

DEPARTMENT OF CONSUMER AFFAIRS

Notice of Proposed Hearing and Opportunity to Comment

What are we proposing? The Department of Consumer Affairs is proposing rules to clarify 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), create requirements to carry it out 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 10:00 am on Monday, January 11, 2016. 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 Mary Cooley, Director of City Legislative Affairs, 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 212-436-0392. You can also sign up in the hearing room before the hearing begins on January 11th. You can speak for up to three minutes.

Is there a deadline to submit written comments? Written comments may be submitted on or before January 11th.

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 January 7th.

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 Mary Cooley, Director of City Legislative Affairs, 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 2203(f) of the New York City Charter authorize the Department of Consumer Affairs to make these proposed rules. These proposed rules were 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.

Amendment of Earned Sick Time Rules

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), so that employees can take time off work to address their health needs or the health needs of family members. The City Council determined that earned sick time would improve public health, foster employee retention and productivity and result in a more prosperous, safer and healthier city.

These rules clarify parts of the Earned Sick Time Act, creating requirements to carry it out and meet its goals and provide guidance to covered employers and protected employees. Specifically, these rules:

- Provide additional guidance on calculating the number of employees in a business;
- Address situations where employees are employed by a joint employer;
- Define “temporary help firm” and define when temporary help firms are legally responsible for violations;
- Allow an employer to set the minimum number of hours and time frame for the use of sick time;
- Clarify the calculation of rate of pay of paid sick time for employees paid on a piecework basis;
- Clarify that wage supplements need not be included in the rate of pay of paid sick time;

- Require a business that takes ownership of another business to provide written sick time policies to employees at the time of sale, transfer, acquisition or assignment;
- Address written sick time policies and what an employer must include in them;
- Clarify what records employers must keep;
- Make clear that an employer’s failure to keep or produce written sick time policies and records creates a reasonable inference that the department’s allegation against it is a fact;
- Clarify that an employer’s failure to respond to a complaint or provide information requested by the Department regarding a complaint will be subject to a \$500 penalty;
- Establish relief to an employee if an employer’s policy or practice is not to allow an employee to accrue and/or use sick time;
- Address the calculation of accruals and hours worked for certain employees;
- Clarify that an employer may take disciplinary action against an employee who engages in a pattern of abuse of paid time;
- Define the term “adverse employment action” as used in the definition of retaliation against an employee; and
- Clarify the department’s burden of proof for retaliation cases.

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

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Proposed Rule

Section 1. Chapter 7 of Title 6 of the Rules of the City of New York is amended to read as follows:

CHAPTER 7 EARNED SICK TIME

§ 7-01 Definitions.

(a) As used in this chapter, 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.

(b) As used in this chapter, the term “temporary help firm” means an organization that recruits and hires its own employees and assigns those employees to perform work or services for other organizations to: (i) support or supplement the other organization’s workforce; (ii) provide assistance in special work situations including, but not limited

to, employee absences, skill shortages or seasonal workloads; or (iii) perform special assignments or projects.

§ 7-02 [New Employers] Business Size.

- (a) Business size for [a business] an employer that has operated for less than one year 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 between less than five employees and five or more employees 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] immediately preceding the date the employee used sick time.
- (b) Business size for an employer that has operated for one year or more is determined by counting the number of employees working for the employer per week at the time the employee uses sick time, unless the number of employees fluctuates, in which case business size may be determined for the current calendar year based on the average number of employees per week during the previous calendar year. For purposes of this subdivision, “fluctuates” means that at least three times in the most recent calendar quarter the number of employees working for an employer fluctuated between less than five employees and five or more employees.

§ 7-03 Joint Employers and Temporary Help Firms.

- (a) [Two] Where two or more [businesses] employers exercise some control over the work or working conditions of an employee, the employers may be treated as a “joint employer” of [an] the 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] employer 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 under its sole control has six employees for purposes of the Earned Sick Time Act and must provide paid sick time.
- (c) [If an employee is employed jointly by two or more joint employers, all of the employee’s work for each of the joint employers will be considered as a single employment for purposes of accrual and use of sick time under the Earned Sick Time Act.
- (d)] In discharging their joint obligations under the Earned Sick Time Act, joint employers may allocate responsibility for the requirements of such Act among themselves.
- [(e) All] (d) Except as limited by subdivision (f) of this section, all covered joint employers are responsible, individually and jointly, for compliance with all applicable provisions of the Earned Sick Time Act and satisfaction of any penalties imposed for any violation thereof, regardless of any agreement among joint employers.
- (e) If an employee is employed jointly by two or more joint employers, all of the employee’s work for each of the joint employers will be considered as a single

employment for purposes of accrual and use of sick time under the Earned Sick Time Act.

