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Employer Update

New York City Compulsory Paid Sick Leave Law to Take Effect April 1, 2014

By Millie Warner

In This Issue

New York City has joined the cities of San Francisco, Washington, D.C., Seattle, Portland, Newark, and Jersey City, and the state of Connecticut[1] in enacting legislation to require certain employers to provide paid sick leave to their employees. The New York City Earned Sick Time Act (the "Act") goes into effect on April 1, 2014. The Act was originally enacted last summer over then-Mayor Michael Bloomberg's veto, but was recently expanded by two amendments passed by the New York City Council and signed into law by current Mayor Bill de Blasio on March 20, 2014. Once effective, the Act will require most private employers to provide up to five days of paid sick leave per year to employees working in New York City. This article summarizes the key provisions in the Act and provides guidance on compliance for employers with employees working in New York City.[2]

Background

The Act was originally passed into law last summer. On May 8, 2013, the New York City Council passed the Act by a 45-3 vote, but Mayor Bloomberg vetoed the bill on June 6, 2013. The City Council overrode Mayor Bloomberg's veto on June 26, 2013. In December 2013, the New York City Independent Budget Office determined, based on economic indicators, that the law would take effect on April 1, 2014.

Before the law was scheduled to take effect, Mayor de Blasio replaced Mayor Bloomberg. On January 17, 2014, shortly after Mayor de Blasio took office, he announced plans for new legislation to expand the Act to provide paid sick leave to approximately 500,000 more New Yorkers, 200,000 of whom did not then have any paid sick days.[3] As a result, in February 2014, the New York City Council approved two amendments to the Act, significantly expanding its coverage.

The recent amendments to the Act do not delay its effective date, and the Act, as amended, takes effect on April 1, 2014.

The Earned Sick Time Act, as Amended

Employer Coverage

The Act applies to all employers (except for federal, state, and local government employers) who have employees who work in New York City. N.Y.C. Admin. Code § 20-912(g). Employers with fewer than five employees

in New York City are covered by the Act, but are only required to provide unpaid sick leave. N.Y.C. Admin. Code § 20-913(f); § 20-913(2). Employers with five or more employees in New York City must provide paid sick leave under the Act. N.Y.C. Admin. Code § 20-913(f), § 20-913(a)(1).

All New York City employees "performing work for compensation," including part-time and temporary employees, are counted for purposes of determining the size of the employer.[4] N.Y.C. Admin. Code § 20-912(g). If the number of employees per week fluctuates, employer size is determined for the current calendar year based on the average number of employees who worked for compensation per week during the preceding calendar year. N.Y.C. Admin. Code § 20-912(g).

Once effective, the Act will require most private employers to provide up to 5 days of paid sick leave per year to employees working in New York City.

Employee Eligibility

In general, all employees, including part-time employees, "employed for hire" within New York City "for more than eighty hours in a calendar year" are covered by the Act. N.Y.C. Admin. Code § 20-912(f). Participants in certain work-study programs, employees compensated by or through qualified scholarships, independent contractors who do not meet the definition of an employee under the New York Labor Law, and certain hourly professional employees who are licensed by the New York State Department of Education, call in for work assignments at will and are paid at least four times the federal minimum wage, are not covered by the Act. N.Y.C. Admin. Code §§ 20-912(j), 20-913(f).

Accrual of Sick Leave

Employees start to accrue sick leave under the Act on April 1, 2014, or at their time of hire if they are hired after that date. N.Y.C. Admin. Code § 20-913(d)(1). An employee is not entitled to take sick leave time under the Act that he or she has not yet accrued, although an employee may be entitled to leave under other leave laws (*e.g.*, the FMLA) or as a reasonable accommodation under the ADA, New York State Human Rights Law, or New York City Human Rights Law.

Employees accrue one hour of paid sick leave for every 30 hours worked, up to a maximum of 40 hours of paid sick leave per calendar year. N.Y.C. Admin. Code § 20-913(b). The employer may designate any regular and consecutive 12-month period as its "calendar year" for purposes of sick leave. N.Y.C. Admin. Code § 20-912(a). Employees who are exempt from New York's overtime requirements (whose hours an employer may not track because they are paid on a salary, rather than an hourly, basis) are assumed to work 40 hours per week for purposes of accruing sick leave time. N.Y.C. Admin. Code § 20-913(e). However, if the employer can show that such employees' regular work week is under 40 hours, sick leave time accrues based upon that lower figure. *Id.*

Carryover of Accrued but Unused Sick Leave Time

Employees who do not use all accrued sick leave time in a calendar year are entitled to carry over to the next year up to 40 hours of accrued but unused sick leave. N.Y.C. Admin. Code § 20-913(h). The only exception to this requirement is if the employer both (i) pays employees out for accrued but unused sick time at the end of the year,[5] and (ii) provides employees with at least 40 hours of paid sick leave time on the first day of the next year. N.Y.C. Admin. Code § 20-913(h)(ii). In other words, paying employees out at the end of the year for accrued but unused sick leave does not, by itself, excuse employers from the obligation to allow employees to carry over accrued but unused time.

