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SUBMITTED ELECTRONICALLY AND VIA U.S. POSTAL MAIL

Robert Waterman, Compliance Specialist
Wage and Hour Division, U.S. Department of Labor
Room S-3510, 200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1235-AA13, Proposed Department of Labor (Wage and Hour Division)
Rules on Establishing Paid Sick Leave for Federal Contractors

Dear Mr. Waterman:

The New York City Department of Consumer Affairs (“the Department”) writes to express its support for the U.S. Department of Labor (“DOL”) proposed rules implementing Executive Order 13706 (“EO”), *Establishing Paid Sick Leave for Federal Contractors*. As the agency responsible for enforcing the Paid Sick Leave Law¹ (“the Law” or “Earned Sick Time Act”) in New York City, we have a unique window into the critical job and economic security paid sick leave laws provide to workers and their families, and the positive effect these laws have on the economy.

New York City passed its paid sick leave law in 2013, extending the right to 1.2 million workers who previously did not have it and expanding or guaranteeing it for another 2.2 million workers.² The marketplace and labor force in New York City continue to thrive since the Law’s implementation.³ New York City’s law covers workers at unionized and non-unionized workplaces in an array of industries, many of which provide contracted services to the federal government.⁴

The Department draws on its expertise in the implementation and enforcement of the Earned Sick Time Act to provide the following commentary on the proposed rules set forth by DOL. Specifically, New York City provides insights and recommendations regarding the proposed regulations setting forth Definitions

¹ Earned Sick Time Act, N.Y.C. Local Law No. 46 (2013) (codified as amended at N.Y.C. ADMIN. CODE §§ 20-911 to 20-925 (2016))

² See N.Y.C. Dep’t of Consumer Affairs, NYC’S PAID SICK LEAVE LAW: FIRST YEAR MILESTONES 8 (June 2015) available at <http://tinyurl.com/zjufvqz>.

³ N.Y.C. Current Employment Statistics (C.E.S.), N.Y.S. Department of Labor, <https://www.labor.ny.gov/stats/nyc/> (last visited April 6, 2016); CITY OF NEW YORK ONCE AGAIN REACHES ALL TIME HIGH JOB TOTALS, N.Y.C.E.D.C., <http://www.nycedc.com/press-release/city-new-york-again-reaches-all-time-high-job-totals> (last visited April 6, 2016).

⁴ See Earned Sick Time Act, N.Y.C. ADMIN. CODE § 20-916(a) (2016); Federal agency spending in New York County alone exceeds \$300 million in 2016. See <https://www.usaspending.gov/transparency/Pages/SpendingMap.aspx>.

(§13.2), Paid sick leave for Federal contractors and subcontractors (§13.5), Prohibited acts (§13.6), Notice (§13.27), Complaints (§13.41), and Remedies (§13.44).

The estimated 437,000 employees of federal contractors who currently receive no paid sick leave will join over 10 million workers across the country who have gained or will soon gain access to paid sick leave as a result of laws that have been enacted in five states, the District of Columbia and more than 20 localities across the country.⁵

The New York City Earned Sick Time Act

Generally, under New York City’s Law, employees who work more than 80 hours a year for an employer are entitled to earn sick leave which can be used to care for themselves or family members.⁶ Employers with five or more employees must also pay for the sick time used at the employee’s usual rate of pay. The Law includes strict prohibitions on “retaliation or threaten[ed] retaliation against an employee for exercising or attempting to exercise any right provided pursuant” to the Earned Sick Time Act.⁷ It further requires that employers provide their New York City employees with a “Notice of Employee Rights” (“Notice”), which was prepared by the Department, in English as well as in the primary language of the employee to whom it is being distributed (when such translation is available).⁸

The Law provides for sick leave accrual at the rate of no less than one hour of sick time for every thirty hours worked, up to 40 hours, while also permitting employers to simply provide employees with 40 hours of sick leave at the beginning of each calendar year. Employees can carryover up to 40 hours of unused sick leave from one calendar year to the next,⁹ and accrue an additional 40 hours of sick leave in the new calendar year. If an employee does not use any sick time, she may have up to 80 hours of sick leave in her sick leave bank, though employers may restrict employees’ use of sick time to 40 hours per calendar year.¹⁰

The Law mandates that employees who are rehired by the same employer within six months must have their unused paid sick time reinstated unless the employer paid the employee for unused sick leave when he or she left the job and the employee agreed to be paid out.¹¹ The Law also protects employees’ accrued sick time when a business is sold to or acquired by another—employees retain all accrued sick time if the employee continues to perform work in New York City for the successor employer.¹²

The Law allows for individual employees to file a paid sick leave complaint with the Department. Since the Law took effect in 2014, New York City has received about 850 such employee complaints arising out of deficiencies in employers’ paid sick leave policies and practices. Should a subsequent investigation

⁵ National Partnership for Women & Families. (2016, March). *Paid Sick Days – State Statutes and City and County Laws*. Retrieved 14 March 2016, from <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf>.

