



NOVEMBER 2, 2018

Westchester County Enacts Earned Sick Leave Law

Effective April 10 2019, under the recently enacted Westchester County Earned Sick Leave Law (the "Law"), employees of an employer with five or more employees will be entitled to earn and use, at a minimum, up to 40 hours of paid sick time in a year. Under the Law, paid sick time must be compensated at the same hourly rate as the employee normally earns during hours worked. Employees of an employer with fewer than five employees will be entitled to earn and use up to 40 hours of unpaid sick time in a year.

Covered Employers and Employees

In determining the number of employees performing work for an employer, all employees performing work for compensation on a full-time, part-time, or temporary basis will be counted. However, where the number of employees who work for an employer per week fluctuates, the number of employees for the current calendar year may be based on the weekly average number of employees who worked during the preceding calendar year. "Calendar year" means from January 1 to December 31. Notably, all domestic workers employed by any employer, regardless of the number of domestic workers employed, will be entitled to earn and use up to 40 hours of earned paid sick time in a year, unless the employer selects a higher limit.

The Law covers employees employed for hire for more than 80 hours in a calendar year in any employment within Westchester County, including work performed in subsidized private sector and not-for-profit employment programs, but excluding work performed: (1) as a participant in a work experience program established by a services district; (2) pursuant to work study programs; and (3) by employees compensated by or through qualified scholarships.

The Law does not apply to employees covered by a valid collective bargaining agreement if: (1) such provisions are expressly waived in such collective bargaining agreement; and (2) such agreement provides for a comparable benefit for the employees covered by such agreement in the form of paid days off.

Accrual of Earned Sick Time and Employer's Options

Under the Law, all employees, except for domestic workers, will accrue a minimum of one hour of sick time for every 30 hours worked at the commencement of employment or 90 days after the Law goes into effect, whichever is later. Domestic workers accrue a minimum of one hour of sick time for every seven days worked, which is in addition to the one day of rest provided for in New York State Labor Law section 161(1). Additionally, an employer may, at its discretion, loan earned sick time to an employee in advance of accrual by such employee. The maximum amount of sick leave to be accrued in a year, defined as a regular and consecutive 12-month period as determined by the employer, is 40 hours.

The Law also provides that in lieu of calculating the accrual of earned sick time, employers have the option to provide employees with sick time and personal time totaling 40 hours or more per calendar year, or the year as determined by the employer (e.g., employee's anniversary date). However, the employee must be permitted to take sick time as needed, with no advance notice necessary and no restrictions on use of earned sick time other than those provided by the Law.

Protections for Earned Sick Leave

Earned but unused sick time can be carried over to the following year, provided that the maximum amount of sick leave for any given year remains at 40 hours. Additionally, if an employee, including domestic workers, is transferred to a separate division, entity, or location within Westchester County, but remains employed by the same employer, the employee is entitled to all unused earned sick time accrued at the prior division, entity, or location provided that said prior division, entity, or location is also located in Westchester County.

Other protections include reinstatement of previously accrued but unused sick time when there is a separation from employment and the employee is rehired within 9 months of separation by the same employer, and entitlement to all unused earned sick time accrued when one employer is succeeded by another employer.

Use of Earned Sick Time

Under the Law, earned sick time may be used for:

- (1) An employee's or family member's mental or physical illness, injury, or health condition; need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or need for preventative medical care;
- (2) If authorized by an employer who is willing to pay for the use of an employee's earned sick time, an employee's mental or physical illness, injury, or health condition or need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition the employer reasonably determines requires immediate attention;
- (3) The care of an employee or family member when it has been determined by the public health authorities that the employee's or family member's presence in the community may jeopardize the health of others because of his or her exposure to a communicable disease whether or not the employee or family member has actually contracted the communicable disease;
- (4) The closure of the employee's place of business by order of a public official due to a public health emergency;
or
- (5) The closure of a day care, or elementary or secondary school, attended by an employee's child where such closure was due to a public health emergency.

