



Alba Pico
First Deputy Commissioner

██████████
Agency Attorney
██████████

42 Broadway
9th Floor
New York, NY 10004

nyc.gov/consumers

VIA ELECTRONIC MAIL

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UPDATE: Clarification of Carryover and Accrual, January 15, 2015

Dear ██████████

Thank you for contacting the NYC Department of Consumer Affairs (“DCA”) concerning the Earned Sick Time Act (“Paid Sick Leave Law” or “Law”). You have asked several questions about employees’ accrual and use of sick leave, which we address below in turn.

1. How can employers prevent employee abuse of paid sick leave?

The Law contains a number of provisions that were included to allow employers to ensure paid sick leave is not abused. These include:

- Employers can require employees to give notice of their need to use sick leave. If the need is foreseeable, the employer can require up to seven days advance notice of an employee’s intention to use sick leave. If the need is unforeseeable, the employer may require an employee to give notice as soon as practicable. Whether and when an employee can practicably provide notice depends upon the individual facts and circumstances of the situation.
- Employers may require the employee to provide written confirmation that the employee used sick leave for a purpose permitted under the Law. If an employee uses more than three consecutive workdays as sick leave, the employer can require the employee to provide a note from a licensed health care provider confirming the need for the amount of sick leave taken.
- The Law specifically provides that an employer can discipline an employee who uses sick leave for a purpose other than those set forth in the Law.

2. How does sick leave accrual work under the Law?

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.

3. Where employees are paid by units of work completed (such as workshops attended and completed) rather than by the hour, how should an employer calculate sick leave for purposes of accrual and pay?

As stated above, sick leave under the Law accrues at the rate of one hour for every 30 hours actually worked. The Law requires that the employer pay the employee the employee’s regular hourly rate at the time the sick leave is taken.



For employees who do not have a set work schedule and perform work in periods of indeterminate length, the employer should measure the actual length of time spent performing work where practicable for accrual purposes, even if the employee’s pay is not based on that measure. Where such measurement is not practicable, the employer may make a reasonable estimate of how much time is spent based, for example, on an average length the employee or all employees spend on the task at issue.

With regard to calculating pay in these circumstances, the employer is responsible for making a reasonable calculation for the employee’s rate of pay. The employer may make this calculation based, for example, on the average length of workshops and the pay for each workshop, or an employer may develop a method for averaging out what an employee in that position earns during a month or during a calendar year, to then determine how much to pay the employee when they are sick on a day that they are scheduled to work. The employer should be able to articulate and document a reasonable basis for the calculation and why the payment is a fair wage for use of sick leave, consistent with the Law. Under no circumstance can an employee be paid less than the minimum wage.

4. If an employee carries over 40 hours of unused sick leave to a new calendar year, does the employee continue to accrue more sick leave in the new calendar year?

Yes. Although employers are only required to allow employees to use up to 40 hours of sick leave per calendar year, they must also allow employees to continue to accrue sick leave at the statutory rate up to a maximum of 40 hours, independent of any leave the employee carried over from the previous year. If the employee uses some or all of the carried over sick leave in the new calendar year, up to 40 hours of unused sick leave can again be carried over to the following calendar year and will be available for immediate use.

Example of One Employee’s Sick Leave Hours Over 4 Years – Carried Over, Accrued and Used				
Sick Leave Hours	Calendar Year 1	Calendar Year 2	Calendar Year 3	Calendar Year 4
Carried Over from Previous Calendar Year (capped at 40 hours)	n/a	20	40	40
Accrued (capped at 40 hours)	40	40	40	40
Used (capped at 40 hours)	20	0	40	0
Unused	20	60	40	80

5. Can employees use sick leave before it is accrued?

Employers are not required to permit employees to use sick leave under the Law before it is accrued. The Law provides that employees can start using accrued sick leave on July 30, 2014 or 120 days after the start of employment, whichever is later. After 120 days, an employee can use sick leave *as it is accrued*. Although not required, employers may provide a more generous leave policy, including permitting employees to use sick leave they expect to accrue later in the calendar year. In addition, an employee may be entitled to leave under different laws, such as the Family Medical Leave Act (“FMLA”) or Americans with Disabilities Act (“ADA”).

6. Can an employer provide a more generous leave policy to some employees and not others?



The Paid Sick Leave Law provides the minimal rights that must be provided to all employees to whom the Law applies. The Law also expressly encourages employers to provide more generous leave policies. As long as all employees are given all benefits to which they are entitled under the Law, the Law does not prohibit treating only one group of employees, for example only full-time employees, more generously. An employer must ensure, however, that its policies do not violate any other laws or regulations that may apply or any contractual obligations of the employer.

7. Must a New York City employer provide sick leave to employees who work outside of the City?

No. The Law applies only to those employees who work more than 80 hours a calendar year in New York City. Employees who work 80 hours or less a calendar year in New York City are not covered by the Law.

For further information describing the Law and for helpful materials such as FAQs, one page guidance for employers and a copy of the Notice of Employee Rights that employers are required to distribute, go to www.nyc.gov/PaidSickLeave.

Employers may contact the Department of Consumer Affairs as described below.

- Email PaidSickLeave@dca.nyc.gov
- Call 311 (212-NEW-YORK outside NYC) and ask for information about Paid Sick Leave
- Online Live Chat, available at nyc.gov/BusinessToolbox

The Department has issued proposed rules that address various issues you have raised, including employee notification of the use of leave time, documentation from a licensed health care provider and rate of pay. We would welcome your comments on the proposed rules, which are available online at the site linked above.

I hope this is of assistance.

Sincerely,

[Redacted signature]

[Redacted line]

Modified by [Redacted]