⁶ See Earned Sick Time Act, N.Y.C. ADMIN. CODE §§ 20-913 to 20-914 (2016).

⁷ N.Y.C. ADMIN. CODE § 20-918.

⁸ Earned Sick Time Act, N.Y.C. ADMIN. CODE § 20-919 (2016).

⁹ Earned Sick Time Act, N.Y.C. ADMIN. CODE. § 20-913 (h) (2016).

¹⁰ See *Id.*

¹¹ Earned Sick Time Act, N.Y.C. ADMIN. CODE. § 20-913 (j) (2016).

¹² 6 R.C.N.Y. §7-11(a) (2016).

reveal violations of the Earned Sick Time Act, the Department may pursue civil penalties and restitution for employees harmed.¹³ Restitution provided for under the Law generally amounts to between \$250 and \$500 per affected employee for each violation of the Law, and an employer's failure to provide or failure to compensate sick leave allows the Department to seek triple the wages in restitution for the affected employee.¹⁴ Employees subjected to retaliation are entitled to lost wages and benefits, \$500 for each instance of retaliation (\$2,500 in cases of termination), and equitable relief.¹⁵ The Law also provides for civil penalties payable to the City of New York, which generally amount to \$500 per each employee affected and violation. Employers who persist in violating the Earned Sick Time Act are subject to higher penalties for their subsequent offenses.¹⁶ To date, New York City has secured more than \$2.3 million dollars in fines and restitution for more than 12,300 employees.

Comments on Proposed Rules

- 1. Family relationship definitions:** Proposed section 13.2 defines the terms "child," "domestic partner," "individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship," "parent," and "spouse."

The inclusive definitions contained in the proposed rules take a positive step in the evolution of paid sick leave by acknowledging the spectrum of relationships in American society.

Like DOL, New York City recognizes the importance of defining key relationships in an inclusive manner. The New York Law's current definition expanded on a narrower definition of "family member" in the original 2013 law that excluded grandparents and grandchildren.¹⁷ The Law presently defines "family member" to include an employee's children, spouse, domestic partner, parent, sibling, grandchild, grandparent, or the child or parent of the employee's spouse or domestic partner.¹⁸

DOL's proposed definitions reflect the diverse nature of family relationships by emphasizing the "significant personal bond" an employee may have regardless of biological or legal relationships.¹⁹ Even though the New York City Earned Sick Time Act has a broad definition of family, the Department has received complaints that cannot be substantiated as violations of the Law because, for example, a worker was denied the use of sick time to care for a fiancé or an aunt, who is not a covered family member under the Law. The broad definition proposed by DOL acknowledges the importance of such bonds and will extend coverage to cases such as those the Department was unable to pursue.

- 2. Written notice requirements:** Proposed section 13.5(a)(2) requiring contractors to notify employees performing work on or in connection with a covered contract of the paid sick time requirements by posting a notice to be provided by DOL in a prominent and accessible location. Proposed section

¹³ See N.Y.C. ADMIN. CODE § 20-924(d)-(e).

¹⁴ N.Y.C. ADMIN. CODE § 20-924(d)-(e).

¹⁵ N.Y.C. ADMIN. CODE § 20-924(d)(iii)-(iv).

¹⁶ N.Y.C. ADMIN. CODE § 20-924(e).

¹⁷ Earned Sick Time Act, N.Y.C. Local Law No. 46, § 20-912 (h) (2013).

¹⁸ Earned Sick Time Act, N.Y.C. ADMIN. CODE. § 20-912 (h) (2016).

¹⁹ Gretchen Livingston, *Fewer Than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RESEARCH CENTER (December 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>.

13.27 notice requiring contractors to inform employees in writing of the amount of paid sick time the employee has accrued but not used at various times.

We support DOL’s proposed notice provisions because they will encourage employee use of sick leave and lend transparency to the development and implementation of paid sick leave.

DOL’s proposed notice requirements are similar to those mandated by the Earned Sick Time Act. New York City’s “Notice of Employee Rights” (“Notice”) also provides employees with critical information regarding the right to paid sick leave, including the amount of sick leave to which they are entitled under the Law, the reasons for which they may use sick leave, permissible restrictions on the use of sick time, the prohibition on retaliation, and their right to file a complaint.²⁰ The Law requires that the Notice be distributed to employees, sharing the DOL’s concern for adequate notice exhibited in the proposed rules’ posting requirement.