However, when an employee carries over sick leave time, the employer may limit the use of paid sick

leave time to a total of 40 hours per calendar year. N.Y.C. Admin. Code § 20-913(h)(i). Because carrying over sick leave time does not increase the amount of sick leave that an employee is entitled to take in the year under the Act, the only purpose of the carry over requirement is to provide employees who carry over time with sick leave time that they can use immediately in the new year, before they otherwise would have accrued any time under the Act.

Use of Sick Leave

Although employees begin accruing sick leave time immediately upon their hire or the effective date of the Act, whichever is later, employees are not entitled to use their accrued sick leave time until the later of 120 days after their date of hire or the effective date of the Act. N.Y.C. Admin. Code § 20-913(d)(1). Accordingly, the earliest date on which employees employed as of April 1, 2014 may begin using accrued sick leave under the Act is July 30, 2014. Employees hired after April 1, 2014 must wait until 120 days (four months) after their date of hire to begin using accrued sick leave. *Id.*[6]

After that point (the later of July 30, 2014 or 120 days from an employee's date of hire), employees may use sick leave as it is accrued. *Id.* Employers, however, may set a reasonable minimum increment for the use of sick time, but this increment cannot exceed four hours per day. N.Y.C. Admin. Code § 20-913(g).

Employees may use accrued sick leave provided by the Act for any of the following purposes:

- The employee's own "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 or need for preventive medical care." N.Y.C. Admin. Code § 20-914(a)(1).
- Care for a "family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care." N.Y.C. Admin. Code § 20-914(a)(2). "Family member" is defined as an employee's child, spouse, domestic partner, parent, sibling (including half siblings, step siblings, and adopted siblings), grandchild or grandparent, or the child or parent of an employee's spouse or domestic partner. N.Y.C. Admin. Code. § 20-912(h).
- Closure of an employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency. N.Y.C. Admin. Code § 20-914(a)(3).

An employer may impose discipline, up to and including termination of employment, on any employee who uses sick leave time provided by the Act for any purpose other than as described above. N.Y.C. Admin. Code § 20-914(f).

Notice Requirements for Use of Sick Leave

Employers may require employees to provide "reasonable notice" of the need to use sick leave time. N.Y.C. Admin. Code § 20-914(b). If the need for sick leave is not foreseeable, the employer may only require notice from the employee "as soon as practicable." *Id.* But if the need for sick leave is foreseeable, the employer may require up to seven days' notice before the leave is to begin. *Id.*

Medical Documentation

If an employee is absent from work for more than three consecutive work days, an employer may require the employee to provide "reasonable documentation" substantiating the employee's use of the leave time for one or more of the purposes authorized by the Act. N.Y.C. Admin. Code § 20-914(c). For sick time taken for the employee's own health condition or to care for an ill family member, documentation signed by a licensed health care provider indicating the need for the amount of sick time taken qualifies as "reasonable documentation" under the Act. *Id.* An employer may not require that the documentation disclose the nature of the employee's or the employee's family member's injury, illness or condition. *Id.* Any health information about an employee or an employee's family member that an employer obtains solely in connection with an employee's use of sick leave under the Act must be treated as confidential. N.Y.C. Admin. Code § 20-921.

Notice to Employees of Sick Leave Rights

By May 1, 2014, employers must provide written notice to all employees employed as of that date of their right to sick leave under the Act. N.Y.C. Admin. Code § 20-919(a). Thereafter, employers must notify newly hired employees at the commencement of their employment of their right to sick leave. *Id.*

The written notice must explain how sick time is accrued and how it can be used, identify the employer's calendar year for purposes of sick time, and inform employees of their right to be free from retaliation and to file a complaint with the Department of Consumer Affairs. N.Y.C. Admin. Code § 20-919(a). The employer must provide the written notice in English and the employee's primary language, if the employee's primary language is Chinese, Korean, Russian, Polish, Haitian-Creole, or Spanish, provided that the Department of Consumer Affairs has made a translation of such notice available. *Id.* The Department of Consumer Affairs has made a model notice in English available on its website.[7] As of the date of this article, the Department of Consumer Affairs has not yet published any translations of this notice.

