



NYC Employers Must Comply With New Safe And Sick Leave Obligations

Insights

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Just days before New York's statewide paid sick leave law (NYPSL) takes effect on September 30, the New York City council passed a suite of amendments to NYC's existing Earned Safe and Sick Leave Law (ESSL), in part aligning safe and sick leave obligations with the impending NYPSL and in part creating new obligations under the ESSL. The amendments to the ESSL were signed into law by Mayor DeBlasio on September 28 and take effect on September 30.

Meanwhile, with just one day to go until the NYPSL's effective date, the state has not yet issued any guidance or regulations on NYPSL, leaving employers with many unanswered questions with respect to their obligations under the state safe/sick leave law due to ambiguities in the statute's language. Despite many unknowns regarding NYPSL, it is clear that employers in NYC must take immediate action to comply with the new obligations under the ESSL created by the recent amendments.

What Do New York City Employers Need To Know About The ESSL Amendments?

NYC's ESSL took effect April 1, 2014 and was amended in 2018 to expand sick leave obligations to also cover safe leave. Prior to the recent amendments, NYC employers with five or more employees who work more than 80 hours a year in NYC were required to provide paid safe/sick leave of up to 40 hours per year; employers with fewer than five employees were required to provide unpaid safe/sick leave in the same amount.

The amendments to the ESSL change NYC employers' obligations to provide safe/sick leave to employees. Certain amendments align the ESSL to obligations under the PS�:

- **Obligation for smaller employers to provide paid leave:** Previously, NYC employers with fewer than five employees were required to provide employees with *unpaid* safe/sick leave. To align with the NYPSL, going forward, employers with four or fewer employees and a net income of \$1 million or more in the previous tax year must provide *paid* safe/sick leave. Employers with four or fewer employees with a net income below this threshold can continue to provide unpaid safe/sick leave.
- **Increased leave for large employers:** Since its inception, the ESSL has provided employees with up to 40 hours of safe/sick leave, to be accrued at a rate of one hour for every 30 hours worked. NYC employers with 100 or more employees now must provide up to 56 hours of safe/sick leave,

which aligns with the leave obligations under the NYPSL for employers of this size.

- **Elimination of waiting period:** Prior to the amendments, employers could institute up to a 120-day waiting period before a new hire would be permitted to use safe/sick leave under the ESSL. Employers can no longer require employees to be employed for any length of time prior using leave. Rather, employees can use leave immediately as it accrues, which seemingly conforms to the NYPSL. Note, however, NYC employers facing increased leave obligations do not have to provide the greater benefit until January 1, 2021. Specifically, employers with 100 or more employees that must now provide 56 hours of leave rather than 40 do not have to permit use of leave beyond 40 hours until January 1. Employers with four or fewer employees and a net income of \$1 million or more do not have to provide paid leave until January 1.

The amended ESSL also includes a stopgap clause which provides that if the NYPSL or any regulation issued thereunder “sets forth a standard or requirement for minimum hour or use of safe/sick time that exceeds any provision in [the ESSL],” the higher standard will be incorporated into the ESSL by reference. Accordingly, if the NYPSL’s forthcoming regulations create a greater benefit or right to employees, such greater benefit will be incorporated into the NYPSL and enforceable by the City.

Other amendments to the ESSL create new obligations for NYC employers:

- **Expanded employee eligibility:** Prior to the amendments, only employees who worked for more than 80 hours a year in NYC were eligible for safe/sick leave under the ESSL. The amendments eliminate this 80-hours-of-employment requirement, meaning even employees who work for small amounts of time in NYC are covered by the law.
- **Reimbursement for documentation costs:** The ESSL allows employers to require documentation for absences of more than three consecutive workdays. For sick leave, the employer can require written documentation signed by a health care provider confirming both the need for the amount of sick leave taken and that the use of sick leave was for a purpose authorized under the law. For safe leave, employers can require reasonable documentation from a social service provider, legal service provider, or member of the clergy, a copy of a police report, court record, or a notarized letter written by the employee indicating the need for safe leave. Previously, the employee had to bear any cost of obtaining the required documentation. Going forward, the ESSL mandates an employer to reimburse an employee for any costs incurred in obtaining such documentation.
- **Notice of safe/sick leave balance:** NYC employers now need to include on an employee’s paystub, or other separate writing provided to the employee each pay period, (1) the amount of safe/sick time accrued and used during the pay period, and (2) the total balance of accrued safe/sick time.
- **Notice and posting:** NYC employers must now post a notice of rights under the ESSL in the worksite. Additionally, employers are required to provide updated notice of rights to existing employees by October 30, 2020, 30 days after the law’s effective date. Employers must continue to provide new employees with a notice of rights at the time of hire.

- **Increased retaliation protections:** The amended ESSL expands the anti-retaliation language contained in the statute. While the ESSL has always prohibited retaliation, the amended law specifically prohibits anyone from taking an adverse action against an employee that penalizes an employee for, or is reasonably likely to deter an employee from, exercising their rights under the ESSL. The amended statute specifically delineates 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/sick leave as an absence that may lead to an adverse action. An employee need not specifically reference the ESSL to be protected from an adverse action. A violation of the retaliation provisions can be established when protected activity is a motivating factor for the adverse action, even if other factors also motivated the adverse action.
- **New enforcement mechanisms:** The amended ESSL provides the City with expanded investigatory and enforcement powers. Additionally, the amended statute makes clear that any penalties against an employer for violations of the ESSL will be imposed on a per employee basis.

What Do NYC Employers Need To Do?

If you have employees in NYC, you must take immediate action to comply with the newly amended ESSL. Specifically, you must revise your sick leave policy to comport with the new requirements imposed by the amendments, including the increased leave where applicable. Additionally, you must post a notice of employee rights, and provide existing employees with an updated notice, which will be available on the NYC Department of Consumer and Worker Protection's website once updated by the agency. You must also start providing safe/sick leave accrual, usage and balance on employee paystubs. If you require employees to submit documentation substantiating absences over three days, you must now reimburse your employees for any costs associated with obtaining the documentation. Finally, you must stay alert for any regulations or administrative guidance from the state on the NYPSL. Such guidance may further impact your safe/sick leave obligations.

We will continue to monitor developments impacting New York employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our [New York City](#) office.

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