In the Department’s experience, employees who are not made aware of their right to paid sick leave are less likely to take advantage of it when they or their family members are ill. Lack of notice thus undermines the Law’s goal of improving public health. Further, employers who do not put their employees on adequate notice of their paid sick leave rights may, intentionally or unintentionally, misrepresent their legal obligations in their implementation of sick time policies. Workforces informed of their right to paid sick leave and their employer’s sick leave policies are better able to monitor the employers’ compliance with the Law. For instance, many of the Department’s investigations of Earned Sick Time Act violations have involved employers who told their employees they may not use sick time to care for a family member. This error is less likely to go unchecked in a workplace in which the Notice, containing a list of family members for whom sick leave may be taken, has been distributed or posted. While New York City’s Law does not require notice to employees of the amount of paid sick time the employee has available for use, the Department believes that such notice would help employees keep track of their leave balances and protect employers who deny paid sick leave to an employee who has exceeded his leave balance from liability.

3. Accrual of Sick Time

- a. **Accrual Rate:** Proposed section 13.5(a)(1) sets the minimum accrual rate at one hour for every 30 hours worked on or in connection with a covered contract. Section 13.5(a)(3) permits contractors to frontload 56 hours at the beginning of a calendar year.

We support the DOL’s proposed provisions concerning sick leave accrual and frontloading because they ensure an adequate amount of sick leave for employees while offering employers a simple and cost-effective way to provide sick leave.

New York City’s Law requires the same rate of accrual, at least one hour of sick time for every 30 hours worked. The Law also permits an employer to have a sick leave policy that provides all employees with 40 hours of sick leave at the beginning of each calendar year. In the City’s experience, this option can be attractive to employers who prefer not to track the accrual of sick leave for each covered employee. We

²⁰ See N.Y.C. Dep’t of Consumer Affairs, *Notice of Employee Rights* (June 11, 2014), available at <http://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-MandatoryNotice-English.pdf>.

commend the DOL for including this practical alternative, especially for smaller employers who might not have large human resources support. Enabling workers to accrue an adequate amount of sick time is essential to protecting the financial security of low-income workers. For these workers, the loss of pay for a few days, or even just one day, can pose serious financial hardship. The median wage of workers who lack paid sick leave is \$10.00 an hour, or \$20,800 a year.²¹

b. Limitations on Accrual: Proposed section 13.5 capping accrual, use, and carryover.

DOL should simplify section 13.5 for the sake of clarity and consistency and to minimize confusion by simply capping carryover at up to 56 hours of unused time and capping accrual at 56 hours per year, regardless of what the employee carried over from the previous year.

The proposed rules provide that a contractor may limit an employee's annual accrual to 56 hours ("annual limit")²² and limit the hours *available for use* at any point to 56 hours ("availability limit").²³ However, the regulations state that a contractor may not limit the amount of sick time an employee may *use* per year or at once²⁴ and that employee can carry over any unused time from one year to the next, and the amount carried over does not count toward the employee's 56-hour annual accrual limit.²⁵ Allowing contractors to limit the total amount an employee can have available to use at any point will be confusing for contractors and employees alike. For example, an employee who carries over 16 hours of unused time would still be allowed to accrue up to 56 additional hours the following year, because the carried over hours do not count towards the employee's total annual accrual limit. In effect, however, the employee would only accrue 40 more hours before hitting the 56-hour *availability* limit, and would not accrue additional hours until they used some of their available time.

4. Reinstatement Protections: Proposed section 13.5(b)(4) provides for reinstatement of accrued unused paid sick time for employees rehired by the same contractor or a successor contractor within 12 months after a job separation.

We strongly support the proposed rule on reinstatement of sick leave because it ensures that workers subject to fluctuating schedules or intermittent work with federal contractors do not lose their earned sick time.

Similar to DOL's proposed rule, New York City's Earned Sick Time Act ensures that workers with fluctuating schedules, particularly temporary and seasonal workers who are most likely to work for contractors, are not denied sick leave because of the nature of their employment. The 12-month

²¹ See ANDREW GREEN ET AL., ECON. POLICY INST., THE NEED FOR PAID SICK DAYS (2011), *available at* <http://bit.ly/1SkilZx>.

²² Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9591 (proposed February 25, 2016) (to be codified at 29 C.F.R. pt. 13) (proposed § 13.5(b)(1)).

²³ *Id.* (proposed § 13.5(b)(3)).

²⁴ *Id.* (proposed § 13.5(c)(4)).

²⁵ *Id.* (proposed § 13.5(b)(2)).

reinstatement period is more generous than that provided in New York City's Earned Sick Time Act, which allows for restoration of accrued sick leave for employees rehired within six months after a job separation,²⁶ meaning that covered federal contractor employees will have an extended opportunity to use previously accrued sick leave.

