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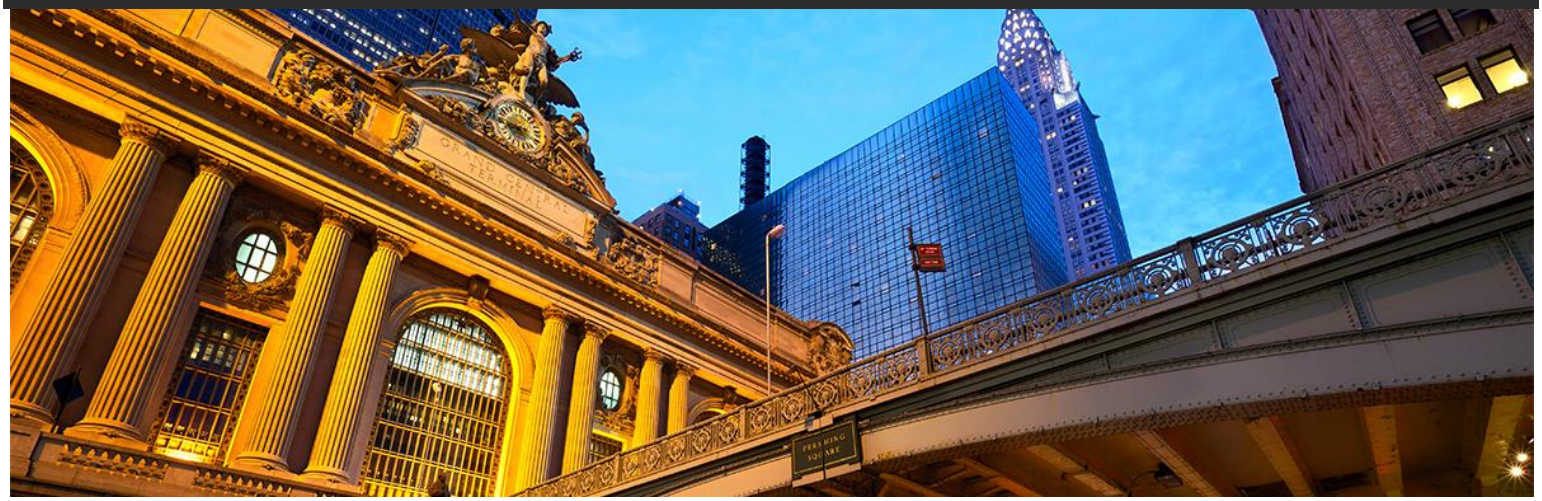

October 2023

New York City Safe and Sick Time Rules Amended

The New York City Department of Consumer and Worker Protection (DCWP) on Sept. 15, 2023, issued amended rules pertaining to the city's Earned Safe and Sick Time Act (ESSTA). The new rules go into effect Oct. 15, 2023. New York state enacted paid sick leave in 2020, and the same year the New York City Council amended ESSTA to align the city's law with the state law. The amendments bring the NYC rules into alignment with ESSTA and touch upon a number of topics related to earned safe and sick time and, in many instances, attempt to clarify areas of perceived ambiguity.

The amendments remove several references and requirements from the rules, including:

- the 120-day waiting period;
- that an employee must work more than 80 hours per calendar year in New York City to be covered under ESSTA;
- different conditions of coverage for domestic workers.

Highlights of the amended rules include topics and clarifications summarized below:

- How is employer size determined? Under the ESSTA, employers with 100 or more employees must provide up to 56 hours of paid safe and sick time per calendar year; employers with between five and 99 employees must provide up to 40 hours of paid safe and sick time per calendar year; and employers with four or fewer employees must provide paid safe and sick time if the employer's net income is

greater than $1 million or unpaid safe and sick time if net income is $1 million or less. The amended rules provide that employer size will be determined based on the employer's total number of employees ***nationwide*** and that employer size during a given calendar year will be determined by counting the highest total number of employees concurrently employed at any point during the calendar year to date. For the purposes of counting the number of employees concurrently employed, employers must count full-time employees, part-time employees, and employees jointly employed by more than one employer. Employers must also count employees on paid or unpaid leave, disciplinary suspension, or any other type of temporary absence, as long as the employer has a reasonable expectation that the employee will later return to active employment.

