



the work and family legal center

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Commissioner Julie Menin
Department of Consumer Affairs
42 Broadway, 8th Floor
New York, NY 10004

Submitted via email to Rulecomments@dca.nyc.gov

Re: Comments on Proposed Rules to Clarify Provisions in the New York City Earned Sick Time Act

Dear Commissioner Menin:

We are writing to submit comments on the proposed rules regarding the “Earned Sick Time Act.” We thank you for the opportunity to comment on these proposed rules.

A Better Balance is a national legal advocacy organization dedicated to empowering individuals to meet the conflicting demands of work and family without sacrificing their economic security. We believe that workers should not have to face impossible choices between earning a paycheck and caring for themselves or their loved ones. A Better Balance helped to draft the New York City Earned Sick Time Act and negotiated the final terms of the legislation. In addition to providing legal and strategic support to the New York City paid sick time campaign, A Better Balance has gained expertise on this issue by drafting paid sick time laws in cities and states across the country and helping to draft rules and regulations in cities where paid sick time requirements have been enacted. Through our free legal clinic in New York City, we have answered questions for many employers and employees regarding the Earned Sick Time Act, and these questions have informed our testimony.

We believe these rules are generally an excellent reflection of the intent of the ordinance, but we do have some comments laid out below. In section one, we provide comments on the specific rules proposed by the Department of Consumer Affairs (DCA). In section two, we suggest some potential additions to the proposed rules issued by DCA.

Section I. Comments on Proposed Rules

§ 7-2 New Employers

We are glad that DCA is clarifying how to determine business size for employers that have been in operation for less than one year as of April 1, 2014. However, we think the issue of how to determine business size should clarify that the overarching rule for all businesses is that when the

number of employees who work for compensation per week fluctuates, business size for the current calendar year is based on the average number of employees who worked for compensation per week during the preceding calendar year.

In addition, we think it would be useful to clarify that the proposed rule for determining business size for new businesses also applies to new businesses that begin operation *after* April 1, 2014 and have a fluctuating number of employees. This approach would give new small businesses time to determine whether they will have to provide paid or unpaid sick time during the 120-day waiting period before new employees can use their accrued sick time. Without these clarifications, the regulation could leave the impression that only businesses in operation less than a year on April 1, 2014 calculate business size in this manner.

§ 7-4 Employees

In subsection (b) of this proposed rule, we suggest that DCA clarify that this rule pertains to the 80-hour threshold in the definition of “employee.” As written, we are concerned that the proposed rule does not address the 80-hour threshold in Section 20-912(f)’s definition of who is employed for hire within New York City. The requirements of being “employed for hire” and the 80-hour threshold for work within New York City are two components of the Earned Sick Time Act’s “employee” definition that must be read together. We think DCA could further clarify the rule by referencing the 80-hour threshold, as in the paragraph below (suggested changes in italics):

An individual is “employed for hire within the city of New York *for more than eighty hours in a calendar year*” for purposes of section 20-912(f) of the Administrative Code if the individual performs work, including work performed by telecommuting, *for a minimum of 80 hours* while the individual is physically located in New York City, regardless of where the employer is located. *Work performed by telecommuting will count for this purpose whenever the individual is physically located in New York City, regardless of whether the employer is located outside of New York City.*

Without the suggested clarifications above, we are concerned employers and employees could misinterpret the example provided in (b)(i) of this proposed rule to imply that telecommuters are not covered at all by the Earned Sick Time Act for hours worked within New York City if they work *any* hours while physically outside of New York City. Therefore, we would suggest eliminating or clarifying the example.

In addition, as mentioned earlier in this document, we think it is useful when a provision of the Earned Sick Time Act is generally applicable—but the rules address some nuance for specific situations—for DCA to restate the general rule so that there is clarity for all employers and workers. Therefore, we think it would be helpful in this rule to restate the general rule for determining business size applicable to *all* employers: in determining the number of employees

performing work for an employer for compensation during a week, all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted.

§ 7-6 Employee notification of use of sick time

We are pleased to see that DCA has delineated the circumstances under which notice requirements will be deemed appropriate and fair. In particular, we commend DCA on considering, in subdivisions (d) & (e), how to ensure that employers who have not distributed a written policy on providing notice cannot use the notice requirement to evade their obligation to provide sick time.

§ 7-7 Documentation from licensed health care provider

We would like to suggest new language in this rule to address the common situation of workers who return to work before they can visit a health care provider. We believe the rule should clarify that an employee does not have to provide the employer with a note immediately upon return from an absence of more than three days. If an employee is unable to visit a doctor before returning to work (as will often be the case), the employee should be given a reasonable amount of time to locate and visit a medical provider after recovering from the illness or injury.

In addition, we are pleased that DCA has emphasized, in subdivision (c), that an employer cannot require documentation from a second health care provider. We think it would also be worth emphasizing in this rule that if the employer requires a note from a health care provider after more than three consecutive days of absence, the note need not specify the nature of the individual's illness.

