

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

OCTOBER 3, 2023

### Recent Amendments to New York City's Earned Safe and Sick Time Act

On Sept. 15, 2023, the New York City Department of Consumer and Worker Protection adopted several amendments to the City's Earned Safe and Sick Time Act (ESSTA). Notably, some of the key amendments include changes to 1) what constitutes an "employee" under the ESSTA; 2) how to calculate an employer's size to meet safe/sick time requirements; 3) when it is permissible to request documentation from employees for safe and sick leave; 4) information on requirements for employees to notify their employer for use of leave; 5) calculating an employee's rate of pay; and 6) updates that should be made to an employer's ESSTA workplace policy. These amendments take effect on Oct. 15, 2023. A brief summary of some of the notable changes are detailed below.

#### Who is Covered by the ESSTA?

The COVID-19 pandemic has undoubtedly increased popularity of remote work in New York City. The new amendments specify that an employee who performs work, including work performed by telecommuting, while physically located in New York City is "employed for hire within the City of New York," regardless of where the employer is located. These employees, therefore, will now be covered by the ESSTA.

An employee who works primarily in another state is also covered by the ESSTA, as long as they "regularly perform, or are expected to regularly perform, work in New York City during a calendar year." However, only working hours that these employees work in New York City will count for leave accrual purposes.

On the other hand, employees who work strictly outside of New York City via remote means are not covered by the ESSTA, regardless of whether their employer is physically located in New York City.

#### Calculating Employer Size

Private employers with 100 or more employees must provide up to 56 hours of paid safe and sick time annually, and employers with 99 or fewer employees need only provide up to 40 hours of safe and sick time on an annual basis. The amendments provide clarity as to how to calculate employer size in accordance with the ESSTA.

An employer's size is based on the number of employees nationwide—not only those employees working in New York City—and it is determined by counting the highest total number of employees employed at any point during the calendar year to date. This headcount must include full-time employees, part-time employees, employees jointly employed by one or more employers, and employees on leaves of absence, suspensions and other temporary absences (so long as the employer has a reasonable expectation that the employee will later return to active employment).

## **Requesting Documentation for Employees' Safe and Sick Leave**

An employer is not permitted to require documentation from an employee in support of the need for safe and sick time if the use of safe/sick time lasts three or fewer consecutive workdays. Unless otherwise required by law, an employer must not require an employee to submit this documentation prior to his or her return to work. When requiring documentation, an employee is allowed a minimum of seven days from the date he or she returns to work to submit the requested documents.

An employer that requests documentation may withhold payment of safe and sick time until the employee has provided such documentation or confirmation, except that an employer must not withhold payment when the required documentation is unattainable by the employee due to associated costs.

If an employer requests documentation from an employee to support the use of sick time and the licensed health care provider charges the employee a fee for obtaining this documentation, the employer must reimburse the employee for this fee. Similarly, if an employer requests documentation from an employee to support the use of safe time, the employer must reimburse the employee for all reasonable costs or expenses incurred for the purpose of obtaining this documentation.

## **Employee Notice**

Under the ESSTA, where the leave is *foreseeable*, an employer can require that the employee provide reasonable notice, as long as the requirement to provide notice and the method of providing notice are set forth in the employer's written ESSTA policy. An employer that requires notice of *unforeseeable* leave must provide a written policy that contains reasonable procedures for the employee to provide notice as soon as practicable. The amendments include additional examples of such procedures for employees to provide notice of unforeseeable leave, such as sending an email or submitting a leave request in the scheduling software system.

The amendments also include a definition for when leave is *foreseeable* versus *unforeseeable*, stating that "[a] need is foreseeable when the employee is aware of the need to use safe/sick time seven days or more before such use. Otherwise, the need is unforeseeable."

## **Calculating Employees' Rate of Pay**

Under the ESSTA, covered employees are entitled to their "regular rate of pay" for safe and sick leave. The amendments clarify that the "regular rate of pay" means the employee's regular rate of pay at the time the safe or sick time is taken.

Employers must be careful not to give employees less than the highest applicable rate of the pay the employee is entitled to under applicable law, contract or agreement.

## **ESSTA Policy Requirements**

The amendments require employers to make a number of changes to their ESSTA policy, including, but not limited to:

1. If an employer requires an employee to provide reasonable notice of the need to use safe and

sick leave, this requirement and the method of providing notice must be specified in the policy.

2. If an employer requires employees to submit documentation in support of their use of safe and sick leave, then this must be specified in the written policy, as well as the documentation that the employer will accept and instructions on how employees can submit the documentation. In addition, if the employer withholds payment until such documentation is provided, the employer must include this in their policy as well as how the employee can submit requests for reimbursement.
3. Employers must include a more specific statement regarding confidentiality—that the employer “will not ask the employee to provide details about the medical condition that led to the employee to use sick time, or the personal situation that led to the employee to use safe time, and that any information that the employer receives about the employee’s use of safe/sick time will be kept confidential and not disclosed to anyone without the employee’s written permission or as required by law.”

## **Penalties**

Failure to comply with the requirements of the ESSTA can result in a broad range of penalties that will be imposed on a per employee basis.

## **Note for Employers**

Employers should update employee handbooks as soon as possible to reflect the new changes of the City’s ESSTA and an employer’s ability to comply with the new amendments.

Please contact [Mallory Campbell](#) or [Samuel Dobre](#), if you have questions about these amendments, or if you would like any additional information regarding New York City’s Earned Safe and Sick Time Act (ESSTA).

*\*Special thanks to Associate Trainee Camisha Parkins for her assistance in the preparation of this memo. Camisha is not yet admitted to practice law.*

