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Are You Feeling Sick? New York City Passes a New Sick Leave Law

By Terri Solomon, Jean Schmidt, and Jill Lowell

If at first you don't succeed, try and try again. That is what the New York City Council (the Council) has done since 2009. And after four years, the result is a controversial sick leave law, the Earned Sick Time Act (the Act), which grants many employees in New York City up to 40 hours of paid sick leave per year. For employees not eligible for paid leave, the Act provides for up to 40 hours of unpaid sick leave per year. Although Mayor Bloomberg has promised to veto the Act, which was passed on May 8, 2013, the Act has enough Council support to override any veto.¹

Summary of Provisions

Effective Date

In a somewhat unique provision, the effective date of the Act is pegged to the New York City economy. If, as of December 16, 2013, the economy is performing at or better than it was as of January 2012 according to certain economic indicators, the Act will go into effect on April 1, 2014. If the economy is performing worse than it was in January 2012, the Act will not take effect on that date. Rather, the city's Independent Budget Office will monitor the economy every six months. Once the economy performs at or better than it was performing as of January 2012, the law will become effective on the following April 1 or October 1, whichever is sooner.

Coverage

The Act applies to private employers with 20 or more employees for the first 18 months after it becomes effective. Thereafter, the Act will apply to employers with 15 or more employees, and to employers of one or more domestic workers. The Act does not apply to public employers, including employees of the United States, New York State or New York City governments.

Where the number of employees fluctuates above and below 20 persons per week over the course of a year, business size will be determined for the current calendar year based upon the average number of persons who worked for compensation per week during the preceding calendar year.

¹ The Act was passed by the Council with a vote of 45-3, with 3 members absent. To override a mayoral veto, the Council only needs the support of 34 of its 51 members, far less than the 88% support the Act received for its enactment. The text of the Act can be viewed [here](#).

All persons performing work for compensation, whether on a full-time, part-time, or temporary basis, are counted when determining coverage. Employers with employees not entitled to paid sick leave must provide unpaid sick leave when the Act takes effect.

Eligibility

Subject to the exceptions noted below, any person employed for hire within New York City for more than 80 hours in a calendar year who performs work on a full-time or part-time basis is entitled to sick leave benefits under the Act.

Participants in certain work study programs, employees compensated by or through qualified scholarships, independent contractors who do not meet the definition of employee under the New York Labor Law, and certain hourly professional employees who are licensed by the New York State Department of Education, who call in for work assignments at will and are paid at a premium rate (defined by the Act as at least four times the minimum federal wage) are not covered by the Act.

Amount and Type of Leave Required

Subject to the exceptions noted below, once the law becomes effective, employers with 20 or more employees are required to provide employees with one hour of paid sick leave for every 30 hours worked, with a maximum requirement of 40 hours of paid sick leave per calendar year. Eighteen months after the law becomes effective, employers with 15 or more employees are required to provide these same paid sick leave benefits to their employees. Employers who do not employ the requisite number of employees, and thus are not required to provide paid sick leave, must still provide employees with up to 40 hours of unpaid sick leave once the law takes effect.

Employees who do not use all accrued sick leave in a calendar year are entitled to carry over all unused sick leave. 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. An employer may also choose – but is not required – to pay an employee for any unused sick leave at the end of the calendar year, in which event the employee would not be entitled to carry over that sick leave, provided that the employer provides the employee with an amount of paid sick leave that meets or exceeds the requirements of the Act for such employee on the first day of the immediately subsequent calendar year. The employer may not circumvent its sick leave obligations by providing an employee with payment of unused sick leave that is less than the amount to which the employee is entitled under the Act. Upon the employee's termination, resignation, retirement, or other separation from employment, an employer is not required to pay an employee for accrued but unused sick leave.

Use of Leave

In a sweeping provision, the Act allows employees to take sick leave for “the employee's mental or physical illness, injury or health condition.” Despite a lengthy definition section, the Act provides little guidance regarding what these terms mean. Read broadly, the Act might, theoretically, include an employee's request for a “mental health day.”