§ 7-8 Domestic workers

We are pleased to see that DCA has clarified that domestic workers will be entitled to their two days of paid sick time as soon as they are eligible for their paid days of rest after April 1, 2014. In subdivision (a), we suggest stating that domestic workers “will *be entitled to* two days,” rather than will accrue two days,” so as not to imply that domestic workers are entitled to the same accrual rates as other employees under Earned Sick Time Act.

§ 7-9 Rate of pay

We are pleased to see that DCA has clarified that employees who are paid on commission shall be entitled to their base wage, if that exceeds the minimum wage.

We have concerns regarding subdivision (b), which applies to all employees and states that “[i]f 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.” We would like to make several points regarding this proposed rule:

- We do not believe the law intended to draw a blanket prohibition on payment of an overtime rate in all circumstances. In a number of industries and job sectors covered by this ordinance, overtime is often regularly scheduled. In cases where overtime work is part of an employee’s job schedule, if there is a need for sick time during that regularly scheduled overtime, that sick time should be compensated at the overtime rate. This provision of the ordinance was meant to apply *only* to situations where the employee *volunteered* for premium pay and then needed to use sick time. Specifically, the provision was inserted to address concerns of the restaurant industry that wait staff who normally receive minimum wage would volunteer for banquet duty, which is paid at a very high rate; in such cases, the ordinance intended to only provide minimum wage pay. The provision was not meant to apply to all time paid at a higher rate under other applicable labor laws where such time is part of the employee’s regular schedule.
- The above allowance for regularly scheduled overtime pay would be consistent with DCA’s Frequently Asked Question (FAQ) on the topic, which states that “employees who volunteer to work hours in addition to their normal schedule would be paid at their normal pay rate if they take sick leave.”¹ In contrast to the scenario envisioned in this FAQ, regularly scheduled overtime entails a “normal schedule” that includes overtime hours which employees do not necessarily work on a “volunteer” basis.
- The proposed rule is not consistent with Section 20-912(k) of the Earned Sick Time Act, which states only that “[i]n no case shall an employer be required to pay more to an employee for paid sick time than the employee’s regular rate of pay at the time the employee uses such paid sick time. . . .” For employees who use sick time during regularly scheduled overtime, such overtime pay is indeed their “regular rate of pay” at the time they use their paid sick time. The exception in Section 20-912(k) for a worker who “*volunteers or agrees to work hours in addition to his or her normal schedule*” was not intended to encompass workers with regularly scheduled, or “normal” overtime (emphasis added). Rather, as stated above, this provision of the law was drafted with the intent to address a specific type of scenario: to protect food service employers whose staff sometimes volunteer for banquets or special events at which the employees’ pay is higher than their regular pay; in such cases, the employer would have to pay only an employee’s usual rate if the employee volunteers to work at—and then uses sick time during—a “premium pay” event. We believe that the current proposed rule would expand the language of the law beyond workers who volunteer on occasion for a “premium pay” event and sweep in workers who regularly work overtime hours.

§ 7-10 Payment of sick time

We have serious concerns about the proposed rule in subdivision (b) that allows employers to delay payment of sick time until the employee has obtained documentation from a health care

¹ New York City Department of Consumer Affairs, *Know the Law, Paid Sick Leave: Frequently Asked Questions*, last accessed April 24, 2014, available at www.nyc.gov/html/dca/html/law/PaidSickLeave_FAQs.shtml.

provider pursuant to Section 20-914(c) or provided written confirmation pursuant to Section 20-914(d). Neither Section 20-914(c) nor Section 20-914(d) of the Earned Sick Time Act states that payment can be withheld or delayed until these requirements are met. In addition, the definition of “paid sick time” in the law, Section 20-912(k), does not condition the payment of sick time on receipt of such documentation or confirmation.

However, if DCA maintains this proposed rule, it should be strengthened to ensure that employers cannot use the documentation or confirmation requirement in subdivision (b) to evade payment of sick time. This could be accomplished by adding in a final sentence to subdivision (b) stating: “In such cases, the employer must obtain signed and dated verification from the employee demonstrating that the employee received the request for documentation or verification.”

§ 7-11 Employer’s sale of business

We are pleased to see that DCA has proposed this rule, in order to ensure that the sale or acquisition of a business does not impede employee rights to sick time.

§ 7-12 Employer’s distribution or posting of policies

We strongly suggest revising this rule to clarify that, as clearly stated on DCA’s website, “[a]n employer cannot post the notice instead of providing the notice to employees.”² Section 20-919(a) of the Earned Sick Time Act clearly requires written notice of sick time rights, while making posting discretionary: “Such notice *may* also be conspicuously posted in an employer’s place of business in an area accessible to employees” (emphasis added). However, subdivision (a) of the proposed rule could be read to make posting an adequate substitute for written notice, as it states that “[e]very employer shall distribute *or* post the employer’s written policies on sick time . . .” (emphasis added), which we believe conflicts with the language of the Earned Sick Time Act.

