NYC Consumer and Worker Protection

Comments Received by the Department of Consumer and Worker Protection on

Proposed Rules related to the Earned Safe and Sick Time Act

NYC | HOSPITALITY ALLIANCE

November 23, 2022

New York City Department of Consumer and Worker Protection *Via email only: Rulecomments@dcwp.nyc.gov.*

Re: Amendments to ESSTA pursuant to Local Law 97 of 2020

Comments of the NYC Hospitality Alliance (The Alliance) on the Department of Consumer and Worker Protection's proposal to amend its rules related to the Earned Safe and Sick Time Act ("ESSTA").

The NYC Hospitality Alliance is a not-for-profit trade association representing thousands of restaurants, bars, and other hospitality businesses across the five boroughs. We submit these comments on DCWP's proposal to bring the rules related to the ESSTA into alignment with Local Law 97 of 2020.

The Alliance welcomes the Department's efforts to provide clarification for employers about their compliance obligations, and to conform the Department's rules to existing city and state law.

However, certain proposed regulations extend past the stated purpose of the proposed rule. Under the proposed regulations, if an employer does not have a written policy or their policy is not compliant, "there shall be a reasonable inference that the employer, as a matter of official or unofficial policy or practice, does not provide accrued safe/sick time in violation of [the law]." *See, e.g.*, Proposed Regulations §§ 7-213, 7-210(a), and 7-211(h).

First, such a rule unfairly assumes that if an employer makes a mistake in one area of Paid Sick/Safe Leave, then it is not in compliance with any other provision of Paid Sick/Safe Leave. Second, this language could potentially require a factfinder at the Office of Administrative Trials and Hearings to ignore what the actual facts of the situation are and merely to assume that the employer is in violation of one ESSTA provision if their policy is not 100% compliant with another. Third, it shifts the burden of persuasion from the Department or individual making the allegation onto the employer.

We strongly oppose this aspect of the proposed regulations as it seeks to enact burden shifting from the petitioner individual or agency to the respondent small business via *rulemaking* when the authorizing statue does not provide for it. The Department claims to merely align the proposed rules with Local Law 97 of 2020, but the latter makes no provision for such burden shifting. The rules thus go well beyond the statute, in a way that significantly impacts how allegations under ESSTA are adjudicated at OATH.

A change of such magnitude should only be done by elected leaders within the City Council, not by unelected attorneys at a city agency. While we welcome the balance of the proposed rules, we

ask that the Department not enact the proposed rebuttable presumption or reasonable inference provisions.

New York City Hospitality Alliance
65 West 55th Street, Suite 203A | New York, NY, 10019
212-582-2506 | info@thenycalliance.org | www.thenycalliance.org

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the work and family legal center

Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office
815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office
303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

November 23, 2022

Carlos Ortiz
Senior Advisor
Policy and Intergovernmental Affairs
New York City Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004

Submitted Electronically

Re: *Comment on Proposed Rules Related to the Earned Safe and Sick Time Act*

Dear Commissioner Mayuga and Senior Advisor Ortiz,

A Better Balance is writing to comment on the proposed rules related to the New York City Earned Safe and Sick Time Act ("ESSTA"). We thank you for the opportunity to comment on these proposed rules, and for the work you do on behalf of workers in New York City.

A Better Balance is a national legal advocacy organization headquartered in New York City. We are dedicated to using the power of the law to ensure that workers are able to care for themselves and their loved ones without sacrificing their economic security. A Better Balance worked with Councilmember Gale Brewer to draft and pass the New York City Earned Sick Time Act, helping to lead the coalition that fought for passage and helping to negotiate the final law. A Better Balance has gained expertise on this issue by drafting paid sick time laws in cities and

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Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office
815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office
303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

states across the country, including the New York State sick time law, passed in 2020. We have also helped to draft rules and regulations in places where paid sick time requirements have been enacted. Through our free legal helpline, we have answered questions for many workers regarding the Earned Sick Time Act, and the experiences of these workers has informed our testimony today.

The New York State sick time law, passed in the early days of the COVID-19 pandemic. The law was an important step to ensure that workers throughout the state receive the right to paid safe and sick time, a right workers in New York City have had under ESSTA since 2013. Crucially for New York City, the state law makes clear that ESSTA can continue to operate in light of the state law's passage, so long as ESSTA "meet or exceed the standard or requirements for minimum hour and use set forth," by the state law.[1] A Better Balance along with DCWP advocated with the drafters of the state law to ensure that the New York City law could continue to stand under those standards (all other jurisdictions are preempted from enacting their own paid sick time laws.) In 2020, in light of this strict requirement, the City Council passed, and the mayor signed into law, a bill making crucial adjustments to ESSTA to ensure that it meets the standards of the newer state law.[2] It is equally crucial that the regulations adopted by this Department ensure that the City's interpretation of ESSTA meets or exceeds the requirements of the state law, lest the future of ESSTA be jeopardized. For that reason, we are grateful for the Department's proposed regulations and for the opportunity to comment today. We appreciate the Department's efforts to streamline and clarify the regulations, particularly with regards to domestic workers; coverage of domestic workers is a crucial area in which ESSTA far exceeds the state law, a fact of which we are tremendously proud.

[1] N.Y. Lab. L. § 196-b(12).
[2] N.Y.C. Council Int. 2032-A (2020).

