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Deadline Approaches For Compliance With New York City's Amended Earned Sick Time Act

In June of 2013, the New York City Council enacted the Earned Sick Time Act (the "Act"), which required most NYC employers to provide their employees with paid sick leave. In February 2014, the City Council amended the Act to extend the paid sick leave requirements to most small employers. While there is a grace period for small employers, the Act generally becomes effective on April 1, 2014. Below is an overview of what employers need to know to ensure that they are in compliance with the Act by the April 1st deadline.

Under the amended Act, if any employer has five or more employees, the employer must provide eligible employees with *paid sick leave*. If an employer has less than five employees, then the employer need only provide eligible employees with *unpaid sick leave*.

Eligible Employees

The Act requires that covered employers provide sick leave to each person who is employed on a full-time or a part-time basis for more than 80 hours per year. Independent contractors, student interns compensated through qualified scholarship programs, and participants in certain types of work-study and transitional job programs are *not* considered eligible employees. These are narrow exceptions with specific and strict criteria. Generally, paid interns who work more than eighty hours per year will be considered eligible employees.

Calculating Sick Leave

The Act mandates that employees earn 1 hour of sick leave for every 30 hours worked, up to a maximum of 40 hours of sick leave per calendar year (which translates to 5 paid sick days per employee per calendar year). Current employees are not entitled to use their paid sick leave until 120 days following the effective date of the Act (April 1, 2014). Future hires are subject to a waiting period of 120 days following their employment start date.

Employees can carry over accrued sick time to the following calendar year, subject to the 40-hour cap. However, even when an employee carries over sick leave,

employers may limit the use of paid sick leave to a total of 40 hours per calendar year. As an alternative, an employer can pay its employees for any accrued but unused sick time at the end of a calendar year. There is no requirement to pay out accrued but unused sick time upon termination.

For purposes of the Act, a calendar year is "a regular and consecutive twelve month period", so it need not be an actual calendar year.

It should be noted that the Act is not a ceiling but a minimum requirement. Employers may maintain or promote more generous policies if they so choose. In order to streamline their human resource practices, some employers have chosen to provide employees with a general bank of annual leave, which the employees may use as sick leave, vacation, or personal days, as they choose. Note, however, this approach does not eliminate the requirement to comply with all of the Act's requirements.

Utilizing Sick Leave

Eligible employees may take sick leave for the employee's mental or physical illness, injury or health condition. Under the original Act, eligible employees were also allowed to utilize their sick leave to care for a "family member" including their child, spouse, domestic partner, parent, or the child or parent of the employee's spouse or domestic partner. In amending the Act, the City Council extended the Act to allow employees to take sick leave to care for their siblings, grandparents or grandchildren.

Employees cannot be required to find a replacement worker as a condition of utilizing their sick leave. Nor can they be required to work additional time to make up for sick leave taken.

Employers may require seven days notice where the need for leave is foreseeable. When the need for leave is not foreseeable, an employer may require an employee to provide notice as soon as practicable. Employers can require an employee who is sick for *three or more consecutive days* to provide a note from a health care provider. However, the employer cannot require disclosure of the nature of illness, injury or condition and must keep any health information confidential.

Employees who use sick leave under the Act for purposes not permitted by the Act may be disciplined by their employer, up to and including termination.

Notice Requirements, Record Retention and Penalties

The Act requires employers to provide notice to their employees regarding their right to paid sick leave. All current employees must be notified of their rights under

the Act by May 1, 2014. New employees must be provided with notice upon hire. The notice must inform employees of their right to sick time, their right to be free from retaliation and their right to file a complaint with the Department of Consumer Affairs (DCA). The notice must be provided in English and the employee's primary language (provided DCA has made available a translation in such language). Employers may also (but are not required to) post a notice in the workplace. Further, employers must maintain records documenting their compliance with the Act for three years.

Enforcement

Aggrieved employees may file complaints with DCA. If DCA receives a complaint, it will send notice of the complaint to the employer. The employer will then have 30 days to respond, and DCA will attempt to resolve the complaint through mediation. If DCA determines that a violation occurred, DCA will commence an adjudicatory hearing through an administrative tribunal. Employers found in violation will be subject to a civil penalty up to \$500 for a first violation. If a second violation occurs within two years, the employer may be subject to a civil penalty of up to \$750, with subsequent violations subject to penalties up to \$1,000 per occurrence. There are also civil fines for an employer's willful violation of the notice requirements, and DCA also has the power to order damages be paid to the employee. The statute of limitations was extended by the amended Act to two years from the date the person knew or should have known of the alleged violation. DCA also has the power to commence an investigation of an employer on its own initiative.

The Mayor has the authority to designate an agency other than DCA to enforce the Act.

Grace Period for Small Employers

The amended Act provides a grace period for small employers with fewer than 20 employees. During the grace period, the Act waives civil penalties for violations by small employers until October 1, 2014. A first time violation of the Act during the grace period will not serve as a factor in determining penalties for subsequent violations that occur on or after October 1, 2014. However, any additional violation by the employer during the grace period may serve as a factor in determining penalties for violations that occur on or after October 1, 2014.