



## New York City Establishes Office of Labor Standards and Issues Proposed Amendments to the Rules for Paid Sick Leave

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On November 30, 2015, New York City Mayor Bill De Blasio signed a bill establishing the New York City Office of Labor Standards. This office will make recommendations for worker education, safety and protection, educate employers on labor laws, create public education campaigns regarding worker rights and collect and analyze labor statistics. The Director of the Office of Labor Standards will have authority to conduct investigations, serve subpoenas and impose civil penalties on businesses that violate New York City's labor standards. The Office of Labor Standards will also enforce New York City's Earned Sick Time Act (the Act), which requires most employers in New York City to provide paid sick leave to their employees. To date, the Act has been enforced by the City's Department of Consumer Affairs (DCA).

Soon after Mayor De Blasio signed this legislation, the city proposed additional rules to clarify portions of the Act. New York City is currently accepting comments on the proposed rules and individuals can submit comments through January 12, 2016. The proposed amendments contain some significant changes. Should the rules be enacted as drafted, they would affect the Act as follows:

- Determining the number of individuals employed by an employer:
  - o For businesses that have been in operation for less than one year, the size of the business will be determined based upon the average number of employees per week during the first 80 days of operation in the calendar year immediately preceding the date that the employee used sick time.
  - o The business size for an employer that has operated for one year or more is determined by counting the number of employees working for the employer per week at the time the employee uses sick time, unless the number of employees fluctuates, in which case business size may be determined for the current

calendar year based on the average number of employees per week during the previous calendar year. For purposes of this subdivision, "fluctuates" means that at least three times in the most recent calendar quarter the number of employees working for an employer fluctuated between less than five employees and five or more employees.

- Joint employers:
  - o Under the changes, where two or more employers exercise some control over the work or working conditions of an employee, the employers may be treated as a "joint employer" of the employee. If an employee is employed jointly by two or more entities, 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 leave. For example, Company A is a hospitality company that operates a number of restaurants, Company B is one of the restaurants operated by Company A and Company C is another restaurant operated by Company A. Employee X works as a server during lunch shifts for Company B and dinner shifts for Company C. Under this scenario all three companies are joint employers. If Employee X works 20 hours for Company B and 40 hours for Company C, the employee would have accrued two hours of paid sick leave under the Act.
- Temporary help firms:
  - o Pursuant to the proposed rules, the term "temporary help firm" means an organization that recruits and hires its own employees and assigns those employees to perform work or services for other organizations to: (i) support or supplement the other organization's workforce; (ii) provide assistance in special work situations including, but not limited to, employee absences, skill shortages or seasonal workloads; or (iii) perform special assignments or projects.

- o This additional definition is significant as the revised joint employer rules includes a carve out for employees placed with a business by a temporary help firm as the temporary help firm who places a temporary employee in an organization shall be solely responsible for compliance with the provisions of the Act for the temporary employees it placed, not the business where the individual is placed. To illustrate, a temporary help firm that has 100 employees placed in several different organizations must provide paid sick time to its employees placed at the other organizations, regardless of the size of the organization where the temporary help firm places the employee.
- Minimum increments for use of paid sick leave:
  - o Employers are permitted to set an initial minimum use of sick leave of four hours. For example, where an employer has a four-hour minimum sick leave increment requirement and an employee is scheduled to work from 8 a.m. to 4 p.m. on Mondays, notifies her employer of a doctor's appointment for 9 a.m. on a Monday and that she intends to use sick time and return to work the same day, the employee should report for work at noon if she did not report for work prior to her appointment.
  - o The proposed amendments will permit employers to set fixed periods of 30 minutes or less that sick time must be used in when it exceeds the employer's required minimum increment. To illustrate, in the same example as above, the employer's written policy requires employees to use sick time in half-hour intervals that start on the hour or half hour. If the employee arrives to work at 12:17 p.m., the employer can require her to use four-and-a-half hours of sick time and require her to begin work at 12:30 p.m. Similarly, if the employee wanted to leave work at 8:40 a.m. to go to her 9 a.m. doctor's appointment, the employer could require the employee to stop work at 8:30 a.m.
- Explicitly prohibit employers from requiring employees to appear in person or provide any document prior to using sick time when the need to use sick time is not foreseeable.
- Clarify the calculation of rate of pay of paid sick time for employees paid on a piecework basis. To determine the rate of pay for an employee paid on a piecework basis, the employer is to add together the employee's total earnings from all sources in the most recent workweek where no sick time was taken and divide that sum by the number of hours spent performing such work during the workweek.
- Establish that wage supplements (i.e., health, welfare, nonoccupational disability, retirement, vacation benefits, holiday pay, life insurance and apprenticeship training) need not be included when paying an employee who uses paid sick time.
- Require successor employers to provide employees with its written sick policies upon the sale or acquisition of a business.
- Written sick time policies must state at a minimum:
  - o The employer's method of calculating sick time;
  - o The employer's policies regarding the use of sick time, including any limitations or conditions the employer places on the use of sick time; and
  - o The employer's policy regarding carry-over of unused sick time at the end of an employer's calendar year.
- States that an employer cannot distribute the required notice of rights under the Act in place of its own written policy.
- Prevent employers from denying employees sick time or payment of sick time for failure to comply with its policy when the employer did not distribute its policy in writing to employees.
- Records that employers must maintain:
  - o Records demonstrating compliance with the requirements of the Act, including records of any policies regarding sick time, for a period of three years.
  - o Contemporaneous, true and accurate records that show:
    - Each employee's name, address, phone number, date(s) of start of employment, date(s) of end of employment (if any), rate of pay and whether the employee is exempt from overtime;
    - The hours worked each week by each employee;
    - The date and time of each instance of sick time used by each employee and the amount paid for each instance;
    - Any change in the material terms of employment of an employee; and
    - The date that the Notice of Rights was provided to each employee and proof that the Notice of Rights was received by each employee.
- Establish that an employer's failure to keep or produce written sick time policies and records creates a reasonable inference that the DCA's allegation against it is a fact. Upon creation of the Office of Labor Standards, all references to the DCA will likely be revised to refer to the Office of Labor Standards.