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Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office
815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office
303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

Below, we highlight several key ways in which the proposed regulations must be updated to ensure compliance with the state law as well as ways in which the regulations could be strengthened to better provide workers with the stronger protections they need.

A. Employer Size

The proposed regulations specify that employer size "shall be determined based on the employer's total number of employees nationwide," and further specify that employer size is determined based on the highest number of employees "concurrently employed at any point during the calendar year to date." We support the use of this method of determining employer size but would recommend that the Department add more detail so as to avoid confusion and ensure compliance with the state law.

The text of ESSTA specifies that, for purposes of determining employer size, "all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted," and further that, when determining the number of employees "performing work for an employer that is a chain business, the total number of employees in that group of establishments shall be counted."[3] The state regulations are even more detailed, providing that "[e]mployees on paid or unpaid leave, including sick leave, leaves of absence, disciplinary suspension, or any other type of temporary absence, are counted as long as the employer has a reasonable expectation that the employee will later return to active employment," "[p]art-time employees are considered to be employed each working day of the calendar week," and "[e]mployees jointly employed by more than one employer must be counted by each employer, whether or not they are on the employer's payroll records."[4]

[3] N.Y.C. Admin. Code. § 20-912.
[4] N.Y. Comp. Codes R. & Regs. tit. 12, §196-1.4.

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Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office
815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office
303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

To ensure that the ESSTA regulations add clarity and ensure compliance with the state, we strongly recommend that the proposed regulations be updated to ensure that interpretation of ESSTA is at least as generous as the state law in specifying which employees are counted for the purpose of determining employer size. Specifically, the proposed regulations should be updated to make clear that part-time and temporary employees are considered employed on each working day of the calendar week, that employees on paid and unpaid leave are counted as employees as long as the employer has or should have a reasonable expectation that the employee will return to active employment, and that jointly-employed employees must be counted by each employer for purposes of determining their obligations under ESSTA. These changes will have the crucial impact of ensuring that ESSTA can continue to operate in light of the state law. These changes will also help to ensure that employers cannot deny workers the amount of sick time they are owed, or deny them paid sick time rather than unpaid, by undercounting their employees.

B. Documentation Requirements

The proposed regulations make important updated to the requirements related to documentation of authorized use of safe and sick time, providing both useful clarification and necessary changes to better align with the state law. We suggest that the Department make two minor additional changes to the documentation regulations ensure that the regulations are as clear as possible.

First, the proposed regulations refer repeatedly to documentation "from a third party." The state sick time regulations specify that acceptable requests for documentation after an employee has been absent for three or more consecutive previously-scheduled work shifts can include "[a]n attestation from an employee of their eligibility to leave," language that goes beyond the third-party documentation that the proposed regulations contemplate to allow for self-attestation as

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the work and family legal center

Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office
815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office
303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

well. In recognition of this, the proposed regulations should be revised to clarify that self-attestation is sufficient documentation. While ESSTA acknowledges that "a notarized letter from the employee explaining the need" for safe time constitutes sufficient documentation,[5] the proposed regulations should clarify that self-attestation can meet the documentation requirements for both sick and safe time. We would also support a technical amendment to the law itself clarifying this point, should it be needed.

Second, we applaud the Department's proposed removal of language stating that the employee is responsible for the cost of providing documentation, where applicable. This important change helps bring the regulations into alignment with both the state sick time law itself and the 2020 changes made to ESSTA to ensure compliance with the state sick time law. However, the state sick time regulations specify clearly that the employer is responsible for any costs of documentation.[6] Since the proposed regulations simply remove the language stating that employees are responsible for the costs, the regulations are silent on where that responsibility falls. To ensure that the regulations are clear and consistent with the state regulations, we recommend adding language specifying that the employer bears the responsibility for any cost of documentation. We note that the text of ESSTA itself states that, "[w]here a health care provider charges an employee a fee for the provision of documentation requested by their employer, such employer shall reimburse the employee for such fee" with regard to sick time and, with regard to safe time "[a]n employer shall reimburse an employee for all reasonable costs or expenses incurred for the purpose of obtaining such documentation for an employer."[7] If a technical amendment to ESSTA is needed to clarify that an employer must pay all costs of documentation, we would support such an amendment.

[5] N.Y. Comp. Codes R. & Regs. tit. 12, §196-1.3(d); N.Y.C. Admin. Code. § 20-914(b)(2).
[6] N.Y. Comp. Codes R. & Regs. tit. 12, §196-1.3(b); N.Y.C. Council Int. 2032-A (2020).
[7] N.Y.C. Admin. Code. § 20-914.

