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## Attention New York Employers: New State and City Sick Leave Requirements

Recently, both New York State and New York City have promulgated new sick leave laws which expand the rights of employees to accrue and use sick leave. Both laws took effect on September 30, 2020, but employers are generally not required to allow employees to use the leave provided under the laws until January 1, 2021.

Below are a few key takeaways and a general discussion of the key provisions of each law.

### *I. Key Takeaways*

- To the extent that New York State and New York City employers have not done so, they should review their sick-leave policies to ensure compliance with the new State and City laws.
- New York City employers should ensure that they include the amount of safe/sick time employees have accrued and used during a pay period and an employee's total balance of accrued safe/sick time on their paystubs equivalent documentation.
- New York City employers should also ensure that they provide proper and timely sick leave notices to both new and current employees.
- New York State and New York City employers should update their handbooks accordingly.

### *II. New York's State-Wide Sick Leave Law*

- **Leave provisions:** Under the new law, employees' paid sick leave entitlement is governed by their employer's size or net income as follows:
  - Employers with **four (4) or fewer employees in any calendar year and a net income of \$1 million or less** in the prior tax year must provide employees with **up to 40 hours of unpaid sick leave.**

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- Employers with **four (4) or fewer employees in any calendar year and a net income of greater than \$1 million** in the prior tax year must provide each employee with **up to 40 hours of paid sick leave per year**.
  - Employers with **between 5 and 99 employees in any calendar year** must provide each employee with **up to 40 hours of paid sick leave per year**.
  - Employers with **100 or more employees in any calendar year** must provide **up to 56 hours of paid sick leave per year**.
    - For purposes of determining how many employees an employer has, New York State defines a "calendar year" as of January 1 through December 31.
    - For all other purposes concerning the provision of sick leave, the State defines a "calendar year" as either the twelve-month period from January 1 through December 31 or a regular and consecutive twelve-month period, as determined by an employer.
    - The new law does not address: 1) whether the employer's size is calculated by counting all of its employees nationwide, or only those in New York State; or 2) which calendar year an employer considers for determining its size (i.e., only the previous completed calendar year, multiple calendar years, etc.).
  - **Summary of sick time upon request:** Within three business days of an employee's oral or written request, the employer must provide an overview of the employee's accrued and used sick leave amounts in the current calendar year or accrued and used sick leave amounts in any previous calendar year.
  - **Accrual/carryover:**
    - The new law allows employees to begin accruing one (1) hour of sick time per 30 hours of work. Alternatively, employers may frontload the entire leave entitlement at the beginning of the year. Still, upon electing this option, an employer may not reduce an employee's sick leave allotment based on the actual number of hours the employee worked.

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- According to the new law, an employee's unused sick time must be rolled over to the next year, but employers with less than 100 employees may restrict sick time use to 40 hours per year, and employers with 100 or more employees may restrict sick time use to 56 hours per year.
  - However, the new provisions do not address whether employers who frontload sick time are subject to the statute's carryover obligations.
  - **Use of sick leave:**
    - Employees may use sick leave:
      1. for a mental or physical illness, injury, or health condition of such employee or such employee's family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
      2. for the diagnosis, care, or treatment of mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
      3. for absence from work due to any of the following reasons when the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking:
        - a) to obtain services from a domestic violence shelter, rape crisis center, or other services program;
        - b) to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
        - c) to meet with an attorney or other social services provider to obtain information and advice on and prepare for or participate in any criminal or civil proceeding;
        - d) to file a complaint or domestic incident report with law enforcement;

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- e) to meet with a district attorney's office;
  - f) to enroll children in a new school; or
  - g) to take any other actions necessary to ensure the employee's health or safety or the employee's family member or protect those who associate or work with the employee.
- Key terms concerning the use of sick leave are defined as follows:
    - "Family member" is defined as an employee's child, spouse, domestic partner, parent, sibling, grandchild, or grandparent; and the child or parent of an employee's spouse or domestic partner.
    - "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 child.
    - "Child" is defined as a biological, adopted, or foster child, a legal ward, or a child of an employee standing in loco parentis.
  - **Documentation**: According to the new law, an employer may not require the disclosure of confidential information "relating to mental or physical illness, injury, or health condition of such employee or such employee's family member, or information relating to absence from work due to domestic violence, a sexual offense, stalking, or human trafficking, as a condition of providing leave."
    - Aside from the above, the new law does not address what documentation an employer may require, if any, to support the employee's need for leave.
  - **Retaliation prohibited**: Employers may not retaliate against employees who exercise their rights under the new sick leave law.
  - **Restoration of previous position**: Upon returning from sick leave, employees are to be restored to the position, pay, and other terms and conditions of employment they held prior to using sick leave.

