

## > Client Alert

### New York City Amends Earned Safe and Sick Leave Law to Align with Statewide Paid Sick Leave

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On September 28, 2020, New York City Mayor Bill de Blasio signed into law a series of amendments to the City's Earned Safe and Sick Leave Act (ESSL), geared toward aligning it with New York State's new Paid Sick Leave Law (PSL). These amendments took effect on September 30, 2020, [the same day as New York employees began to accrue paid sick leave under the PSL](#). While the State has yet to release guidance on the PSL beyond the law itself, it is clear that employers throughout New York State must start tracking paid sick leave accrual time for each employee as of September 30, 2020. The City's amendments to the ESSL now create further obligations for New York City employers, such as requiring further reporting by employers to their employees regarding the amount of safe and sick leave an employee has accrued and used, doing so on their pay statements or in a separate writing provided to the employees, and not solely upon request as required by the PSL. This client alert discusses the details of the amendments to the ESSL and provides steps employers should take to comply with them accordingly.

#### The Amendments to the ESSL Surrounding Increased Leave

Prior to the amendments to the ESSL, the law required New York City employers with five or more employees who work more than 80 hours a year to provide up to 40 hours of paid safe and sick leave to employees per calendar year. New York City employers with fewer than five employees were required to provide unpaid safe and sick leave in the same amount.

The amendments to the ESSL now align the New York City law with the requirements of the recently enacted statewide PSL. Specifically, the amendments to the ESSL provide that New York City employers must now provide safe and sick leave in varying amounts based on the size of the employer, as follows:

- Employers with fewer than five employees and a net income of greater than \$1 million in the previous tax year must provide up to 40 hours of paid safe and sick leave per calendar year. As noted above, previously, employers with less than five employees were only obligated to provide unpaid safe and sick leave in that amount. The amendment aligns the ESSL with the requirements of the PSL for employers of this size and net income threshold. However, employers with fewer than five employees with a net income below this threshold may continue to provide unpaid safe and sick leave.

- Employers with between five and 99 employees, regardless of net income, will be required to provide up to 40 hours per calendar year of paid safe and sick leave, which is consistent with the prior requirements for these employers.
- Employers with 100 or more employees, again, regardless of net income, will be now required to provide up to 56 hours per calendar year of paid safe and sick leave, which is an increase from the previous 40 hours and also matches the requirements of the PSL.

Notably, employers with these newly increased leave obligations (*i.e.*, employers with fewer than five or over 100 employees) need not provide the greater benefit—*i.e.*, permit use of increased benefits, until January 1, 2021. The amendments to the ESSL also contain a provision that will incorporate by reference any higher standard or requirement for minimum hour or use of safe and sick time that exceeds the provisions in the ESSL. As such, if the PSL or any forthcoming regulation issued thereunder increases the amount of leave required under the law, that requirement will be automatically incorporated into the ESSL and enforceable by New York City.

### Additional Amendments to the ESSL

The amendments to ESSL create other new obligations for employers. Specifically, the amendments eliminate an employer's option to institute a waiting period of up to a 120 days before a new hire can use safe and sick leave under the law. Employees are therefore allowed to use safe and sick leave immediately as it accrues on and after September 30, 2020.<sup>1</sup>

The amendments also eliminate the requirement that employees must work at least 80 hours a year to be eligible for leave under the ESSL. As such, employees who work only a few hours during the calendar year are now covered by the law.

### Documentation; Cost

The ESSL has always permitted employers to require documentation from employees after having used three consecutive workdays for safe or sick leave purposes. Such documentation can be in the form of, for example, a physician's note for sick leave, or documentation from a social service provider, legal service provider or a police report, among other items, for safe leave. Prior to the amendments, employees were required to bear the cost of obtaining this required documentation. The amendments to the ESSL now obligate employers to reimburse employees for the costs incurred in obtaining this documentation.

In addition, the amendments now require employers to include on an employee's paystub, or in a separate writing issued to the employee at the conclusion of each pay period, the amounts of accrued and used leave and the total balance of accrued and unused leave available. Employers must also post a notice of rights under the ESSL in the workplace and provide an updated notice of rights to existing employees by October 30, 2020. New employees must also continue to receive a notice of rights under the ESSL at the time of hire. Such notice must be given to each employee in English and, if available, the employee's primary language. A model Notice of Employee Rights in various languages will be available on the NYC Department of Consumer and Worker Protection's [website](#) once updated by the agency.

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<sup>1</sup> The amendments do not affect the accrual of safe and sick leave. All employees will continue to accrue safe and sick leave at the rate of one hour of leave for every 30 hours worked, unless an employer elects to front-load all safe and sick leave time at the beginning of the year by providing employees with the total amount of safe and sick leave that could accrue during that calendar year. Employees must also be allowed to carry over any unused sick leave into the following calendar year; however, employers are not required to allow employees to use more sick leave than the accrual limits as noted above, (*i.e.*, 40 or 56 hours per calendar year) and payout of any unused sick leave upon termination of employment is not required.

The amendments to the ESSL further expand the statute's prior general anti-retaliation language by specifically prohibiting employers from taking any adverse action that penalizes an employee for, or that is reasonably likely to deter an employee from, exercising their rights under the ESSL. The amended language lists various prohibited adverse actions, including threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee's exercise of rights, blacklisting, or maintaining an absence control policy that counts protected safe and sick leave as an absence that may lead to an adverse action. Moreover, employees need not specifically reference the ESSL to be protected from an adverse action.

Finally, the amendments provide the City with additional mechanisms to investigate violations of and enforce the ESSL. The amendments also mandate that any penalties against an employer will be meted out on a per employee basis.

### Next Steps

New York City employers should immediately proceed with reviewing and updating their employee handbooks with respect to the amount of safe and sick leave employees are entitled to accrue and use, depending on employer size and whether the leave is front-loaded or accrued, capped up to 40 or 56 hours, as appropriate and in accordance with this new law. Employers must also provide proper notice to employees and post such a notice in the workplace once the model notices are updated by the NYC Department of Consumer and Worker Protection. Employers who use payroll providers should contact them to ensure that employees receive safe and sick leave accrual, usage and balance on their paystubs appropriately. If an employer requires documentation to substantiate the circumstances surrounding three or more consecutive days of safe or sick leave, it must plan to reimburse employees for any costs associated with obtaining these notices and make sure those are paid accordingly. The new guidance requires active and immediate compliance steps by New York City employers. We will continue to update you as further guidance is released on both New York City's ESSL and the statewide PSL.

The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice on safe and sick leave entitlements and related information discussed herein or such other employment law issues as needed.