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First Deputy
Commissioner

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VIA ELECTRONIC MAIL

[REDACTED]
[REDACTED]
April 17, 2014

Dear Ms [REDACTED]:

Thank you for contacting the NYC Department of Consumer Affairs (“DCA”) concerning the Earned Sick Time Act (“Paid Sick Leave Law” or “Law”). You have asked the following question:

I have over 7 employees. Some of my employees are salaried employees who definitely qualify for paid sick leave. However, I also have hourly employees who are speech language pathologists who determine their own work schedule, have the ability to accept or reject any work assignments, to whom I pay an hourly wage of more than 4 times the federal minimum wage but I am confused as to what "call in for their work assignments at will" means. These employees maintain ongoing work assignments (clients) and I usually call them if I have any new assignments- at which point they can decide to either take the assignment or not. Can you please help me clarify this?

What speech pathologists are exempted by the law?

Section 20-912(j) exempts from the Law certain physical therapists, occupational therapists, speech language pathologists, and audiologists. In order for the speech language pathologist exemption to apply, each of the three following conditions must be met: (i) the pathologist must be licensed by the New York State Department of Education; (ii) the pathologist must call in for work assignments at will and determine their own work schedule with the ability to reject or accept any assignment referred to them, and (iii) the pathologist must be paid an average hourly wage, which is at least four times the federal minimum wage. See Sections 20-912(j) and 20-913(f)(iv) of the Law.

What does the second requirement (i.e. “must call in for work assignments at will and determine their own work schedule with the ability to reject or accept any assignment referred to them”) mean?

The second requirement contemplates that the pathologists set their own schedules, manage their own time and choose their own work assignments. While you have stated that the pathologists can reject assignments, it is not clear from the facts you present whether your speech pathologists have autonomy with



regard to their “clients” or you manage these employees’ time and schedules. If you do manage the pathologists’ time and schedules with regard to existing clients, then the exemption does not apply.

The plain language of the Law, as well as its legislative history helps inform our analysis. (See attached testimony of [REDACTED] a professional staffing agency.)

For further information describing the Law and for helpful materials such as FAQs, one page guidance for employers and a copy of the Notice of Employee Rights that employers are required to distribute, go to www.nyc.gov/PaidSickLeave.

Employers may contact the Department of Consumer Affairs as described below.

- Email PaidSickLeave@dca.nyc.gov
- Call (212-NEW-YORK outside NYC) and ask for information about Paid Sick Leave
- Online Live Chat, available at nyc.gov/BusinessToolbox

I hope this is of assistance.

Sincerely,

[REDACTED]

[REDACTED]
Paid Sick Leave Division
New York City Department of Consumer Affairs
42 Broadway, 8th Floor
New York, New York 10004



Testimony to City Council Regarding
Provision OF Paid Sick Time Earned By Employees, Int 0097

Thank you for this opportunity to testify today about how the New York City Paid Sick Time Bill will impact my business. My name is Lisa Davis, and along with Marilyn Rosee, I own Therapeutic Resources, a professional staffing agency specializing in the placement of occupational, physical and speech/language pathologists. I am part of an industry which includes dozens of smaller and larger such companies. I am here both to lend my support to the legislation and to request the creation of an exemption in the bill for "hourly professional employees" who are licensed by the New York State Education Department.

Background Information

1. Therapeutic Resources has been in business in NYC for 29 years, and today employs over 600 therapists along with an in house staff of 35 who work from our Long Island City office. Our company services over 2000 special needs children through our longstanding NYC and NYS contracts as well as serving disabled adults and children through our contracts with area hospitals, nursing homes and home care agencies.
2. Therapists working for us are paid extremely competitive and generous rates. For example, occupational and physical therapy assistants, who possess a two year degree earn between \$30 to \$55 per hour. Therapists, who are now required to have Master's and Doctorate level educations, earn between \$52 to \$85 per hour.
3. Due to controversy over the classification of independent contractors, we have elected to treat our professionals as employees. This decision increases our costs by 14% but ensures compliance with the ambiguous regulations of the Department of Labor and the Internal Revenue Service. Like us, most of our competitors treat their independent providers as employees.
4. Even though our providers are treated as employees for tax purposes, they remain completely independent. They supervise their own work, set their own schedules, manage their own time and choose their own work assignments. TR only serves as a conduit for payment. We simply refer therapists to open positions as per their specifications . We do not make hiring decisions, supervise, or make guarantees about the length of the assignment, which is often transitory and temporary. We have no

