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## **RLG FAQs: All Things Earned Sick and Safe Time (“ESST”)**

### **Payout**

Q: If an employee does not use their ESST time, do you have to pay it out?

A: The only time an employer is required to pay out ESST is if the employer frontloads 48 hours of ESST in a year. Under that scenario, the employer must pay out the employee’s accrued but unused ESST at the end of the year at the employee’s hourly rate.

Q: Is ESST only paid out when an employee terminates? We don’t have to pay out unused ESST at the end of the year for active employees, right?

A: Employers are not required to pay out accrued, unused ESST at the end of employment.

Q: If you front load 80 PTO hours and they leave in June, how do you calculate out what you owe them when they leave? If they haven’t used any time.

A: Employers are not required to pay out accrued, unused ESST at the end of employment. However, if your PTO policy provides for payout at end of employment, you should follow your PTO policy.

Q: If you let employees accrue time rather than frontloading 80 hours at the start, do you have to pay out at the end of the year or can you allow a rollover amount instead?

A: Under the accrual method, the employer must permit the employee to carryover their accrued, unused ESST (subject to an 80-hour cap) to the next year.

Q: If you frontload 48 and pay it out at the end of the year, do you have to pay it on a specific payroll? We currently have a year-end bonus that happens mid-December and we previously paid out unpaid medical leave at that time. Would you have to wait until after 12/31 to pay out unused ESST?

A: Apart from stating “at the end of a year”, the law does not specify the exact date for when ESST must be paid out under the 48-hour frontloading method.

Q: What if we currently allow unlimited sick time for exempt employees, would we have a payout obligation if no time is used during the year?

A: No. There is no payout requirement if you provide unlimited sick time.

### **Frontloading**

Q: Can we front load half of the ESST and then in 6 months load the other half?

A: No. Under both the 48-hour frontloading method and the 80-hour frontloading method, the entire amount must be frontloaded at the beginning of a year.

Q: Can you explain why the employer would front load 80 hours when the requirement is only 48 hours?

A: One possible reason to frontload 80 hours as opposed to 48 hours is because under the 48-hour frontloading method, the employer is required to payout any accrued, unused ESST at the end of the year.

Q: Does the 48 hours start over if they change employers?

A: An employee's ESST balance is specific to each particular employer. For example, if an employee receives ESST through their full-time employment employer A, and receives ESST through employer B through their part-time job, the two ESST balances are separate.

There are two exceptions to this general rule, however:

- (1) If an employee is transferred to a separate division, entity, or location, but remains employed by the same employer, the employee is entitled to all ESST accrued at the prior division, entity, or location and is entitled to use all ESST.
- (2) When a different employer succeeds or takes the place of an existing employer, all employees of the original employer who remain employed by the successor employer are entitled to all ESST accrued but not used when employed by the original employer, and are entitled to use all ESST previously accrued but not used. If, at the time of transfer of the business, employees are terminated by the original employer and hired within 30 days by the successor employer following the transfer, those employees are entitled to all ESST accrued but not used when employed by the original employer, and are entitled to use all ESST previously accrued but not used.

Q: If an employee gets 60 hours of PTO/ESST combined time front loaded, but they take all of it for vacation. Then have an ESST event. Do they now get another 48 hours?

A: Where an employer maintains a policy where vacation and ESST are combined into one bucket, and the employee uses their entire balance for vacation, the employer is not required to provide the employee additional ESST if the employee has an ESST event.

### **Accrual**

Q: What if we set ESST up by the accrual method instead of front-loading; and a new employee wants to use it? Then would they not have any accrued?

A: Where an employer adopts the accrual method for ESST, ESST may be used as soon as it is accrued.

Q: If I have someone work 80 hours each week and accrue 1 hour for each 30 hours worked, once they hit 48, we can stop accruing - is that correct?

A: Correct. Under the accrual method for ESST, once an employee accrues 48 hours of ESST in a year, they do not accrue additional ESST for the rest of the year (unless the employer allows the employee to accrue more than 48 hours in a year).

Q: Do employees need to be allowed to use accrued hours before payroll is processed? I work 60 hours in the 1st week, should I be able to use the 2 hours ESSL the next Monday? Most timekeeping/payroll systems run the accrual-based calculations once payroll is processed.

A: Conceivably yes. The law states that ESST may be used as soon as it is accrued (earned). If an employee accrues 2 hours of ESST in the first week, they could conceivably use those two hours of ESST for an ESST event the second week.

Q: If we go the carry over route, and the employee is at 80 hours would they then be allowed to accrue another 48 hours in the following year?

A: No. Unless the employer agrees to a higher amount, the maximum amount of ESST an employee can have in their balance at any given time is 80 hours.

Q: With having salaried and hourly employees, how do you recommend keeping track of hours worked for the salaried employees for ESSL accrual?

