

DEPARTMENT OF CONSUMER AFFAIRS

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing?

Proposed rules to clarify provisions in the “Earned Sick Time Act,” found in Chapter 8 of Title 20 of the Administrative Code of the City of New York (as added by Local Law 46 for the year 2013, and amended by Local Laws 6 and 7 for the year 2014), establish requirements to implement the Act and meet its goals, and provide guidance to covered employers and protected employees.

When and where is the Hearing? The Department of Consumer Affairs will hold a public hearing on the proposed rule. The public hearing will take place at 10 a.m. on April 29, 2014. The hearing will be in Department of Consumer Affairs hearing room at 66 John Street, 11th Floor, New York, New York.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of Consumer Affairs through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to Rulecomments@dca.nyc.gov.
- **Mail.** You can mail written comments to Ricky Wong, Assistant Commissioner for Community and Governmental Relations, Department of Consumer Affairs, 42 Broadway, 8th Floor, New York, NY 10004.
- **Fax.** You can fax written comments to the Department of Consumer Affairs, (646) 500-5962.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling 212-436-0186. You can also sign up in the hearing room before the hearing begins on April 29, 2014. You can speak for up to three minutes.

Is there a deadline to submit written comments? Written comments may be submitted on or before 5 p.m. on April 29, 2014.

Do you need assistance to participate in the Hearing? You must tell the Office of Legal Affairs if you need a reasonable accommodation of a disability at the Hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at 212-436-0155. You must tell us by April 28, 2014.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A

few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available between the hours of 9 a.m. and 5 p.m. to the public at the office Ricky Wong, Assistant Commissioner for Community and Governmental Relations, Department of Consumer Affairs, 42 Broadway, 8th Floor, New York, NY 10004.

What authorizes the Department of Consumer Affairs to make this rule? Sections 1043 and Section 2203 (e) of the New York City Charter authorize the Department of Consumer Affairs to make this proposed rule. This proposed rule was not included in the Department’s regulatory agenda for this Fiscal Year because it was not contemplated when the Department of Consumer Affairs published the agenda.

Where can I find the Department of Consumer Affairs’ rules? The Department of Consumer Affairs’ rules are in title 6 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department of Consumer Affairs must meet the requirements of Section 1043 of the New York City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

The City Council enacted the “Earned Sick Time Act,” found in Chapter 8 of Title 20 of the Administrative Code of the City of New York (as added by Local Law 46 for the year 2013, and amended by Local Laws 6 and 7 for the year 2014), to ensure that employees can take time off work to address their health needs or the health needs of family members. The City Council determined that providing sick time would have a positive effect on public health, foster employee retention and productivity and result in a more prosperous, safer and more healthy city.

These proposed rules clarify provisions in the Earned Sick Time Act, establish requirements to implement the Act and meet its goals, and provide guidance to covered employers and protected employees. Specifically, these rules:

- Provide a methodology for new employers to calculate the number of their employees;
- Address situations where employees are employed by more than one employer, who, as “joint employers,” are jointly and individually liable for ensuring compliance with the Earned Sick Time Act;
- Confirm that the Earned Sick Time Act applies to employees irrespective of immigration status;
- Explain what may constitute a “reasonable” minimum amount of leave that an employer may require for the use of sick time;
- Establish requirements for employer policies that require employees to provide “reasonable notice” before using sick time;
- Clarify that an employer may require an employee to provide written documentation of the need for sick time from a licensed health care provider if the employee is absent for more than three consecutive “work days” and define “work day” in this context;

- Address accrual of sick time for domestic workers;
- Address the rate of pay of paid sick leave for certain employees;
- Provide that employees must be paid for sick time no later than the payday for the next regular payroll period after the sick time was used by the employee, unless the employer has asked for written documentation or verification of the need for sick time, in which case the employer is not required to pay sick time until the employee provides it;
- Address what happens to accrued sick time after an employer sells, transfers or otherwise assigns its business to another employer and the employee continues to work for that business;
- Establish requirements relating to the distribution or posting of an employer’s sick leave policies;
- Clarify the requirements in the Earned Sick Time Act relating to Department access to employer records and define “appropriate notice” of the need for such access by the Department;
- Describe the circumstances in which the Department will issue a Notice of Violation to an employer;
- Establish a cure period for certain violations of the Earned Sick Time Act relating to the failure to respond to a complaint or provide records; and
- Describe the circumstances in which the Department may conduct an investigation of an employer’s employment practices on its own initiative.

The authority for the Department of Consumer Affairs to promulgate these rules is found in section 2203 of the New York City Charter and Chapter 8 of Title 20 of the Administrative Code.

Proposed Rule

Section 1. A new chapter 7 of Title 6 of the Rules of the City of New York is added to read as follows:

CHAPTER 7 EARNED SICK TIME

SUBCHAPTER A

§ 7-1 Definitions.

As used in this subchapter, the terms “calendar year,” “domestic worker,” “employee,” “employer,” “health care provider,” “paid sick time,” and “sick time” shall have the same meanings as set forth in section 20-912 of the Administrative Code.

§ 7-2 New Employers.