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control over what our professional staff do, their schedules, how long the assignment will last and the means of completing the work.

5. Due to very strong demand for therapists, our providers have ample opportunity to accept salaried positions with benefits, but have chosen to work with us as independent providers because they prefer the improved earning potential, flexibility and autonomy. The benefits they miss from a more traditional employment relationship is compensated by the premium rates being paid to them which amounts to about 35% over what they could expect as a traditional employee . It is also important to note that the majority of our affiliating providers work part time with us. These providers often receive benefits from their primary employer and enjoy the extra income and flexible scheduling options we offer.
6. We agree that workers need protection from health and family emergencies, and we proudly provide generous benefits including sick time for our office staff, Yet, our business model cannot feasibly absorb the cost of such coverage for our professional employees. Such a mandate would create an extreme financial hardship for us forcing us to reconsider the feasibility of continuing our operation, jeopardizing the livelihood of our 35 administrative staff members as well as our professional staff.¹

The Substance Of the Exemption

Knowing that paid sick time would not work for professional staffing agencies, we have researched how other municipalities handle the issue of professional, per diem employees. We have identified two examples of enacted legislation that includes carve outs or exemptions for circumstances and classification of professionals similar to what is found in our industry.

- **Washington, DC's Paid Sick Leave law** exempts all premium pay health care workers (such as our providers).

¹ Illustration: For a six hour day we would pay the therapist \$330. Payroll expenses are \$43. The client is billed \$402. Profit before overhead is \$29. If the therapist is out for the day, we cannot bill, but under the Sick Leave Bill we could be obligated to pay for the day off, the cost of which would amount to \$373. Our profit, before overhead (rent, office salaries and benefits, phones, advertising, etc) would amount to \$29. Thus, paying for one sick day would assume the entire profit of 13 days of billing for that therapist. Five days would assume 65 days or three months (@ five days per week) of billing.

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- **Connecticut's Paid Sick Leave law** exempts all temporary workers and per diem employees (who can accept or refuse work at will). Additionally employees must be "not exempt from minimum wage and overtime requirements" to qualify for paid sick leave. As our professionals are "exempt" under the Federal government's Fair Labor Standards Act this language could be another route toward carve out.

We propose a solution that is very specific to New York law which will exempt "hourly professional employees", who (i) are professionally licensed by the New York State Education Department, under the direction of the New York State Board of Regents; (ii) call in for work assignment at will; determine their own work schedule; have no obligation to provide services; and can reject or accept any assignment referred to them and (iii) earn an average hourly wage which is four (4) times the Federal minimum wage for hours worked during the calendar year.

After sharing our industry specific concerns with Gale Brewer's office and Sherry Leiwant, the lawyer who is drafting the bill, they have expressed a willingness to incorporate our proposed language (or something comparable) into the bill to protect our industry. These additions would not alter the intended purpose or design of the bill.

While we support the concept of paid sick time, we respectfully request that we work together to identify a solution to exempt professionally licensed health care professionals who, while technically employees have opted for an independent practice where autonomy and earning potential are maximized and benefits are built into the rates.

We want to thank Gale Brewer's office, Sherry Liewant and all of the City Council members who have met with and spoken to us to hear our concerns. We anticipate that should the bill be presented for a vote, it will include language which exempts our class of employee, while still protecting the workers who need protection. Thank you for giving me the opportunity to address the City Council.

Respectfully submitted,

