leave would be eligible to use this time during the following year without having to start the accrual process over again. This employee, however, would not be entitled to bank this time in order to use more than 40 hours of sick leave in a calendar year (unless permitted by the employer).

An employer can also pay out unused sick time at the end of the calendar year in which the time is accrued—provided that the employee is eligible to take at least 40 hours of sick leave starting on the first day of the following year.

DO I HAVE TO PAY OUT UNUSED SICK LEAVE TIME IF THE EMPLOYEE RESIGNS OR IS FIRED?

No. An employee is not entitled to financial or other reimbursement upon his or her termination, resignation, retirement, or other separation from employment for unused accrued sick time. However, when there is a separation from employment and the employer rehires the same employee within six months of separation, the employee is entitled to previously unused accrued sick time.

DOES AN EMPLOYEE NEED TO BE SICK IN ORDER TO TAKE SICK LEAVE?

No. Employees can take sick leave for any of the following reasons:

- An employee's mental or physical illness, injury, or health condition, or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition, or need for preventive medical care.
- Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition, or who needs preventive medical care.
- Closure of such employee's place of business by order of a public official due to a public health emergency, or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

WHAT ABOUT WORKERS COVERED BY A COLLECTIVE BARGAINING AGREEMENT?

The Act does not apply to workers covered by a valid collective bargaining agreement that waives the Act's provisions, provided that the agreement allows for benefits comparable to paid days off. Comparable benefits include, but are not limited to, vacation time, personal time, and sick time.

WHAT RECORDS SHOULD I BE KEEPING?

Employers are required to keep records documenting compliance with the law's provisions for at least two years. This includes records that track the accrual and use of sick leave.

DO I HAVE TO PROVIDE EMPLOYEES WITH NOTICES ABOUT THE LAW?

Yes. Covered employers must provide their employees with a written notice of their right to sick time under the law at the commencement of employment. This notice must explain how sick time is accrued and how it can be used. The notice must also note the employer's calendar year in which the sick leave applies and inform the employee of his or her right to be free from retaliation and to bring a complaint regarding a violation of the law.

In addition to providing written notice at the start of employment, notice may also be conspicuously posted at the employer's place of business, in an area accessible to employees. New York City's Department of Consumer Affairs will create notices that contain the required information, which employers will be able to download. Employers that willfully violate the notice provisions of the law can be subjected to a \$50 civil fine for each employee who was not given the appropriate notice. The Department of Consumer Affairs will make notices available, and employers must provide notice in English and any other primary language spoken by an employee if the Department has published on its web site a version of the notice in that language.

WHAT ARE THE POTENTIAL PENALTIES FOR NOT COMPLYING WITH THE LAW?

Penalties vary by the conduct that caused the violation. The law generally penalizes four categories of violations noted below:

- Sick time taken but not compensated lawfully. The penalty for this type of violation can be up to three times the wages that should have been paid, or \$250, whichever is greater.
- Sick time requested but unlawfully denied and not taken. This includes conditioning approval of an employee's use of sick leave upon searching for, or finding, a replacement worker, or requiring an employee to make up the time that he or she used on a valid sick leave. This type of violation can result in a \$500 penalty.
- Unlawful retaliation that does not result in discharge from employment. This violation can result in full compensation to the affected employee, including lost wages and benefits, a \$500 fine, and equitable relief as appropriate.
- Unlawful discharge from employment. This can render the employer liable for full compensation to the affected employee, including lost wages and benefits, a \$2,500 fine, and equitable relief as appropriate, including reinstatement.

An employer found to violate these provisions of the law will also be liable for a civil penalty payable to the City not to exceed between \$500 and \$1,000 per violation depending on the timing and number of prior violations committed by the employer.

CAN I BE SUED BY AN EMPLOYEE UNDER THE ACT IN COURT?

No. New York City's Department of Consumer Affairs is solely responsible for enforcing this law. An employee claiming a violation cannot sue his or her employer in court. Rather, the employee must file a complaint with the Department of Consumer Affairs within 270 days of the date the employee is aware, or should have been aware, of the alleged violation. Only the Department's final determination can be challenged in court in an Article 78 proceeding.

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