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5 Columbus Circle, 11th floor
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C. Enforcement

Since the state sick time law is housed within Article 6 of the Labor Law, the remedies applicable to that section apply to the sick time law. Accordingly, when an employee's rights under the state sick time law are violated, the employee has the right to file an action in court.[8] This is an important protection that gives employees the ability to vindicate their rights, including for many employees in New York City who have overlapping rights under the state sick time law and ESSTA—if they work for an employer with between 5 and 99 employees, for instance, they have a right to take 40 hours of sick time under the state law and the same right under the city law, but when the time comes to actually take their 40 hours of sick time, that time isn't designated as ESSTA time or state sick law time. Rather, it's both at once. This means that for New York City employees whose rights under ESSTA are violated, it will also often be the case that their state sick time rights were violated, which means that they, like any employee in the state whose rights under the state sick time law are violated, have the option to file a claim in court. The current ESSTA regulations provide information about administrative enforcement through the Department, and the proposed regulations add additional detail to that information. However, the proposed regulations should go further, clarifying that, to the extent that they are duplicative of rights under the state law, those rights are enforceable in court via the private right of action established under the state law. This will help to ensure that employees are aware of all avenues open to them should they need to vindicate their rights. At the same time, we urge the City Council to pass Int. 563 to provide employees in New York City with a clear private right of action under ESSTA itself, which would enable them to vindicate their rights under both ESSTA and the state law in court.[9]

[8] N.Y. Lab. L. § 198.
[9] N.Y.C. Council Int. 0563 (2022).

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Headquarters
5 Columbus Circle, 11th floor
New York, NY 10019
tel: 212.430.5982

Southern Office
2301 21st Ave. South, Suite 355
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tel: 615.915.2417

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D. Absence Control Policies

We applaud the Department's clarification in the proposed regulations that absence control policies that penalize the use of protected time under ESSTA are unlawful. Absence control policies frequently mislead and misinform workers about their rights, leading to too many workers being punished for taking time off to care for themselves or their loved ones even where, as in New York City, there are strong laws providing them with the right to take that time off.[10] The proposed regulations make an important step towards better addressing employers' use of these policies to skirt the law, but the proposed regulations should be expanded to better address the full range of ways absence control policies curb workers' rights.

To better address the full scope of the ways in which these policies penalize workers for exercising their right to sick and safe time, we would suggest that the Department expand on the language in the proposed regulations. We have heard repeatedly from callers to our free legal helpline whose employers maintain absence control policies in which workers are apportioned an allotted bank of time absent and, once they have exceeded that bank of time, they are penalized for additional absences; these policies often interact with sick time laws, including ESSTA, in troubling ways that allow employers to evade their obligations and deny workers their rights. For instance, suppose an employer with between 5 and 99 employees maintained a policy under which an employee is penalized for each absence after their first 50 hours absent. A worker who takes 40 hours of their ESSTA-protected sick time may not be penalized after their 40th hour—

[10] *See* DINA BAKST, ELIZABETH GEDMARK, & CHRISTINE DINAN, A BETTER BALANCE, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (2020), https://www.abetterbalance.org/misled-misinformed/; DINA BAKST, ELIZABETH GEDMARK, & CARA SUVALL, A BETTER BALANCE, POINTING OUT: HOW WALMART UNLAWFULLY PUNISHES WORKERS FOR MEDICAL ABSENCES (2017), https://www.abetterbalance.org/resources/pointing-out.

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Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

but if they are then absent for another ten hours, they will be penalized. This means that their ESSTA-protected time is counting against the bank of time allotted to them and that it is thus contributing to their punishment. But for their ESSTA-protected time, they would not have been punished. Policies like these are exceedingly common and exceedingly damaging to workers, and they allow employers to appear to comply with the law while in fact evading its requirements. We strongly suggest that the Department revise the proposed regulations to add language clarifying that counting ESSTA-protected time against an allotted bank of time under an absence control policy is unlawful, even where, as in the example above, no points are assigned or other punishment dealt for the ESSTA-protected time per se. This clarification would also be consistent with state bill S1958A/A8092B, just signed by the Governor yesterday, which makes clear that penalizing an employee for lawfully-protected absences under an absence control policy, including by deducting from an allotted bank of time, is illegal under the state labor law.

E. Language Access

ESSTA's notice requirements make clear that employers must provide employees with written notice of their rights under ESSTA in both English and the primary language spoken by the employee (provided that the Department has made a translated notice available in such language).[11] This is an incredibly important provision, ensuring that New York City workers who do not speak English or for whom English is not their primary language have ready access to information about their rights—a guarantee that is especially impactful for immigrant workers, who are disproportionately low-wage.[12] We recommend that the Department revise the proposed

[11] N.Y.C. Admin. Code. § 20-919(a)(1).
[12] *See* NYC MAYOR'S OFFICE FOR ECONOMIC OPPORTUNITY, AN ECONOMIC PROFILE OF IMMIGRANTS IN NEW YORK CITY 2017 (2020), https://www1.nyc.gov/assets/opportunity/pdf/immigrant-poverty-report-2017.pdf.

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Headquarters
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New York, NY 10019
tel: 212.430.5982

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tel: 615.915.2417

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Washington, DC 20005

Colorado Office
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Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

regulations to build on this important provision and more fully enact the City Council's goal of ensuring equitable access to information about workers' rights under ESSTA. Specifically, we recommend that the regulations specify that the notice posted in an employer's place of business be posted in English and any language that is the primary language spoken by any employee, provided that the department has made available a translation of such notice in such language pursuant to N.Y.C. Admin. Code. § 20-919(b).

Conclusion

A Better Balance appreciates the Department's efforts to clarify employees' rights and employers' obligations under ESSTA and appreciates the opportunity to submit these comments. We hope you will give them consideration in your efforts to ensure that the Earned Sick Time Act is implemented effectively and clearly, and is in compliance with the state law. If you have any questions, please contact us at sleiwant@abetterbalance.org and mracklin@abetterbalance.org.

