

NYC Amends Earned Sick and Safe Time Act

On September 28, 2020, New York City Mayor Bill de Blasio signed a bill amending the Earned Sick and Safe Time Act (ESSTA). The amended ESSTA took effect on September 30, 2020. Although the intent of the amended law was to make ESSTA synchronous with the New York State Paid Sick Leave Law (NYSSL), the revisions also made significant changes to the law unrelated to the NYSSL.

Changes to ESSTA for Consistency with NYSSL

The amendments which create consistency between ESSTA and NYSSL are as follows

Prior Law	Revised Law
"Employee" for purposes of ESSTA only applies to individuals who work in the city more than 80 hours in a calendar year.	"Employee" for purposes of ESSTA includes all individuals employed in the city of New York, regardless of number of hours worked.
Employers with fewer than five employees did not have to grant paid ESSTA to employees; they were required to provide unpaid ESSTA.	Employers with four or fewer employees and a net income of \$1 million or less in the previous tax year must provide 40 hours of unpaid ESSTA. Employers with four or fewer employees and a net income of \$1 million or more in the previous tax year must provide 40 hours of paid ESSTA. *See section on domestic workers below: employers with one or more domestic employees must provide leave.
Employers with five or more employees must provide up to 40 hours of ESSTA.	Employers with 5-99 employees must provide up to 40 hours of ESSTA. Employers with 100 or more employees must provide up to 56 hours of ESSTA.
Employers with five or more employees must allow carryover of up to 40 hours.	Employers with 100 or more employees must allow up to 56 hours of carryover (unless the employer frontloads ESSTA on the first day of each year).
Employers could impose a 120-day waiting period prior to allowing employees to use accrued/granted leave.	Employees may use leave as it is accrued. ** Employers with four or fewer employees and a net income of \$1 million or more in the previous tax year cannot use accrued time until January 1, 2021. ** Employers with 100 or more employees may limit the use of leave to 40 hours in 2020.

Documentation: ESSTA allows employers to request "reasonable" documentation from a medical provider to support an employee's need for the leave if the employee uses more than three consecutive ESSTA days and the requirement is part of the employer's written policy. However, the revised law now mandates that when an employer requires this documentation, the employer must reimburse the employee for any fee charged to the employee by the health care provider relating to producing the documentation. The same principle applies to documentation required by an employer to support an employee's need to take leave for "safe time" purposes, such as domestic violence, stalking, or sexual offenses.

Retaliation: The revised law broadens the definition of “retaliation” under ESSTA. Under the amended law, no person may take an adverse action against any employee that “penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights” under ESSTA. The revised law then provides a list of adverse actions, including, but not limited to, “threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee’s exercise of rights under ESSTA, blacklisting, and maintenance or application of an absence control policy that counts protected leave for safe/sick time as an absence that may lead to or result in an adverse action.” Adverse actions were also defined to include actions related to perceived immigration status or work authorization. A “causal connection” between the protected action and retaliation may be shown by either direct or indirect evidence. Additionally, the protected activity need only be a “motivating factor” for an adverse action, even if other non-protected factors contributed to the adverse action. Moreover, employees who mistakenly, but in good faith, assert their rights under ESSTA may not be retaliated against.

Pay Statement/Posting: The revised law requires employers to include on paystubs (or other form of written documentation provided to the employee each pay period), the amount of ESSTA time accrued and used during the pay period and an employee’s total balance of accrued ESSTA time. Moreover, employers must now conspicuously post the Notice of Employee Rights at an employer’s place of business “in an area accessible to employees.” Furthermore, the updated Notice of Employee Rights must be provided to employees at the time of hire; for those already employed as of September 30, 2020, the updated Notice of Rights must be provided by October 30, 2020. The Department of Consumer Affairs has yet to release a revised Notice of Employee Rights form.

Domestic Workers: The revised law expands the definition of “domestic worker” to include “any person who provides care for a child, companionship for a sick, convalescing or elderly person, housekeeping, or any other domestic service in a home or residence.” Furthermore, while the law previously allowed domestic workers who worked for the same employer for at least one year and more than 80 hours in a calendar year to earn 2 days of ESSTA, the revised law allows domestic employees (regardless of employer size, financial condition or number of hours worked in a calendar year) to accrue up to 40 hours of ESSTA at a rate of 1 hour for every 30 hours worked.

Enforcement: The Department of Consumer Affairs (the Department) may now investigate violations on its own initiative, as well as the upon the receipt of an employee complaint. Under the revised law, employers must respond to complaints from the Department within 14 days (a decrease from 30 days). Significantly, the revised law also provides the Department with the ability to grant relief not just for the complainant, but for “each and every employee or former employee” affected by the violation. Penalties to the employer shall now be imposed on a “per employee” basis.

Although the ESSTA took effect on September 30, 2020, the Department has posted language on its website stating that it will not enforce the paystub requirements of this law until November 30, 2020, provided an employer is attempting to comply with the requirements in “good faith.”

The extend and scope of this revised law are substantial and impose immediate requirements on employers. Employers affected by the amended law should act to revise their policies as soon as possible, as well as to comply with the revised law’s other provisions.

Please contact [Kerry Langan](#), [Theresa Rusnak](#), or any attorney at Bond Schoeneck & King for more information.



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