

EXPERT ANALYSIS

A Look at Changes to New York City's Earned Sick Time Act

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On March 20 New York Mayor Bill de Blasio signed into law two bills that significantly expanded the provisions of the New York City Earned Sick Time Act. The act, which took effect April 1, requires most private employers to provide up to 40 hours of paid or unpaid sick leave per year to employees working in New York City.

The amendments to the act expanded the law's paid sick leave requirements to cover employers with between five and 15 employees, expanded the definition of "family member," increased employers' notice and record-keeping requirements, broadened the enforcement power of competent authorities, and increased the time an employee has to file a complaint for alleged violations.

BACKGROUND

The original Earned Sick Time Act was adopted into law June 26, 2013, after the New York City Council overrode then-Mayor Michael Bloomberg's veto. The effective date of the law was specified as April 1 this year.

Following the inauguration of de Blasio on Jan. 1, City Council overwhelmingly passed two new bills in February designed to expand the provisions of the original act, which by its terms had not yet taken effect. The amended version of the act became effective April 1.

SUMMARY OF PROVISIONS AND CHANGES MADE TO THE ORIGINAL ACT

Coverage

The amended act applies to private employers, including manufacturing employers (defined below), with five or more employees, and those with one or more domestic workers. Employers with employees who are not entitled to paid sick leave under the act still must provide unpaid sick leave. The amended act does not apply to public employers, including employees of the United States, New York state or New York City governments.

Manufacturing employers and employers with between five and 19 employees have a six-month grace period before facing civil penalties for any violation of the amended act. However, to discourage repetitive violations during the grace period, the amended act further provides that any second or subsequent violation that occurs before Oct. 1 will serve as a predicate for imposing penalties for subsequent violations that occur on or after that date.

Where the number of employees fluctuates above and below five persons per week over the course of a year, business size will be determined for the current calendar year based on the average number of persons who worked for compensation per week during the preceding calendar year. All persons performing work for compensation, whether on a full-time, part-time or temporary basis, are counted when determining coverage.

The amended act applies to private employers, including manufacturing employers, with five or more employees.

Changes from the original Earned Sick Time Act

The original act would have initially applied to private employers with 20 or more employees, and then would have expanded Oct. 1, 2015, to include employers with 15 or more employees and employers of one or more domestic workers. The amended act now immediately applies to private employers with five or more employees and employers with one or more domestic workers.

The original act did not have a grace period for employers to come into compliance. The amended act added the grace period for manufacturing employers (defined below) and employers with between five and 19 employees to respond to concerns raised by small business in connection with the expansion of the act.

The original act did not apply to certain employers classified in sections 31, 32 or 33 of the North American Industry Classification System (manufacturing employers). The amended act applies to manufacturing employers.

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, including a commissioned salesperson, is entitled to sick leave benefits under the amended 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 amended act as at least four times the minimum federal wage) are not covered by the amended act.

Changes from the original Earned Sick Time Act

There are no changes from the original act in this section.

Amount and type of leave required

Subject to the exceptions noted below, effective April 1, employers of five 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. Employers who do not employ at least five employees, and thus are not required to provide paid sick leave, must still provide employees with up to 40 hours of unpaid sick leave per calendar year.

The act defines calendar year as "a regular and consecutive 12-month period, as determined by an employer." Thus, it need not be an actual calendar year.

Employees who do not use all accrued sick leave (paid or unpaid) in a calendar year are entitled to carry over unused sick leave, up to a limit of 40 hours. 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 does not have to allow carry-over of unused paid sick leave from one calendar year to the next provided that the employer pays the employee for any unused sick leave at the end of the calendar year and provides the employee with an amount of paid sick leave that meets or exceeds the requirements of the amended act on the first day of the following 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 amended 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.

Changes from the Original Earned Sick Time Act

The original act did not contain a limit on the amount of unused sick time an employee could carry over each year. The amended act explicitly limits the amount to 40 hours.

Use of leave

The amended 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 amended act provides little guidance regarding what these terms mean. Read broadly, the amended 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:

- Need a medical diagnosis.
- Require care or treatment of a mental or physical illness.
- Have an injury or health condition.
- Need preventive 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; child or child of a domestic partner — including a biological, adopted or foster child, stepchild, legal ward or a child of an employee standing *in loco parentis*; siblings, including half-siblings, step-siblings and siblings related through adoption; grandchildren and grandparents.

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 amended act for purposes not permitted by the amended 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 their date of hire or April 1, whichever is later.