Sincerely,

Sherry Leiwant, Co-Founder and Co-President
Meghan Racklin, Senior Staff Attorney
A Better Balance

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BRAD LANDER

Comment from New York City Comptroller Brad Lander Regarding Proposed Amendments to the Department of Consumer and Worker Protection's Rules for the Earned Sick and Safe Time Act
November 23, 2022

Thank you for the opportunity to comment on the proposed amendments to the DCWP rules for the Earned Sick and Safe Time Act (ESSTA, f/k/a ESTA). As a Council Member, I was a proud supporter of the ESTA and its subsequent amendments and expansion, and I share the department's goals of ensuring the enforceability of an effective and robust set of rules. To that end, I encourage the department to make several important clarifications and changes to ensure that the rules properly implement the law and its protections.

Documentation

The use of the phrase "third party" in certain locations in section 7-206 of Subchapter B of Chapter 7 of Title 6 of the Rules of the City of New York serves to undercut the provisions of section 20-914(b)(2) of the Administrative Code which allow an employee using safe time to submit their own notarized statement to satisfy the reasonable documentation requirement. "Third party" language should be eliminated in the locations noted below to eliminate any potential confusion about whether an employee's notarized letter serves as reasonable documentation. This correction could be accomplished by making the following amendments to proposed 7-206:

(a) When an employee's use of safe/sick time results in an absence of more than three consecutive work days, an employer may require reasonable written documentation [from a third party] that the use was for a purpose authorized under section 20-914(a) or (b) of the Administrative Code. For a use of sick time, written documentation signed by a licensed clinical social worker, licensed mental health counselor, or other health care provider indicating the need for the amount of sick time taken shall be considered reasonable documentation. For a use of safe time, any documentation [from a third party as] set forth in section 20-914(b)(2) shall be considered sufficient. Consistent with the requirement in section 20-921 of the Administrative Code that an employer cannot require disclosure of details, such documentation is sufficient if it is written by an appropriate third party or contains the appropriate attestation for the use of safe time and if it states the dates the employee needed to use safe/sick time.

….

(c) If an employer requires an employee to provide written documentation [from a third party] when the employee's use of safe/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. Unless otherwise required by law an employer must not require an employee to submit such documentation before returning to work.

(d) If an employee provides written documentation from [a third party] in accordance with subdivision (a) of this section <u>for a use of sick time</u>, an employer may not require an employee to obtain documentation from another provider[indicating the need for sick time in the amount used by the employee].

…..

(f) An employer may not require written documentation [from a third party] that the use of safe/sick time was for a purpose authorized under section 20-914 of the Administrative Code if the use of such safe/sick time lasts three or fewer consecutive work days.

Further, I encourage DCWP to amend the language in 7-206(e) requiring an employer to set forth "the types of written documentation the employer will accept" in the written safe/sick time policy required by section 7-211 to read "the types of reasonable documentation" to clarify that an employer may not create their own separate and smaller list of individuals from whom required documentation will be accepted.

<u>Regular Rate of Pay</u>

Dating back to the initial promulgation of the ESTA rules in 2014, advocates and others involved in the passage of Local Law 46 have argued that the rules are inconsistent with section 20-912(k) of the original Earned Sick Time Act, which stated 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 safe/sick time during regularly scheduled overtime, such overtime pay is indeed their "regular rate of pay" at the time they use their paid safe/sick time. Though section 7-208(b) presently exempts an employer from paying overtime for safe/sick leave, the 2020 legislative amendments only further clarify that overtime, whether regularly scheduled or in addition to employee's normal schedule, obliges an employee to the higher rate of pay. DCWP should take the opportunity to bring clarity by repealing the existing language of subdivision b of section 7-208 and simply retaining the laudatory clarification provided by the newly proposed second sentence. This would be consistent with the statement of basis and purpose which claimed the amendments "[r]emove from section 7-208 provisions regarding the rate of pay for safe/sick time, which is now addressed in section 20-913(a)(1) of ESSTA." Such revision would read as below:

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

(b) [If the employee uses paid safe/sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate of pay.] The employer may only

deduct the number of hours of safe/sick time actually used by the employee from the employee's safe/sick time accruals, regardless of whether those hours would have been classified as straight-time or overtime hours.

Delayed Payments

I also reiterate long-standing concerns that section 7-09(b), which allows an employer to withholding or delaying payment of safe/sick time until the request for documentation or written confirmation is met is not consistent with sections 20-914(c) nor section 20-914(d) of the Administrative Code. It should be noted that section 20-914.1(b) of the Administrative Code, which pertains to COVID-19 child vaccination time, explicitly provides that such time "must be paid no later than the payday for the next regular payroll period beginning after the COVID-19 child vaccination time was used by the employee." This is so even though there is a provision allowing an employer to require reasonable documentation that the child received the applicable vaccine. Section 7-09(b) should be replaced with language mirroring the quoted provision of section 20-914.1(b).

Reimbursements

The 2020 amendments to ESSTA (LL 97 of 2020) added language to section 20-914(a)(2) of the administrative code to require an employer to reimburse an employee for fees and all reasonable costs or expenses incurred in obtaining the documentation requested by an employer. I encourage the department to enact language ensuring that employees are timely reimbursed for such costs in the next pay period after they submit proof of such costs and permissible methods for establishing such an amount.

