

Guidance Interpreting Minnesota's New Earned Sick and Safe Time Law

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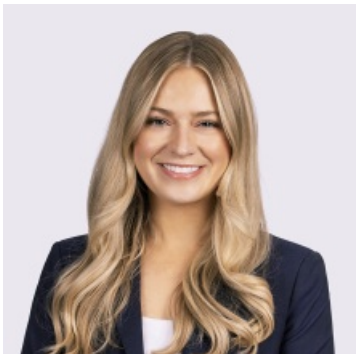
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Minnesota's statewide paid sick and safe leave mandate, the Earned Sick and Safe Time (ESST) law, went into effect Jan. 1, 2024. The Department of Labor and Industry (DLI) has [posted answers to Frequently Asked Questions](#) (FAQ Guide) that it revised on Dec. 4, 2023.

The revised FAQ Guide provides more information and example scenarios related to the ESST law. It is one of many resources the DLI published to assist understanding the new workplace responsibilities and protections created by the ESST law. The DLI also posted a YouTube [video](#) and [slide show presentation](#).

Coverage

The ESST law defines an employee as any individual who works at least 80 hours per year in Minnesota, regardless of the employer's physical location or the location of an employee's residence. The Dec. 4 update clarifies that an employer includes state or local governments and may include volunteer firefighters or government committee members who "receive some financial contribution but work infrequently" if the individual qualifies as an employee under the law.

Under the statute, for employers and employees in the building and construction industry, the obligations and rights created by the ESST law may be waived through a collective bargaining agreement if the waiver clearly and unambiguously references the ESST law. But, as the FAQ Guide clarifies, if a building and construction trades labor organization represents employees outside of the building and construction trades, like a manufacturer, the parties cannot agree to disregard the ESST law.

ESST Accrual

Employees accrue ESST hours for time spent working. The FAQ Guide explains that only hours worked in Minnesota count toward ESST accrual. Accrual is at a rate of one hour earned per 30 hours worked in Minnesota, up to 48 hours per year. Employees start accruing ESST on their first day of employment, even though the statute defines an employee as any person who works at least 80 hours per year in Minnesota. Pursuant to the statute, employees accrue ESST hours on overtime hours worked unless the employee is exempt from earning overtime wages. ESST hours do not accrue when an employee is on leave from work, which the FAQ Guide says includes leave such as vacation. The FAQ Guide does not give a bright-line answer for whether an employee accrues ESST hours for time spent on call. Rather, the Dec. 4 revisions to the FAQ Guide explain that on-call time *could* be deemed hours worked, subject to factors such as an employee's obligation to remain close or on an employer's premises during on-call time. According to the Dec. 4 revisions to the FAQ Guide, if an employee works for more than one employer, the employee accrues ESST at each place of employment.

The Dec. 4 revisions to the FAQ Guide spell out the rate of ESST accrual for employees who

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work fewer than 30 hours per pay period, given that ESST only accrues at a rate of one hour per 30 hours worked. Employers can choose to provide partial hours of ESST, such as banking 2.5 hours of ESST on an employee's biweekly paycheck if the employee works 7.5 hours per weekday. Even so, employers are not required to provide partial ESST.

Because employers define a "year" for purposes of ESST use and carryover, the FAQ Guide details what happens when an employer's year began before the ESST law took effect on Jan. 1, 2024. An employer can count ESST accrued before Jan. 1 toward the 48-hour annual cap on accrued ESST. If an employer elects to frontload ESST instead of permit ESST accrual, then it must provide 48 or 80 hours (depending on the frontloading scheme used) for immediate use at the beginning of the accrual year, no matter if the accrual year begins on Jan. 1, 2024. The FAQ Guide provides the following example:

- Bonnie works as a math teacher for a school district that front loads 80 hours of paid time at the start of the school year on Sept. 1, 2023. The district's designated accrual year runs from Sept. 1 until Aug. 31. The school district has met its obligations on Jan. 1, 2024, under the front loading options, but must front load hours again on Sept. 1, 2024.

Limits on Increments of Time for Using ESST

Under the statute, employers can limit employees' use of ESST to blocks of four hours or less. However, employers must use the smallest increment their payroll system can track.

Use of ESST

According to the Dec. 4 revisions to the FAQ Guide, an employer cannot require an employee to use ESST for leave, even if the employee misses work for a reason covered by the statute. The updated FAQ Guide also reminds employers they cannot count an employee's request for — or use of — ESST against them when applying an attendance policy or an attendance point system.

The revised FAQ Guide explains that an employer does not have to pay ESST to employees for a workplace closure unrelated to inclement weather or a state or local public emergency (declared under Minnesota Statutes §§ 12.03 or 12.29). For example, if an employer closes for a holiday party or construction, the employer need not provide employees with ESST. Additionally, employees do not accrue ESST for the time off due to the closure because ESST can only be accrued for hours worked.

