Employment

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# Update: Final Rules Clarify New York City Employers' Sick Leave Obligations

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*In response to widespread employer concerns over ambiguities in New York City's Earned Sick Time Act ("ESTA"), the New York City Department of Consumer Affairs ("DCA") published its Final Rules regarding the ESTA on July 30, 2014. Employers must now ensure that their sick leave policies comply with the ESTA, as amended on March 20, 2014, and the Final Rules, which provide additional guidance on requirements of employers.*

As discussed in Pillsbury Client Alerts on January 6 and March 24, 2014, the ESTA applies to almost all private employers with at least one employee working in the City. As of July 30, covered employees who have worked for their employer since April 1, 2014—the ESTA's effective date—became entitled to use their accrued sick leave. Under the ESTA, private employers with five or more employees working in the City are required to afford up to 40 hours of *paid* sick leave per calendar year to covered employees. Private employers with fewer than five employees working in the City are still required to provide up to 40 hours of *unpaid* sick leave to covered employees. As affirmed by both the ESTA and the Final Rules, employers are free to adopt more generous leave policies than mandated under the ESTA.

While the Final Rules, which adopted many of the provisions in the preliminary version of the Rules introduced on March 28, clarify specific parts of the ESTA, they also leave employers less discretion over the way certain requirements must be implemented.

## Covered Employees

The Final Rules state that an employee is entitled to the protections of the ESTA, regardless of immigration status, so long as he or she is employed for hire within the City for more than 80 hours in a calendar year. Notably, an employee is considered "employed for hire within the city of New York" if he or she performs work for the employer while that employee is *physically located* in the City, regardless of whether the employer actually has an office in the City. Employees who telecommute from the City, for example, are covered under the Final Rules.

## Rate and Timing of Pay for Used Sick Leave

Of great concern to many employers is the rate at which sick leave must be paid. The Final Rules dictate that an employee who takes paid sick leave must be compensated at the same hourly rate that the employee would have earned at the time the paid sick leave is used. But, where employees use sick leave during hours that would have been designated as overtime, their employers are not required to pay the overtime compensation rate.

For employers in the hospitality industry, tipped employees must receive at least the minimum wage (currently $8 per hour, and set to rise to $8.75 on December 31, 2014) on days in which they use sick leave—though they are not entitled to lost tips or gratuities. Employees compensated on a commissioned basis must receive their base wage or the minimum wage, whichever is greater.

Employers must also ensure that sick leave is paid no later than the payday for the next regular payroll period that begins after the employee uses his or her sick leave. If an employer has requested written documentation or verification of an employee's use of sick leave (described more fully below), however, the employer is not required to pay sick leave until that employee has provided the requested documentation or verification.

## Minimum Hourly Increments for Use of Sick Leave

According to the Final Rules, employers may require employees to use their sick leave in specified increments, so long as the minimum increment does not exceed four hours per day. If the minimum increment set by the employer is not "reasonable under the circumstances," then the Final Rules suggest that the employer adopt a lower threshold for that employee. For example, if an employer sets a four-hour increment policy, but an employee has not yet accrued four hours of sick leave, then that employee should be allowed to use the lesser number of hours he or she is entitled to at that time.

## Employers' Requests for Advance Notice and Documentation

In general, employers may obligate employees to provide "reasonable" notice of their need to use sick leave. If the need to use sick leave is not foreseeable, employees should notify their employer "as soon as practicable." In deciding when notice is "practicable," the "individual facts and circumstances" of the situation must be assessed.

Also, as mandated by the Final Rules, employers that require advance notice of the need to use sick leave must provide a written policy containing procedures for employees to give such notice. For example, employers may instruct employees to follow a specific call-in procedure or use another "reasonable and accessible" means of communication with the employer. Employers that fail to provide employees with a copy of their written policy for providing notice may not prohibit an employee from using sick leave based on his or her non-compliance with the policy.

Where an employee is absent for more than three consecutive work days[1] due to his or her use of sick leave, employers may require that employee to provide "reasonable written documentation" confirming that the use of sick leave was authorized under the ESTA. This "reasonable documentation" requirement would

[1] "Work days" is defined as the "days or parts of days" the employee would have worked had he or she not used sick leave.

be satisfied by a document, signed by a licensed health care provider, indicating the need for the amount of sick leave taken. Upon that employee's return to work, he or she must be afforded at least seven days to obtain the documentation. And, once an employee has provided such documentation, the employer may not require that employee to procure documentation from a second health care provider.

## Joint Employer Liability and Employers' Sale of Business

Under the Final Rules, two or more businesses may be considered a "joint employer" of an employee, even where the employers are separate and distinct entities. If an employee is employed jointly, "all of the employee's work for each of the joint employers will be considered as a single employment for purposes of accrual and use of sick time" (emphasis added). While joint employers may choose to divide responsibilities for complying with the ESTA requirements among themselves, they are held individually and jointly accountable for any ESTA violations.

In the event that an employer sells its business or is acquired by another employer, an employee will retain and may use all accrued sick leave if he or she continues to perform work in the City for the successor employer. Successor employers must recognize sick leave accrued by employees prior to the sale of the business.

## Informing Employees of Sick Leave Policies

The Final Rules emphasize that employers must distribute or post their written sick leave policies, as failure to do so may result in civil penalties. Employers may distribute the policies to each employee personally or through employee handbooks, by posting the policies in a conspicuous place where notices are customarily posted, or through other means that the employer uses to comply with its notice obligations under New York State Labor Law § 195(5).

Recently, the DCA posted its Notice of Employee Rights in additional languages, which are available on the DCA's website. Employers must distribute the Notice to all new hires upon commencement of their employment, in both English and in the employee's primary language, if a version of the Notice in that language is available on the DCA's website.

In light of the City's adoption of these Final Rules, employers should immediately review their sick leave policies to ensure that their policies contain, among other things:

- Procedures for the employee to provide notice of the need to use sick leave, where the employer elects to require that advance notice be given.
- Information about the employees' obligation to provide documentation or verification of their need to use sick leave—as well as the consequences of any failure or delay in providing documentation or verification—where the employer chooses to require such documentation or verification.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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