Accrual of Hours

As a federal court has opined,[1] ESSTA, especially in wake of the 2020 amendments, is not limited to accruals based on the hours worked by an employee while physically within city limits. Rather, anyone permitted or allowed to regularly work within City limits within a given calendar year automatically accrues, without needing to reach the prior 80-hour threshold, safe/sick leave up to the limit for the size of their particular employer based on the total hours they work regardless of location. Previous "Enforcement Policies" issued by DCWP made this applicability clear: "Once covered by the Law, all hours worked for an employer count toward an employee's safe and sick leave accrual, regardless of the employee's or the employer's location." Codifying a contrary instruction in the proposed Rules runs contrary to the plain language and judicial interpretation and should be abandoned. I do however support the rules clarifying that safe/sick leave may only be taken for hours assigned to work within NYC.

Section 7-203, as drafted in the current proposal, is ripe for misinterpretation. I recommend revising subdivision a of such section to read as below, while striking subdivision b in its entirety (as well as amending Example 1 accordingly):

> An employee, as defined by section 20-912 of the Administrative Code, is "employed for hire within the City of New York" if the employee *regularly* performs work, *including work performed by telecommuting,* while the employee is physically located in New York City, regardless of where the employer is located. An employee who only performs work, including by telecommuting, while physically located outside of New York City, is not "employed for hire within the City of New York," even if the employer is located in New York City.

Thank you again for your committed work to the implementation of ESSTA and the protection of NYC's workers and for the opportunity to submit these comments.

[1] *See* Delta Air Lines, Inc. v. N.Y. City Dep't of Consumer Affairs, 564 F. Supp. 3d 109, 125 (2021).

Seyfarth Shaw LLP
620 Eighth Avenue
New York, New York 10018
T (212) 218-5500
F (212) 218-5526

jseidman@seyfarth.com
T (212) 218-4647

www.seyfarth.com

November 23, 2022

Commissioner Vilda Vera Mayuga
New York City Department of Consumer and Worker Protection
42 Broadway, 8th Floor
New York, New York 10004
http://rules.cityofnewyork.us
Rulecomments@dcwp.nyc.gov

Re: Comments on Proposed Rules Proposing to Amend Rules Related to the Earned Safe and Sick Time Act

Dear Commissioner Mayuga:

We appreciate the opportunity to present these comments in response to the New York City ("NYC") Department of Consumer and Worker Protection's ("DCWP" or "Department") proposed rules that would amend the rules related to the City's Earned Safe and Sick Time Act ("ESSTA"), Local Law 97 of 2020 ("LL 97") to align with previously made amendments and provide additional clarification for employers about their compliance obligations in providing Earned Safe and Sick Time ("ESST"). Our comments are made on behalf of the international law firm, Seyfarth Shaw LLP ("Seyfarth"). We do not make these comments on behalf of any specific client that we represent. Rather, our comments are informed by feedback we have received from, as well as our experience representing, thousands of employers across most of the industries that comprise the United States economy.

Seyfarth is a global, full-service law firm with 12 U.S. offices and more than 400 attorneys who represent domestic businesses in their labor and employment matters. Among the 400 attorneys are several dozen who devote a substantial amount of their time to counseling employers on compliance with existing federal, state and municipal leave laws, including mandatory paid sick leave laws. Over the years, our lawyers have helped hundreds, if not thousands, of businesses in this regard.

We have listened carefully to our clients' and other businesses' concerns regarding the DCWP's proposed rules. We have done so through conversations with interested clients, as well as businesses that are not our clients. The businesses with which we have spoken are gravely concerned by certain updates presented by the Department in its ESSTA proposed rules, and the

complex compliance burdens imposed on covered businesses. We share these concerns and hope that our comments below will inform a more reasoned and justified result than the Department's current proposed rules would suggest.

Specific Comments On The Department's ESSTA Proposed Rules

- **Employer Size:** The proposed rules seek to apply a "nationwide" rather than "employed within NYC" standard to determining employer size with respect to topics such as annual accrual cap, annual usage cap, and treatment of earned, unused ESST at year end. A "nationwide" standard can be highly burdensome for employers with a small footprint in New York City but at least 100 employees nationwide. The standard is also inconsistent with other portions of ESSTA, such as its provisions on employees who temporarily perform work *within* NYC and determining employer obligations and employee rights with respect to which ESST annual accrual, usage, etc. amounts will apply. As such, employer size should similarly be determined based on the number of employees employed for hire within NYC, not nationwide. Otherwise, the proposed rules would create an excessive hardship on employers who have a low headcount in NYC, and thus a tenuous connection to the City, but more than five or 99 employees in their overall workforce.

- **Accrual Programming:** The proposed rules would require fractional accruals for time worked that is less than a 30-hour increment and rounding accruals to as little as the nearest five minutes. Imposing such a fractional accrual standard would require significant adjustments to the payroll systems and software programs many companies currently use to track absences due to time off. This new requirement would also be counterintuitive to ESSTA in light of the fact that the ordinance's increment of use standard is a four-hour, not five minute, initial increment.

- **Notice and Documentation:** There are multiple inconsistencies between (a) ESSTA's standards involving documentation of authorized use and employee notice to employer for planned and unplanned absences, and (b) the New York State Paid Sick Leave law's standards on the same topics. The Department's rulemaking should endeavor to better align the NYC and NYS standards with one another, rather than expand the differences.