Business size for a business that has operated for less than one year as of April 1, 2014 shall be determined by counting the number of employees performing work for an employer for compensation per week, provided that if the number of employees fluctuates per week, business size may be determined for the current calendar year based

on the average number of employees per week who worked for compensation for each week during the first 80 days of operation in that calendar year.

§ 7-3 Joint Employers.

- (a) Two or more businesses may be treated as a “joint employer” of an employee for purposes of complying with chapter 8 of title 20 of the Administrative Code (“the Earned Sick Time Act”). Joint employers may be separate and distinct entities with separate owners, managers and facilities.
- (b) Every business deemed to be a joint employer must count each employee jointly employed in determining the number of employees performing work for compensation for the employer under the Earned Sick Time Act. For example, an employer who jointly employs three workers from a temporary help agency and also has three permanent employees has six employees for purposes of the Earned Sick Time Act and must provide paid sick time.
- (c) Every joint employer is responsible, individually and jointly, for compliance with all provisions of the Earned Sick Time Act.

§ 7-4 Employees.

- (a) An employee is entitled to the protections of the Earned Sick Time Act regardless of immigration status.
- (b) An individual is “employed for hire within the city of New York” for purposes of section 20-912(f) of the Administrative Code if the individual performs work, including work performed by telecommuting, while the individual is physically located in New York City, regardless of where the employer is located.
 - i. Example: An individual who performs work while physically located outside of New York City, even if the employer is based in New York City, is not “employed for hire within the city of New York” for purposes of section 20-912(f) for hours worked outside New York City.

§ 7-5 Minimum increments for the use of sick time.

Unless otherwise provided by state or federal law or regulations:

- (a) an employer may not require an employee to use another form of paid or unpaid leave (such as annual leave) in conjunction with sick time; and
- (b) an employee may decide how much earned sick time to use, provided however, that an employer may set a minimum increment for the use of sick time, not to exceed four hours per day, provided such minimum increment is reasonable under the circumstances.

§ 7-6 Employee notification of use of sick time.

- (a) An employer may require an employee to provide reasonable notice of the need to use sick time.
- (b) An employer that requires notice of the need to use sick time where the need is not foreseeable shall provide a written policy that contains procedures for the employee to provide notice as soon as practicable. Examples of such procedures may include, but are not limited to, instructing the employee to: (1) call a designated phone number at which an employee can leave a message; (2) follow a uniform call-in procedure; or

- (3) use another reasonable and accessible means of communication identified by the employer.
- (c) In determining when notice is practicable in a given situation, an employer must consider the individual facts and circumstances of the situation.
- (d) An employer that requires notice of the need to use sick time where the need is foreseeable shall have a written policy for the employee to provide reasonable notice. Such policy shall not require more than seven days notice prior to the date such sick time is to begin. The employer may require that such notice be in writing.
- (e) An employer that has not provided to the employee a copy of its written policy for providing notice of the need to use sick time shall not deny sick time to the employee based on non-compliance with such a policy.

§ 7-7 Documentation from licensed health care provider.

- (a) When an employee's use of sick time results in an absence of more than three consecutive work days, an employer may require reasonable written documentation that the use of sick time was for a purpose authorized under section 20-914(a) of the Administrative Code. Written documentation signed by a licensed health care provider indicating the need for the amount of sick time taken shall be considered reasonable documentation. "Work days" means the days or parts of days the employee would have worked had the employee not used sick time.
- (b) If an employer requires an employee to provide written documentation from a licensed health care provider when the employee's use of sick time resulted in an absence of more than three consecutive work days, the employee is responsible for the cost of such documentation not covered by insurance or any other benefit plan.
- (c) If an employee provides written documentation from a licensed health care provider in accordance with subdivision (a) of this section, an employer may not require an employee to obtain documentation from a second licensed health care provider indicating the need for sick time in the amount used by the employee.

§ 7-8 Domestic workers.

- (a) Domestic workers who have worked for the same employer for at least one year and who work more than 80 hours in a calendar year will accrue two days of paid sick time per year, as provided in this section.
- (b) The two days of paid sick time must be calculated in the manner that paid days of rest for domestic workers are calculated pursuant to New York State Labor Law section 161(1).
- (c) A domestic worker described in subdivision (a) of this section will be entitled to two days of paid sick time on the next date that such domestic worker is entitled to a day or days of rest under New York State Labor Law section 161(1) that immediately follows April 1, 2014, and annually thereafter.
- (d) Sick time accrued by a domestic worker will carry over to the next calendar year.

§ 7-9 Rate of pay.

- (a) Except as provided in subdivision (b) of this section, when using paid sick time, an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid sick time is taken.

- (b) If the employee uses sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate of pay.
- (c) An employee is not entitled to compensation for lost tips or gratuities, provided, however, that an employer must pay an employee whose salary is based in whole or in part on tips or gratuities at least the full minimum wage.
- (d) For employees who are paid on a commission (whether base wage plus commission or commission only) or piecework basis (whether base wage plus piecework or piecework only), the hourly rate of pay shall be the base wage or applicable minimum wage, whichever is greater.
- (e) If an employee performs more than one job for the same employer or the employee's rate of pay fluctuates for a single job, the rate of pay shall be the rate of pay that the employee would have been paid during the time the employee used the sick time.