Lastly, the Dec. 4 revisions to the FAQ Guide explain that employers are only required to permit employees to use ESST for eligible purposes on the days on which the employee is scheduled to work. Therefore, employers can deny requests to use ESST on days on which the employee was not scheduled to work.

Interplay Between Existing Paid Leave Policies and ESST Law

In order for an employer's paid leave policy to meet the ESST law requirements, the policy must be as generous as what is required under the state statute. The DLI confirmed an employer's paid leave policy, like a paid time off (PTO) policy, meets ESST requirements "even if an employee chooses to use some or all PTO for vacation leave instead of ESST leave."

Prorating Frontloaded ESST

The Dec. 2023 revisions to the FAQ Guide illuminate a significant ambiguity about

employer obligations when frontloading ESST. While the ESST law does not expressly prevent an employer from prorating frontloaded ESST, the FAQ Guide states, “the ESST law does not authorize prorating front-loaded hours.” Employers choosing to frontload ESST must provide either 48 or 80 hours of ESST (depending on the method chosen), beginning on Jan. 1, 2024. The FAQ Guide suggests an employer place new hires on an accrual system on their first day of employment and then switch employees to a frontloaded system at the beginning of the next accrual year, as defined by the employer.

Requirements for Notice to Employees

At the start of their employment or by Jan. 1, 2024, employers must provide all employees a notice of their rights and any employment policies related to the ESST law. The [DLI has posted a model notice](#). The FAQ Guide explains the notice must include, at minimum, information stating:

- Employees are entitled to ESST;
- The amount of ESST employees will accrue;
- The accrual year for the employee (as set by the employer);
- When employees may use ESST;
- Any written policy regarding the procedure to follow when requesting to use ESST;
- Retaliation for requesting or using ESST is prohibited; and
- Employees have a right to file a complaint or to bring a civil action if ESST is denied or if employees are retaliated against for requesting or using ESST.

If an employer has an employee handbook, it must include a notice with the above information in the handbook.

Employers must also provide employees notice of the total number of ESST hours accrued and available for use and the total number of ESST hours used in a pay period on each earning statement. Employers are not permitted to satisfy this obligation by making this information available elsewhere; however, employers can choose to make the information available to employees in other places in addition to their earning statements.

ESST Pay Rate

Employees receive ESST payments at the same hourly rate they earn from employment, provided the rate is at least the minimum wage required by applicable local or state law. The FAQ Guide addresses the complexities involved in determining an employee’s hourly rate when compensation is based on shifting jobs, productivity, mileage, or commission. If an employee has two or more different rates of pay with the same employer, then the rate of pay is the rate for the job or shift for which the employee took ESST. If an employee is paid a non-hourly rate, the DLI instructs employers to review an employee’s “several” past paychecks to calculate an average hourly rate. This rate must meet or exceed the applicable minimum wage. An hourly rate calculation does not include gratuities, and employers are not required to compensate employees for missed gratuities while out on ESST leave. Additionally, if an employee’s compensation is not reduced for missing work

because the employee received a fixed stipend or other form of payment that is not reduced due to the employee missing work, then the employer does not need to pay an hourly rate for the work the employee missed while taking ESST.

When an employee would have received overtime wages but-for taking ESST, the employer need not pay ESST at an overtime rate.

ESST Payout Obligations Upon Separation From Employment or Job Transfer

Upon separation of employment, employers are not required to pay out a separated employee's earned and unused ESST. However, employers must reinstate an employee's ESST bank if the employee is reinstated to work within 180 days from the date of separation. If an employer chooses to pay out an employee's earned and unused ESST at separation, it need not reinstate those ESST hours if the employee returns to work for the same employer.

Employers cannot exercise the option to pay out accrued ESST when an employee moves to a different department or position with the same employer. Employees retain their ESST bank as long as they remain employed by the same employer. Employees, however, may transfer their accrued ESST to another employee if the employer's policy permits.

Maintenance of Insurance Coverage

The updated FAQ Guide also expressly provides that employers must maintain coverage under any group insurance policy, group subscriber contract, or other healthcare plan for employees and any applicable dependents while the employee is off work taking ESST to the same extent the employer would maintain the coverage if the employee was working. Employers can continue requiring employees to pay their share of the cost of such benefits.

If you have questions about Minnesota's state-wide mandatory leave laws, local leave laws in Minnesota, or the mandatory employee leave laws around the country, please reach out to the Jackson Lewis attorney with whom you often work, or any member of our Disability, Leave and Health Management team.

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