

NYC Department of Consumer and Worker Protection Issues Final Rules Under NYC's Earned Safe and Sick Time Act

In September 2023, the New York City Department of Consumer and Worker Protection (“the Department”) finalized amendments to rules (“final rules”) under the New York City Earned Safe and Sick Time Act (“ESSTA”). These rules follow the New York City Council’s amendments to ESSTA in 2020 to align the City law more closely with New York State law. The final rules, among other things, clarify the eligibility conditions for employees to secure benefits, the method for calculating employer size and coverage thresholds, and other enforcement provisions. Below, we provide an overview of the key takeaways.

Background of ESSTA’s Key Provisions

Statutory Thresholds for Paid and Unpaid Safe/Sick Time: ESSTA provides New York City employees with time to be taken for safe and sick leave purposes. Eligibility for this leave depends on the size of the employer. Under New York’s Administrative Code, employers with five or more employees or one or more domestic workers must provide paid safe/sick time. If an employer employs four or fewer employees but has an income of a million dollars or more in the previous year, that employer must also provide paid safe/sick time. Any employee or worker not entitled to paid safe/sick time under ESSTA has a legal right to unpaid time off.

Accrual of Safe/Sick Time: An employee’s accrual of safe/sick time likewise depends on the size of the employer. Employees ordinarily accrue an hour of sick/safe time for every 30 hours that they work, with hours capped depending on the size of the employer. Employers with one hundred or more employees must provide at least 56 hours of safe/sick time per calendar year to each of their employees. Employers with fewer employees must provide at least 40 hours of safe/sick leave per calendar year. (Employers may of course provide more safe/sick time to their employees if they wish to do so.)

The Final Rules

Calculating Employer Size: The final rules clarify that calculating employer size for the purposes of ESSTA depends on the number of employees nationwide. Part-time hires, employees on paid/unpaid leave or those who are otherwise temporarily absent, and employees hired jointly with other employers are all counted when determining an employer’s size.

Crossing Statutory Thresholds Mid-Calendar Year: The duty to provide safe/sick time in a calendar year is prospective from the date that the employer crosses the statutory headcount threshold. For example, if an employer with three workers hires four additional employees in the calendar year (thus exceeding the statutory threshold of five employees), then the obligation to provide safe/sick time begins from the time the headcount meets or exceeds the statutory threshold. Likewise, if an employer with ninety-nine employees hires two more workers in the calendar year, then the obligation to provide 56 hours of paid safe/sick time arises on the date on which the headcount meets or exceeds one hundred employees.

By contrast, in the event that the headcount dips below the statutory threshold, it does not impact an employer’s duty to provide paid safe/sick leave for the remainder of the calendar year. An employer whose headcount reduces from six to two in a calendar year still has a duty to provide their current employees with up to 40 hours of paid safe/sick time for the remainder of the calendar year. Any changes in the ownership structure of the employer’s business – including sale of the business,

transfers in stock, or even changes in the subcontracting relationships – do not affect its employees' statutory rights to avail their accrued safe/sick time.

Eligibility for Statutory Benefits: The final rules clarify which employees may claim benefits under ESSTA in light of many employers' decisions to shift to "remote" and "hybrid" work following the pandemic. The final rules establish:

- Employees (including fully remote workers) whose physical place of work is in New York City can claim ESSTA's benefits regardless of their employer's location.
- Employees who work physically only outside of New York City cannot claim any benefits, even if they work for employers within the City.
- Employees with primary work locations outside the City but who work regularly within the City are eligible for benefits, but only the hours worked in New York City count for accrual purposes. Such workers must work 30 hours physically within New York City to accrue an hour of safe/sick time.

Documentation to support the use of safe/sick time: An employer is prohibited from requesting documentary support for any use of safe/sick time leave that is three or fewer days in duration. When an employee uses safe/sick time for more than three consecutive days, the employer may request documentary support. In such cases, reasonable supporting documentation includes a note by a licensed health care provider (including clinical social workers and mental health counselors) indicating the employee's need for such time. The employer cannot require any further disclosure. The employer must reimburse all reasonable costs of obtaining any such documentary support.

Carryover of accrued time: The amended rules clarify how accrued time carries over across calendar years. Employers must maintain a record of the balance of accrued safe/sick time for each of their employees. Unless employers have a policy of paying out unused safe/sick time at the end of the calendar year, employers with ninety-nine or fewer employees may allow employees to carry over 40 hours, while larger employers (with 100 or more employees) may permit carrying over 56 hours. However, no matter how many hours an employee accrues across different calendar years, employers are not required to permit employees to use more than 40 or 56 hours, as applicable, in any given calendar year (Employers may, of course, provide more hours in their discretion).

Notice of Benefits: Employers must notify their employees either on a pay stub or through any other form of written documentation of the balance of safe/sick time that they accrued in the pay period and the amount of time available for use in the calendar year. As noted above, employers are not required to permit employees to use more than 40/56 hours of safe/sick time in a calendar year. When an employee's balance of accrued time exceeds the amount of time that they can use in the calendar year, the employer must notify the employee of this fact.

If the employer uses an electronic system for generating pay stubs or documents relating to safe/sick time, then the employer can comply with the notice provisions by doing all of the following: (i) alerting their employees electronically during each pay period of the balance of accrued time and the amount of time available for use in the calendar year; (ii) making this information accessible to employees electronically from outside the workplace; and (iii) making such information for any past pay period also readily available to employees from outside the workplace.

Enforcement Provisions: The final rules also clarify ESSTA's enforcement capabilities. There is a "reasonable inference" of statutory non-compliance where employers (i) fail to maintain and circulate a written safe/sick time policy; or (ii) fail to record the employees' accrual of safe/sick time. The final rules describe other facts that may warrant an inference of non-compliance, such as failing to notify employees about available safe/sick time, creating barriers to using this time (including unreasonable notice requirements or requirements for additional documentation), requiring waiting periods for using safe/sick time, failing to pay employees during paid safe/sick time off, failing to carry over time, and issuing other prohibitions against using safe/sick time.

Employers within New York City or employers with any employees working in New York City should review these finalized rules carefully to ensure their safe/sick time policies and documentation comply

with ESSTA's requirements. Employers who violate ESSTA may be liable for fines starting from \$250 to \$500 for every violation committed against an individual employee in each calendar year. For more serious violations, the Department is also authorized to direct employers to provide backpay, reinstate unlawfully discharged workers, and issue other types of equitable relief where necessary.

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