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## Westchester County Adopts Mandatory Paid Sick Leave Law

By Carolyn D. Richmond, Glenn S. Grindlinger, and Bryn Goodman

Westchester County's Board of Legislators recently adopted a sick leave law that affects most Westchester County employers. Westchester County's recently adopted Earned Sick Leave Law (ESLL) is similar to New York City's Earned Safe and Sick Time Act. Like NYC's law, ESLL requires employers with five (5) or more employees to provide at least one (1) hour of paid sick time for every 30 hours worked up to a maximum of 40 hours of paid sick time a year and employers with fewer than five (5) employees must provide the same amount of sick time to their employees albeit, unpaid.

The law takes effect on March 30, 2019, and covers full-time and part-time employees who work for Westchester County employers for more than 80 hours in a calendar year. Three important differences from NYC's sick leave law are Westchester's severe penalties for failure to comply with the law's notice requirements, Westchester's lack of "safe" time as a basis to use the time off, and Westchester's shortened waiting period for new employees to use accrued sick time.

### Notice Requirements

Westchester's law requires employers to post a copy of the law in English, Spanish, and any other language deemed appropriate by the County of Westchester in a conspicuous location in the workplace, where all employees can access it. At the time of hire, or within 90 days of the effective date of the law, whichever is later, employers must give employees a copy of the ESLL and written notice of how the law applies to that employee. Failure to comply with the notice and posting requirement may result in a civil fine of \$500 per violation,

whereas under NYC's law the penalty is \$50 per violation.

### Qualifying Uses for Taking Sick Time

Under the ESLL, employees may use paid sick time to care for oneself or one's family due to illness, injury, health condition, need for diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, and for preventative medical care. Employees may also use sick time when his or her place of business, day care, or school closes due to a public health emergency. An employee may also take leave if public health authorities deem the employee or a family member a health risk to the community because of his or her exposure to a communicable disease.

Employers must pay sick time at the employee's normal rate of pay. If an employer takes a tip credit towards its minimum wage obligation to the employee, then the employer must pay such employee's sick time at the full minimum wage rate. Employees may take no less than four (4) hours of sick time, but can take increments thereafter at the rate an employer allows for other time off. Regardless of when an employee provides notice of the need for sick time, an employer cannot require the employee to find someone to cover his or her shift when the absence is for a reason covered by the law.

### Requesting and Storing Documentation Related to Health and Safety

If an employee is requesting sick time for more than three (3) consecutive work days, the employer may request reasonable documentation signed by a health care professional that the sick time is being

used for a purpose covered by the law. This documentation cannot require a doctor to provide a note containing information in violation of HIPAA. The law requires employers to ensure that such health information be kept confidential and not disclosed without written permission from the employee. To ensure confidentiality, ESLL requires employers to maintain a separate file for sick time related health and safety information.

### **Earning and Calculating Sick Time**

Employees will begin to accrue paid sick leave at the rate of one (1) hour for every 30 hours worked from the first day of employment, or 90 days after the law takes effect, whichever is later. Of course, an employer may adopt a more favorable policy. ESLL establishes a floor for paid sick leave, an employer may still be obligated to provide more sick time, if such an obligation exists based on a contract, collective bargaining agreement, employment benefit plan, or other agreement. Employers may delay an employee's ability to use earned sick time until the employee has worked for the employer for 90 days (under NYC's law this delay period is 120 days).

Instead of dealing with accrual calculations, an employer may frontload sick time at the beginning of the calendar year or on the employee's employment anniversary date, given the employer does not require the employee to provide advanced notice to take sick leave or impose other restrictions. At its discretion, an employer may also loan sick time to an employee in advance of accrual. ESLL permits employees to carry over unused sick time from one (1) year to the next, but this carryover of time does not allow the employee to exceed 40 hours of sick time per year. An employer is also not required to pay out unused sick time at the end of the employment relationship, but the employer's policy should explicitly state that there is no payout for unused time.

### **Recordkeeping Requirements**

Employers are required to keep track of the hours worked by employees and the sick time accrued and taken for a period of three (3) years. If an employer

fails to maintain such records, the presumption is that a violation of the law has occurred.

### **Complaints**

Employees must file complaints within one (1) year after the occurrence of the alleged violation with the Westchester County's Department of Weights and Measures (Department) or in court. The Department will investigate the complaint and attempt to facilitate a resolution. If no resolution can be reached, the Department shall issue a summons, hold a hearing, and determine whether a violation occurred. Both the Department and a court will have the authority to assess penalties.

An employee may file a complaint alleging that an employer interfered with, restrained, or denied the exercise of, or the attempt to exercise, the right to use earned sick leave. Employers must be cautious about disciplining an employee who has requested sick time, used sick time, or has filed a complaint for violation of his or her right to use sick time. Earned sick time cannot be counted as an absence that may lead to or result in discipline, discharge, demotion, or suspension. If an employer disciplines, discharges, demotes, or suspends an employee within 90 days of his or her filing of a complaint about a sick time violation, there will be a presumption that employer's action was retaliatory.

### **Penalties**

The Department's hearing officer and a court of competent jurisdiction both have discretion to hear a complaint and award damages for violations of the employee's right to take sick time. Damages may include the full amount of unpaid earned sick time plus actual damages suffered, reasonable attorney's fees, the cost of the administrative hearing, and other monetary and equitable relief "as may be appropriate," including reinstatement and back pay. If an employee was permitted to take time off, but was not paid for accrued sick time, an employer will be required to pay the employee three times the wages that should have been paid for each instance, or \$250, whichever is greater. If the employee claims that he or she requested sick time, but that the employer denied the request, or claims the employer required the employee to find his or her

own replacement worker, the employer will be required to pay the employee \$500 for each instance. The employer or employee can appeal the Department's determination to a court within 30 days.

Given the penalties involved, employers should be careful to comply with the law's notice and policy requirements. We encourage Westchester County employers to consult with legal counsel before implementing or revising their sick leave policy to ensure they comply with all state and federal laws.

For more information about this alert, please contact Carolyn D. Richmond at (212) 878-7983 or [crichmond@foxrothschild.com](mailto:crichmond@foxrothschild.com), Glenn S. Grindlinger at (212) 905-2305 or [ggrindlinger@foxrothschild.com](mailto:ggrindlinger@foxrothschild.com), or any member of the firm's Hospitality Practice.