

# EARNED SICK TIME (ESTA) Q&A

**Featuring Lisa Sabourin**

Executive Vice President, American Society of Employers

## VIRTUAL TOWN HALL

FRIDAY, MARCH 28  
8:30 A.M. - 9:30 A.M.  
ZOOM MEETING

**GRAND  
RAPIDS  
CHAMBER**

**the  
Chamber**  
Grand Haven  
Spring Lake  
Fannyburg

 **MUSKEGON  
LAKESHORE**  
chamber of commerce

# Agenda

- Kickoff with Josh Lunger
- Q&A with Lisa Sabourin, EVP, American Society of Employers (ASE)



**If I frontload 72 hours, can we do this retroactive to January 1 (our benefit plan year) and count the sick/personal time already taken against the 72 hours?**

- **Answer**

It depends, can't count the time that was taken and is no longer available on 2/21/25, but can count the time given that is still available.

**From LEO FAQ #15**

Example: The employer intends to use the calendar year for purposes of ESTA, the employer may frontload based on the period from February 21, 2025, through the end of 2025. Formula: Feb 21 to Dec 31 equals 314/365 days, or 86%. An employer could frontload 62 hours for 2025. Small employers are not obligated to begin until October 1, 2025. (FAQ provides 2 examples of time given and available)

If the employee did not receive enough time and/or if the employee has used the time and doesn't have at least the prorated amount (86% - 62 hours) available on 2/21/25, you will have to add more time. The same is true for anniversary date benefit years. And may be the case for small employers that start in Oct based on the benefit year.

# How is accrual tracked for those commissioned employees that are compensated on duties vs hours worked? Is there a difference for partial vs full commission?

- **Answer**

The Act and LEO do not specifically address this. To track hours, consider:

- Do they have full discretion over their schedule and # hours and are not tied to the employer's schedule? If so, FAQ#3 and an exemption may apply. It won't if partial.
- Are they salaried exempt and if so, does the assumed 40 hours make sense?
- Have them track hours worked or consider frontloading for this classification.
- Is there a job offer, employment agreement, commission agreement, or regular schedule that references expected hours of work and wage calculation?
- Consult your attorney.

Partial versus full commission for calculating the hourly pay rate has been defined as dividing the total earnings by the hours worked. If partial commission, you will need to determine total earnings. From LEO FAQ #21 employers are not required to include overtime pay, holiday pay, bonuses, commissions, etc. in the calculation of an employee's normal hourly wage or base wage. The rate must meet the minimum wage.

## How do we attribute ESTA hours to part-time employees that have complete autonomy over their schedules and hours worked?

- **Answer**

See the previous slide for things to consider to determine expected hours of work.

From LEO FAQ #3

They could be exempt from ESTA if under an employer policy 1) the individual schedules their own hours and 2) there is no adverse action if the individual does not schedule a minimum number of working hours. In LEO's example, if an individual sets their schedule based on a posted employer's schedule, they are not exempt from ESTA.

This could be an exemption for owners, commission-based, etc. Consult your attorney regarding any exemption.

**Can new hires be classified separately from established employees that are "frontloaded" in order to track accrual for any employee that may not work enough hours to reach 72 hrs?**

- **Answer**

Yes, you can manage specific classifications of employees differently. You may:

1. Accrue for all new hires, interns, seasonal, etc. until they reach the next benefit year or established period.
2. You may front-load a prorated amount based on scheduled hours of work; however, you will need to "true-up" employees at least once a year to ensure they receive enough time based on actual hours worked.

Special note on new hires, from LEO FAQ #15 if you accrue ESTA time you can enforce a waiting period not longer than 120 days. If you front-load you cannot enforce a waiting period. Some attorneys disagree.

**How much notice do small employers (10 or less employees) need to give regarding their ESTA policies that go into effect Oct 1st? In other words, do they need to share information prior to Oct 1st?**

- **Answer**

LEO's FAQ does not break this out for small and large employers. Attorneys say you can wait and notify BY Oct 1st. Do what makes sense, follow your communication practices, and be mindful of your culture. You may want to share some information now and inform them that you will provide specific details and the policy by the effective date of 10/1/25.

**Minors under 18 years of age (covered under the Youth Employment Standards Act) are exempt from accrued ESTA hours. Do these employees still count towards total employee levels to determine small employer status? Do all employees also count towards total, regardless of hours worked?**

- **Answer**

In general, yes, all (W-2) employees count for calculating large or small employers regardless of the state they work in, classification like owner, full, part-time, and temporary. (From LEO FAQ #5).

However, the 3<sup>rd</sup> bullet of this FAQ states “employs 11 or more employees for 20 or more workweeks.” The youth may not be employed for that long.



**If we want to combine plans, allowing up to 36 hours to be used for flex PTO within the 72 hours of sick time, is this acceptable, so long as they're both tracked?**

- **Answer**

If they are flexing time for a DR appointment and have the CHOICE to make it up in the same week or use ESTA or vacation, then ESTA or vacation time/pay wasn't actually used. I caution against interference or retaliation. Only ESTA time needs to be tracked for this Act, FLSA has separate requirements regarding payroll records.

If the question is what can be in the bucket(s) from LEO FAQ #19

. Do employers have to create a separate “bank” of time for earned sick leave, or can employers use existing paid time off policies? • No. An employer’s paid time policy may be used so long as it provides at least the same benefits as provided in the ESTA, and may be used for the same purposes, under the same conditions, and accrued at a rate equal to or greater than the rate described in the ESTA.

**If an employer posts the state provided posters, are they also required to provide written notice of ESTA policy to employees?**

- **Answer**

Yes, the Notice includes the ESTA poster and providing written notice (policy) of:

1. How much time is allotted by frontload or accrual
2. What is your 12-month period (benefit-year)
3. Under what circumstances they may use ESTA (copy 5 bullets)
4. “Retaliation is prohibited and you have a right to file a claim, please see the poster.”

Also, going forward, those hired after the respective compliance dates (3/23/25 or 10/1/25) must be provided written notice at the time of hire (onboarding).

And, if part-time ESTA time is not defined in your written policy, they must have notice of the allotted time. Actual hours worked must be reviewed at least once a year. (True-Up)

# Can we have any type of attendance incentive, or would that be looked at as 'negative action'?

- **Answer**

LEO has not addressed this and attorneys caution.

ESTA explicitly prohibits employers from interfering with, restraining, or denying the exercise of these rights. Employers cannot take retaliatory personnel action or discriminate against an employee for exercising their rights. An employer's absence control policy must not treat earned sick time taken under this act as an absence that may lead to retaliatory personnel action.

**Are employees covered by a collective bargaining agreement (CBA) that is completely silent on sick time policy covered by ESTA?**

- **Answer**

**From LEO FAQ #9**

**Employees covered by a collective bargaining agreement that is completely silent on sick leave, either for the entire unit or for specific classifications covered by the agreement, are covered by the ESTA and begin accruing benefits on February 21, 2025, unless they are a small employer as outlined in FAQs.**

## Can an employer require employees to use earned sick time in full day increments?

- **Answer**

**No**

**From LEO FAQ #16**

**The employer may allow 1-hour increments or the smallest increment that the employer uses to account for absences or use of other time (tardies, etc.).**



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# Thank You

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