The employer may, but is not required to, also post a notice in a conspicuous place accessible to all employees informing employees about their sick leave rights. *Id.* Posting a notice does not, however, satisfy an employer's obligation to provide written notice to employees of their rights under the Act. *Id.*

Recordkeeping Requirements

Employers must retain records documenting their compliance with the Act for at least three years. N.Y.C. Admin. Code § 20-920. Employers must allow the Department of Consumer Affairs to access such records, with appropriate notice and at a mutually agreeable time, in connection with any investigation conducted pursuant to the Act. *Id.*

Employers with Separate Leave Policies

If an employer otherwise provides paid leave to its employees (*e.g.*, paid time off, paid vacation, paid personal days, paid rest days), the employer is not required to provide additional paid sick leave to satisfy the Act, provided that the employer's policy: (1) provides employees with at least as much paid leave as otherwise required under the Act (*i.e.*, at least one hour of paid leave for every 30 hours worked, up to a maximum of 40 hours of paid leave in a year); and (2) allows employees to use the leave for the same purposes and under the same conditions as sick leave under the Act. N.Y.C. Admin. Code § 20-913(c). Thus, for example, an employer who provides employees with at least five paid vacation days, which can be used for the same purposes as sick leave under the Act, need not provide additional sick leave time to comply with the Act. This is true whether or not the employee chooses to use the leave provided for the purpose of sick time. *Id.* An employer still must satisfy the employee notification, recordkeeping, carryover, and other requirements of the Act.

Enforcement

The Act does not provide employees with a private right of action to enforce the Act. Rather, the Department of Consumer Affairs is responsible for enforcement. N.Y.C. Admin. Code § 20-924. However, as recently amended by Mayor de Blasio, the Act permits the mayor to designate any other agency to assume enforcement responsibility in lieu of the Department of Consumer Affairs. N.Y.C. Admin. Code § 20-925.

A person alleging a violation of the Act must file a complaint with the Department of Consumer Affairs (or such other agency as designated by the mayor) within two years of the date the person knew or should have known of the alleged violation. N.Y.C. Admin. Code § 20-924(b). The Department of Consumer Affairs will investigate the complaint and attempt to resolve it through mediation. N.Y.C. Admin. Code § 20-924(c). In addition, it will send written notification of the complaint to the employer, which must provide a written response and other information requested by the Department of Consumer Affairs within 30 days. *Id.* If the Department of Consumer Affairs determines that an employer violated the Act, it will issue a notice of violation and the case will proceed to a hearing before an administrative tribunal. *Id.*

If the tribunal determines that the employer violated the Act, the Department of Consumer Affairs must impose a civil penalty payable to the city of up to $500 for the first violation. If the employer commits a second violation within two years of the first violation, the civil penalty may be up to $750. For all succeeding violations, the civil penalty may be up to $1,000. N.Y.C. Admin. Code § 20-924(c).

In addition to imposing civil penalties, the Department of Consumer Affairs also may award damages to the employee, including:

- For each instance of sick leave taken by the employee but not paid by the employer: three times the wages that should have been paid or $250, whichever is greater.
- For each instance of sick leave requested by an employee but unlawfully denied by the employer and not taken by the employee: $500.
- For each instance of retaliation, not including discharge from employment: full compensation, including wages and benefits lost, $500, and equitable relief as appropriate.
- For each instance of discharge from employment in violation of the Act: full compensation, including, but not limited to, wages and benefits lost, $2,500, and equitable relief as appropriate, including reinstatement.

N.Y.C. Admin. Code § 20-924(d).

* * *

Employers with employees in New York City are urged to familiarize themselves with the Act's requirements and take the steps necessary to ensure compliance. These steps include preparing or obtaining from the Department of Consumer Affairs the notices required to be provided to employees and reviewing and, if necessary, preparing or revising personnel policies to conform to the Act's requirements.

