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New York City paid sick leave law takes effect April 1

On March 20, 2014, New York City Mayor Bill de Blasio signed into law legislation that will require private sector employers with five or more employees to provide paid sick leave – and smaller employers to provide unpaid leave - to eligible employees who work in New York City. Employers will need to evaluate their leave policies and recordkeeping practices, and prepare employee notices, to ensure compliance with the new law beginning April 1, 2014.

Background

On May 8, 2013, the New York City Council overwhelmingly passed the Earned Sick Time Act (Act) requiring private sector employers with employees who work in the City of New York to provide a minimum amount of job-protected sick time. See our May 20, 2013 *For Your Information*. On June 26, 2013, the City Council again passed the Act, overriding then New York Mayor Michael Bloomberg's veto.

As originally passed, the Act's paid leave requirement applied to employers with 20 or more employees beginning in 2014, with application to smaller employers beginning in 2015. On February 4, 2014, the City Council adopted amendments to the Act that: require manufacturing businesses to provide unpaid sick time to their employees; cap the amount of paid-sick hours that employees can carry over into a new year at 40; and require employers to inform current employees of their rights under the new law. On February 26, 2014, the City Council amended the Act to expand coverage to employers with five to 15 employees beginning April 1, 2014. The amendments also broaden the definition of "family member," eliminate the exemption for certain employers in the manufacturing sector, increase employer notice and recordkeeping requirements, extend the time for employees to file a complaint, and give enforcement authority to additional city agencies.

On March 20, New York Mayor Bill de Blasio signed the amendments to the Act into law. When the law takes effect on April 1, 2014, New York will join five other major metropolitan areas with a broad employer mandate already in effect, including San Francisco, Seattle, Washington DC, Portland, and Jersey City. Newark's paid sick leave law is slated to take effect shortly thereafter, and DC is expected to implement recently expanded paid sick leave provisions later this year. See our March 18, 2014 and March 21, 2014 *For Your Information* publications.

The new mandate

Beginning April 1, 2014, private sector employers with five or more employees must provide eligible full-time and part-time employees with a minimum amount of paid sick leave. Smaller employers will be required to provide job-protected, but unpaid, sick leave.

Who is covered

With certain exceptions, any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business, or service is an "employer" subject to the new mandate. Public sector employers (federal, state, and local) are generally exempt from coverage.

The law applies to all of the covered employer's full-time and part-time employees (other than participants in federal work-study programs, employees compensated by or through qualified scholarships, certain hourly professionals licensed by the New York State Department of Education, participants in work experience programs, and certain employees subject to a collective bargaining agreement (CBA)) who are employed for hire within New York City for more than 80 hours in a "calendar year," regardless of where they live.

> Buck comment. Employers can use any consecutive 12-month period as their "calendar year" for purposes of the Act. For administrative ease, many employers will likely use the same year they use for wage and benefit purposes, which may include tax year, fiscal year, contract year, or the year from an employee's anniversary date.

Whether an employer is obligated to provide paid or unpaid sick time depends on its size. All full-time, part-time, and temporary employees who are hired to work within the city of New York for more than 80 hours in a calendar year are counted in making that determination. Where the number of employees fluctuates, size may be determined by reference to the average number of employees who worked for compensation per week during the preceding calendar year. Special aggregation rules apply to chain businesses.

> Buck comment. The Department of Consumer Affairs (DCA), which is charged with enforcing the new mandate, has clarified that only the hours an employee works in New York City count toward the 80-hour threshold, and employees who are based outside New York City but occasionally work in the city can only use sick leave when working in the city.

Special considerations apply to telecommuters. According to the DCA, whether employees who telecommute are covered by the new mandate depends on where they – not their employers – are physically located. They are covered when they are physically working in the city, regardless of where the employer is located. However, they are not covered for hours when they are not physically working in the city, even if the employer is located in the city. Although an employer cannot require an employee to telecommute or work from home rather than taking sick leave, it can offer the employee an option to do so rather than using accrued leave.

Accrual, use, and carryover of sick time

The same benefit accrual rates, caps, and carryover provisions apply to all eligible employees, regardless of the employer's size. What varies is whether the leave is paid or unpaid. Although employers may adopt or retain more generous sick time policies, the following chart summarizes the Act's requirements.

Buck comment. Companies that already allow employees paid time off (PTO) that can be used for purposes such as vacation or personal leave will not have to provide additional PTO if the time off is sufficient to satisfy the new mandate and can be used for the same purposes and under the same conditions as required by the Act.

Annual Accrual Schedule*			
Number of Employees	**Accrual Rate****	**Paid/Unpaid**	**Annual Accrual Cap**
5 or more	1 hour per 30 hours worked	Paid	40 hours
Fewer than 5	1 hour per 30 hours worked	Unpaid	40 hours

* Domestic workers are also covered after one year of service. The DCA is expected to issue guidance for employers shortly.

** Leave for exempt employees accrues on the basis of a 40-hour workweek. If, however, their regular workweek is less than 40 hours, sick time accrues based on that regular workweek. Leave for non-exempt employees accrues on the basis of actual hours worked.

When accrual begins. An employee generally would begin to accrue sick time at the commencement of employment or on April 1, 2014 (whichever date is later), but would not be able to use the time until he or she had been on the job for 120 days (four months). After 120 days, the employee may use sick time as it accrues. Employees covered by a CBA in effect on April 1 will begin to accrue sick leave beginning on the date the CBA ends.

Using sick time. Generally, employees may use their earned sick time for their own or a family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment; or preventive medical care. For these purposes, a family member is an employee's child, grandchild, spouse, domestic partner, parent, grandparent, sibling, or the child or parent of an employee's spouse or domestic partner. Employees may also use accrued sick leave for reasons relating either to the closure of their place of business or child's school or day care due to a public health emergency.