A: For purposes of ESST accrual, exempt, salaried employees are deemed to work 40 hours in each workweek for purposes of accruing ESST. However, if a salaried, exempt employee's normal workweek is less than 40 hours, ESST would be accrued based on the normal workweek.

### **Carryover**

Q: If we choose to accrue & not front load any ESST hours, what is the max carryover?

A: Under the accrual method, employers must permit employees to carryover all their accrued, unused ESST into the following year. However, unless an employer agrees to a higher amount, the maximum amount of ESST an employee can have in their balance at any given time is 80 hours.

Q: We have PTO accrual with a max carry over of 200 hours. Someone who maxes out will I need to give them additional 48 hours the following year?

A: No. 200 hours of carryover exceeds ESST's maximum cap of 80 hours.

## PTO

Q: Does ESSL have to be “separate” from PTO?

A: No. Employers can still maintain PTO policies that combine vacation and ESST. However, employers should ensure that their PTO policy meets or exceeds ESST’s requirements.

Q: Can we make employees use ESST first/before other paid time off options?

A: If the reason the employee needs to use paid time off is for an ESST-covered reason, then likely yes, you can require the employee to use ESST before other paid time off options.

Q: What happens if someone on commission doesn’t receive PTO, then how do you pay them for ESST?

A: ESST must be provided to any employee who performs work for at least 80 hours in a year for their employer in Minnesota. Therefore, even if the employee doesn’t receive PTO, they would receive ESST. ESST must be paid at the same hourly rate as an employee earns from employment, but in no case can this hourly rate be less than applicable minimum wage rate.

Q: If your PTO policy is better than the ESST, do we have to name it on the paystub as ESST?

A: No. An employer who maintains a PTO policy that meets or exceeds ESST’s requirements does not have to rename “PTO” to “ESST” on the paystub.

Q: If we split our PTO to include the required accrual of ESST and their PTO balance, two different banks, but the total between the two equals their standard PTO accrual rate (so they don’t get more time between PTO and ESST), can employees be allowed to take the “ESST” time as normal vacation?

A: The law does not appear to prohibit employers from allowing employees to use ESST for reasons not covered by ESST.

Q: If the employer front loads 80 hours of ESST/PTO. A new employee has access to all hours immediately. If they have a reason that falls under ESST of course they can use those hours for that unforeseeable time off. If the new employee requests off in advance to take 5 days off/40 hours for a personal vacation - can the employer approve them being off work but deny using the PTO time?

A: Where the employee is attempting to use their ESST/PTO balance for a reason not covered by ESST, the employer would maintain discretion to deny the use of PTO.

Q: Say we front load 80 PTO hours each year - we don't have to up our PTO if we call it PTO/ESST hours?

A: Correct. However, the employer should ensure that the rest of their PTO policy meets or exceeds ESST's requirements.

Q: Can you explain why more people are trying to combine ESST with their current PTO?

A: Many employers combine their paid time off into one "PTO" bucket for ease of administration/tracking.

Q: If we have one bucket and employee used all the accrual as PTO and not ESSL and then says they need to take ESSL, is the employee out of luck because they used the accrual for PTO?

A: Correct.

Q: If salaried employees have unlimited vacation/PTO, do we need to track or give them 48 hours?

A: No. Employers who maintain unlimited PTO policies do not need to provide additional ESST hours. However, they should ensure that they are tracking usage of such PTO, as the employer is required beginning January 1, 2024, to include on each employee's paystub the amount of ESST (or PTO where the employer has a combined paid time off policy):

- (1) Earned and available for use; and
- (2) The amount used in the pay period.

We are waiting for additional information from the Minnesota Department of Labor and Industry whether employers who maintain unlimited PTO policies can satisfy #1 by stating "unlimited" on the paystub.

Q: If our vacation/PTO policy satisfies the requirements of the law, can we make the employee use their available paid hours for every absence regardless of the reason? Then, if all time is exhausted and they are absent, they would be subject to an occurrence within the attendance policy if no paid time is available?

A: It depends. Some leave laws prohibit an employer from requiring an employee to use their paid time off for an absence.

### **Waiting Period**

Q: Our policy now is more generous than the ESSL, but we have a waiting period to start using it which is 60 days, but they accrue at day 1- do we need to change our waiting period?

A: Yes, employees would need to be permitted to use their time off for an ESST-covered reason as soon as it is accrued.

Q: Do employees have to wait 90 days after their start date before using ESST?

A: No. ESST may be used as soon as it is accrued.

Q: Do we have to add this on the first day of employment? We have a 60-day waiting period on their benefits, including their PTO and WFH hours.

A: Employees must be permitted to use their time off as soon as it is accrued for an ESST-covered reason.

### **Wage Theft Notice**

Q: Do we have to do a full wage theft notice or just an acknowledgement of the new policy?

A: Employers are advised to notify employees of any updates to their policies addressing ESST prior to such changes taking effect. For existing employees, this could be done via written notice (i.e., not the full wage theft notice). New employees after January 1, 2024, would need to be provided the full wage theft notice.

