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New York City's Earned Sick Time Act

Employers with 20 or more employees must provide up to five days of annual paid sick leave, effective April 1, 2014

SUMMARY

On June 26, 2013, the New York City Council overrode Mayor Bloomberg's veto to pass into law an amendment to the New York City Administrative Code requiring certain employers to provide all employees employed for more than 80 hours in a calendar year up to five days paid sick leave per year. The law, dubbed the "Earned Sick Time Act," implements its provisions over time. Employers with at least 20 employees must provide paid sick leave starting on April 1, 2014; employers with between 15 and 19 employees must provide paid sick leave effective October 1, 2015. A special provision covering domestic employees requires some paid sick leave as of October 1, 2015. All employees not entitled to paid sick time are entitled to unpaid sick time accrued at the same rate. The law recognized that many employers provide paid vacation or paid time off, and does not require those employers to provide additional paid sick time, provided that the leave may be used for the purposes set forth in the law.

BACKGROUND

New York City now joins other municipalities, including San Francisco, Washington D.C., Portland, Seattle and the State of Connecticut, in requiring private employers to provide paid sick leave for employees. The Earned Sick Time Act, however, is unique among these laws in that it sets forth a schedule by which its enactment may be postponed depending on the health of the city's economy at various dates, as measured by the New York City Coincident Economic Index, a Federal Reserve Bank of New York index. The Independent Budget Office ("IBO") will determine on December 16, 2013 whether the City's economy is healthy enough to implement the law. If the health of the economy is below January 2012 levels when analyzed in December of 2013, the IBO will re-examine the issue every six

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months, and the provisions of the Act will be delayed until six months after the IBO states that the economy is at or above January 2012 levels.

PROVISIONS

The Earned Sick Time Act¹ will require employers² with 15 or more employees to provide paid time off for their employees' own "mental or physical illness, injury or health condition," care for an ill family member (a spouse, domestic partner, child or parent), or care for a child when the child's regular childcare provider or school has been closed "due to a public health emergency."³ Employers with fewer than 15 employees must provide unpaid leave for the same purposes. The Act provides little guidance or further definition of the meaning of "mental or physical illness" or the health conditions that would qualify an employee to use sick leave.

The law provides for staggered implementation of its requirements. As noted, effective April 1, 2014, employers with at least 20 employees will be required to provide up to five paid sick days to all persons employed for at least four months; employers with between 15 and 19 employees must provide commensurate unpaid leave. Effective October 1, 2015 (or 18 months after the Act has become effective), employers with between 15 and 19 employees must provide up to five paid sick days, and employers with less than 15 employees must provide up to five days of unpaid sick leave annually.

Domestic workers are covered by the Act. Employers of one or more domestic workers who have worked at least one year must provide two days sick time on an unpaid basis effective April 1, 2014, and on a paid basis effective October 1, 2015. The two days of sick leave under the Act is in addition to the three days of paid leave required by New York State's Domestic Workers' Bill of Rights for all domestic workers employed for more than one year. In total, therefore, domestic workers in New York City after one full year of service are entitled to five paid days off in a calendar year.

Eligible employees will accrue sick leave at the rate of one hour of paid leave for every 30 hours of work, beginning from the employee's date of hire or on the date the law becomes effective, whichever is later, up to a total of 40 hours in a calendar year. Employees are not permitted to use their statutory sick leave until they have been employed for at least 120 days or on the 120th day following the effective date of the Act, whichever is later. Employers may require that sick leave be taken in a minimum increment of four hours. Employers may also require that employees provide up to seven days advance notice of the intention to use sick time where such need is foreseeable, or notice as soon as practicable where such need is not foreseeable. Employers may also request reasonable documentation justifying a leave when absences last for three or more consecutive workdays.