1. *See* Committee Report of the Human Services Division, Committee on Civil Service and Labor, (available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1636850&GUID=FD23CC16-F69E-4F06-B448-251F1CFC922D&Options=ID%7CText%7C&Search=&FullText=1).
2. This article does not address the Act's requirements with respect to domestic workers.
3. *See* "Mayor de Blasio Announces Major Expansion of Paid Sick Leave in New York City," Jan. 17, 2004 (available at http://www1.nyc.gov/office-of-the-mayor/news/025-14/mayor-de-blasio-major-expansion-paid-sick-leave-new-york-city#/0).
4. The Act defines "employee" as "any 'employee' as defined in section 190(2) of the labor law who is employed for hire within the city of New York for more than eighty hours in a calendar year who performs work on a full-time or part-time basis[.]" N.Y.C. Admin. Code § 20-913(f). The Act is ambiguous as to whether all of an employer's employees in New York City are counted for purposes of determining employer size, or only New York City employees who work "more than eighty hours in a calendar year." *Id*. Because the Act provides that "temporary" employees are counted for purposes of determining employer size, *all* New York City employees (not just those who work "more than eighty hours in a calendar year") are likely intended to be counted for purposes of determining employer size. *See* N.Y.C. Admin. Code § 20-912(g).
5. Upon the termination of the employee's employment, an employer is not required to pay an employee for accrued but unused sick time. N.Y.C. Admin. Code § 20-913(i).
6. If an employee separates from the employer, but is later reinstated, the employee is treated as a new employee under the Act if the separation period was greater than six months. N.Y.C. Admin. Code § 20-913(j).
7. Available at http://www.nyc.gov/html/dca/downloads/pdf/MandatoryNotice.pdf.

Co-Determination of Employment Terms by Employees in German Companies

By Stephan Grauke and Mareike Pfeiffer

Employee co-determination rights in German entities are established by statutory law authorizing employees and their representative bodies to co-determine their employment terms and, to a limited extent, the business decisions of the company's management. Such influence can be exerted via unions or works councils and, in case of larger companies, via a mandatory representation on the company's supervisory board. Whereas unions generally act on an inter-company level, works councils have jurisdiction over measures of the company that concern individual employees (such as hiring and termination of employment) or groups of employees or the workforce of the company in its entirety (such as headcount reductions).

This spring, due to a uniform date determined by German law, works council elections will take place in all enterprises in Germany in which a works council has been established (or must be established). On the occasion of these elections, this article provides an overview of co-determination rights of employees in German companies.

Unions and Collective Bargaining Agreements

German unions are organized by industries (and regions) and campaign for an improvement of employment terms in their industry, in particular by negotiating with employers' associations on collective bargaining agreements and amendments thereto. However, collective bargaining agreements only apply to a German company to the extent that:

- the company becomes a member of the employers' association and the employee becomes a member of the union that entered into the respective collective bargaining agreements;
- the company itself enters into a so-called company collective bargaining agreement with the respective union and the employee is a member of this union;
- the company and the employee agree, *e.g.*, in the employment agreement, that collective bargaining agreements shall apply to the employee; or
- a collective bargaining agreement is declared to be generally binding by the German Ministry for Labor and Social Affairs (which requires that this collective bargaining agreement applies to at least 50% of all employees employed in the relevant industry and region prior to the declaration and that the declaration is required due to public interests).

Collective bargaining agreements typically provide for various employment terms, in particular for salaries and the assignment of jobs/positions to specific salary brackets, working time, annual paid leave, notice periods for termination and the granting of benefits (such as vacation allowances and Christmas bonuses, and top-up payments to the salary in case of long-term sickness or death benefits). Some collective bargaining agreements (*e.g.*, those applied in the metal industry) also restrict the possibility of terminating older employees with a considerable length of service. However, the employment terms agreed in the collective bargaining agreements differ from industry to industry and region to region.

In 2010, approximately 60% of the employees in Germany were bound by collective bargaining agreements, 5% thereof by company collective bargaining agreements[1], and approximately 40% of the German employees were not subject to collective bargaining agreements at all.

Works Councils' Participation Rights

Different from unions, works councils generally operate at the level of the company or, specifically, at the level of a so-called "*business unit*," which may be smaller than the company and which according to the German Federal Labor Court is deemed to exist if a certain unit of the business is managed by one or

more individuals responsible to decide on personnel and organizational matters of such unit. Thus, a local works council may be established at each branch office of a company, provided that the branch office is managed in its own responsibility as regards personnel and organizational matters. In addition to local works councils, works councils can be established at the company level, at the group level and, in case the statutory requirements are met, at the level of the controlling company in case the group operates in several European countries.

