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NYC Department of Consumer Affairs Adopts Final Rules Regarding the Earned Sick Time Act

The New York City Department of Consumer Affairs (the “Department”), the enforcement agency for the “Earned Sick Time Act” (“ESTA”), recently adopted a set of final rules clarifying certain provisions of ESTA and establishing requirements to assist in ESTA’s implementation. This client advisory summarizes some of the main aspects of the final rules.

Joint Employers

The final rules discuss the responsibilities of employers in a joint employer relationship. Although the rules themselves do not define joint employers, the Department’s “Frequently Asked Questions” (“FAQs”) website asserts that whether a business is a joint employer depends on “the extent to which the employer exercises formal and functional control over the employee.” The website specifies a number of factors the Department will consider in determining whether there is a joint employer relationship, including but not limited to: (1) whether the business can hire and fire the employee; (2) supervision and control of the employee’s work schedule or conditions of employment; (3) whether the business determines the rate and method of pay of the employee; (4) location and maintenance of employee records; (5) employee’s use of the business’s premises and equipment; (6) whether the employee performs discrete work integral to the business’s production or work; (7) whether the employee works exclusively or predominantly for the business; and (8) whether the business provides training for the employee. Both the FAQs and the final rules state that joint employers may be “separate and distinct entities with separate owners, managers and facilities”.

A business that is deemed a joint employer must include jointly employed individuals when assessing whether it is required to provide paid sick leave under ESTA. The final rules offer the example of an employer with three permanent employees and three workers from a

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temporary help agency that the employer jointly employs. This employer therefore has six employees for the purposes of ESTA and must provide paid sick time. All of a joint employee's work for each of the joint employers counts toward the accrual and use of sick time under ESTA. The final rules permit joint employers to allocate among themselves responsibility for certain ESTA requirements such as notice and recordkeeping, but such agreements will not spare any joint employer from joint and individual liability for compliance with all applicable provisions of ESTA.

Covered Employees

ESTA defines an employee, in relevant part, as an individual "who is employed for hire within the city of New York for more than eighty hours in a calendar year". The final rules clarify that an individual is "employed for hire within" New York City if he or she performs work, including telecommuting, while physically located in New York City, regardless of where the employer is located. If an employee performs work outside of New York City for a company based within New York City, such hours do not count toward the employee's 80 hours of work under ESTA.

The final rules also make clear that an individual who otherwise meets the definition of "employee" under ESTA is entitled to ESTA's protections and benefits, regardless of immigration status.

Minimum Use of Sick Time

ESTA permits employers to set a "reasonable minimum increment" for sick time use, not to exceed four hours. However, the final rules clarify that the four-hour increment may not always be reasonable under the circumstances. The final rules provide the following example: an employee has worked 80 hours and more than 120 calendar days have passed since the employee's first day of work, but the employee has not yet accrued four full hours of leave. The final rules conclude that, under those circumstances, it is not reasonable for the employer to require the employee to use four hours of sick time as the minimum increment of sick time use.

Employee Notification and Provision of Documentation

Under ESTA, an employer may require an employee to provide up to seven days' notice of the need to use sick time where the need is foreseeable, and notice "as soon as practicable" where the need is not foreseeable. The final rules expand on this by providing that sick leave may not be denied on grounds of inadequate notice unless the policy is written and distributed to employees in advance, and explains the notice procedures. For notice given "as soon as practicable", examples of such

procedures may include calling a designated phone number and leaving a message, following a uniform call-in procedure, or “another reasonable and accessible means of communication identified by the employer.” For leave that is foreseeable, the employer may require notice in writing.

Employers may also require reasonable documentation that the use of sick time was authorized by ESTA when the employee is absent for more than three consecutive work days. The final rules and FAQs clarify that “work days means the days or parts of days the employee would have worked had the employee not used sick time” and that a “workday does not need to be a ‘full’ day if the employee works part time”. ESTA states that documentation signed by a licensed health care provider indicating the need for the amount of sick time taken is considered reasonable documentation. The final rules require employers to permit employees at least seven days from the date the employee returns to work to obtain such documentation. Further, the final rules prohibit employers from requiring the employee to obtain a second opinion regarding the need for sick time used if the employee provides documentation from a licensed healthcare provider. The final rules state that the employee is responsible for any costs of such documentation not covered by insurance or another benefit plan.

Payment of Sick Time

Employees who use paid sick time must be paid at the same hourly rate that the employee would have earned if he or she worked that time. If, however, the employee uses sick time during hours that would have been considered overtime, the employer need not pay the overtime rate.

The final rules clarify that sick time must be paid no later than the payday for the next regular payroll period beginning after the employee utilized the sick time. However, if the employer has asked for written documentation from a licensed health care provider or verification from the employee of use of sick time, the employer does not have to pay sick time until the employee has provided such documentation or verification. If the employer requires documentation or verification, these requirements, as well as any consequences resulting from noncompliance with the requirements, must be included in the employer’s written sick time policy.

Distribution and Notice of Policies

ESTA requires employers to give employees a notice of employee rights, and the Department has provided a copy of such notice in numerous languages on its website. The final rules also require every employer to distribute or post their written policies on sick time, “using a delivery method that reasonably ensures that employees receive the

policies”. Such delivery methods may include: (1) distribution via mail, email, or in person; (2) distribution through company newsletters or newspapers; (3) inclusion in employee handbooks or manuals; (4) inclusion with paychecks; (5) posting on the company intranet; (6) posting the policy in a conspicuous place where other employee notices are normally posted; or (7) any method which the employer uses to comply with its obligations under § 195(5) of the New York Labor law. The rules make clear, however, that nothing prevents an employer from making exceptions to its written sick time policy for individual employees when such exceptions are more generous than the terms of the written policy.

Employers must retain records documenting compliance with ESTA, including copies of their sick time policies, for three years, unless otherwise required pursuant to another law, rule, or regulation.

Enforcement

The final rules elaborate on the Department’s authority to enforce ESTA, including by issuing subpoenas, document demands, or by requesting to view records “upon appropriate notice”. The final rules further note that the Department may conduct an investigation on its own initiative when it has reason to believe the facts and circumstances of an employer’s ESTA practices so warrant, including when an employer has a history of non-compliance with ESTA, where the Department has reason to believe the employer engages in certain unlawful employment practices, and as part of a coordinated enforcement effort with other agencies to protect employee rights.

Employers are encouraged to review their sick time policies for compliance with the Act and the final regulations. If you have any questions or would like detailed information about the Act or the regulations, please contact Tina Grimshaw at (212-758-7792) or any other attorney at the Firm.

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