- What happens if an employer gains or loses employees? If an employer increases the number of employees to reach five employees or to reach 100 employees, thereby crossing an employer size threshold, the duty to provide paid safe and sick time or to provide additional paid safe and sick time is prospective from the date of the increase in the number of employees. However, reductions in the number of employees working for an employer will not reduce employee safe and sick time entitlements until the following calendar year.
- What constitutes a New York City-based employee for the purposes of the Act? Employees are covered if they physically perform work in New York City. Even if they work primarily in another state, they are covered if they "regularly perform, or are expected to regularly perform, work in New York City during a calendar year." They are also covered if they work remotely for an employer anywhere, while physically working in New York City. If an employee is based in New York City but only works remotely outside of New York City, they are not covered.
- Do employees have to be notified of their safe and sick time accrual, use, and balance? A new section in the rules, titled "Notice of Safe/Sick Time Accruals and Use on Pay Statement," reiterates that employees should be notified of their safe and sick time accrual and usage during the relevant pay period, and of their balance of safe and sick time available for use. Employers may use an electronic system to comply with the accrual, use, and balance notification requirements if (1) employees are electronically alerted each pay period that their accrual, use, and available balance information is available for review, (2) the required information within the electronic system is readily accessible by employees outside of the workplace, and (3) the required accrual, use, and available balance information from past pay periods is also readily accessible by employees outside the workplace.
- At what rate must employers pay employees taking paid safe and sick time? An employer must pay an employee for paid safe and sick time at the employee's regular rate of pay at the time the paid safe and sick time is taken.
- May employers require advance notice of using safe and sick time? An employer may require reasonable advance notice of an employee's need to use safe and sick time if this requirement and the methods of providing such notice are included in the employer's written policy. The amended rules continue to categorize absences as either "unforeseeable" or "foreseeable" but make clear that an absence may only be considered "foreseeable" if the employee is aware of the need to use safe and sick time seven days or more before the use. Employers can require providing advance notice using "reasonable methods," such as calling a designated phone number where an employee can leave a message, following a uniform call-in procedure, sending an email to a designated email address, submitting a leave request in a scheduling software system provided the employee has access to such system on non-work time, or any other reasonable and accessible means of communication identified by the employer.

- Can an employer use fractional accruals? Yes. Accrual of earned safe and sick time must account for all time worked. The amended rules state that employers can round to the nearest five minutes, one tenth of an hour, or one quarter of an hour.
- How can an employer ask employees to document the need for paid sick time? An employer may ask an employee to provide documentation supporting the need for taking safe and sick time if the leave lasts more than three consecutive workdays. Under the amendments, employers requiring employees to provide reasonable written documentation in support of taking safe and sick time must include this requirement in their written safe and sick time policy. The written safe and sick time policy should set forth the types of reasonable written documentation the employer will accept and instructions on how employees can submit the documentation to the employer. The amendments also clarify that an employer is prohibited from requiring such documentation before the employee returns to work. The documentation can come from a licensed clinical social worker, licensed mental health counselor, or other licensed health care provider. Additionally, if an employer requests such documentation, it must give the employee at least seven days to submit the documentation, and it must reimburse employees for all fees charged by a licensed health care provider.
- Are there factors that determine whether penalties will be awarded? Employers that fail to adhere to the ESSTA will incur fines. Although the penalties themselves have not been amended, the amended rules state that there will be a "reasonable inference" that the employer is not in compliance with the law if the employer fails to maintain or distribute a written safe and sick time policy and fails to maintain adequate records of employees' safe and sick time use and balances. The amended rules also set forth that evidence that an employer maintains a policy or practice of not providing or refusing to allow the use of accrued safe and sick time may include, but is not limited to:

  (i) Unlawful barriers such as requiring workers to find replacement workers to cover shifts missed due to safe and sick time, unreasonable notice requirements, or requirements that workers provide medical documentation of absences of three consecutive days or fewer;

  (ii) Probation periods, waiting periods, blackout days, or other measures that prevent employees from using safe and sick time as it is accrued;

  (iii) Prohibitions on use of safe and sick time such as caring for a family member;

  (iv) Failure to pay employees for time off due to safe or sick time authorized reasons;

  (v) Failure to provide for the accrual of safe and sick time at the appropriate rate;

  (vi) Failure to properly carry over safe and sick time hours at the end of an employer's calendar year, if the employer does not properly utilize a frontloading system;

  (vii) Policies that penalize the use of safe and sick time, such as points systems that do not differentiate between safe and sick time absences and other absences; or

  (viii) Failure to inform employees that safe and sick time is available.

Given the new rules and the parallel requirements under the state and city laws, New York City employers should review their safe and sick time policies and update those policies where appropriate.

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