

Austin's Earned Sick Time Ordinance

Last month the City of Austin joined a growing number of jurisdictions throughout the United States to require private employers to provide their employees with a minimum amount of paid sick leave. Below is a summary of Austin's Earned Sick Time ordinance, as well as list of issues for local employers to consider to ensure compliance.

Effective Date:

The ordinance takes effect on October 1, 2018 for all private employers, including non-profit organizations, with six or more employees in Austin. For employers with five or fewer employees, compliance is required beginning October 1, 2020.

What is Earned Sick Time?

Earned Sick Time (EST) is a period of paid leave for work absences for employees to attend to a health condition of either the employee or the employee's family members, or to attend to certain specific safety concerns. Specifically, employees have a right to use EST for:

- The employee's own physical or mental illness or injury, preventative medical or health care, or health condition;
- The employee's need to care for a family member's physical or mental illness, preventative medical or health care, injury, or health condition; or
- The employee's need to seek medical attention, seek relocation, obtain services from a victim services organization, or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or employee's family member.

For EST, "family member" is extremely broad: it includes not only an employee's spouse, child, or parent, but also "any other individual related by blood or whose close association with the employee is the equivalent of a family relationship."

Eligible Employees:

Private employers are required to provide EST to all employees who perform at least 80 hours of work for pay within the City of Austin in a calendar year, including full time, part time, temporary, and seasonal employees, regardless of overtime exempt status. Paid interns and employees who perform work through a temporary or employment agency are also eligible for EST. The ordinance does not apply to unpaid interns or independent contractors.

Accrual Rates and Usage:

Employees earn one hour of EST for every 30 hours worked, beginning at the first day of employment. Employers must grant EST in one-hour increments, and not in fractions of an hour. EST must be available to employees to use as soon as it is accrued, except that an employer may restrict an employee from using EST during an employee's first 60 days of employment "if the employer establishes that the employee's term of employment is at least one year."

Maximum Yearly Accrual Caps:

Employers are allowed to “cap” accrual of EST as follows, based upon employer size.

EMPLOYER SIZE	YEARLY ACCRUAL CAP
SMALL EMPLOYERS: Employers with 6-15 employees ¹	48 hours of EST per employee
MEDIUM OR LARGE EMPLOYERS: Employers with more than 15 employees	64 hours of EST per employee

Carryover Requirements:

All of an employee’s available EST up to the yearly accrual cap must be carried over to the following year. However, employers are not required to allow an employee to use more than eight days² of EST in a calendar year.

Frontloading is Allowed:

An employer that provides the yearly accrual cap amount at the beginning of each calendar year is not required to carry over EST for that year.

Usage and Required Rate of Pay:

If an employee’s absence from scheduled work time is for reasons that qualify under the ordinance, the employer must provide EST if the employee has available accrued EST and makes a timely request to use the EST before the scheduled work time. The employer must pay EST in an amount equal to what the employee would have earned if the employee had worked the scheduled work time, not including overtime premiums, tips or commissions, but no less than the state minimum wage.

Verification:

An employer may adopt “reasonable verification procedures” (i.e., require documentation) for requests to use EST for more than three consecutive work days.

Existing PTO policies and More Generous Sick Time Practices:

The ordinance allows employers to provide paid leave benefits that exceed the requirements of the ordinance. Further, the ordinance does not require an employer to provide additional EST if it already provides at least as much paid time off (PTO) to its employees as the Ordinance requires. The ordinance permits an employer to allow its employees to donate available EST to another employee and to allow its employees to exchange hours or trade shifts voluntarily with another employee so as not to use available accrued EST.

¹ After October 1, 2020, this yearly accrual cap will apply to employers with 1-15 employees.

² The term “days” is not defined in the ordinance. It is likely that “days” in this context will mean 64 hours. However, as this ordinance applies to employees who may work fewer than 8 hour days, the term is unclear as if it is applied to employees who generally work 4 hours a day, this term could mean 32 hours.

Other Employer Obligations:

On no less than a monthly basis, employers must provide each employee a statement showing the amount of available EST. Further, employers will need to include a notice of employee rights under the ordinance in an existing employee handbook. Employers will also be required to post a notice about EST, which will be provided by the City of Austin. Finally, employers must maintain records demonstrating the amount of EST accrued and used by each employee.

Separation from Employment:

An employee who is rehired by an employer within six months following separation of employment may use any EST available to the employee at the time of separation. The ordinance is silent as to whether the accrued EST is to be paid out upon termination of employment. It is almost certain that unless employers state that it will be paid out at termination, it need not be, but employers would be well served to state in their policies that it will not be paid out.

Enforcement:

Retaliation against employees who complain about violations of the ordinance is prohibited. The ordinance gives the City of Austin Equal Employment Opportunity/Fair Housing Office (“EEO/FHO”) the authority to adopt rules necessary to implement it. The EEO/FHO has the authority to assess a civil penalty up to \$500 for each violation occurring after June 1, 2019. No criminal liability or private right of action is created. The EEO/FHO office will also have the authority to issue subpoenas, violations of which will be a Class C misdemeanor.

What to do before October 1, 2018 (if you have 6 or more employees in Austin)?

If your current paid leave benefits exceed the requirements of the ordinance, there are probably few, if any changes, that you will need to make. However, you need to consider the following issues:

1. Does your paid leave policy cover part-time and temporary employees or only provide paid leave benefits to full-time employees? If not, you may need to create a new policy for those employees who would be eligible to accrue EST under the ordinance, but would not be eligible under the current employer policy.
2. Does your paid leave policy only cover the employee’s own physical or mental illness or injury, and not the illness of the employee’s family members? Or, does your current paid leave policy have a stricter definition of “family member”? Any sick leave policy would need to be updated to allow for leave for the reasons contained in the ordinance.
3. Does your paid leave policy provide paid time off for domestic abuse, sexual assault, or stalking?

If you do not currently have any paid leave benefits, you should carefully consider how you want to structure the paid leave. Do you want to grant it on an accrual basis of one hour for every 30 hours worked and be subject to the administrative burdens of accrual and carryover? Or, do you want to grant the yearly accrual cap upfront and not be subject to carryover requirements? What type of structure best works for your business?

If you have a handbook, you will need to make sure that you include any updates to existing policies or a new policy by October 1, 2018.

Unanswered Questions:

As with many city ordinances, the city's EST ordinance does not answer all possible questions. Most expect the EEO/FHO office to issue guidance for employers. For example, does an employer outside of the city limits become subject to the ordinance once one of its employees works a minimum of 80 hours within the city limits? Does an employer with separate vacation and sick leave policies collectively exceeding the minimum number of EST still have to ensure its employees get the minimum number of paid *sick time*?

At Cornell Smith Mierl Brutocao Burton, LLP, our attorneys have extensive experience advising on the issues of paid sick leave and drafting policies and handbook addendums, as well as compliance with other cities' paid sick leave ordinances outside of Texas. On March 21, 2018, we will be hosting a free client seminar in which we will address Austin's new earned sick time ordinance.