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ALERT

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Welcome to ESTA: New York City's 'Earned Sick Time Act' Comes into Effect, DCA Proposes New Rules

Nearly a year after it was first passed in June 2013, the New York City Earned Sick Time Act (ESTA), providing paid sick time to employees in New York City, took effect this month. The law has been a top priority for the Mayor of New York City (The Mayor), who championed the original act as Public Advocate, campaigned for Mayor on pledges to expand its protections, and spearheaded amendments to broaden ESTA almost immediately upon taking office earlier this year. The law is likely to receive energetic enforcement, and employers in the City need to be aware of their expanded obligations under ESTA.

Under ESTA, employees of businesses with five or more workers are entitled to five paid sick days a year. Employees accrue a minimum of one hour of sick time for every 30 hours worked, but employers are not obligated to provide more than 40 hours of paid sick time in a calendar year. Sick time provided pursuant to ESTA begins to accrue at the commencement of employment, and the employee will be entitled to begin using sick time on the 120th calendar day following the start of his or her employment, or 120 days following the law's effective date. Employees may use sick time as it accrues.

While unused paid sick time carries over to the following calendar year, employers will not be required to allow the use of more than 40 hours of paid sick time in a calendar year. Also of note, ESTA does not require financial or other reimbursement to an employee for unused accrued sick time upon the employee's termination, resignation, retirement or other employment separation.

The law provides a broader definition of "sick" leave than what is traditionally considered by employers under the federal Family and Medical Leave Act. In addition to the traditional reasons for taking "sick" leave, ESTA covers an employee's need for diagnostic or preventative care, and provides that sick leave may be taken in the event the employee's place of business is closed by order of a public health official due to a public health emergency, or to care for a child whose school or place of care has been closed by

order of a public health official. An employee may also use sick time to care for a family member who needs diagnosis, treatment or preventative medical care. ESTA defines "family members" broadly to include an employee's child, spouse, domestic partner, parent, sibling (including half-siblings, step-siblings and adopted siblings), grandchild or grandparent, as well as a child or parent of the employee's spouse or domestic partner.

Employers may require "reasonable notice" of sick time use of up to seven days for foreseeable needs or "as soon as practicable" for unforeseeable needs. Employers may also require reasonable documentation for absences exceeding three consecutive work days. However, employers may not require an employee to find, or even to look for, another employee to cover his or her shift as a condition of taking leave.

Employers with an existing paid leave policy, such as paid-time off (PTO), will not have to offer additional time off if they already provide sufficient leave to satisfy the ordinance's annual accrual requirements, and if they allow employees to use the time for the same purposes and under the same conditions as paid sick time under the ordinance. Critically, the employer may set a "reasonable minimum increment" for use of sick time, not to exceed four hours per day. This allows employers to mirror the requirements of ESTA with any current PTO policy already in place, and the law will not have an impact on more generous paid leave policies. Employers with existing collective bargaining agreements need not implement the terms of the Act until the current CBA expires.

ESTA requires employers to provide written notice to current employees this month, and to new employees at commencement of employment, regarding an employee's rights to sick time, the employer's calendar year, and an employee's right to be free from retaliation and to bring a complaint. The notice must be posted "conspicuously" and any willful violation will result in a civil fine of $50 for every employee not provided appropriate notice. The New York City Department of Consumer Affairs (DCA) recently published a form Mandatory Notice.

The Mayor will designate a city agency (most likely the DCA) to administer and enforce ESTA's provisions. ESTA provides the commissioner with "the power to conduct investigations … upon his or her own initiative." ESTA requires employers to retain records documenting their compliance for a minimum of three years, and to allow the Department to access those records in furtherance of any investigation. An employee may file a complaint with the Department within two years from the date the employee "knew or should have known" of the alleged violation.

The DCA has already published proposed Rules implementing ESTA, and scheduled a public hearing for April 29, 2014. A copy of the proposed Rules, along with information on how to submit a comment can be found here.

While some "grey areas" remain about how New York City will implement and enforce ESTA, this much is clear: ESTA is here, and it is here to stay. Employers operating in the City should review their PTO policies to ensure they are in compliance with ESTA's provisions, and likewise ensure that they are meeting the Act's notice and document retention requirements.

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