§ 7-10 Payment of sick time.

- (a) Sick time must be paid no later than the payday for the next regular payroll period beginning after the sick time was used by the employee.
- (b) If the employer has asked for written documentation or verification of use of sick time pursuant to section 20-914(c) or 20-914(d) of the Administrative Code, the employer is not required to pay sick time until the employee has provided such documentation or verification.

§ 7-11 Employer's sale of business.

- (a) If an employer sells its business or the business is otherwise acquired by another business, an employee will retain and may use all accrued sick time if the employee continues to perform work within the City of New York for the successor employer.
- (b) If the successor employer has fewer than five employees, and the former employer had more than five employees, the employee is entitled to use and be compensated for unused sick time accrued while working for the former employer, until such sick time is exhausted.

§ 7-12 Employer's distribution or posting of policies.

- (a) Every employer shall distribute or post the employer's written policies on sick time, including, but not limited to those required by the Earned Sick Time Act and this subchapter.
- (b) An employer may comply with subdivision (a) of this section by:
 - (1) distributing the policies to each employee personally, by regular mail or by email;
 - (2) distributing through company newspapers or newsletters, inclusion with paychecks, inclusion in employee handbooks or manuals, or posting on the company intranet;
 - (3) posting the policies in a conspicuous place where notices to employees are customarily posted; or
 - (4) using any means of distribution or posting that the employer uses in order to comply with section 195(5) of the New York State Labor Law.
- (c) Employers shall retain records documenting such employer's compliance with the requirements of the Earned Sick Time Act, including records of any policies required

- pursuant to this subchapter, for a period of three years unless otherwise required pursuant to any other law, rule or regulation.
- (d) Requirements relating to an employer's obligation to provide employees with a Notice of Rights under the Earned Sick Time Act are set forth in section 20-919 of the Administrative Code.

§ 7-13 Employer records.

- (a) If the department issues a subpoena or document demand, an employer shall provide the department with access to records documenting its compliance with the requirements of the Earned Sick Time Act and the provisions of this subchapter, upon appropriate notice, at the department's office.
- (b) Alternately, in the absence of a subpoena or document demand, an employer shall provide the department with access to records upon appropriate notice and at a mutually agreeable time of day at the employer's place of business.
- (c) "Appropriate notice" shall mean 30 days' written notice, unless the employer agrees to a lesser amount of time or the department has reason to believe that:
- (1) the employer will destroy or falsify records;
 - (2) the employer is closing, selling or transferring its business, disposing of assets or is about to declare bankruptcy;
 - (3) the employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers' compensation or discrimination; or
 - (4) more immediate access to records is necessary to prevent retaliation against employees.
- (d) The department will make two attempts by letter, email or telephone to arrange a mutually agreeable time of day for the employer to provide access to its records in accordance with subdivision (b) of this section. If these attempts are not successful, the department may set a time to access records at the employer's place of business during regular business hours, upon two days' notice.

§ 7-14 Enforcement.

- (a) The department may issue a notice of violation after conducting an investigation pursuant to section 20-924(c) of the Administrative Code.
- (b) Additionally, the department may issue a notice of violation to an employer who fails to respond to a complaint or provide information requested by the Department in connection with a complaint, as required by section 20-924(c) of the Administrative Code, or who fails to provide records or access to records as required by section 20-920 of the Administrative Code, provided that:
- (1) the department makes two written attempts to obtain the response to the complaint, requested information or records, or access to records; and
 - (2) the department notifies the employer that failure to respond to the complaint, or provide requested information, records or access to records will result in a notice of violation.
- (c) The employer may cure a notice of violation issued in accordance with subdivision (b) of this section without penalty by:
- (1) producing the requested information or records on or before the first scheduled hearing date; or

- (2) resolving to the satisfaction of the department on or before the first scheduled hearing date the employee complaint that is the basis for the request for a response to the complaint.
- (d) The department may conduct an investigation on its own initiative where the department has reason to believe that the facts and circumstances of an employer's practices related to the Earned Sick Time Act warrant investigation, including where:
 - (1) the employer has a history of non-compliance with the Earned Sick Time Act, including failure to comply with settlements or orders of the department, or the department has reason to believe that the employer engages in a pattern of violations of the Earned Sick Time Act;
 - (2) the department has reason to believe that the employer fails to pay minimum wage, prevailing wage, engages in discriminatory practices or retaliation, misclassifies employees as independent contractors or denies undocumented employees sick time required under the Earned Sick Time Act; or
 - (3) the investigation is part of a coordinated enforcement effort with other state, local or federal agencies to protect employee rights.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Paid Sick Leave Rules

REFERENCE NUMBER: 2014 RG 020

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: March 27, 2014

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Paid Sick Leave Rules

REFERENCE NUMBER: DCA-18

RULEMAKING AGENCY: DCA

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) The proposed rules provide a cure period for failure to respond to a complaint and for failure to provide records. The proposed rules also give businesses ample notice before specific violations are issued.

/s/ Francisco X. Navarro
Mayor's Office of Operations

March 27, 2014
Date