

Client Alert **Employment & Labor**

NYC Employers: Beware of the City's Earned Sick Time Act

As we have advised in prior alerts, New York City enacted last year the New York City Earned Sick Time Act ("ESTA" or the "Act"). Effective in its original version on April 1, 2014 and subsequently amended to expand its reach, ESTA applies to virtually all private employers in New York City ("NYC" or the "City"). NYC's Department of Consumer Affairs ("DCA" or the "Department") enforces the Act. Detailed guidance concerning the Act is available from the DCA at http://www.nyc.gov/html/dca/html/law/PaidSickLeave_FAQs.shtml.

Summary of ESTA's Provisions

Coverage

ESTA requires employers who employ five or more employees in NYC to provide up to 40 hours of paid sick leave for employees who work 80 or more hours in a calendar year (the employer can define the calendar year to be any consecutive 12-month period). Smaller employers with fewer than five employees must provide unpaid sick time.

The Act covers full-time, part-time, temporary, per diem, and on call employees, as well as employees who live outside NYC, but work in the City. ESTA does not cover bona fide

F e b
2015

This Client Alert has been prepared by Sills Cummis & Gross P.C. for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of the Firm or legal counsel licensed in their state. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to Sills Cummis & Gross without first communicating directly with a member of the Firm about establishing an attorney-client relationship.

independent contractors or employees who work fewer than 80 hours in a calendar year. If a collective bargaining agreement (“CBA”) that was in effect on April 1, 2014 covers employees, the Act does not apply to such employees until that CBA ends. For employees covered by a CBA that came into effect after April 1, 2014, the Act does not apply if the CBA expressly waives ESTA’s provisions and provides a comparable benefit to employees.

Accrual and Carry-Over of Sick Time

Under ESTA, employees accrue sick leave at the rate of one hour for every 30 hours worked, up to a maximum of 40 hours of sick leave per calendar year. Employees begin to accrue sick leave at the commencement of employment, but can be required to wait 120 days after the start of employment to begin to use such leave. An employer can have a policy that provides all employees with 40 hours of sick leave at the beginning of each calendar year. The Act requires management to allow employees to carry over up to 40 hours of unused leave to the next calendar year. However, employers are only required to allow employees to use up to 40 hours of sick leave per calendar year.

Use of Sick Time

Employees can use sick leave, under ESTA, for absences from work due to:

- The employee’s mental or physical illness, injury or health condition
- The employee’s or employee’s family member’s need for medical diagnosis, care, treatment of a mental or physical illness, injury or health condition
- The employee’s or the employee’s family member’s need for preventative medical care
- Closure of the employee’s place of business due to public health emergency, or the employee’s need to care for a child whose school/child care provider is closed due to a public health emergency

The Act defines “family member” as a child, grandchild, spouse, domestic partner, parent, grandparent, child or parent of an employee’s spouse or domestic partner, sibling.

Under ESTA, an employer can require advance reasonable notice of the employee’s need to use sick leave. If the need for sick leave is unforeseeable, management may require an employee to give notice as soon as practicable.

Notice, Recordkeeping and Policies

ESTA requires NYC employers to distribute the employer's sick leave policy to employees in a manner that ensures that employees will receive it. Management must provide each employee with written notice of the employee's right to sick leave, including notice of the accrual and use of sick leave, the employee's right under ESTA to file a complaint against the employer, and the employee's right to be free from retaliation. A copy of the required notice is available at <http://www.nyc.gov/html/dca/downloads/pdf/MandatoryNotice.pdf>. Employers must maintain records that document their compliance with the Act for at least three years.

Other time off policies can satisfy the requirements of the Act. Employers can use such policies to meet ESTA's paid sick leave provisions. For example, if an employer provides vacation or personal leave, the employer does not have to provide additional time designated for sick leave if those days can be used for sick leave and the employer's policy satisfies the other requirements of the Act.

Complaints and Penalties

The DCA enforces ESTA and has the right to conduct on-site employer visits and to issue violations. The Department may initiate investigations upon its own initiative or pursuant to an employee complaint. Employers have an opportunity to cure violations, or to settle violations with the Department. If an employer does not cure or settle a violation, the employer must appear at a hearing on the violation before an Administrative Law Judge ("ALJ") at the DCA's Adjudication Tribunal.

After a hearing, the ALJ may require an employer that has violated an employee's rights under ESTA to pay that employee:

- three times the wages that the employer should have paid for each time the employee took sick leave but was not paid or \$250 (whichever is greater);
- \$500 for each time the employer unlawfully denied sick leave requested by the employee;
- Full compensation, including lost wages and benefits, equitable relief, and a \$500 additional penalty, for each time the employer retaliated against an employee. The additional penalty rises to \$2,500 for each time the employer discharged an employee for taking sick leave;

In addition to the relief set forth above, a DCA ALJ may impose the following civil penalties against employers under ESTA: up to \$500 for the first violation, up to \$750

for a second violation within two years of any previous violation; up to \$1,000 for subsequent violations that occur within two years of any previous violation; and up to \$50 for each employee to whom the employer did not give the Notice of Employee Rights that the Act requires.

In sum, ESTA's requirements are onerous and require immediate action by all employers in New York City that are not yet in full compliance. Please contact us if you need any guidance in navigating the Act in order to comply with its complicated provisions.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.

Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.

Client Alert Editor
Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.

Client Alert Author
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Jill Turner Lever, Esq.

Client Alert Author
Of Counsel, Employment and Labor Practice Group
jlever@sillscummis.com | (973) 643-5691