

LABOR & EMPLOYMENT

ALERT

NEW YORK REQUIRES EMPLOYERS TO PROVIDE PAID SICK DAYS – AN UPDATE

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On May 1, 2013, the New York City Council released the final version of the New York City Earned Sick Time Act (the Act), which will require all New York City employers to provide their employees with sick leave and will require most New York City employers to provide paid sick leave. The City Council will vote on whether to approve the Act on May 8, 2013, and it is a near certainty that the Act will be passed and enacted into law, despite an expected Mayoral veto. The final version of the Act provides additional clarification for employers on a number of issues, but it still leaves some key questions unanswered.

Covered Employers and Employees and Leave Accrual

Under the Act, effective April 1, 2014, all New York City employers must provide at least 40 hours of sick leave (i.e., five sick days) to most of their employees. For employers with 20 or more employees, the five sick days must be paid; for employers with less than 20 employees, the sick leave can be unpaid. On October 15, 2015, the requirement to provide paid sick days to employees expands to employers with 15 or more employees. In determining whether an employer has more than 15 or 20 employees, the Act requires a “chain business” to be treated as one large entity. A “chain business” is “any employer that is part of a group of establishments that share a common owner or principal who owns at least 30 percent of each establishment where such establishments (i) engage in the same business or (ii) operate pursuant to a franchise agreement[.]” For example, if a restaurateur owns two establishments under separate corporations each with 12 employees, the Act treats the two corporate entities as one employer with 24 employees.

For those employers that are required to provide paid sick leave, the pay is based on the employee’s wage rate in effect at the time that he or she takes sick leave. For those employees who receive most of their compensation in the form of “gratuities,” it appears that the Act only requires the employer to pay the employee his or

her base wages.

At the commencement of employment or on the date that the law becomes effective, whichever is later, employees accrue sick leave at the rate of one hour of leave for every 30 hours of work. However, employees can only accrue up to 40 hours of leave per calendar year, which is any regular and consecutive 12-month period as determined by the employer. For those employees who are exempt from overtime, the Act assumes that such individuals work 40 hours per week.

Although, employees begin to accrue sick leave at the commencement of employment, they are not entitled to take such leave until they have been employed by the employer for 120 days. Therefore, even if an employee has accrued sick leave time, he or she may not take the leave until the employee has been employed for approximately four months. In addition, the Act states that upon the cessation of the employment relationship, the employer is not required to pay the departing employees for their accrued but unused sick leave.

Further, at the end of each calendar year, the employer has a choice. The employer can either pay out all accrued but unused sick leave to the employees or the employer can permit employees to carry over accrued sick leave from year to year up to a maximum of 40 sick leave hours. Indeed, under the Act, employers are not required to provide more than 40 hours of sick leave to an employee during any calendar year.

Use of Sick Leave

Employees may use accrued sick leave to care for themselves or a close family member. If the leave is foreseeable, the employer can require the employee to provide up to seven days advanced notice of the employee’s intention to take accrued sick leave. If the leave is unforeseeable – as will likely occur in the vast majority of

cases – the employer can require the employee to provide as much notice as is “practicable.” However, the term “practicable” is not defined in the Act.

If an employee notifies the employer that he or she intends on taking sick leave under the Act, the employer cannot require the employee to find a replacement to cover the employee’s shift as is common in the hospitality industry. Indeed, if an employer conditions the employee’s use of sick leave on finding a replacement such a condition is a clear violation of the Act and would entitle the affected employee to damages. However, in certain circumstances, the employer and the employee can voluntarily agree to work additional time to make up for the time taken under the Act; such an agreement must be truly voluntary as the employer cannot compel or otherwise pressure the employee to work the extra time. In addition, if an employee uses sick leave under the Act, the employer cannot require the employee to work additional time to make up for the taken leave time nor can the employer retaliate against the employee by disciplining, discharging, demoting, suspending, cutting hours, or otherwise taking an adverse employment action against the individual.

When an employee has been on sick leave for three or more consecutive work days, the employer can require the employee to provide a note from a health care provider that confirms that the leave was authorized under the Act. Because the Act states that the employer can request the note only after the employee has been out for three or more consecutive days, it is unlikely that the employer can request such a note when the employee has been out for less than three consecutive work days. However, if an employee uses sick leave for less than three consecutive days, the employer can request the employee to submit written confirmation that the employee used sick leave pursuant to the Act as long as the employer does not require that the confirmation come from a doctor or other health care provider.

Notice of Rights

The Act also requires employers at the commencement of employment to provide employees with written notice of the employee’s rights to sick leave, including the accrual and use of sick leave, the applicable calendar year as determined by the employer, the right to be free from retaliation, and the right to file a complaint with the New York City Department of Consumer Affairs. This notice must be provided in English and the employee’s primary language. The Act also states that the “notice may also be conspicuously posted at an employer’s place of business in an area accessible to employees.” It is unclear whether the employer can

post the notice in lieu of providing written notice to each employee at the commencement of employment. However, as these statutes are generally construed in favor of the employee, it is likely that the employer must provide written notice to each individual and in addition, at the employer’s option, the employer can also post the notice.

Other Employer Leave Policies

If an employer provides at least 40 hours of other paid leave to its employees, such as paid time off, paid vacations, or paid personal days, and employees can use such paid leave to care for themselves or a close family member then the employer is not required to provide additional paid sick leave under the Act.

Enforcement

The Act will be enforced by the Department of Consumer Affairs. Individuals have 270 days (i.e., nine months) from the date that they knew or should have known of the alleged violation to file a complaint.

If an employer violates the law, the penalties differ depending upon the type of violation. If an employer fails to provide paid sick leave to an employee (where such paid leave is required), the employee will be entitled to three times the wages that should have been paid or \$250, whichever is greater. If an employee requests sick time and that request is unlawfully denied by the employer or the employer requires the employee to find a replacement to cover the employee’s shift, the employee can recover \$500. If an employer retaliates against the employee for exercising his or her rights under the Act, the employee is entitled to back pay and benefits, appropriate equitable relief (e.g., removal of warning, reinstatement) and \$500, which is increased to \$2,500 when the employee was unlawfully discharged. Further, the Department of Consumer Affairs can also recover civil penalties ranging from \$500 to \$1,000 for each violation of the Act.

The Act will certainly increase costs for all New York City employers. These costs are not just financial. Indeed, there will be additional administrative burdens for New York City employers, such as covering employee shifts on short notice and tracking employee usage of sick days. The Act will also subject unwary employers to fines and penalties if they fail to properly comply. Accordingly, employers must be diligent in ensuring that they continue to comply with applicable law.

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