Nearly all non-governmental employees who work in New York City are covered under the Act. The law exempts work-study students, independent contractors, seasonal workers, certain workers in the manufacturing sector and some hourly occupational, speech and physical therapists. The Act also does

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not apply to unionized employees covered by a collective bargaining agreement, so long as the Act's provisions are expressly waived in the collective bargaining agreement, and the agreement provides a comparable leave benefit (except that for unionized employees in the construction and grocery industries, there is no requirement that the agreement provide a comparable benefit).

INTERACTION WITH EMPLOYERS' EXISTING LEAVE POLICIES

The Act does not require employers that already provide paid leave – whether characterized as sick time or not – to provide additional paid sick time, so long as the employer's policy is “sufficient to meet the requirements of [the Act]” and allows “paid leave to be used for the same purposes and under the same conditions as sick time required” by the Act.⁴

Thus, an employer providing paid leave that could be used for the purposes of the Act will comply with the Act even if the employer calls the leave something else, such as “paid time off, paid vacation, paid personal days or paid days of rest required to be compensated pursuant to section 161(1) of the labor law.”⁵ Such a policy satisfies the requirements of the Act “whether or not [an] employee chooses to use such leave for the purposes” set forth in the law.⁶

The Act sets forth complex rules governing accrual of paid sick time and employees' carry-over privileges.⁷ For all covered employees apart from domestic workers, unused sick time carries over to the following calendar year, but employers are not required to provide more than 40 hours, or five days, of sick leave per calendar year.⁸ In other words, an employee with unused sick leave is eligible to use previously accrued time without having to start the accrual process over again. An employer is permitted to pay out unused sick time at the end of the calendar year in which the time is accrued, but unused paid sick time need not be paid out if the employee resigns, retires or is discharged. Attention should be paid to the interaction between these rules and Family and Medical Leave Act provisions; sick leave time may run concurrently with the FMLA.

NOTICE REQUIREMENTS, ANTI-RETALIATION AND ENFORCEMENT PROVISIONS

Employers must provide all new hires with written notice, in English and in the employee's primary language, of the employee's right to sick time at the start of his employment, which must include reference to the employee's right to be free from retaliation and to bring a complaint to the Department of Consumer Affairs.⁹ This notice must also explain how sick time is accrued and how it can be used. Failure to provide this notice can result in civil fines of \$50 per employee. Employers are required to keep records documenting compliance with the law's provisions for at least two years. Employers may also, but are not required to, post conspicuous notice of employees' entitlement to sick time in an area accessible to employees.

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The Act prohibits an employer from firing or taking other adverse action against employees who exercise their right to paid sick leave. The Act amends the New York City Charter to give the Department of Consumer Affairs authority to enforce the law. The Commissioner of Consumer Affairs has the power to receive, investigate, attempt mediation and, if needed, hold administrative hearings to resolve complaints regarding earned sick time.¹⁰ The Department has the power “to order equitable relief for and payment of monetary damages in connection with enforcement” of the Earned Sick Time Act. Employees must file a complaint with the Department “within 270 days of the date the person knew or should have known of the alleged violation.”¹¹ Employees do not have the right to bring independent actions against employers.

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ENDNOTES

¹ N.Y.C. Admin. Code § 20-911.

² The Act excludes from the definition of “employer” the U.S. government, the state of New York, the city of New York, and any employer that is a business establishment classified in section 31, 32 or 33 of the North American Industry Classification System (*i.e.*, manufacturing businesses). *Id.* at § 20-912(g).

³ *Id.* at § 20-914.

⁴ *Id.* at § 20-913(3)(c).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at § 20-913.

⁸ Unused sick leave time does not carry over for domestic employees.

⁹ The Act requires the Department of Consumer Affairs to prepare and post these notices in a downloadable format on the Department’s website in Chinese, English, French-Creole, Italian, Korean, Russian and Spanish. For employees whose primary language is other than English, employers need only provide a translation for those languages for which the Department of Consumer Affairs has provided a translation.

¹⁰ N.Y.C. Charter § 2203(e).

¹¹ N.Y.C. Admin. Code § 20-924.

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