

ESTA FAQs

Q: Are these workers exempt from ESTA based on these new modifications?

Temporary or seasonal	No, not exempt
Gig workers	Yes, exempt
Unpaid Intern	Yes, exempt (when unpaid)
Variable Wage	No, not exempt
Camp Counselor/ School Resident Assistant	Seek legal counselor clarification on workers who might receive room and board in lieu of base wages
Independent Contractor	Yes, contractors are not employees
On-Call/Float Positions	No, not exempt
Substitute teachers & Adjunct Professors	Seek legal counsel
Church volunteers	Yes, they are exempt, unless they are receiving pay

Q: Are non-profits exempt from ESTA?

No. Only the United States Government is exempt.

Q: If an employer has reason to believe time is being taken for an ESTA-qualifying reason, can/should they designate that as ESTA time even if the employee doesn't request it?

Yes, employers should spell out that rule in policy if that is the intent. Include language in the policy that paid time is automatically applied to all planned and unplanned absences, and all paid time must be exhausted before unpaid time can be taken.

Q: Can we still hold people accountable for being tardy and document it even if they state they weren't feeling well?

Employers can hold employees accountable for attendance rules like failure to follow call in procedures, or improper notification for planned absences. But if an employee says they are sick and they have paid sick time available, it should be applied and the time excused. If an employer has a "no fault" attendance policy that applies points to all absences, whether an employee is sick or not, those policies will likely need to be amended.

Q: Does the employee have to follow the employer's call-in procedure and notify in advance?

Yes, when absences are foreseeable the employee is required to give at least 7 days' notice. Unforeseeable absences require notice as soon as practicable. It's a good idea to have clear call-in rules.

Q: Can we have separate PTO accrual plans for full-time and part-time employees?

Yes. So long as the employer meets the minimum requirements of the law for ALL groups of employees, they can have different benefits or levels of benefits for different classifications of employees. Just be sure to spell it out in the policy. For example, an employer may want different accrual rates for hourly vs. salaried employees or special rules for seasonal and paid interns. The key is to make it clear what the differences are in the policy, and make sure all classifications are compliant and consistently applied.

Q: Can you delay ESTA usage for one group of employees (e.g., part-time vs. full-time)?

Yes. For example, an employer may choose to front load time for salaried/exempt employees and make time eligible for use immediately. Then, for hourly/non-exempt employees they may have an accrual system and allow use of sick time after 120 days. As in the previous question, make sure it's clear in the policy and compliant with the law. Employers may also want to consider how the different rules for different groups will affect morale and the sense of "fairness" in the workplace. Some differences may make sense to everyone, while others could cause feelings of inequality.

Q: Does shift premium need to be included in wage calculations?

Yes, we believe they are still included. While shift premiums were not addressed directly, they were not called out as an exclusion like incentives and commissions. Previous legal advice was to include them in the wage calculation.

Q: If an employer has a single PTO bucket with more than 72 hours, does it need to earmark 72 of those for sick time?

No. Employers need not "earmark" specific time for ESTA usage but should include all the ESTA rules and requirements in their policies. And if an employer wants to have more stringent rules for vacation (for example, require 2 weeks' notice or only allow use of 1 week at a time) they can do that now. Just be sure to spell it out clearly in the policy and when employees are requesting time off, have a method for them to designate if the time is for vacation or sick/ESTA time.

Q: If an employer front-loads PTO, does the full amount need to be available immediately, or can it be prorated based on the anniversary date?

Employers may pro-rate based on anniversary date when front loading PTO. In fact, this is quite common. For example, if a company has defined a calendar (1/1 - 12/31) benefit year and an employee is hired in June, the employee would typically receive 6/12ths or 50% of the total allotment at hire, then a full allotment the following January.

Q: If an employer offers unlimited PTO, does that comply with ESTA? And does it satisfy all ESTA requirements?

Yes, an unlimited PTO program can be applied to comply with ESTA but no, simply offering unlimited time does not satisfy ALL the requirements. Employers must follow the notice requirements, notification rules, approval procedures, etc. There is more to ESTA compliance than simply meeting the time off requirement.

Q: How do you determine the ESTA sick pay rate for 100% commission-based employees?

These employees are considered “variable pay” employees so employers should follow the ESTA guidelines, which recommends using the average hourly rate as calculated in the payroll period immediately preceding the request for paid time off.

Q: If an employee reaches the 72-hour accrual cap, do they start accruing again after using some hours, or is 72 the annual cap?

There is no cap on the amount of time that can be accrued. There is a cap on annual usage and carryover. So, the system should continue to accrue but track and limit the amount the employee can request, use, and carry over.

Q: The new stipulations of a new business under three years of age, is that a new EIN number? Or new owner? Or new rebranding? What are your thoughts on ‘new business’?

The law is not clear on this; however, it is our professional opinion that a change in ownership or branding is not likely to constitute a new business. Relying on the date that the entity was formed is probably the safest bet to ensure compliance. And remember, the rule only applies to small businesses, those with 10 or fewer employees.