Morrison Cohen

Client Alert | March 21, 2024

NYC Employees Can Now File Private Lawsuits for Safe and Sick Time Leave Violations

On March 20, 2024, New York City's recent amendments to the Earned Safe and Sick Time Act ("ESSTA") became effective. Under these recent amendments, employees now have a private right of action to bring claims in court alleging violations of the ESSTA. Such actions must be brought within two years of the date the employee knew or should have known of the alleged ESSTA violation.

Previously, employees' only recourse for alleged ESSTA violations was to file a complaint with the City's Department of Consumer and Worker Protection ("DCWP"), which allowed employees to recoup compensatory damages if the DCWP determined a violation of the ESSTA occurred. Under the recent amendments, employees can still file complaints with the DCWP, but they may now their own action in court seeking compensatory damages, injunctive relief, attorneys' fees and costs, and other penalties, and can file such ESTA-related claims regardless of whether they have initiated a complaint with the DCWP.

Under the ESSTA, employers with 100 or more employees must provide up to 56 hours of paid safe and sick time leave each calendar year, and employers with between 5 and 99 employees, or who employ at least one domestic worker, must provide up to 40 hours of paid safe and sick time leave each calendar year. Employers with four or fewer employees must provide up to 40 hours of safe and sick time leave, but that leave may be unpaid if an employer has a net income of less than one million dollars during the previous tax year.

Below are some common pitfalls that employers should be mindful of when handling requests for employee safe and sick time leave:

Permissible Uses of Safe and Sick Time Leave

An employee may use safe and sick time leave for a variety of reasons, including:

- To obtain medical treatment for themself (including preventative care or a well visit)
- To recover from illness or injury, or to care for a "family member" who is ill or receiving medical treatment (including preventative care or a well visit)
- For mental health care
- For appointments with health care providers such as eye doctors and dentists
- To obtain vaccinations
- For prenatal appointments or to recover from childbirth, but it cannot be used for time to bond with a new child (although employees seeking bonding leave may separately apply and qualify for New York State Paid Family Leave)
- To obtain services or participate in court proceedings if the employee or a "family member" has been the victim of domestic violence, family offense, sexual offense, stalking, or human trafficking

New York City defines "family member" broadly to include not only an employee's spouse, child, and other blood relatives, but also former spouse or anyone with whom the employee has a close, family-like relationship. Thus, an employee could use safe and sick time leave expansively to include taking their child or spouse to a doctor's appointment or to accompany a relative or close family friend to obtain services from a domestic violence organization.

Safe and Sick Time Leave Documentation Requests

If an employee requests to take safe and sick time leave, the employer should not request documentation unless the employee has been absent for at least three consecutive work days and, in such circumstance, should only request reasonable documentation. Reasonable documentation may include, but is not limited to, a note from a licensed healthcare or mental health provider or social worker or victims' services organization. Employers, however, should be careful not require documentation that specifies the nature of the illness or injury or provides details of any domestic violence or similar incident, aside from the dates the employee needs or needed to be absent from work due to a safe or sick time leave related reason. If the employee provides such documentation, the employer may not seek to obtain a second opinion to verify that the documentation provided by the employee is valid. Instructions concerning appropriate documentation under the ESSTA should be included in an employer's written safe and sick time leave policy. Such policies should also specify any notice requirements and the method for providing safe and sick time leave notice. Employees are not required to give advance notice if leave is unforeseeable, but if safe or sick time leave is foreseeable (i.e., a scheduled doctor's appointment), employers may establish protocols for notifying an employer in advance of such an absence.

Retaliation Prohibited for Taking Safe and Sick Time Leave

The ESSTA prohibits employers from retaliating against or interfering with an employee's use of safe and sick time leave. For example, employers may not discharge, demote, or harass an employee on the basis that the employee has requested or used safe and sick time leave. Employers also may not require that an employee find another worker to cover their shift before taking safe and sick time leave under the ESSTA.

Accrual and Carryover Policies

Employers should also review their policies to ensure employees are allowed appropriate accrual and carryover of safe and sick time leave. Under the ESSTA, safe and sick time leave accrues at a rate of one hour of leave for every 30 hours worked capped at 40 or 56 hours based on the size of the employer. To avoid potential accrual calculation mistakes, however, employers may wish to "frontload" safe and sick time leave such that each employee receives their full safe and sick time leave balance at the beginning of the year or upon joining the company. Regardless of the accrual method used, employees must be permitted to use safe and sick time leave as it accrues, and there cannot be a "waiting period" for new employees to use safe and sick time leave.

Employees must also be permitted to carryover any unused safe and sick time leave from one year to the next unless the employer frontloads such leave and pays out any accrued unused time at the end of each calendar year. The amount of safe and sick time leave that can be carried over also depends on the size of employer. Employee pay statements should include the amount of safe and sick time leave that has accrued and been used during the pay period and the balance of accrued safe and sick time leave that remains unused. Employers are not required to pay employees for any unused paid safe and sick time leave upon separation of employment unless otherwise stated in their policies.

Conclusion

Based on these new amendments, employers should familiarize themselves with the circumstances for which employees can take protected safe and sick time leave in order to avoid unlawfully denying leave to an employee who qualifies under the ESSTA. Employers should also review and update their safe and sick time leave policies to ensure that they are compliant

with the ESSTA. Lastly, employers should conspicuously post the DCWP's Notice of Employee Rights in the workplace and, if applicable, on a virtual workspace where such notices are posted. A copy of such notice can be found here.

Key Contacts

Our Labor & Employment Law team is available to assist employers in reviewing and drafting safe and sick time leave policies and other employee handbook policies, and to counsel employers on their handling of employee safe and sick time leave requests in New York City and other jurisdictions throughout the country with similar leave laws.

Jeffrey P. Englander
Partner & Co-Chair
D 212.735.8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
D 212.735.8736
kmarkel@morrisoncohen.com

John B. Fulfree
Partner
D 212.735.8850
jfulfree@morrisoncohen.com

Cassandra N. Branch
Associate
D 212.735.8838
cbranch@morrisoncohen.com

Alana Mildner Smolow
Associate
D 212.735.8784
amildner@morrisoncohen.com

Kayla West
Associate
D 212.735.8760
kwest@morrisoncohen.com