A Timely Analysis of Legal Developments

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Final Rules Adopted Clarifying Employers' Obligations Under the New York City Earned Sick Time Act

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The New York City Earned Sick Time Act (ESTA or the Act) went into effect on April 1, 2014, giving many New York City employees up to 40 hours of paid sick time per year.[1] Since March, the Department of Consumer Affairs (DCA) has provided guidance on its website concerning the ESTA. However, the DCA did not adopt Final Rules[2] pursuant to the ESTA until the end of July.

Specifically, the Final Rules:

- Provide a methodology for new employers to calculate the number of their employees;
- Address situations where employees are employed by more than one employer, who, as "joint employers," are jointly and individually liable for ensuring compliance with the ESTA;
- Confirm that the ESTA applies to employees irrespective of immigration status;
- Explain what may constitute a "reasonable" minimum amount of leave that an employer may require for the use of sick time;
- Establish requirements for employer policies that require employees to provide "reasonable notice" before using sick time;
- Clarify that an employer may require an employee to provide written documentation of the need for sick time from a licensed health care provider if the employee is absent for more than three consecutive "work days" and define "work day" in this context;
- Address accrual of sick time for domestic workers;
- Address the rate of pay of paid sick leave for certain employees;
- Provide that employees must be paid for sick time no later than the payday for the next regular payroll period after the sick time was used by the employee, unless the employer has asked for written documentation or verification of the need for sick time, in which case the employer is not required to pay sick time until the employee provides it;

1 Littler has been following the development of the ESTA from its proposal to the present. *See* Terri Solomon, Jean Schmidt and Jill Lowell, *Are You Feeling Sick? New York City Passes a New Sick Leave Law*, Littler ASAP (May 10, 2013); Terri Solomon, Jean Schmidt, Huan Xiong, Christine Hogan, and Jill Lowell, *Revised New York City Earned Sick Time Act Effective on April 1, 2014*, Littler ASAP (Mar. 17, 2014).

2 The Final Rules went into effect on July 30, 2014 and will make up a new Chapter of the Rules of the City of New York (R.C.N.Y.). A complete copy of the Final Rules can be found on the Department of Consumer Affairs' website, at http://www.nyc.gov/html/dca/html/law/PaidSickLeave.shtml.

- Address what happens to accrued sick time after an employer sells, transfers or otherwise assigns its business to another employer and the employee continues to work for that business;
- Establish requirements relating to the distribution or posting of an employer's sick leave policies;
- Clarify the requirements in the ESTA relating to DCA access to employer records and define ''appropriate notice" of the need for such access by the DCA;
- Describe the circumstances in which the DCA will issue a Notice of Violation to an employer;
- Establish a cure period for certain violations of the ESTA relating to the failure to respond to a complaint or provide records; and
- Describe the circumstances in which the DCA may conduct an investigation of an employer's employment practices on its own initiative.

The Final Rules are generally consistent with prior guidance issued on the DCA's website in the form of "Frequently Asked Questions" and Proposed Final Rules. However, the Final Rules address several areas previously unaddressed by this prior guidance. This ASAP highlights the key changes and clarifications set forth in the Final Rules, and contains Litter's recommendations for integrating the Rules' guidance into employers' ESTA administration policies and practices:

1 – Clarity on Joint Employers' Obligations (R.C.N.Y. §7-3)

The Rules provide that if an employee is employed jointly by two or more employers, all of the employee's work for each of the joint employers will be considered as a single employment for purposes of accrual and use of sick time under the ESTA. Joint employers may allocate responsibility for the requirements of the ESTA among themselves. Regardless of any agreement among joint employers, however, all joint employers are responsible, individually and jointly, for compliance with the ESTA, including satisfaction of any penalties.

We recommend that employers in joint employment relationships or potential joint employment relationships (including employers in the staffing industry, franchises, or those undergoing business restructuring events) create or review existing contracts to clearly allocate rights and responsibilities pertaining to the ESTA. Such contract provisions might designate which party will (i) administer sick time under the ESTA; (ii) be responsible for keeping records; (iii) liaise with, and be responsible for responding to, investigative inquiries from the DCA or other governing regulator; and (iv) pay the penalty in the event a violation is found. We also recommend that employers include indemnification provisions in these contracts to cover penalties imposed for violations of the Act. This will help ensure that the proper allocation of responsibility between the parties is maintained, regardless of which party the DCA seeks to pursue for violations.