Apart from the right of a works council to supervise compliance of the company with, *inter alia*, collective bargaining agreements and other applicable laws,

Although (or maybe because of) the co-determination and participation rights of employees under German law are fairly comprehensive compared to other countries, employees in Germany are not often participating in strikes, lock-outs or other industrial dispute measures.

its main rights consist of statutory co-determination rights. These rights can be exercised only by a works council and not by individual employees and require that at the level of the respective company a works council has been established. The establishment of a works council is not mandatory under German law, in particular not for the company's management. Rather, the employees are eligible to elect a works council if the business unit they are employed with regularly employs at least five employees. In practice, the employees employed with smaller companies often have not established a works council: In 2011, only 10% of the employees working for companies with a headcount ranging from 5 to 50 individuals had a works council, whereas the number was about 92% for companies with more than 500 employees.[2]

The main areas of participation of a works council can be described as follows:

- Organizational matters, including questions of order in the company and employee conduct, beginning and end of the daily working hours (including breaks), questions pertaining to the general wage structure of the company, time, place and method of payment of the remuneration, and the organization of social benefits/services provided to employees (*e.g.*, a company pension scheme, cafeteria or kindergarten).
- In case of termination of employment, the company must inform and consult with the works council before serving the termination letter on the employee. Non-compliance of the company with such consulting obligation results in the termination being invalid. However, once consulted with, the works council does not have the power to prevent the termination. In addition, in companies in which a works council exists and which regularly employ more than 20 employees, the works council's consent is required for every single hiring, assignment to a salary bracket and relocation of an employee.
- In cases where significant operational changes are implemented, such as the closure of operational units or material parts thereof, headcount reductions involving a material number of employees, relocation of a business unit, merger or spinning off of a business unit or a material change of the operational organization where a works council exists and regularly more than 20 employees are employed, a company must consult and agree with the works council on those matters, whereby the underlying economic decision is in the sole discretion of the company (or its shareholder) but the rights of the employees must be complied with. In particular, the company needs to agree on a reconciliation of interest agreement (*Interessenausgleich*) defining the scope and implementation of the intended operational change and a social plan (*Sozialplan*) defining severance payments and other benefits to compensate

the employees for any disadvantages triggered by the operational change. The company may not implement the operational change unless negotiations with the works council have taken place. Although the works council may delay the implementation of the intended operational change, it has no statutory power to ultimately prevent it.

Employee Co-Determination in Supervisory Boards

In addition to the foregoing, employees have the right to become a member of the supervisory board of a larger company as part of the corporate governance regime. In this function, they have the obligation to monitor the management of the company and to resolve upon the employment and termination of the managing directors and board members.

As a general rule, employee co-determination in the supervisory board is mandatory in companies which regularly employ more than 500 employees and which are legally organized as stock corporations (*Aktiengesellschaften*), partnerships limited by shares (*Kommanditgesellschaften auf Aktien*), limited liability companies (*Gesellschaften mit beschränkter Haftung*) or cooperatives (*Genossenschaften*) under German law. German partnerships as well as companies established under foreign law are, in general, not subject to co-determination, even if their head office is located in Germany. Likewise, the implementation of co-determination mechanisms at the supervisory board level is not mandatory in enterprises engaged directly and primarily in political, religious, charitable, educational, scientific, and artistic or news reporting activities.

German law generally distinguishes between two types of co-determination rights in supervisory boards depending on the number of employees:

- so-called one-third co-determination for companies with 500 to less than 2,000 employees
- so-called full co-determination for companies with 2,000 or more employees

In a one-third co-determination board, only one-third of the members of the supervisory board are employee representatives, the rights of which are limited since the shareholder representatives always have the majority of the votes.

A fully co-determined supervisory board consists of an equal number of shareholder and employee representatives. Since the chairman of the supervisory board who is always a shareholder representative ultimately has a casting vote in case of a tie, the ultimate control is still with the shareholders (specific rules apply to the mining, coal and steel industry).

Depending on the size of the company, employee supervisory board members are either elected directly by the employees of the company or indirectly through employee delegates previously elected in a secret ballot. As a rule, two-thirds of the employee representatives on the supervisory board are made up of employees of the company (including one employee at management level) and one-third of the employee supervisory board members consists of union representatives.

Impact of Co-Determination Rights

Although (or maybe because of) the co-determination and participation rights of employees under German law are fairly comprehensive compared to other countries, employees in Germany are not often participating in strikes, lock-outs, or other industrial dispute measures. According to statistics, in the period between 2005 and 2012, only 16 working days per 1,000 employees were lost in Germany due to strikes and lock-outs compared to other countries like France (150 days), Canada (117 days) and Spain (65 days), but slightly above the USA (10 days).

1. German Federal Statistical Office, *Collective Bargaining Agreements in Germany in 2010*, published in 2013.
2. German Federal Statistical Office, *Employees who are represented by works councils*, published in 2014.

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