

DCA Enforcement Policy: Airline Flight Crew under the New York City Earned Safe and Sick Time Act

This memorandum sets forth the New York City Department of Consumer Affairs (DCA) Office of Labor Policy and Standards' (OLPS) enforcement policy with respect to coverage of airline flight crew employees under the New York City Earned Safe and Sick Time Act (Paid Safe and Sick Leave Law).

Background

The Paid Safe and Sick Leave Law¹ is a New York City law that requires certain private employers to provide paid safe/sick time to employees that meet the jurisdictional thresholds set forth in the law. N.Y.C. Admin. Code § 20-911 et seq. DCA is the New York City agency charged with enforcement of the Paid Safe and Sick Leave Law. N.Y.C. Charter § 2203(e); N.Y.C. Admin. Code § 20-924(a). DCA conducts investigations of covered employers and enforces the Law where these employers have failed to comply with the protections codified in the law. If DCA determines, pursuant to an investigation, that a covered employer has violated the Law, DCA may bring charges seeking penalties and relief before the New York City Office of Administrative Trials and Hearings.

Coverage of Airline Flight Crew Employees

The Paid Safe and Sick Leave Law applies to an individual that works as a crewmember on board airline flights, provided that such individual qualifies as an “employee” and the airline qualifies as an “employer” under the Law. The Paid Safe and Sick Leave Law defines “employee” to include “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 . . .” N.Y.C. Admin. Code § 20-911(f). “Employer” similarly is defined with reference to the New York Labor Law. N.Y.C. Admin. Code § 20-911(g). To determine whether a flight crew employee has reached the 80-hour requirement, DCA counts the time worked before take-off on flights departing from a New York City airport and after landing for flights arriving to a New York City airport. Take-off refers to the time when a flight leaves the ground while landing refers to the time that a flight touches down on the ground.

Airlines generally base flight crew employees out of a particular airport that serves as those employees’ primary arrival and departure location. Flight crew employees spend time working before, during, and after flights at their base location. Accordingly, DCA applies a rebuttable presumption that flight crew employees based out of New York City airports work 80 or more hours per calendar year in New York City and thus meet the definition of “employee” under the Law.

To rebut this presumption, an airline employer must demonstrate that a flight crew employee based out of a New York City airport in fact worked fewer than eighty hours within the city limits during the calendar year. To do this, the airline employer need only count the time the employee worked while physically present in New York City. In most cases, these hours would include: the time between when a flight crew employee is required to arrive at the airport ready to perform his or her duties and the take-off of the aircraft from a New York City airport; and the time between an aircraft’s landing at a New York City airport and when an employee is free to leave and is no longer subject to the direction or control of the airline employer. Employers who seek to rebut the 80-hour presumption for New York City-based flight crew employees typically must do so through contemporaneously-maintained records of time worked or other evidence establishing that the 80-hour requirement was not met.

Application of the Paid Safe and Sick Leave Law to Covered Airline Flight Crew

For airline flight crew that qualify as employees, airline employers must comply with the Paid Safe and Sick Leave Law. Below, this memorandum discusses the application of the accrual, use, and retaliation provisions of

¹ L.L. 199/2017 amended the Earned Sick Time Act as the Earned Safe and Sick Leave Law, effective on May 5, 2018.

the Law to flight crew employees.

Accrual of Safe and Sick Leave Hours

Flight crew employees accrue safe/sick leave at the same rate as other covered employees. Under the Law, once employees satisfy the 80-hour requirement, employers “shall provide a minimum of one hour of safe/sick time every 30 hours worked . . .” N.Y.C. Admin. Code § 20-913(b). Once covered by the Law, all hours worked for an employer count toward an employee’s safe and sick leave accrual, regardless of the employee’s or the employer’s location. An employer may simplify any administrative burden associated with safe/sick time accruals by frontloading 40 hours’ safe/sick time (the maximum that can be required under the law for an employee working at least 1,200 hours in a year, or approximately 30 weeks). 6 Rules of the City of New York (R.C.N.Y) § 7-12(a)(1). Frontloading safe/sick time enables an employer to avoid ongoing accrual calculations, including the reduction of an employee’s safe/sick time balance any time the employee is absent from work due to a covered use under the Law. Employers that choose not to frontload safe/sick time must ensure that flight crew employees accrue at least one hour of safe/sick time, up to 40 hours per year, for every thirty hours worked.

Use of Accrued Safe and Sick Leave Hours

A covered flight crew employee may use accrued safe/sick time hours under the Paid Safe and Sick Leave Law for any flight originating or ending in New York City. Airline employers may require reasonable notice of the need to use safe/sick time consistent with the provisions set forth in the Law and its implementing regulations. N.Y.C. Admin. Code § 20-914(b); 6 R.C.N.Y. § 7-06.

Under the Paid Safe and Sick Leave Law, employees generally can determine their usage of accrued safe/sick leave, though employers “may set a reasonable minimum increment for the use of safe/sick time not to exceed four hours per day.” N.Y.C. Admin. Code § 20-913(g). Thus, for example, an employer may require that a worker to use up to four hours of safe/sick time to account for a one-hour absence during an eight-hour scheduled shift. The employer may not, however, require the worker to use any more than four hours to account for the absence.

Due to the physical impossibility of joining a flight after take-off, DCA recognizes an exception to the Law’s minimum increment provision where a flight crew employee uses safe/sick leave for a flight with an actual or expected duration greater than four hours. In these circumstances, an airline employer may require a flight crew employee to use an amount of safe/sick leave equal to the expected or actual duration of a missed flight lasting more than four hours, up to a maximum of eight hours. For example, an employer may allocate six hours of safe/sick leave for a six-hour flight or eight hours of safe/sick leave for a ten-hour flight. Employers may still use a four-hour minimum increment for flights lasting fewer than four hours. This exception is similar to the U.S. Department of Labor’s enforcement of the Family Medical Leave Act (FMLA) minimum increment provision, which recognizes that it is “physically impossible” to join a flight mid-air and allows employers to allocate up to one day of FMLA leave even where the actual time needed by the flight crew employee is shorter. 29 C.F.R. §§ 825.205(2) and 825.802.

Retaliation Prohibited

Airline employers, like all other employers, cannot retaliate or threaten to retaliate against covered employees for exercising or attempting to exercise their rights to paid safe/sick leave under the Law. Retaliation may include “any threat, discipline, discharge, demotion, suspension, reduction in employee hours, or any other adverse employment action against any employee . . .” N.Y.C. Admin. Code § 20-912(p). DCA enforces the retaliation provisions of the Law where an employer maintains a policy that imposes progressive discipline, such as the accrual of points where a certain number of points triggers concrete disciplinary action, or other adverse employment actions on employees who exercise their rights to Paid Safe and Sick Leave Law-protected leave.