

EMPLOYEES ENJOY A PRIVATE RIGHT OF ACTION UNDER CHANGES TO NEW YORK CITY EARNED SAFE AND SICK TIME ACT

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Recently, New York City adopted an amendment (the “Amendment”) to the New York City Earned Safe and Sick Time Act (“ESSTA”) that provides a private right of action to aggrieved employees. Employees alleging violations of ESSTA may now commence a civil action in court against their employer within two years of the date of the alleged violation or when the employee should have known of the violation. The Amendment, which the New York City Council passed on December 20, 2023, became law after Mayor Eric Adams returned the bill unsigned, but did not veto it. The Amendment will go into effect on March 20, 2024.

Prior to the Amendment, New York City employees alleging violations of ESSTA were limited to filing complaints with the New York City Department of Consumer and Worker Protection (“DCWP”), the administrative agency that enforces ESSTA. Notably, the Amendment does not require that an employee file a claim with the DCWP prior to commencing in action in court. Rather, employees may file a civil action in court, **or** an administrative complaint with DCWP, against employers, seeking compensatory damages, injunctive relief, declaratory relief, attorney’s fees, and any other appropriate relief.

October 15, 2023, ESSTA Rule Changes

In addition to the recent Amendment, the City’s DCWP changed its safe and sick time regulations effective October 15, 2023 (the “2023 Rule Changes”). The 2023 Rule Changes clarified an employer’s compliance obligations under ESSTA with regard to:

- Accrual, use, and carryover requirements for large employers;
- Certain notice obligations for employers;
- Defined terms; and
- Obligations in relation to documentation.

Accrual, Use, and Carryover Requirements

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Under ESSTA and the New York State Paid Sick Leave Law, employers are required to provide leave based on number of employees and/or net income. For example, employers with four employees or fewer and less than \$1 million in net income must provide each year 40 hours of unpaid leave; employers with four employees or fewer and more than \$1 million in net income must provide each year 40 hours of paid leave; employers with 5 to 99 employees must provide each year 40 hours of paid leave; and employers with over 99 employees must provide each year 56 hours of paid sick leave. The 2023 Rule Changes clarified which persons New York City employers must count for purposes of calculating leave under ESSTA.

Under the 2023 Rule Changes, “[e]mployer size [is] determined based on the employer’s total number of employees nationwide” and includes part-time employees, employees that may be on another employer’s payroll under a joint employer arrangement, and employees who may not be working due to a statutory or disciplinary leave. The highest number of employees during a calendar year is the number on which the employer must rely for determining size under ESSTA and calculating the amount of leave to which an employee is entitled. Accordingly, employers that are required to provide paid leave under ESSTA, due to an increase in size, are prohibited from later providing unpaid leave due to a subsequent decrease in size until the next calendar year.

The 2023 Rule changes also clarified the amount of leave that employees may carryover each year under ESSTA, which is also based on the employer’s size. Employers with 99 or fewer employees may allow employees to carryover up to 40 hours of leave per year, and employers with 100 or more employees may allow employees to carryover 56 hours of leave per year. Notwithstanding the amount of leave an employee carries over, an employer may cap the amount of leave an employee uses under ESSTA at the amount of time that employee could accrue in a calendar year.

Notice and Documentation Obligations

Although employers are permitted to request reasonable notice of an employee’s foreseeable need to use ESSTA leave, under the 2023 Rule Changes, an employer may only request reasonable notice if “the requirement to provide notice and the method of providing notice are set forth in [a] written policy.” The 2023 Rule Changes included an email to a designated email address and submission in a scheduling software system as permissible procedures for requesting leave.

Furthermore, the 2023 Rule Changes clarified the definition of healthcare provider and included licensed clinical social worker, licensed mental health counselor, or “other” health care professional, significantly broadening who may provide documentation that supports an employee’s need for leave.

The 2023 Rule Changes also placed an obligation on employers to notify employees of the amount of leave available, the amount of leave the employee has accrued, and the amount the employee has used. Employers may inform employees of their paid sick leave, usage, and accrual on pay statements or “other” form of written documentation.

Enforcement

Under the 2023 Rule Changes, employers will be “inferred” to have an unofficial or official policy or practice of violating the ESSTA if the employer fails to maintain adequate records in connection with an employees’ accrual, use, and carryover of ESSTA leave, among other reasons.

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In light of the recent Amendment and the 2023 Rule Changes, New York City employers need to review handbooks and policies to ensure they are complying with the ESSTA. Employers should also train human resources personnel and management on how best to comply with the new changes.

If you have any questions about ESSTA, or need help updating your organization's ESSTA policy to reflect the recent changes, please contact [Charles H. Kaplan](#) (646.218.7513), [Glen P. Doherty](#) (518.433.2433), [Kinsey A. O'Brien](#) (716.848.1287), or any other member of our [Labor & Employment Practice](#).

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