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NYC clarifies employer obligations under paid safe and sick time law

On September 15, the New York City Department of Consumer and Worker Protection adopted changes to its safe and sick time regulations under the city's Earned Safe and Sick Time Act. The amended regulations, which take effect October 15, better align with the ordinance's 2020 amendments and provide additional clarifications of employer obligations.

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Background

New York City has required private-sector employers with five or more employees to provide a minimum amount of job-protected, paid sick leave to eligible full-time and part-time employees since 2014. (See our [March 27, 2014 FYI](#).) In 2017, NYC amended its Earned Sick Time Act to cover additional family members and add family offenses, sexual offenses, stalking, and human trafficking (collectively "safe" time) to the list of permissible reasons to use paid sick time. (See our [November 27, 2017 FYI](#).)

Renamed the "Earned Safe and Sick Time Act" (ESSTA), the law was again amended in 2020 to better align with the state's paid sick leave law and to add or clarify various notice and enforcement provisions. (See our [October 14, 2020 FYI](#).) In October 2022, the NYC Department of Consumer and Worker Protection (DCWP) proposed amended ESSTA regulations to reflect those changes.

Final regulations

On September 15, the DCWP adopted final [amendments](#) to the ESSTA regulations. Slated to take effect on October 15, the amended regulations are intended to align with the 2020 amendments to ESSTA and clarify — among other things — employer size, employee eligibility, notice and documentation, reporting and payment of sick/safe time, and written policy requirements.

Employer size

Under ESSTA, employer size determines employees' annual earned safe/sick time accrual and usage amounts. Employers with 99 or fewer employees must provide their NYC employees up to 40 hours of safe/sick time annually while larger employers must provide up to 56 hours per year. The amended regulations make clear that employer size is based on the employer's total headcount nationwide including both full-time and part-time employees, employees jointly employed by one or more employers, and employees on leaves of absence, suspensions, and other temporary absences with a reasonable expectation of returning to work.

Employee eligibility

The amended regulations clarify that ESSTA, as amended, covers employees who physically perform work in NYC but no longer requires an employee to work more than 80 hours per calendar year in NYC to be covered. Since only the hours worked in NYC count for safe/sick time accrual and usage purposes, ESSTA would not apply to employees outside NYC who are fully remote, regardless of whether the employer is located in the city. However, employees who primarily work in another state — including by telecommuting — may be covered by ESSTA if they regularly perform, or are expected to regularly perform, work in NYC during a calendar year. The final regulations provide several examples of *de minimis* work in NYC that would not trigger ESSTA obligations.

Notice and documentation

The amended regulations confirm that an employer is permitted to require reasonable advance notice — and reasonable method(s) of providing notice — of an employee's need to use safe/sick time. Differentiating between foreseeable and unforeseeable absences in terms of when notice must be given, the amendments make clear that an absence may be considered foreseeable only if the employee is aware of the need to use safe/sick time at least seven days before its use. Otherwise, the absence will be considered unforeseeable.

If an employee's use of safe/sick time extends more than three consecutive workdays, an employer may require reasonable written documentation that the absence was for a purpose authorized by ESSTA. However, employers requiring such documentation for sick time must reimburse the employee for fees charged by a licensed health care provider and reimburse all reasonable costs or expenses incurred in obtaining required documentation for safe time.

Reporting and payment of safe/sick time

The 2020 amendments to ESSTA required employers to show the amount of safe/sick time accrued and used during a pay period and an employee's total balance of accrued safe/sick time on a pay statement or other form of written documentation provided to the employee each pay period. The amended regulations confirm that employers may use an electronic system to satisfy those obligations if they: (1) electronically alert the employee each pay period to the availability of their accrual, use and available balance information; (2) make the required information readily accessible by the employee outside of the workplace; and (3) ensure that accrual, use and balance information for any past pay period is similarly accessible.

The amended regulations clarify that paid safe/sick time shall be compensated at the employee's regular rate of pay when the time is taken. However, the rate of pay cannot be less than the highest applicable rate the employee would be entitled to under any applicable law, contract or agreement. If the employee uses paid safe/sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate. The employer may only deduct the number of hours of safe/sick time used from the employee's safe/sick time accrued, regardless of whether those hours would have been classified as straight-time or overtime hours.

Written policy

Every employer must maintain a written safe/sick time policy and distribute it to employees upon commencement of employment, within 14 days of the effective date of any changes, and upon request by the employee. Among other things, the amended regulations require the policy to inform employees that:

- Safe/sick time is immediately available for use (if frontloaded), or safe/sick time accrual starts at commencement of employment and may be used as it accrues (if not frontloaded);
- Reasonable notice of an employee's need to use safe/sick time is required, along with a description of how to provide notice;
- Reasonable documentation for use of safe/sick time is required, along with a description of acceptable forms of documentation and instructions for submitting it to the employer;
- Payment of safe/sick time will be withheld until required documentation is provided, along with an explanation of how to request reimbursement of costs associated with obtaining it; and
- The employer "will not ask the employee to provide details about the medical condition that led the employee to use sick time, or the personal situation that led the employee to use safe time, and that any information the employer receives about the employee's use of safe/sick time will be kept confidential and not disclosed to anyone without the employee's written permission or as required by law."

In closing

The final amended regulations are slated to take effect on October 15. Employers should review and, as necessary, revise existing sick leave, safe leave, or paid time off (PTO) policies and practices to ensure compliance.

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