Employees also may take sick leave for themselves and their eligible family members who: (1) need a medical diagnosis; (2) require care or treatment of a mental or physical illness; (3) have an injury or health condition; or (4) need preventative medical care. A “family member” is defined to include an employee's spouse or registered domestic partner, parent, parent-in-law or parent of a domestic partner, and child or child of a domestic partner, including a biological, adopted or foster child, a stepchild, a legal ward, or a child of an employee standing *in loco parentis*. Sick leave may also be used when an employee's place of business is closed by order of a public official due to a public health emergency or when the employee must care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

Employees who use sick leave under the Act for purposes not permitted by the Act may be disciplined by their employer, and discipline may include termination of employment.

Although sick leave begins accruing at the time of hire or the effective date of the Act, whichever is later, employees are not entitled to use sick leave until after 120 days (four months) following the later of their date of hire or the effective date of the Act.

While employees determine how much earned sick leave they need to use, employers may set a reasonable minimum increment for use of sick leave, provided that the minimum is not greater than four hours per day.

Employee Notice and Medical Documentation Requirements

Employers may require employees to provide reasonable notice of the need for leave, including up to seven days' notice where the need for leave is foreseeable. Where the need for leave is not foreseeable, an employer may require an employee to provide notice as soon as practicable.

Where an employee is absent for more than three consecutive work days, an employer may require reasonable documentation from a licensed health care provider establishing the need for and duration of any sick leave. However, the employer cannot require disclosure of the nature of the employee's or the employee's family member's injury, illness or condition, and any health information about an employee or an employee's family member must be treated as confidential.

Exemptions and Exceptions

Small Business

Perhaps the most significant compromise to secure passage of the Act was the change in coverage to protect small businesses. After much discussion, the Act exempts small businesses, defined as those employing under 15 employees, from providing paid sick leave.

Employers with a Separate Leave Policy

Employers who already have or who implement a paid leave policy – including paid time off, paid vacation, and/or paid personal days – that provides for paid leave in an amount sufficient to meet the requirements of the Act (*i.e.*, one hour of paid sick leave for every 30 hours worked), and allow the leave to be used for the purposes and under the same conditions as required by the Act, are not required to provide additional paid sick leave. Thus, for example, an employer who already provides at least five days of paid time off or paid vacation, and permits employees to use that time for the purposes specified in the Act, has complied with the Act. This is true whether or not the employee uses such leave for the employee's own illness or that of family members.

Similarly, employers required to provide unpaid sick leave comply with the Act if they already provide paid or unpaid time off/vacation/personal days sufficient to meet the requirements of the Act, and allow employees to use that leave for the purposes specified in the Act.

Employees Covered by a Collective Bargaining Agreement

Where employees are covered by a valid collective bargaining agreement on the effective date of the Act, the Act will not apply until termination of the collective bargaining agreement. However, the provisions of the Act may be expressly waived by the parties to a bona fide collective bargaining agreement, provided that the agreement provides for comparable benefits in the form of paid time off, which may include vacation time, personal time, sick time and/or holiday pay. Holiday and Sunday time paid at premium rates can also satisfy the requirements of the Act. Construction and grocery industry employees covered by a bona fide collective bargaining agreement may, through their union, expressly waive the Act, even if the collective bargaining agreement does not provide benefits comparable to those provided by the Act.

Manufacturing Employers

Certain manufacturing employers with certain classifications under the North American Industry Classification System are excluded from the definition of "employer" and are not subject to the Act.

Domestic Workers

In 2010, New York State passed the Domestic Workers' Bill of Rights, which, among other rights, entitles domestic workers to three paid days off from work after one full year of service. Notably, that law represents the first occasion that New York required any private sector employer to provide an employee with paid time off. Eighteen months after the Act is effective, it will supplement the Bill of Rights, and will require employers to provide domestic workers with two days of paid sick leave per calendar year – in addition to the other three paid days off required by the Domestic Workers' Bill of Rights – provided the domestic worker is employed for one full year of service.²

² See Stephen Fuchs, [New York Enacts Bill of Rights for Domestic Workers](#), Littler ASAP (Sept. 1, 2010).

Employer Obligations

When an employee is hired, an employer must provide a notice of entitlement to leave, and must describe the amount and terms of sick leave, including any right to unpaid leave. The notice must also inform employees that the Act expressly prohibits retaliation for requesting or using sick leave, and that they have a right to file a complaint with the Department of Consumer Affairs. Similar to New York's Wage Theft Prevention Act, the employer must provide notice of the sick leave benefits in English and the employee's primary language, if the employee's primary language is Chinese, Korean, Russian, Polish, Haitian-Creole, or Spanish. The Department of Labor is tasked with preparing the notices in these languages.