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

Changes from the original Earned Sick Time Act

The amended act has expanded the definition of “family member” to include siblings (including half-siblings, step-siblings and siblings related through adoption) grandchildren and grandparents.

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 his or her family member’s injury, illness or condition. In addition, any health information about an employee or an employee’s family member must be treated as confidential.

Changes from the original Earned Sick Time Act

There are no changes from the original act in this section.

Exemptions and exceptions

- Small Businesses: The amended act exempts small businesses, defined as those employing fewer than five employees, from providing paid sick leave.

With some exceptions, 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, including a commissioned salesperson, is entitled to sick leave benefits under the amended act.

- Employers with a separate leave policy: Employers who already have or who implement a paid leave policy — including paid time off, paid sick leave, paid vacation and/or paid personal days — that provides for paid leave in an amount sufficient to meet the requirements of the amended act (*i.e.*, one hour of paid sick leave for every 30 hours worked) and allows the leave to be used for the purposes and under the same conditions as required by the amended 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 are not required to provide unpaid sick leave if they already provide paid or unpaid time off/sick/vacation/personal days sufficient to meet the requirements of the amended act and allow employees to use that leave for the purposes specified in the amended act.

- Employees covered by a collective bargaining agreement: Where employees are covered by a valid collective bargaining agreement on April 1, the amended act will not apply until termination of the collective bargaining agreement. However, the provisions of the amended 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 amended act. Construction and grocery industry employees covered by a bona fide collective bargaining agreement may, through their union, expressly waive the amended act, even if the collective bargaining agreement does not provide benefits comparable to those provided by the act.
- Domestic workers. In 2010 New York State passed the Domestic Workers' Bill of Rights which, among other things, 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. Effective April 1, the amended act supplements this Bill of Rights and requires 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 that the domestic worker is employed for one full year of service.

Changes from the original Earned Sick Time Act

As stated above, the original act exempted manufacturing employers from coverage. The amended act does not. In addition, the original act defined "small businesses" as those with fewer than 15 employees. The amended act lowered that number to five employees.

Employer obligations

As of May 1 employers must provide all employees with notice of entitlement to leave and describe the amount and terms of sick leave, including any right to unpaid leave. The notice must also inform employees that the amended act expressly prohibits retaliation for requesting or using sick leave, and that they have a right to file a complaint with the city's Department of Consumer Affairs. Similar to New York's Wage Theft Prevention Act, the employer must have provided notice of the sick-leave benefits in English and the employee's primary language (if the employee's primary language is Chinese, Korean, Russian, French-Creole, Italian or Spanish). A form notice in English and all of the languages mentioned above is available on the department's website.

When new workers are hired, employers also have to provide the notice described above.

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

In addition to notice requirements, the act also requires employers to retain records documenting compliance with the act for a period of three years.

Changes from the original Earned Sick Time Act

The original act did not require notice to current employees, only to new hires. The amended act requires that notice have been given to current employees by May 1 and to new hires.

In addition, the amended act now requires employers to retain records of sick leave for a period of three years, up from two years in the original act.

Enforcement

The department has the power to commence an investigation of an employer on its own initiative, including conducting audits of an employer's compliance with the amended act and its record-keeping. Additionally, a person claiming to be aggrieved by a violation of the amended act can file a complaint with the department (or designated agency) within two years 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. In addition, it will send written notification of the complaint to the employer, which will then have 30 days to provide a written response and any other such information the department may request.

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 amended 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.
- \$500 for each instance of sick leave requested by an employee but unlawfully denied by the employer and not taken by the employee
- 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.
- 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.

In addition, the mayor has the authority to designate an agency other than the department to enforce the act. The designated agency will have all of the powers given to the department, including the authority to initiate an investigation of an employer, hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, render decisions and orders, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of the act. The designated agency can also impose civil penalties, order equitable relief and provide monetary damages.

Changes from the original Earned Sick Time Act

The original act had a limitations period of 270 days, not two years, as provided for under the amended act. Employers did not have the right under the original act to provide a written

response to a complaint. According to the amended act, employers must respond to a complaint within 30 days.

In addition, the original act did not empower the department to commence investigations of employers on its own initiative. The amended act gives the department this power. Finally, the amended act gives the mayor the authority to designate an agency other than the department to enforce the act. This was not the case in the original act.

The department also prepared and posted on its website frequently asked questions, which will be updated frequently, to provide guidance to employers and employees with their responsibilities and rights under the act.

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 Newark and Jersey City, N.J.; San Francisco; Seattle; and Portland, Ore., also require employers to allow employees to accrue and use paid sick leave. Other states and cities currently are contemplating similar legislation.



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