We are further concerned that the methods of providing notice of sick time policies in subdivision (b) may not adequately inform workers about their rights, and the rule should be clarified to say that employers must provide written notice of sick time rights to existing and new employees using a delivery method that *reasonably ensures that employees receive the notice*. Some of the examples in subdivision (b) of this proposed rule may not meet this standard; for example, inclusion of sick time policies in an employee newspaper, newsletter, handbook, manual, or Intranet may not in all cases be a method that ensures the employee will receive it. The proposed rule should specify that inclusion of sick time policies in such materials will only comply with the notice requirements of the law if such materials are given directly to the employee.

² *Id.*

This suggested change to the proposed rule would be consistent with DCA’s FAQ on the topic, which states that: “[t]he employer may use a delivery method that reasonably ensures that employees receive the notice. For example, an employer may provide the notice to each employee personally or by regular mail or by email or deliver the notice to the employee by including it in new hire materials if the employer gives those materials directly to the employee.”³

Section II. Other Potential Areas of Rulemaking

Paid Time Off and More Generous Sick Time Policies

We are pleased that DCA’s FAQ document clarifies when a paid time off or paid leave policy will meet or exceed the requirements of the law, as many employers have contacted our office with this question.⁴ Given the frequency of this inquiry, we suggest incorporating the list of minimum requirements for such compliance into the Earned Sick Time Act’s rules.

We would like to see a rule that addresses what happens when an employer has an existing paid leave or paid time off policy (with a calendar year that began prior to April 1, 2014) that meets or exceeds the Earned Sick Time Act’s requirements and an employee uses up all or most of that time before April 1, 2014. According to DCA’s FAQ, “[t]he employer would not be required to provide that employee with more sick leave until the next calendar year.”⁵ We do not believe that time off given prior to the Earned Sick Time Act’s effective date should negate an employer’s requirement to provide sick time as of April 1, 2014. We have two suggested changes with respect to these concerns:

- We would like clarification that an employee is entitled to begin accruing up to 40 hours of sick time on April 1, 2014 if the employer had no formal policy or clear guidelines showing that paid leave used prior to April 1st would have met or exceeded the requirements of the Earned Sick Time Act. If an employer provided 5 days of paid time off without a written policy or any clear guidelines on use, and an employee used all of that time prior to April 1st, we believe the employee should be entitled to accrue up to 40 hours of sick time beginning April 1st.
- We would like the rules to clarify that paid leave or paid time off used prior to the law’s effective date or the date on which employees received notice of their rights under the law—whichever is later—cannot be retroactively reclassified by the employer as sick time if the employee was not able to use that paid leave or paid time off under the same conditions and for the same purposes as provided by the Earned Sick Time Act. For

³ *Id.*

⁴ *Id.* (referencing the question in the Frequently Asked Question document that asks “When will an employer’s time off policy meet or exceed the requirements of the law?” and prefaces a list of requirements with “A policy will meet or exceed the law’s requirements and be permissible under the law if the policy at a minimum”)

⁵ *Id.*

example, if an employer provides 10 days of vacation that required pre-approval a month before use, and an employee uses 8 of those vacation days before April 1st, we believe the employer should not be permitted to reclassify the time taken as sick time, even if the employer announces after April 1st that all vacation time will now be paid time off that meets or exceeds the Earned Sick Time Act's requirements.

Carry Over and Payment for Unused Sick Time

We believe it would be helpful to clarify in the rules the requirements for employers who choose to pay their employees for unused sick time at the end of the calendar year. According to Section 20-913(3)(h)(ii) of the Earned Sick Time Act, no employer is required to “carry over unused paid sick time if the employee is paid for any unused sick time at the end of the calendar year in which such time is accrued and the employer provides the employee with an amount of paid sick time that meets or exceeds the requirements of this chapter for such employee for the immediately subsequent calendar year on the first day of the immediately subsequent calendar year.” When we were assisting with drafting this ordinance, we worked out an agreement with the City Council's legislative staff to require an employer who pays out an employee for unused sick time at the end of the year to *immediately provide the employee with a full 40 hours* of sick time (if the employee would be entitled to earn 40 hours in the subsequent calendar year) at the start of the new calendar year.

We advocated against proposals to allow employers to pay out unused sick time to employees at the end of the year precisely because it would leave workers with no sick time at the beginning of the new calendar year. However, the agreement we reached with the City Council legislative staff was that cash out could be offered if new sick time was given in full at the beginning of the next calendar year; this agreement is the reason for the language “on the first day of the immediately subsequent calendar year” in Section 20-913(3)(h)(ii). If, under these circumstances, sick time that meets or exceeds the ordinance requirements was meant to be accrued as it generally does (1 hour for every 30 hours worked), the provision would not specify “on the first day.” It would be helpful for the rules to clarify this provision, as some employers have interpreted this language as allowing them to pay out unused sick time and then start accrual over at the rate of 1 hour for every 30 hours worked.

A Better Balance appreciates the opportunity to submit these comments, and we hope you will give them consideration in your efforts to ensure that the Earned Sick Time Act is implemented effectively and clearly. If you have any questions, please contact us at 212-430-5982.

Sincerely,

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