



**October 2020**

**Amendments to NYC Earned Safe and Sick Time Act**

On September 28, 2020, the NYC Mayor signed amendments to the New York City Earned Safe and Sick Time Act (the “ESSTA Amendments”). The ESSTA Amendments increase the paid safe/sick leave accruals for (a) employers with 4 or fewer employees with a net income of \$1,000,000 or more, and (b) employers with 100+ employees.

The ESSTA Amendments are intended to align with the new statewide sick leave requirement (the “NYS Sick Leave Law”), though certain requirements of the ESSTA Amendments differ from the NYS Sick Leave Law. The ESSTA Amendments are effective September 30, 2020; however, some of the requirements do not apply until January 1, 2021.

<b>Which employers are covered by the ESSTA Amendments?</b>	The ESSTA Amendments apply to every employer.
<b>Which employees are covered by the ESSTA Amendments?</b>	ESSTA now applies to any employee in NYC. The ESSTA Amendments deleted the requirement that an employee must work 80+ hours in a calendar year in NYC to be eligible for leave under ESSTA.
<b>When do employees begin to accrue safe/sick leave under the ESSTA Amendments?</b>	September 30, 2020 or the commencement of employment, whichever is later.
<b>When can employees begin to take accrued safe/sick leave under the ESSTA Amendments?</b>	The ESSTA Amendments deleted the previous requirement that employees must wait 120 calendar days after commencing employment to take accrued safe/sick leave. Thus, employees may use safe/sick leave as it accrues, subject to the effective dates described below.
<b>What are the leave requirements for employers with 4 or fewer employees during the previous tax year with a net income of less than \$1,000,000 in the previous tax year?</b>	Employees accrue up to 40 hours of <u>unpaid</u> sick leave in each calendar year. The ESSTA Amendments did not change this.



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<b>What are the leave requirements for employers with 4 or fewer employees during the previous tax year with a net income of \$1,000,000 or more in the previous tax year?</b>	<p>Under the ESSTA Amendments, these employees accrue up to 40 hours of <u>paid</u> safe/sick leave in each calendar year. Prior to the ESSTA Amendments, these employees accrued only <u>unpaid</u> safe/sick leave.</p> <p>These employees can take begin to take accrued safe/sick leave under the ESSTA Amendments on January 1, 2021.</p>
<b>What are the leave requirements for employers with between 5-99 employees?</b>	<p>Employees accrue up to 40 hours of <u>paid</u> safe/sick leave in each calendar year. The ESSTA Amendments did not change this.</p> <p>These employees can take begin to take accrued safe/sick leave under the ESSTA Amendments on September 30, 2020.</p>
<b>What are the leave requirements for employers with 100+ employees?</b>	<p>Employees accrue up to 56 hours of <u>paid</u> safe/sick leave in each calendar year. Prior to the ESSTA Amendments, these employees accrued only 40 hours of paid safe/sick leave per calendar year.</p> <p>These employees can take begin to take accrued safe/sick leave under the ESSTA Amendments (i.e., safe/sick leave accruals exceeding 40 hours per calendar year) on January 1, 2021.</p>
<b>What is the accrual rate for employees to earn safe/sick leave?</b>	<p>Employees earn 1 hour of safe/sick leave for every 30 hours worked. The ESSTA Amendments did not change this.</p>
<b>Can safe/sick leave be carried over?</b>	<p>For employees of employers with 99 or fewer employees, up to 40 hours of unused safe/sick leave shall be carried over to the following calendar year. No such employer (i) shall be required to allow the use of more than 40 hours of safe/sick leave in a calendar year or (ii) carry over unused paid safe/sick leave if the employee is paid for unused safe/sick leave at the end of the calendar year and the employer “front loads” the required safe/sick leave on the first day of the following</p>



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	<p>calendar year. The ESSTA Amendments did not change this.</p> <p>For employees of employers with 100+ employees, the ESSTA Amendments now allow up to 56 hours of unused safe/sick leave to be carried over to the following calendar year. No such employer (i) shall be required to allow the use of more than 56 hours of safe/sick leave in a calendar year or (ii) carry over unused paid safe/sick leave if the employee is paid for unused safe/sick leave at the end of the calendar year and the employer “front loads” the required safe/sick leave on the first day of the following calendar year.</p>
<b>What changed under the ESSTA Amendments regarding employee documentation of safe/sick leave?</b>	<p>Under the ESSTA Amendments, if an employer requires documentation for an absence of more than 3 consecutive work days for safe/sick leave, <u>the employer now must reimburse the employee</u> for (i) any fee charged by a health care provider for the provision of such requested documentation for the use of sick leave and (ii) all reasonable costs or expenses incurred for the purpose of obtaining documentation for the use of safe leave.</p>
<b>Are there new notice requirements under the ESSTA Amendments?</b>	<p>The ESSTA Amendments require an employer to provide an employee with written notice of the employee’s right to safe/sick leave at the commencement of employment. For employees who are already employed, such notice must be provided by October 30, 2020.</p> <p>The employer shall (<i>previously “may”</i>) also “conspicuously post” such notice at the employer’s place of business in an area accessible to employees.</p>
<b>Do the ESSTA Amendments impose any new requirements on employers to notify employees</b>	<p>Yes. Effective September 30, 2020, the amount of safe/sick leave accrued and used during a pay period and an employee’s total balance of accrued safe/sick leave must be noted on a pay statement or other form</p>



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<p><b>about their safe/sick leave accruals?</b></p>	<p>of written documentation provided to the employee each pay period.</p> <p>The NYC website states “For this requirement only, employers 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.”</p>
<p><b>How do the ESSTA Amendments revise employee protection against retaliation and interference?</b></p>	<p>Under the ESSTA Amendments, no person shall take any adverse 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 ESSTA or interfere with an employee's exercise of rights under ESSTA.</p> <p>Adverse actions include, but are not limited to, threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee’s exercise of ESSTA rights, blacklisting, and maintenance or application of an absence control policy that counts protected leave for safe/sick leave 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.</p> <p>The ESSTA amendments clarified that a causal connection between the exercise, attempted exercise, or anticipated exercise of ESSTA rights and an employer’s adverse action against an employee or a group of employees may be established by indirect or direct evidence. A violation is established when it is shown that a protected activity was a motivating factor for an adverse action, whether or not other factors motivated the adverse action.</p>



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<b>What additional enforcement powers do the ESSTA Amendments give the NYC Department of Consumer and Worker Protection (DCWP)?</b>	The DCWP enforces ESSTA, and can open an investigation upon a receipt of a complaint or on its own initiative.  Within 14 days of written notice of an investigation, the person/entity under investigation must provide a written response.  Penalties are imposed on a per employee basis.
<b>What new enforcement powers do the ESSTA Amendments give the NYC Corporation Counsel?</b>	The Corporation Counsel may initiate any action in court for the enforcement of an order issued by the DCWP or for the correction of any violation.  If there is reasonable cause to believe that an employer is engaged in a “pattern or practice” of ESSTA violations, the Corporation Counsel may seek injunctive relief, civil penalties of up to \$15,000, and any other relief including up to \$500 to each employee.
<b>How does the NYS Sick Leave Law interact with NYC ESSTA?</b>	The ESSTA Amendments specify that if the NYS Sick Leave Law, or any regulation issued under the NYS Sick Leave Law, sets forth a standard or requirement for minimum hour or use of safe/sick leave that exceeds any provision of ESSTA, that standard or requirement will be incorporated by reference.

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