2 – Minimum Increments for the Use of Sick Time (R.C.N.Y. §7-5)

Under the ESTA, employers are permitted to set a minimum increment for the use of sick time, not to exceed four hours, so long as such a minimum increment is "reasonable under the circumstances." However, the Final Rules provide an example that clarifies that, even when an employer's policy contains a four-hour minimum use increment, an employee who worked at least 80 hours and worked 120 days but has not yet accrued four full hours of sick time must be allowed to use his accrued time even if it is less than four hours.

It is unclear whether the above example is an exclusive exception or opens the door to other scenarios for which the DCA could determine that strict adherence to a four-hour minimum is unreasonable. Even if the example is exclusive, many employers with part time employees are likely to encounter that scenario. An employer who must grant fewer than four hours of sick time to one employee while requiring another to use a full four hours under such a policy risks inconsistent administration of the policy.

We recommend that employers continue to implement and consistently adhere to minimum-increment use policies to help manage their employees' schedules and curb excessive absenteeism and abuse in most circumstances. But employers should take care to not deny an employee the use of sick leave simply because he or she has not accrued sufficient hours. Employers may also wish to consider qualifying their minimum-increment use provisions in their sick leave policies to provide that they will be followed where "reasonable under the circumstances."

3 – Rate of Pay (R.C.N.Y. §7-9)

The Final Rules clarify how the "regular rate of pay" should be calculated.

Generally, an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid sick time is taken. However, if an employee uses sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate of pay.

For an employee who is paid in part on tips or gratuities, an employee is not entitled to compensation for lost tips or gratuities, but the employer must pay the employee at least minimum wage.

For an employee who is paid on a commission, whether base wage plus commission or commission only, the hourly rate of pay shall be the base wage or minimum wage, whichever is greater.

For an employee paid on a piece rate basis, the employer calculates the employee's total earnings from all sources on the most recent seven days in which no leave was taken and divides that sum by the number of hours spent performing the work during those work days.

The piecework rate of pay calculation basis is less intuitive and more likely to result in large fluctuations in amount of pay, when compared to the calculation used for employees paid by salary or on commission.

We recommend that employers review their policies, pay practices, and any applicable contracts or agreements with employees to determine the appropriate rate of pay for all employees in advance of requests for sick leave. Employers should familiarize themselves with the various rate of pay calculations provided for in the ESTA and Rules to ensure the proper calculation is used when the time comes to pay their employees for used sick time.

4 – Rules Concerning Documentation From Licensed Health Care Providers and Payment of Sick Time (R.C.N.Y. §§ 7-7 and 7-10)

The Rules provide that if an employer requires an employee to provide written documentation from a licensed health care provider when the employee's use of sick time results in an absence of more than three consecutive work days, the employee shall be allowed a minimum of seven days from the date he or she returns to work to obtain such documentation. Furthermore, an employer with such a policy must include such language in its written sick time policies, and describe the consequences for failing to obtain the documentation within the set time.

The DCA's website has previously acknowledged that employers have the right to refuse to pay for sick leave where an employee fails to provide requested documentation after a three-day leave in violation of the employer's policy, and may delay payment of sick leave until such documentation is provided. But this is the first guidance from the DCA specifying that an employee be granted a seven-day minimum "allowance" period to provide the documentation, and requiring that an employer describe the "consequences" of failing to provide documentation in its sick leave policies.

We recommend that employers review their policies and explicitly declare that when employees are absent for three or more consecutive work days, they are required to produce documentation verifying the use of sick leave within seven (or more) days. We also recommend that employers craft policies that explicitly state the consequences that may befall an employee who fails to comply with his employer's sick leave procedures, which typically include non-payment or delay of payment of the sick time.

Conclusion

In light of the rapidly-evolving guidance on the ESTA, employers should review their contracts, leave policies and administrative procedures and revise as necessary to comply with the ESTA and the Department of Consumer Affairs' interpretation of this new law.

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