- (f) Notwithstanding any other provision of this section, where a temporary help firm places a temporary employee in an organization, the temporary help firm shall be solely responsible for compliance with all of the provisions of the Earned Sick Time Act for the temporary employees it placed in an organization. For example, a temporary help firm that has 100 employees placed in several different organizations must provide paid sick time to its employees placed at the other organizations, regardless of the size of the organization where the temporary help firm places the employee.

§ 7-04 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 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 more than eighty hours while the individual is physically located in New York City, regardless of where the employer is located.
- i. Example: An individual who only 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.
 - ii. Example: An individual performs twenty hours of work in New Jersey and sixty hours of work in New York City in a calendar year. The twenty hours of work performed by the employee in New Jersey do not count towards the employee’s eighty hours of work for purposes of section 20-912(f).

§ 7-05 Minimum increments and fixed intervals for the use of sick time.

- (a) Unless otherwise in conflict with state or federal law or regulations, 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.
- (i) Example: An employee has worked eighty hours and more than one hundred twenty calendar days have passed since the employee’s first day of work for the employer. The employer has set a minimum increment of four hours per day for use of sick [leave] time. The employee has not yet accrued four hours of [leave] time, but is entitled to use the [leave] time he or she has already accrued. Under these circumstances, it would not be “reasonable under the circumstances” for the employer to require the employee to use a minimum of four hours of sick time as the minimum increment.
 - (ii) Example: An employee is scheduled to work from 8:00 am to 4:00 pm Mondays. She schedules a doctor’s appointment for 9:00 am on a Monday and notifies her employer of her intent to use sick time and return to work the same day. The employer’s written sick time policies require a four hour

minimum increment of sick time used per day. If she does not go to work before her appointment, she should appear for work by 12:00 pm.

- (b) An employer may set fixed periods of thirty minutes or any smaller amount of time for the use of accrued sick time beyond the minimum increment described in subdivision (a) of this section and may require fixed start times for such intervals.

Example: The employee in Example (ii) of subdivision (a) of this section arrives to work at 12:17pm. Under her employer's written sick time policies, employees must use sick time in half-hour intervals that start on the hour or half-hour. The employer can require the employee to use four-and-a-half hours of her accrued sick time and require her to begin work at 12:30 pm. Similarly, if the employee wanted to leave work at 8:40 am to go to her 9:00 am doctor's appointment, the employer could require the employee to stop work at 8:30 am.

§ 7-06 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. Such procedures for employees to give notice of the need to use sick time when the need is not foreseeable may not include any requirement that an employee appear in person at a worksite or deliver any document to the employer prior to using sick time.
- (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.]

§ 7-07 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 shall be allowed a minimum of seven days from the date he or she returns to work to obtain such documentation. 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.

§ 7-08 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 be entitled to 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 is entitled to two days of paid sick time on the next date that such domestic worker is entitled to a paid day or days of rest under New York State Labor Law section 161(1), and annually thereafter.
- (d) Sick time accrued by a domestic worker will carry over to the next calendar year.

§ 7-09 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), the hourly rate of pay shall be the base wage or minimum wage, whichever is greater.
- (e) For employees who are paid on a piecework basis (whether base wage plus piecework or piecework only), the employer shall calculate the employee's rate of pay by adding together the employee's total earnings from all sources for the most recent [seven work days] workweek in which no [leave] sick time was taken and dividing that sum by the number of hours spent performing the work during such [work days] workweek. For purposes of this subdivision, "workweek" means a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods. [For purposes of this subdivision, "work days" shall mean the days or parts of days the employee worked.]

- (f) 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.
- (g) An employer is not required to pay wage supplements for sick time used. For the purposes of this subdivision, "supplements" has the same meaning as section 220(5)(b) of New York State Labor Law. The fact that an employer pays wage supplements to an employee does not relieve the employer of the requirements of the Earned Sick Time Act.
- (h) Under no circumstance can the employer pay the employee less than the minimum wage for paid 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.
- [(c) If an employer chooses to require written documentation or verification of use of sick time pursuant to section 20-914(c) or 20-914(d) of the Administrative Code, such a requirement, as well as the employer's policy regarding any consequences resulting from an employee's failure or delay in providing such documentation or verification, must be included in the employer's written sick time policies.]

§ 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.
- (c) A successor employer must provide employees with its written sick time policies at the time of sale or acquisition, which shall include a policy that complies with this section.