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- **Other policies:** Employers who have adopted leave policies that meet or exceed the accrual, carryover, and use requirements of the statute are not required to provide additional leave.
  - **Payout:** Additionally, employers are not required to pay accrued, unused sick leave upon an employee's termination, resignation, retirement, or other separation from employment.

The new law is available on the New York State Assembly website linked here: [\[NYS Assembly\] Bill No. S07506 Summary](#).

### *III. New York City Aligns City Sick Leave with the State's New Law*

The New York City Earned Safe and Sick Time Act ("ESSTA") already provided eligible employees with up to 40 hours of paid sick leave. On September 28, 2020, Mayor Bill DeBlasio signed a bill that aligns the ESSTA with the State's new sick leave law. Like the State law, the bill went into effect on September 30, 2020. Still, employers are generally not required to allow employees to use the leave provided under the new law, as discussed further below, until January 1, 2021.

Notable provisions of the amended ESSTA include:

- **Eligibility:**
  - Employees no longer have to work 80 hours within NYC to be eligible for safe/sick leave.
  - Domestic workers, now defined as any "person who provides care for a child, companionship for a sick, convalescing or elderly person, housekeeping, or any other domestic service in a home or residence," are also eligible to accrue and use sick leave.
- **Waiting period:** The bill eliminated ESSTA's 120-day waiting period for newly hired employees. See the New York City Department of Consumer and Worker Protection ("DCWP") website linked here: [Worker Protection & Workplace Laws: Paid Safe Sick Leave Notice of Employee Rights](#).

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- **New leave provisions:** The bill revised the ESSTA's sick leave provisions to mirror the State's new sick leave law, as outlined in Section II, "Leave provisions," above.
    - Also, ESSTA now states that where the Labor Law or any regulation establishes safe/sick time requirements that exceed ESSTA, such provisions are incorporated by reference, enforceable according to ESSTA's conditions, and subject to the remedies and penalties outlined in the Labor Law.
    - **Domestic workers:** Domestic workers are entitled to paid sick time regardless of the size of their employer.
  - **Use of sick leave:** Effective September 30, 2020, employees may use sick leave as it is accrued, except that, as provided by the bill, an employer may delay an employee's use of sick time in two situations:
    - employees of any employer of 4 or fewer employees that had a net income of \$1 million or more during the previous tax year may use paid safe/sick time as it is accrued on or after January 1, 2021, and
    - employees of any employer of 100 or more employees may use any accrued amount of paid safe/sick time that exceeds 40 hours per calendar year on or after January 1, 2021.
  - **Carryover:** Unlike the State's sick leave law, the ESSTA makes clear that an employer does not need to carry over an employee's accrued but unused sick time if the employer pays the employee for such unused time at the end of the calendar year in which the time was accrued, and provides the employee with time on the first day of the subsequent calendar year that meets or exceeds ESSTA's requirements.
  - **Documentation:** Employers may still require reasonable documentation to substantiate the leave need where the employee was out of work for three (3) or more consecutive days, but effective September 30, 2020, employers are required to reimburse employees for any fees incurred when obtaining such documentation.

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- **Adverse action:** The new provisions also expanded the definition of "adverse action":
    - The term is defined as any action against an employee "that penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights under this chapter or interfere with an employee's exercise of rights under this chapter and implementing rules."
      - ESSTA provides a non-exhaustive list of examples, including: "threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee's exercise of rights under this chapter, blacklisting, and maintenance or application of an absence control policy that counts protected leave for safe/sick time as an absence that may lead to or result in an adverse action. Adverse actions include actions related to perceived immigration status or work authorization."
  
  - **Notice:**
    - ESSTA requires that NYC employers provide employees notice of their sick/safe time leave rights at the commencement of employment and those who were already employed at the time of these new provisions, within 30 days of enactment (i.e., **October 30, 2020**). Notices will be available on the DCWP's website [[Paid Safe and Sick Leave Law: Notice of Employee Rights](#)] and must be provided in English and the employee's primary language. Notices must also be posted conspicuously at the employer's place of business in an easily accessible area for employees.
      - Currently, the DCWP has advised that it is "in the process of updating and translating materials" and that its website should be monitored regularly.
  
    - ESSTA also requires that "**the amount of safe/sick time accrued and used during a pay period and an employee's total balance of accrued safe/sick time shall be noted on a pay statement or other form of written documentation provided to the employee each pay period.**"

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- For this requirement only, the city has stated the following: "[E]mployers that could not operationalize the documentation requirement by September 30, 2020, but are working in good faith on implementation will have up to November 30, 2020, to ensure compliance without a penalty." See the DCWP's website: [NYC Paid Safe and Sick Leave Law: Notices of Employee Rights](#).

The new bill may be accessed on the New York City Council's Legislation webpage: [\[NYC Council\] Local Law Intro. 2032-2020 re: Sick Leave and City Employers](#).

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