- Mandate a \$500 penalty, on top of any penalties or remedies imposed, for failure to respond to a complaint or provide information requested by the DCA.
- Enhanced penalties:
  - o A finding that an employer has a policy of not providing or refusing to allow the use of sick time required by the Act is a violation of the Act for each and every employee affected by the policy and will subject the employer to penalties on a per employee basis.
  - o If an employer does not allow accrual of sick time required by the Act, each and every employee affected must include either application of 40 sick time hours to the employee's sick time balance or, where such information is known, application of the number of sick time hours the employee should have accrued to the employee's sick time balance, provided that such balance does not exceed 80 hours.

In addition to the foregoing changes to the rules regarding the Act, the proposed rules include entirely new sections addressing accrual, hours worked and carry over, employee abuse of sick time and retaliation.

- Accrual:
  - o If an employee is compensated for an on-call shift, regardless of whether the employee works, the scheduled time constitutes hours worked for the purposes of accrual under the Act.
  - o For employees paid on a piecework or commission basis, accrual of sick time is measured by the actual length of time spent performing work.
  - o For employees with indeterminate shift lengths (e.g., a shift defined by business needs), an employer shall base the hours of sick time used upon the hours worked by the replacement employee for the same shift. If this method is not possible, the hours of sick time must be based on the hours worked by the employee when the employee most recently worked the same shift in the past.
- An employee rehired within six months who had not reached the required 120 days to begin using accrued sick time shall, upon resumption of employment, be credited with his or her previous calendar days towards the waiting period.

- Carry over:
  - o An employee may carry over up to 40 hours of unused sick time from one calendar year to the next, unless the employer has a policy of paying employees for unused sick time at the end of the calendar year and providing the employee with at least 40 hours of sick time for the immediately subsequent calendar year on the first day of such year.
  - o Regardless of the number of hours an employee carried over from the previous calendar year, an employer must allow employees to accrue up to 40 hours of sick time in a calendar year, but need only allow an employee to use up to 40 hours. This new rule is clarified by the following example:
    - An employee accrues 40 hours of sick time in year one and uses 20 hours of sick time in year one. She carries over 20 hours to year two, accrues 40 hours in year two, and does not use any hours in year two. Her sick leave balance at the end of year two is 60 hours. She may carry over 40 of those 60 hours into year three and accrue another 40 hours in year three.
- Employers can take disciplinary action against employees who use sick time for purposes not covered by the Act, including an employee who engages in a pattern of abuse of leave. A pattern of abuse of leave may be indicated by repeated use of unscheduled sick time on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day, taking sick time on days when other leave has been denied and a pattern of taking sick time on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.

Although these changes are only proposed rules, it is expected that the changes to the Act will be enacted in their entirety. As a result, New York City employers should review their sick time policies in order to ensure that they comply with the proposed rules in order to avoid unintentional violations of the Act should the proposed rules be adopted.

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