§ 7-12 [Employer's distribution or posting of policies.] Written sick time policies.

- (a) Every employer must distribute or post written policies on sick time and follow such written sick time policies[, including, but not limited to those required by the Earned Sick Time Act and this chapter]. An employer's written sick time policies must meet or exceed all of the requirements of the Earned Sick Time Act and this Title and state at a minimum:
 - (1) The employer's method of calculating sick time as follows:
 - (i) If an employer provides employees with an amount of sick time that meets or exceeds the requirements of the Earned Sick Time Act on or before the employee's 120th day of employment and on the first day of each new

- calendar year, which for the purposes of this section is defined as “frontloaded sick time,” then the employer’s written sick time policy must specify the amount of frontloaded sick time to be provided;
- (ii) If the employer does not apply frontloaded sick time, then the employer’s written sick time policy must specify when accrual of sick time starts, the rate at which an employee accrues sick time and a maximum number of hours an employee may accrue in a calendar year;
- (2) The employer’s policies regarding the use of sick time, including any limitations or conditions the employer places on the use of sick time, such as:
- (i) Any requirement that an employee provide notice of a need to use sick time;
- (ii) Any requirement for written documentation or verification of the use of sick time under Sections 20-914(c) or 20-914(d) of the Administrative Code, and the employer’s policy regarding any consequences of an employee’s failure or delay in providing such documentation or verification;
- (iii) Any reasonable minimum increment or fixed period for the use of accrued sick time; and
- (iv) Any policy on discipline for employee misuse of sick time under Section 7-16 of this Title; and
- (3) The employer’s policy regarding carry-over of unused sick time at the end of an employer’s calendar year in accordance with Section 20-913(h) of the Administrative Code;
- (b) Employers must provide written notice of sick time policies using a delivery method that reasonably ensures that employees receive the policies. For example, an employer may comply with this subdivision 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) Nothing in this chapter shall prevent an employer from making exceptions to its written sick time policy for individual employees that are more generous to the employee than the terms of the employer’s written policy.
- (d) [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 chapter, for a period of three years unless otherwise required pursuant to any other law, rule or regulation.
- (e) Requirements relating to an employer’s additional and separate 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. An employer may not distribute the Notice of Rights required by Section 20-919 of the Administrative Code instead of distributing or posting its own written sick time policies as required by this section.
- (e) An employer that has not provided to the employee a copy of its written policy with any required forms or procedures related to the use of sick time shall not deny sick

time or payment of sick time to the employee based on non-compliance with such a policy.

§ 7-13 Employer records.

- (a) Employers must retain records demonstrating compliance with the requirements of the Earned Sick Time Act, including records of any policies required pursuant to this Chapter, for a period of three years unless otherwise required by any other law, rule or regulation.
- (b) An employer must maintain, in an accessible format, contemporaneous, true, and accurate records that show:
- (1) Each employee's name, address, phone number, date(s) of start of employment, date(s) of end of employment (if any), rate of pay, and whether the employee is exempt from the overtime requirements of New York State labor laws and regulations;
 - (2) The hours worked each week by each employee;
 - (3) The date and time of each instance of sick time used by each employee and the amount paid for each instance;
 - (4) Any change in the material terms of employment of an employee; and
 - (5) The date that the Notice of Rights as set forth in section 20-919 of the Administrative Code was provided to each employee and proof that the Notice of Rights was received by each employee.
- [(a)] (c) 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 chapter, upon appropriate notice, at the department's office.
- [(b)] (d) 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)] (e) "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)] (f) 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.
- (g) An employer's failure to maintain, retain or produce a record otherwise required to be maintained under these rules that is relevant to a material fact alleged by the

department in a notice of hearing issued pursuant to the Earned Sick Time Act or these rules creates a reasonable inference that such fact is true.

§ 7-14 Enforcement and Penalties.

- (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 charging the employer with failure to maintain, retain, or produce records and failure to comply with the requirements of the Earned Sick Time Act.
- (c) An employer who fails to respond to the notice of violation issued under subdivision (b) of this section on or before the hearing date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the department's investigation of the complaint.
- (d) The employer may cure a notice of violation issued in accordance with subdivision (b) of this section without the penalty imposed in connection with subdivision (c) 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)] (e) 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.
- (f) A finding that an employer has an official or unofficial policy of not providing or refusing to allow the use of sick time as required under the Earned Sick Time Act constitutes a violation of Section 20-913 of the Administrative Code for each and every employee affected by the policy and will be subject to penalties as provided in Section 20-924(e).