An employee's ability to use earned sick time may be delayed until the employee has worked for 90 days. In the event that an employee only needs to use a portion of a day of earned sick time, the employee may use a minimum of four hours and then, if more time is needed, the smallest increment that the employer's payroll system uses to account for absence or use of other time.

Procedures Relating to the Request of Earned Sick Time

Under the law, earned sick time must be provided upon the request of an employee. Employees can make requests orally, in writing, electronically, or by any other means acceptable to the employer. The request must include the expected duration of the absence when possible. Employees must also make a “good faith effort” to provide notice to the employer in advance when the use of earned sick time is foreseeable and must make a reasonable effort to schedule the use of earned sick time in a manner that does not unduly disrupt the operations of the employer.

If an employer requires notice of the need to use earned sick time, they must provide a written policy that contains the procedures for the employee to provide notice. Otherwise, employers cannot deny earned sick time to employees based on noncompliance with such policy.

Additionally, employers may not require employees to find another employee to work during the time of the employee’s absence as a condition of the employee’s use of earned sick time. For earned sick time of more than three consecutive work days, an employer may require the employee to provide reasonable documentation that the earned sick time was used for a purpose covered by the Law. Reasonable documentation for this purpose can be documentation provided by the employee and signed by a health care professional indicating that earned sick time is necessary.

Exercise of Protected Rights and Retaliation Prohibited

The Law makes it unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, the right to use earned sick leave. It is also unlawful for an employer to include used earned sick time as an absence that may lead to or result in discipline, discharge, demotion, or suspension. Employers are prohibited from retaliating against employees due to employees: (1) requesting to use or using earned sick time; (2) filing a complaint regarding an employer’s alleged violation of the Law; or (3) informing another employee of his or her rights under the Law. Additionally the Law creates a rebuttable presumption of unlawful retaliation whenever an employer takes adverse action against an employee within 90 days of the filing of a complaint regarding an employer’s alleged violation of the Law.

Notice, Posting, and Recordkeeping Requirements

Employers must give employees a copy of the law and written notice of how the Law applies to the employee at the commencement of employment or within 90 days of the effective date of the Law, whichever is later. Employers must also display a copy of the Law and a poster in English, Spanish, and any other language deemed appropriate by Westchester County, in a conspicuous location accessible to employees. An employer who willfully violates the notice and posting requirements will be subject to a civil fine of up to \$500 per offense.

Employers must retain records clearly documenting the hours worked by employees and earned sick time accrued and taken by employees, for a period of three years. The Law creates a rebuttable presumption of a violation for an employer’s failure to retain records.

Enforcement, Civil Action, and Penalties

An employee may file a complaint with the Weights and Measures Division of the Westchester County Department of Consumer Protection, or bring a lawsuit, within one year of an alleged violation of the Law. The Law provides a wide range of remedies if either a hearing officer or court finds that the employer violated the Law, including the payment of three times the wages due to an employee whom the employer unlawfully failed to compensate for the use of earned sick time, as well as attorney’s fees and litigation costs.

Comparison to New York City's Earned Safe and Sick Time Law

Westchester County's Earned Sick Leave Law does not provide for "safe" time, which New York City's Earned Safe and Sick Time Law provides for purposes relating to domestic violence or unwanted sexual contact, stalking, or human trafficking.

Takeaway for Employers

Employers that do not currently have a paid sick leave policy or have one that falls short of the Law's requirements should begin to develop a compliant one now. Employers that already provide their employees with paid sick leave benefits that meet or exceed the Law's requirements should update their policies and procedures to make sure they comply with the new law as set forth above, including the notice, posting, and recordkeeping obligations.

It should also be noted that in the case of employees covered by a valid collective bargaining agreement in effect on April 10, 2019, the new law takes effect on the date of the termination of such agreement. Employers that have a unionized workforce in Westchester County should review applicable collective bargaining agreements to determine if changes will be necessary when the agreements are renewed or renegotiated.

Employers with employees in both New York City and Westchester County may be able to adapt their New York City-compliant program for their Westchester County employees since both law are similar in many respects.

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If you have any questions regarding Westchester County's Earned Sick Leave Law, please do not hesitate to contact us.

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