- **Rate of Pay:** The current ESSTA legal standard for payment of ESST for hourly employees is the "regular rate of pay at the time the employee uses such safe/sick paid time." Since the law's inception, there has been ambiguity regarding whether the above standard should be interpreted as the employee's normal base wage, "rate in effect" (*i.e.*, what the employee would have earned had he or she worked and not used ESST), or the regular rate of pay for overtime purposes under federal law. The proposed rules appear to use a "rate in effect" standard by noting that "an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid safe/sick time is taken." There is inconsistency between ESSTA's "regular rate of pay" standard and the rules' "same hourly rate" standard. As such, the Department's proposed rules miss the opportunity to resolve this ambiguity contained within the ordinance and, now, within the rules. Both employees and employers stand to gain from clarity on the appropriate method of payment for used ESST.

- **Penalties:** Various components of the Department's proposed rules touch upon the specific penalties that could be imposed on employers found to not have fully complied with ESSTA. These updates would go above and beyond the penalties contained within the ESSTA Ordinance and create a substantial hardship on employers. The specific components at issue are the following:

- § 7-213(c) of the proposed rules would greatly expand the scope of potential penalties by creating a "reasonable inference" that an employer who does not maintain a compliant ESST policy (in accordance with ESSTA's numerous and burdensome written policy requirements) and adequate records of employees' accrued ESST use and balances (in accordance with ESSTA's burdensome recordkeeping requirements), does not provide ESST in accordance with the right to ESST and accrual section of ESSTA as a matter of official or unofficial policy or practice. Similarly, § 7-211(h) of the proposed rules would create a reasonable inference that an employer who fails to maintain and distribute an ESST policy to employees does not provide ESST in accordance with the right to ESST and accrual section of ESSTA as a matter of official or unofficial policy or practice. These inferences would allow the Department to impose employee relief of $500 per employee covered by such policy per calendar year. Such an inference, and corresponding $500 remedy, creates a penalty scheme that is unjustly tilted against and inequitable to employers. This is especially the case as the sweeping inferences would extend to all employers equally, even those who, although not precisely complying with every nuance of the ESSTA written policy mandate, distribution procedures, and recordkeeping requirements, which can be due to any number of factors, including technical system issues, provide their employees with the full complement of ESST in accordance with § 20-913 of the Administrative Code.

- In addition to the above inferences and associated fines, § 7-213(e) would provide a huge windfall to employees by applying the ordinance's current monetary relief of $500 per employee covered by an employer's official or unofficial policy or practice of not allowing accrual of ESST to *each calendar year* during which the policy or practice was in effect. Further, this provides the same amount of relief to all employees, without any regard to the amount of ESST that an employee actually earned or was entitled to use. The increased penalty also ignores employers' good faith compliance efforts with a paid leave law that consists of ever-changing, complex issues.

- Further, in its proposed form, § 7-213(b), which considers an employee to be "covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20913" if he or she was merely employed during the time period that such official or unofficial policy or practice was in effect, would impose *a per calendar year penalty on employers, even if an employee did, in fact, avail himself or herself of up to 40 or 56 hours of ESST in a given year.* As discussed above, this type of penalty is inequitable to employers and should be scaled back to the penalty scheme codified in the ESSTA Ordinance.

II. Conclusion.

Seyfarth respectfully requests that the Department refrain from issuing an updated ESSTA final rule until it reviews and remedies the above issues with the current proposed rules. Based on the feedback we have received from clients and other businesses, we have determined that certain of the provisions that the Department is proposing or may be contemplating would not have the positive impacts on employees that the Department intends, but rather would serve to create complicated, practically unmanageable requirements that are confusing for both eligible employees and covered employers.

Respectfully,

Joshua D. Seidman, Partner, Labor and Employment
Marlin Duro-Martinez, Associate, Labor and Employment
Michelle Shamouilian, Associate, Labor and Employment Seyfarth
Shaw LLP

November 23, 2022

Commissioner Vilda Vera Mayuga
New York City Department of Consumer and Worker Protection
42 Broadway, 8th Floor New
York, New York 10004
http://rules.cityofnewyork.us
Rulecomments@dcwp.nyc.gov

Re: Comments Regarding Proposed Rules Proposing to Amend Rules Related to the Earned Safe and Sick Time Act

Dear Commissioner Mayuga:

SHRM, the Society for Human Resource Management, is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With 318,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. SHRM advocates for clear policies that ensure businesses and workers have clear guidance to comply with laws and regulations and the tools to support workers and remain competitive for talent and in the economy.

Human resources ("HR") is vital in establishing mutually beneficial workplace cultures and environments. Our members' expertise and leadership help employees and employers identify new and better ways to help them thrive together and drive improvements in the workplace.

SHRM submits these comments in response to the Department of Consumer and Worker Protection ("DCWP" or "Department") proposed rules that amend the rules related to the New York City ("NYC") Earned Safe and Sick Time Act ("ESSTA"), Local Law 97 of 2020 ("LL 97") to align with previously made amendments.