- (g) For purposes of Section 20-924(e) of the Administrative Code, penalties shall be imposed on a per employee basis.
- (h) If an employer, as a matter of policy or practice, does not allow accrual of sick time as required under the Earned Sick Time Act, the relief granted to each and every employee affected by the policy or practice must include either application of 40 sick time hours to the employee's sick time balance or, where such information is known, application of the number of sick time hours the employee should have accrued to the employee's sick time balance, provided that such balance does not exceed 80 hours.

§ 7-15 Accrual, Hours Worked and Carry Over.

- (a) If an employee is scheduled and available to work for an on-call shift and is compensated for the scheduled time regardless of whether the employee works, the scheduled time constitutes hours worked for the purposes of accrual under the Earned Sick Time Act.
- (b) For employees who are paid on a piecework basis, accrual of sick time is measured by the actual length of time spent performing work.
- (c) For employees who are paid on a commission basis, accrual of sick time is measured by the actual length of time spent performing work.
- (d) For employees with indeterminate shift lengths (e.g. a shift defined by business needs), an employer shall base the hours of sick time used upon the hours worked by the replacement employee for the same shift. If this method is not possible, the hours of sick time must be based on the hours worked by the employee when the employee most recently worked the same shift in the past.
- (e) If an employee is rehired within six months of separation from employment and had not reached the required 120 days to begin using accrued sick time under section 20-913(d)(1) of the Administrative Code at the time the employee separated from employment, upon resumption of employment, the employee shall be credited at least his or her previous calendar days towards the 120 day waiting period. For the purposes of this subdivision, "waiting period" shall mean the time period described in section 20-913(d)(1) of the Administrative Code between the start of employment or the effective date of the Earned Sick Time Act, whichever is later, and the 120th calendar day following the start of employment or the effective date of the Earned Sick Time Act, whichever is later.
- (f) An employee may carry over up to 40 hours of unused sick time from one calendar year to the next, unless the employer has a policy of paying employees for unused sick time at the end of the calendar year in which such time is accrued and providing the employee with an amount of paid sick time that meets or exceeds the requirements of the Earned Sick Time Act for such employee for the immediately subsequent calendar year on the first day of such year in accordance with Section 20-913(h) of the Administrative Code. Regardless of the number of hours an employee carried over from the previous calendar year, an employer is only required to allow employees to accrue up to 40 hours of sick time in a calendar year. If an employee's sick time balance exceeds 40 hours in a single calendar year, an employer is only required to allow the employee to use up to 40 hours.

Example: An employee accrues 40 hours of sick time in calendar year one and uses 20 hours of sick time in calendar year one. She carries over 20 hours from

calendar year one to calendar year two, accrues 40 hours in calendar year two, and does not use any hours in calendar year two. Her sick leave balance at the end of calendar year two is 60 hours (20 hours from calendar year two plus 40 hours from calendar year two). She may carry over 40 of those 60 hours into calendar year three and accrue another 40 hours in calendar year three.

§ 7-16 Employee Abuse of Sick Time.

An employer may take disciplinary action, up to and including termination, against an employee who uses sick time provided under the Earned Sick Time Act for purposes other than those described in section 20-914(a) of the Administrative Code, including an employee who engages in a pattern of abuse of leave. Indications of a pattern of abuse include, but are not limited to: (1) repeated use of unscheduled sick time on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day, (2) taking scheduled sick time on days when other leave has been denied, and (3) a pattern of taking sick time on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.

§ 7-17 Retaliation.

- (a) For the purposes of Section 20-912(p) of the Earned Sick Time Act, “an adverse employment action” means any act that is reasonably likely to deter an employee from exercising rights guaranteed under the Earned Sick Time Act.
- (b) The department may establish a causal connection between an employee’s exercise of rights guaranteed under the Earned Sick Time Act and an employer’s adverse employment action indirectly, such as with evidence that the protected activity was followed closely by the adverse employment action, or directly, with evidence of retaliatory animus directed towards an employee by an employer. Retaliation is established when the department shows that a protected activity was a motivating factor for an adverse employment action, even when other factors also motivated the adverse employment action.

**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: Amendment of Earned Sick Time Rules

REFERENCE NUMBER: 2015 RG 133

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: December 2, 2015

**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: Amendment of Earned Sick Time Rules

REFERENCE NUMBER: DCA-44

RULEMAKING AGENCY: Department of Consumer Affairs

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) Provides a cure period.

/s/Guenevere Knowles
Mayor's Office of Operations

December 2, 2015
Date