Sick Leave Accrual and Use		
Employee Status	**Date Accrual Begins***	**Date Available for Use**
Current employees	4/1/14	7/30/14
New hires	First day of employment	120 days after first day of employment

* Employees covered by a CBA in effect on April 1 will begin to accrue sick leave beginning on the date the CBA ends.

An employer may require up to seven days notice of an employee's need to use accrued sick time if the need is foreseeable or as soon as practicable if the need is unforeseeable. Although employees generally may determine how much sick time they need to use, employers may set a reasonable minimum increment for its use not to exceed four hours per day. For an absence of more than three consecutive workdays, an employer will be able to

require reasonable documentation (such as a note from a licensed health care provider) that the use of sick time was warranted. An employer may also require an employee to provide written verification that the employee used leave for sick leave purposes.

> Buck comment. Although employees will not be eligible to use sick leave under the Act prior to July 30, 2014 at the earliest, they may be entitled to leave under other laws, such as the federal Family and Medical Leave Act (FMLA), New York State Human Rights Law, New York City Human Rights law, or as a reasonable accommodation under the Americans with Disabilities Act. Leave under those laws is generally not required to be paid. Sick leave used under the Act may run concurrently with leave under FMLA and other applicable laws.

Carryover. Under the Act, up to 40 hours of unused paid sick time must be carried over to the following year unless two conditions are met. First, the employee must be paid for any unused sick time at the end of the calendar year in which it accrued, Second, the employer must provide the employee with an amount of paid sick time that meets or exceeds the Act's minimum requirements for the next calendar year on the first day of that year.

In the event of carryover, the employer can cap usage of sick time at 40 hours in any calendar year. Notably, the Act does not require employers to pay an employee for accrued but unused sick time upon retirement or separation from employment. It does, however, require reinstatement of previously accrued but unused sick time if an employee who separates from employment is rehired within six months, an employee is transferred to another division or location of the same employer within New York City, or in the context of the sale of a covered business.

Will you be compliant?

Employers should consider whether they may need to modify existing paid leave policies to cover part-time and temporary employees who work in New York City more than 80 hours during the year, change accrual rules, modify carryover provisions, or eliminate certain usage restrictions in 2014.

Notice and recordkeeping requirements

Employers must notify employees in writing of their right to sick time (including accrual and use), the employer's calendar year, and the right to file a complaint, and to be free of retaliation. Notice of the Act's provisions must be given to new hires employed on or after April 1, 2014 on their first day of employment and to current employees by May 1, 2014.

The employee rights notice must be given in English and in the primary language spoken by the employee, provided the DCA has made a translation available in downloadable format on its website. The DCA has posted a notice template in English on its paid sick leave website. The DCA indicates that it has translated the notice to six other languages – Spanish, Chinese, French-Creole, Italian, Korean, and Russian, but templates in those languages have not yet been posted. An employer may post a workplace notice in an area accessible to employees, but posting alone will not satisfy the Act's notice requirement.

Employers must retain for a three-year period records of hours worked by employees, as well as the amount of sick time accrued and used. Records must be made available to the DCA on notice and at an agreed-to time. Records may be maintained electronically as long as they can be provided for inspection by the DCA in a readily accessible format, and health information is maintained confidentially. Employers that fail to maintain these records will be presumed to have violated the Act.

Anti-retaliation

Notably, the Act contains broad anti-retaliation provisions that prohibit employers from threatening, firing, disciplining, reducing an employee's hours, or taking other adverse employment action against employees for requesting or using sick time or for informing others of their rights under the Act. The Act also protects whistleblowers and prohibits retaliation for filing a complaint or participating in an investigation, proceeding, or hearing regarding an alleged violation.

Collective bargaining agreements

For employees covered by a valid CBA on April 1, 2014, the Act will not apply – and those employees will not begin to accrue sick leave under the Act – until the agreement's termination date. In addition, the new leave provisions generally will not apply to employees covered by a valid CBA if the agreement expressly waives the provisions and provides a comparable benefit for the employees, such as PTO. The provisions will not be applicable to construction or grocery industry employees covered by a valid CBA, regardless of whether the agreement provides a comparable benefit.

Enforcement

Although the DCA is charged with enforcing the law, the mayor may also designate other agencies for complaint handling. Since the Act does not authorize employees to bring a court action to enforce their rights, any employee who claims to have been denied sick leave will have to seek relief through the DCA or other designated agency. Employees have two years from the date they knew or should have known of a violation to file a complaint with the DCA. Available remedies include lost wage and benefits, and equitable relief such as reinstatement, as appropriate. In addition, employers who violate the Act will be liable for civil penalties ranging from $500 for the first violation up to $1,000 for subsequent violations. A penalty of up to $50 may be imposed for each employee who was not given the employee rights notice.

While all employers must comply with the new law beginning April 1, 2014, employers that were not originally subject to the employer mandate in 2014 (those with fewer than 20 employees and certain employers in the manufacturing sector) will have a six-month grace period to achieve full compliance. During that period, those employers will not be subject to penalties, and a first violation before October 1, 2014 will not be counted against them. However, a second violation that occurs before October 1 will count toward penalties if a subsequent violation for the same offense occurs after October 1.

In closing

For some employers – particularly small-to medium-size businesses – the new law will impose an employee benefit not previously offered and increase their per employee costs. While many other businesses may already offer some form of PTO, their personnel policies and benefit programs may apply eligibility criteria, accrual rates, or use restrictions that do not comply with the new mandate. With mandatory sick leave imminent, employers must evaluate whether they need to make any changes to current leave policies and recordkeeping practices, and prepare appropriate employee notices, to ensure compliance with the new law beginning April 1, 2014.

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