SHRM applauds the efforts of NYC to align its safe/sick time policy with New York State's Paid Sick Leave Law and attempts to clarify several provisions. This alignment will help HR ensure proper compliance with state and city laws. Employers depend on their HR personnel to help them develop effective benefit plans that meet the needs of employees. Access to thoughtful, well-designed paid leave programs has measurable positive effects on employee health and workplace culture. Employers view leave time benefits among the top benefits they can offer employees.

HR departments and professionals are essential stakeholders in organizations because they are the uniting "bridge" between employees and employers. These roles encompass workforce development, talent acquisitions, worker support, and creating and implementing competitive employee benefit programs to attract talent. HR must use an objective lens when advising on benefits offerings and support while keeping costs in mind because of the profession's unique seat at the intersection of work, workers, and the workplace. SHRM members implement and comply with critical workplace policies every day.

While the proposed rules will help to ease the administrative burden on HR to implement, track effectively, and comply with state and local paid leave regulations, some considerations require clarification related to the administration of the ESSTA Employers are already grappling with a fragmented landscape of paid leave laws and regulations across multiple jurisdictions. The administration of a paid leave program is among the top reasons employers find difficulty along with complying with the disruption to staffing levels and the program expense.

Determining Employer Size and Staffing Fluctuations

The employer size determination requiring the total number of employees nationwide may have an adverse impact on employment opportunities for NYC workers. Employers, especially smaller businesses, may have to carefully consider where they operate and staffing during increased demand and seasonal work periods. The proposed rules, specifically § 7-202(b) and (c) require safe/sick time to become immediately available to all employees for the calendar year as soon as they cross an employment threshold. Conversely, § 7-202(d) of the proposed rules would require employers to continue providing employees with a higher amount of ESST until the following calendar year where a business decreases the number of employees below an applicable headcount threshold (i.e., (a) between five and 99 employees to less than 5 employees, or (b) from 100 or more employees to between five and 99 employees).

The dual timing standards is inconsistent, and that inconsistency unnecessarily burdens employers' HR, benefits and payroll teams. In addition, requiring the higher accrual, usage, and carryover requirements to go into effect immediately upon hire of the additional employees that increased an employer's size beyond the five or 100 employee threshold, as opposed to at the start of the next calendar year, would result in a large administrative burden for businesses that frequently change in size due to, for example, seasonal or temporary work. Larger employers will have lesser difficulty complying because many of these organizations have aligned their paid-leave offerings to navigate the various laws across the nation. However, this is not the case across the board for large employers. Further and notably, because of the smaller HR departments usually found in small to mid-size organizations tracking and compliance are more complex.

ESSTA establishes a standard, 'employed for hire within the City of New York,' which should apply to determining employer size instead of examining the total number of employees nationwide. Specifically looking at how the standard applies to *Employees Who Occasionally Work in NYC* if an employee with a primary work location outside of the city regularly performs or is expected to perform duties in NYC regularly, they are eligible for safe/sick leave under

ESSTA for the hours worked in the city. **SHRM recommends** that the "employed-for-hirewithin" standard also applies to determining employer size to make it easier for smaller organizations to strategize on how to right-size their organization and create employment opportunities based on their needs and for HR to ensure compliance with ESSTA. Employers also need this clarification when the hiring need may trigger a threshold requiring the immediate availability and accrual of safe/sick time without any corresponding usage waiting period. Further, applying a "nationwide" rather than "employed-for-hire-within" standard to determining employer size would be inconsistent with a number of existing state and local paid sick and safe time and paid personal leave mandates, including but not limited to those in Connecticut, Maine, Maryland, Nevada, Oregon, Rhode Island, Washington, D.C., Emeryville (CA), and Santa Monica (CA).

Proper Payment Method for Hourly Employees' Safe/Sick Time Absences

While the legal standard for payment of sick time under ESSTA that applies to hourly employees is the "regular rate of pay at the time the employee uses such safe/sick paid time," there has been ambiguity surrounding whether this phrase should be taken as the FLSA regular rate of pay for overtime purposes, the "rate in effect" (i.e., paying employees what they would have earned had they worked the shift instead of using PSL), or the employee's regular hourly base wage. This is unclear under ESSTA. As currently drafted, the proposed rules maintain the following payment standard -- "an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid safe/sick time is taken." The phrases "regular rate of pay" and "same hourly rate" do not align and can be read as imposing competing standards on employers and their HR and payroll teams.

The intent of state and local paid sick leave laws is generally to put employees in the same position that they would have been in had they worked on a given day, rather than taken sick leave. In other words, paid sick leave laws like ESSTA want to ensure that employees do not have to choose between getting paid and getting healthy. Adopting a sick time payment approach that follows a regular rate of pay / weighted average standard will, in at least some circumstances, place employees in a greater position than they would have been in had they actually worked the time because of the various forms of compensation that are factored into the regular rate / weighted average. To avoid this windfall, payment of sick time standards should be set at an employee's regular hourly base wage or "rate in effect." The proposed rules should be updated to explicitly reference the payment of sick time phrase under the ESSTA ordinance -- "regular rate of pay at the time the employee uses such safe/sick paid time" -- and that the practical meaning of this provision that "an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid safe/sick time is taken."

Transfers in Corporate Ownership and Employees

SHRM urges the Department to reconsider holding successor employers individually and jointly liable for penalties related to poor recordkeeping or disclosure by the original employer. The *Fair Labor and Standards Act* ("FLSA") already applies to asset acquisitions as a potential liability on pay and worker classification to the buyer despite the negotiated contractual terms.