Q: Will we need to maintain a signed copy of the notice that we will have to provide in January?

A: Under Minnesota law, changes to an employer's paid vacation, sick time, or other paid time-off accruals and terms of use need not be signed by the employee. However, for new employees after January 1, 2024, the employer should secure a signed copy of the full wage theft notice provided to the employee.

Q: So just adding the ESST as a separate accrual bucket doesn't require a wage theft notice?

A: Where an employer updates their paid time off accruals and terms of use (which would include adding ESST as a separate accrual bucket), the employer must provide existing employees with notice of the change before the change takes effect.

Q: Have you experienced any lawsuits or fines for companies who aren't providing MN Wage Theft notices?

A: Yes, we are aware of a couple of governmental investigations that have stemmed from suspected noncompliance with the Minnesota Wage Theft Act.

### **Employees in Other States**

Q: If an employee lives in MN but works in IA, do they qualify for the ESST?

A: It depends. If the employee living in MN works at least 80 hours in a year *in Minnesota* for the employer, they are eligible for ESST.

Q: We are a MN employer, but we have remote employees who work remote in other states, do we have to provide them with ESST?

A: It depends. If an employee (regardless of where they work remotely from) works at least 80 hours in a year *in Minnesota* for the employer, they are eligible for ESST.

### **Attendance**

Q: I know we can't give attendance points for ESST reasons, but what if someone takes off an entire day due to being sick and only has 1 hour of ESST available?

A: In that circumstance, an employer could likely give attendance points for the hours outside of the 1 hour of ESST, where no other applicable law protects the remainder of the absence.

Q: I understand I cannot penalize them for using this and counting it against our attendance, but can we exclude them from our PERFECT ATTENDANCE reward?

A: Exclusion from the perfect attendance reward due to ESST-covered absences would likely constitute penalizing the employee, and therefore is not advisable.

Q: If we use the accrual option, then a full-time employee would accrue 2.6 hours of ESST by the second week of January. If they are sick in the second week of January, they can get an attendance "point" for all absences except the 2.6 of ESST?

A: Provided the absences are not covered by some other law, likely yes.

Q: How do you discipline employees for attendances, etc.? If they can use the time last minute than they can't be disciplined for the 48 hours.

A: An employer could still penalize an employee for attendance if they have zero ESST hours to use, or if the employee fails to follow the employer's notice requirements (provided the employer's notice requirements adhere to ESST's requirements and are communicated to employees).

### **FMLA**

Q: Can ESST and FMLA run concurrently?

A: If the reason for using FMLA aligns with the reason for using ESST, the two could run concurrently.

Q: Why would you count an absence as unexcused if no ESST is remaining, but qualifies for ESST reason? Wouldn't they qualify for FMLA?

A: It depends. Not all ESST reasons would qualify for FMLA.

### **Different Industries**

Q: We are in the Ag industry, so there are times that many of them work 12-15 hours a day, but then during the winter they are a straight 40 hours a week. Would it be better to start actually tracking hours?

A: Yes, employers should be tracking hours worked by employees; not just for ESST compliance purposes but also general wage and hour compliance purposes.

### **Time Variations**

Q: Employee scheduled 60 hours/pay period, works 80 that pay period. Do they have to earn ESST on all 80 hours for that week?

A: Yes. They would accrue ESST for all hours worked in the week (assuming the employer uses the accrual method).

Q: Employee scheduled 80 hours/pay period, works 90 hours that pay period including OT. Do they earn ESST on all 90 hours?

A: Yes. They would accrue ESST for all hours worked in the week (assuming the employer uses the accrual method).

### **Miscellaneous**

Q: Can you allow non-exempt employees to use ESST in 1-hour increments, but exempt employees in 4 hour increments only?

A: ESST may be used in the smallest increment of time tracked by the employer's payroll system. However, such increments cannot be more than 4 hours.

Q: Are we obligated to train our employees on ESST? Or just comply having it for them?

A: There is no general training requirement attached to ESST; however, employers should ensure that their managers are aware of the basics for how ESST works, including the notice and documentation requirements.

Q: Do you have to track who the annual designated person is each year?

A: Employers are not necessarily required to track each employee's annual designated person. However, employers concerned about employees changing who their annual designated person is on a more than annual basis may want to consider tracking such information.

Q: Is there guidance, yet, saying we have to go by the Jan 1st beginning date rather than the employees' current anniversary dates?

A: For purposes of ESST, a "year" can be any consecutive 12-month period designated by the employer. This could be the calendar year, or based on the employee's anniversary date. However, the employer measures their "year", they must clearly communicate the same to their employees.

*These are fast-moving times, and the information provided is only current as of today's date (October 9, 2023). The information provided does not, and is not intended to, constitute legal advice; instead, all information is prepared and provided for general informational purposes only.*

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