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NYC Prescribes Changes for Sick Time Rules

New York City's Earned Sick Time Act requires private-sector employers to provide a minimum amount of job-protected sick time to full-time and part-time employees who work in the city. Amendments to the Earned Sick Time Rules took effect on March 4, altering the regulatory landscape in a number of significant ways. Employers should evaluate whether they need to make any changes to current leave policies and practices to ensure compliance.

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Background

Originally enacted in 2013 and amended in 2014, New York City's Earned Sick Time Act (Act) requires private-sector employers with employees who work in the City of New York to provide a minimum amount of job-protected sick time. (See our March 27, 2014 *For Your Information*.) Beginning April 1, 2014, employers with five or more employees are required to provide eligible full-time and part-time employees up to 40 hours of paid sick leave annually. Smaller employers must provide an equal amount of job-protected, but unpaid, sick leave.

Final Sick Time Rules

Following a public hearing in January 2016, the Department of Consumer Affairs (DCA) adopted final, amended Earned Sick Time Rules, effective March 4, 2016. The final rules provide a number of important clarifications on the paid sick leave law, and add new requirements for employers. Substantive changes and notable clarifications include the following.

Written Policy Requirement

The Act requires employers to maintain written sick leave policies that meet or exceed the law's minimum requirements and to distribute them to their employees. Employers cannot meet these requirements by satisfying their additional and separate obligation to provide employees with the Notice of Rights available from the DCA. The final rules clarify that employers must distribute their own written sick time policies that set forth, at a minimum: (1) the method of calculating paid sick time (e.g., accrual rate or frontloading); (2) the use of sick time and any

limitations on its use (such as notice or documentation requirements, the consequences for failing to provide required documentation, minimum increment for using sick time, and disciplinary action for misusing sick time); and (3) carryover policy for unused sick time at year end.

Minimum Use Increments

With limited exceptions, the Act generally allows an employer to set up to a four-hour minimum daily increment for using sick time. Under the final rules, an employer can also establish additional use requirements. For sick time that exceeds the minimum daily use increment, employers may also require employees to use that sick time in fixed periods of 30 minutes or less, and may fix start times for those periods (such as on the hour or half-hour).

For example, an employer's policy has a 4-hour minimum usage increment and requires sick time beyond four hours to be used in 30-minute intervals that start on the hour or half-hour. An employee who is scheduled to work from 8:00 a.m. to 4:00 p.m. schedules a doctor's appointment for 9:00 a.m. The employee was to have begun work at noon, but runs late, arriving for work at 12:15 p.m. The employer can require the employee to use 4½ hours of accrued sick time and begin work at 12:30 p.m.

Accrual, Hours Worked and Rate of Pay

The final rules provide additional guidance on accrual rates that apply to certain categories of employees. Scheduled shifts for on-call employees who are compensated regardless of whether they work count as hours worked for sick time accrual purposes. Employees paid on a piecework basis and employees paid on a commission basis both accrue sick time according to the actual length of time they spend performing work. Employers would base hours of sick time used by employees with indeterminate shift lengths on the hours worked by the replacement employee for the same shift, if possible.

The final rules clarify that employers are not required to pay cash in lieu of supplements for sick time used if remuneration for employment includes supplements (such as health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay life insurance, and apprenticeship training).

Cashouts and Carryover

Notably, the final rules do not address the requirement to pay out earned, unused sick time at year end. However, according to the DCA's Frequently Asked Questions (FAQs), employers that frontload a full 40 hours of sick leave at the beginning of the calendar year and also on the first day of each subsequent calendar year are not required to cash out unused time in lieu of allowing carryover.

The final rules confirm that employers are not required to carry over earned, unused time if the employers frontload 40 hours of sick time at the beginning of the year and pay out unused sick time at the end of the year. An employer is generally not required to pay the employee for unused sick leave upon separation, but may have to reinstate the time accrued if the employee is rehired within 6 months.

Temporary Help Firms, Staffing Agencies and Joint Employers

The final rules define "temporary help firm" (such as a staffing agency) as "an organization that recruits and hires its own employees and assigns those employees to perform work or services for another organization 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." The rules clarify that temporary help firms are solely responsible for complying with the NYC sick time requirements applicable to the temporary employees they place with a client, regardless of the client's size.

The final rules also broadly define "joint employer" for purposes of complying with the NYC sick leave law as "two or more employers [that] have some control over the work or working conditions of an employee." The FAQs provide a non-inclusive list of factors DCA will consider in determining joint employer status for these purposes. As the FAQs also explain, if an employee has two or more joint employers, the employee does not accrue separate leave balances with each employer. Rather, all of the work performed by a jointly-employed employee is considered a single employment and the hours worked for all joint employers are aggregated for both accrual and use purposes. While joint employers may allocate compliance responsibilities among themselves, each joint employer remains individually and jointly responsible for compliance with all applicable provisions of the sick leave law and any penalties for violation.

Recordkeeping Requirements

The Act requires employers to maintain records for at least three years documenting compliance. The final rules add a number of specific records that must be maintained for each employee. Those records must show, among other things, dates of employment, pay rates, exempt/nonexempt status, hours worked each week, date and time of each instance of sick leave use with amount paid, any change in material terms of employment, and the date the Notice of Rights was provided to the employee along with proof of receipt.

Enforcement and Penalties

Under the final rules, the employer is subject to a penalty of $500 for failure to respond to a notice of violation by the DCA on or before the hearing date, in addition to penalties for other violations. Importantly, the rules make clear that employers will be subject to a per employee penalty for violation. Thus, an employer that is found to have an official or unofficial policy of not providing sick time as required under the Act or not allowing its use will be charged with a violation for each employee affected by the policy.

Use and Abuse of Sick Leave

While the final rules generally prohibit employers from taking action that is likely to deter an employee from exercising his or her rights under the Act, they also allow employers to take disciplinary action, up to and including termination, against employees who abuse sick leave. Disciplinary offenses may include, for example, using unscheduled sick time on either side of weekends, scheduled days off, holidays, vacation or pay days. Similarly, discipline may be warranted for taking sick time on days when other leave has been denied, or when the employee is scheduled to work an undesirable shift or job.

The final rules make clear that employers are prohibited from taking any adverse employment action — "any act that is reasonably likely to deter an employee from exercising rights guaranteed under the Earned Sick Time Act." In making that determination, the DCA will consider both direct evidence of retaliatory motive as well as indirect evidence (timing of the employment action in relation to the protected employee activity). Retaliation will be established when the DCA shows that the protected activity was one of the motivating factors in the adverse employment action.

In Closing

Noteworthy amendments to the NYC paid sick leave law took effect on March 4, changing the regulatory landscape in a number of significant ways. Employers should review their current leave policies and practices to determine whether they need to make any changes to ensure compliance.

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