While due diligence will likely uncover hidden liabilities, a grace period for the successor organization to adapt its HR practices and philosophy to ensure compliance with NYC regulations immensely benefits employers.

Fractional Accrual Requirement

The proposed rules, specifically § 7-214(g), provide as follows: "Employee accrual of safe/sick time must account for all time worked, regardless of whether time worked is less than a 30-hour increment. For the purposes of calculating accrual for time worked in increments of less than 30 hours, employers may round up accrued safe/sick time to the nearest five minutes, or to the nearest one-tenth or quarter of an hour, provided that it will not result, over a period of time, in a failure to provide the proper accrual of safe/sick time to employees for all the time they have actually worked." Such a requirement imposes a practical hardship on employers, specifically their HR and payroll teams.

Programming fractional accruals is not supported by certain payroll systems and software, and even where supported, requires complicated coding and is difficult to administer in practice. Not only are fractional accruals for time worked that is less than a 30-hour increment and rounding accruals to the nearest five minutes burdensome from an administration and programming perspective, but they also lack practical benefits for employees. This is because ESSTA allows employers to impose a four-hour initial increment of use for ESST, so fractional accruals will not factor into actual employee absences. Further, requiring fractional accrual tracking is inconsistent with many existing state and local paid sick and safe time laws -- Berkeley (CA), San Diego (CA), San Francisco (CA), Santa Monica (CA), Chicago (IL), Cook County (IL), Michigan, Bloomington (MN), Duluth (MN), Minneapolis (MN), Allegheny County (PA), Pittsburgh (PA), and Vermont -- that only require accruals to be tracked and recorded in one hour increments.

Enforcement and Penalties

The Department is urged to consider the impacts on businesses at a reasonable scale. Consecutive worker absences will impact small-, mid-size, and larger businesses differently. DWCP may consider an off-ramp for small businesses that encourages the employee and employer to work collaboratively to minimize the impact on operations. An additional consideration is warranted on how the policy affects organizations in the 5-99 employee range. One individual represents 20 percent of the workforce for an employer with five employees. Approximately 70 percent of businesses with 5-49 employees add HR onto the workload of employees with little to no experience in workforce issues, and 54 percent handle employment matters themselves or piecemeal with staff to save costs. SHRM urges DCWP to consider these factors in the rule amending process as small business focus on compliance and system establishment, workforce planning, administrative functions, recruiting, and training and development priorities to be competitive.

In addition to the above general considerations involving the impact of ESSTA penalties on small and mid-size businesses, the expanded scope of potential penalties under the proposed

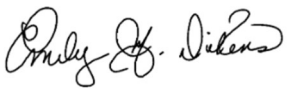
rules is quite excessive and unduly burdens employers. In particular, § 7-211(h) of the proposed rules would create a reasonable inference that an employer, as a matter of official or unofficial policy or practice, does not provide ESST in accordance with the right to ESST and accrual section of ESSTA, § 20-913 of the Administrative Code, where an employer fails to maintain and distribute an ESST policy to employees.[1] Similarly, § 7-213(c) would create a reasonable inference that an employer, as a matter of official or unofficial policy or practice, does not provide ESST in accordance with the right to ESST and accrual section of ESSTA, § 20-913 of the Administrative Code, where an employer fails to maintain a compliant ESST policy (in accordance with ESSTA's written policy requirements) and adequate records of employees' accrued ESST use and balances (in accordance with ESSTA's recordkeeping requirements). To create such inferences, which would trigger employee relief of $500 per employee covered by such policy per calendar year, is inequitable and imposes an overly undue burden on employers who may very well be providing employees with ESST in accordance with § 20-913 of the Administrative Code despite failing to fully comply with the rules' onerous written policy requirement and distribution procedures, or written policy and recordkeeping requirements of ESSTA.

Finally, § 7-213(e) would apply the current monetary relief of $500 per employee covered by an employer's official or unofficial policy or practice of not allowing accrual of ESST to *each calendar year*. Providing such relief on a per calendar year basis would exacerbate the windfall already resulting from the fact that the payment does not take into account whether and how much ESST the employee would have used in any given year were it accrued, and many businesses' good faith compliance efforts with a complex, frequently changing paid leave mandate.

Conclusion

SHRM respectfully submits these considerations to assist the vast majority of employers that strive to do the right things and comply with the state and NYC ESSTA. Our organization supports smart policies that promote positive workplace culture and environments where employees and employers mutually thrive. Practical and unique factors require proper consideration in the diverse NYC business community and the communal impacts. The nearly 14,000 SHRM members across the state of New York and over 5,400 NYC-based members are always ready to work with DCWP and the greater New York government to continue strengthening the NYC business community for workers, workplace cultures, and employers.

Respectfully,



Emily M. Dickens
Chief of Staff and Head of Government Affairs
Society for Human Resource Management

Online comments: 1

- **C. Mitch Taylor**
  On behalf of SHRM, the Society for Human Resource Management, we respectfully submit our comments on the proposal to amend the rules related to the Earned Safe and Sick Time Act.
  Comment attachment
  SHRM-NYC-Earned-Safe-and-Sick-Time-Comment-Letter.pdf
  Comment added November 23, 2022 10:30am