The proposed rule provision on successor contractors emulates New York City's Earned Sick Time Act in acknowledging that a well-functioning paid sick leave scheme should preserve the sick time of employees who perform the same work even as they shift from one employer to another after a merger or acquisition.

5. Interference and Discrimination Protections: Proposed section 13.6(a) prohibiting interference with an employee's accrual or use of paid sick time and proposed section 13.6(b) prohibiting discrimination against an employee for using or attempting to use paid sick time, filing a complaint, cooperating in a DOL investigation of the employer, or informing another of her rights.

We applaud the DOL's proposed retaliation and interference provisions because they will provide critical protections to employees exercising their right to paid sick leave.

The Earned Sick Time Act similarly protects against a broad spectrum of adverse employment actions by employers in order to ensure that employees can exercise their rights under the Law.

In the Department's experience, employers rely on a wide array of tactics to unlawfully limit employee use of paid sick leave. Across different industries, employer retaliation against employees can consist of changed work assignments, verbal harassment, or forcing employees to sign documents denying that the employer violated paid sick leave laws. There are many employers who maintain sick time policies that inherently discourage its use, relying upon disciplinary point systems to subtly curb lawful use of protected sick leave. Robust anti-retaliation provisions and enforcement mechanisms discourage these types of practices. Such protections are fundamental; without them, a worker's right to earn paid sick time would be illusory.

6. Remedies and Sanctions: Proposed section 13.44 provides the authority to recover a range of remedies and sanctions, including liquidated damages (13.44(a)) and debarment for contractors who are found to have disregarded their obligations (13.44(d)).

We support the tough remedial provisions provided in the DOL's proposed rules because they will strongly deter contractors who might otherwise deny workers their paid sick leave rights.

Like the proposed rules, the Earned Sick Time Act allows employees to file complaints with New York City's agency enforcing paid sick leave and provides for the pursuit of legal remedies, which in New York City include civil penalties, generous restitution for affected employees, and injunctive relief. Such robust enforcement mechanisms secure paid sick leave rights for all covered employees. By prioritizing payment of restitution, the New York City Department of Consumer Affairs makes affected employees whole. Treble damages for certain offenses and substantial restitution associated with retaliation conveys to employers the seriousness of the offenses to which they apply and compensates employees for the often substantial financial and emotional toll the employers' offense has caused. Only a fraction of New York

²⁶ Earned Sick Time Act, N.Y.C. ADMIN. CODE. § 20-913 (j) (2016).

City employers subject to a paid sick leave investigation have gone on to again violate the Earned Sick Time Act, evidencing employers' eagerness to come into immediate compliance and avoid another investigation with higher penalties. While New York City does not have an analogue to debarment provided in the proposed rule, such a consequence is certain to promote compliance with the EO and rules promulgated under it given the value of federal contracts.

7. Relationship between EO and local and state laws: Proposed section 13.5(f)(4) dictates that a contractor does not satisfy its obligations under the EO or the rules merely by complying with a state or local paid sick leave law.

DOL should clarify that a contractor subject to both the EO and a state or local law may comply with both by satisfying the more generous terms of each.

The proposed rules, while providing that a contractor does not satisfy its obligations merely by complying with a state or local paid sick leave law, does not clarify that the inverse may also be true, and that a contractor may satisfy its obligations under federal, state, and local regimes by offering generous paid sick leave. More generous sick leave policies are welcome under the proposed rules as well as under state and local paid sick leave laws.²⁷ DOL should provide guidance clarifying that a contractor subject to both the EO and a state or local law may satisfy their obligations under both by complying with the more generous terms of each. For example, a contractor subject to the EO as well as New York City's Earned Sick time Act may meet the accrual requirement of both by allowing employees to accrue up to 56 hours of paid sick leave each year under the EO, as this is more generous than the 40 hours provided under New York City's Earned Sick Time Act.²⁸ Such guidance will ensure that employees of federal contractors reap the benefits of federal, state, and local paid sick leave protections.

Conclusion

The New York City Department of Consumer Affairs strongly supports the proposed rules published in RIN 1235-AA13. The proposed rules will allow employees of federal contractors across the country to benefit from paid sick time policies just as employers and workers in New York City currently do. Our own agency's success in enforcing our paid sick leave law shows that enforcement of the proposed rules is feasible. We urge DOL to incorporate these comments into the proposed rules and finalize the rules with all urgency.

Respectfully submitted,



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²⁷ See, e.g., N.Y.C. ADMIN. CODE § 20-922 to § 20-923.

²⁸ See N.Y.C. ADMIN. CODE § 20-913(b).