The Act does not include any requirement that employers notify current employees of the sick leave entitlement.

Employers may also, but are not required to, post a notice in a conspicuous place, accessible to all employees in each location where such employees are employed, advising employees of their rights under the Act.

In addition to posting and notice requirements, the Act also requires employers to retain records for a period of two years that document the number of hours worked by each employee and the amount of sick leave accrued and taken by each employee. If an employer fails to maintain or retain these records, a presumption arises that the employer has violated the Act.

Enforcement

The sole recourse for a person claiming to be aggrieved by a violation of the Act is to file a complaint with the Department of Consumer Affairs (Department) within 270 days of the date the person knew or should have known of the alleged violation. Employees have no independent private right of action in federal or state court.

When the Department receives a complaint, it will attempt to resolve it through mediation. If mediation is unsuccessful and the Department determines that a violation occurred, it will issue a notice of violation and commence an adjudicatory hearing before an administrative tribunal. If the administrative tribunal finds a violation of the Act, the Department must issue a civil penalty payable to New York City not to exceed \$500 for the first violation. If a second violation occurs within two years of a first violation, a civil penalty not to exceed \$750 may be imposed, with subsequent violations subject to penalties up to \$1,000 per occurrence.

For willful violations of the notice requirements, employers will be subject to a civil fine in an amount not to exceed \$50 for each employee who was not given appropriate notice.

In addition to civil penalties, where an employee's rights under the Act were violated, the Department has the power to order appropriate damages be paid to the employee, including:

- for each instance of sick leave taken by an employee but not compensated by the employer: three times the wages that should have been paid under the Act or \$250, whichever is greater;
- for each instance of sick leave requested by an employee but unlawfully denied by the employer and not taken by the employee: \$500;
- for each instance of retaliation not including discharge from employment: full compensation including, but not limited to, wages and benefits lost, \$500, and equitable relief as appropriate; and
- for each instance of discharge from employment in violation of the Act: full compensation including, but not limited to, wages and benefits lost, \$2,500, and equitable relief as appropriate, including reinstatement.

How the New Law Differs from Proposed Legislation in 2009³

In a series of compromises since the legislation was first introduced in 2009, the proposed provisions of the Act have been amended to decrease the number of covered employers required to provide paid sick leave and also to reduce the amount of leave entitlement. Under the initial version of the Act, employers with less than 10 employees would have been required to provide five paid sick days to qualified employees

3 See Terri Solomon and Adam Colón, [Proposed Legislation Would Require New York City Employers to Provide Paid Sick Leave](#), Littler ASAP (Sept. 24, 2009).

and employers with 10 or more employees would have been required to provide nine paid sick days. Further, proponents of the Act agreed to delete a provision which would have permitted employees to file a private right of action. The final version of the Act also reduced available damages and penalties.

Certain time limitations were also modified. The initial waiting period for an employee to use sick leave was extended from 90 days to 120 days, and employer record retention requirements were decreased from five years to two years. The statute of limitations to file a claim was decreased from three years to 270 days from the date the employee knew or should have known of the violation.

In an amendment broadening coverage, the Act as passed by the Council ensures that employers with multiple locations with a total of 15 employees are covered by the Act.

The definition of “relative” is both more expansive and less expansive, in that it no longer includes aunts, uncles, nieces, nephews, and cousins, but now includes domestic partners and relatives of domestic partners to the same extent they are included for married individuals.

Unlike the initial proposed legislation, the Act contains a “reverse” trigger providing that if the economy significantly erodes, as measured by a financial index kept by the Federal Reserve Bank of New York, the Act’s effective date will be delayed.

Other State and City Laws that Mandate Paid or Unpaid Sick Leave

Federal law does not require employers to provide employees paid sick leave. Increasingly, however, states and cities across the United States are enacting legislation requiring employers to provide paid or unpaid sick leave. Connecticut and the District of Columbia require employers to provide paid sick leave. The cities of San Francisco, California and Seattle, Washington also require employers to allow employees to accrue and use paid sick leave. Effective January 1, 2014, Portland, Oregon will require employers to provide paid sick leave benefits. Other states and cities currently are contemplating similar legislation.

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