NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Notice of Adoption of Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs by Sections 20-a, 1043, and 2203(f) of the New York City Charter, and Chapters 8, 9, 12, and 13 of Title 20 and Section 22-507 of the New York City Administrative Code, and in accordance with the requirements of Section 1043 of the New York City Charter, of the adoption of an amendment to Chapter 7 of Title 6 of the Rules of the City of New York to implement and clarify procedures of the Office of Labor Policy and Standards, clarify provisions of the Earned Safe and Sick Time Act, and to provide guidance to covered employers and protected workers.

Statement of Basis and Purpose of Rules

These rules were proposed on June 29, 2018. The required public hearing was held on July 30, 2018. The Department of Consumer Affairs received public comments on the proposed rules. As a result of those comments, the rules were amended as follows:

- § 7-106 was amended to read "full hourly minimum wage"

- § 7-108 was amended to read

Taking an adverse action includes, but is not limited to threatening, intimidating, disciplining, discharging, demoting, suspending, or harassing an employee, reducing the hours of pay of an employee, informing another employer than an employee has engaged in activities protected by the OLPS laws and rules, discriminating against the employee, including actions related to perceived immigration status or work authorization, and maintenance or application of an absence control policy that counts protected leave as an absence that may lead to or result in an adverse action.

- § 7-201(b) was amended to add "Such person may be considered an employee under the Earned Safe and Sick Time Act and this subchapter."

In March 2016, the Mayor signed into law local law 104 of 2015, which enacted section 20-a of the New York City Charter, establishing the Office of Labor Standards (herein referred to as "Office of Labor Policy and Standards" or "OLPS"). The Mayor designated the Department of Consumer Affairs as the agency in which OLPS would be established. Pursuant to Section 20-a of the New York City Charter, OLPS is tasked with, among many things, enforcing municipal labor laws, such as the Earned Sick Time Act, Chapter 8 of Title 20 of the Administrative Code of the City of New York, the Mass Transit Benefits Law, Chapter 9 of Title 20 of the Administrative Code of the City of New York, the Grocery Workers Retention Law, section 22-507of the Administrative Code of the City of New York, the Fair Workweek Law, Chapter 12 of Title 20 of the Administrative Code of the City of New York, and the Deductions Law, Chapter 13 of Title 20 of the Administrative Code of the City of New York.

These rules amend Chapter 7 of Title 6 of the Rules of the City of New York to establish uniform practices and procedures for the enforcement of the laws enforced by OLPS, where possible. Specifically, these rules:

- Contain a definitions section applicable to certain rules and laws enforced by OLPS.
- Mandate that the rules shall be liberally construed to accomplish the OLPS mandate in Section 20-a of the Charter, with the understanding that they do not supersede any other provision of the OLPS laws and rules, the Freelancers Law and rules, or the Transportation Benefits Law and rules.
- Contain a severability clause that, in the event any provision is deemed invalid or inapplicable in a particular circumstance, maintains the validity and applicability of the remaining rules.
- Clarify that OLPS resources and the rights protected by OLPS extend to persons regardless of immigration status.
- Clarify that OLPS will maintain confidential the identity of complainants and witnesses to the extent possible.

- Clarify that joint employers are individually and jointly liable for violations of laws enforced by OLPS and satisfaction of fines and restitution.
- Clarify how employers in a joint employer relationship should determine the number of employees they have.
- Clarify how to calculate lost earnings for the calculation of damages when an employee is paid a flat rate or performs more than one job for the same employer.
- Clarify how employers must satisfy any obligation to post a notice or other writing required by the laws enforced by OLPS.
- Define what may constitute retaliation, including adverse actions taken by employers against employees.
- Clarify that both direct and indirect evidence are acceptable to establish a causal connection between an adverse action and the exercise, attempted exercise, or anticipated exercise of rights.
- Clarify that the burden of proof for retaliation is whether protected activity was a "motivating factor" for an adverse action.
- Clarify the procedures for investigations of alleged violations of laws enforced by OLPS.
- Clarify that OLPS may issue a notice of violation for failure to comply with a request for information.
- Clarify what constitutes proper service of process.
- Clarify that a failure to maintain records creates an inference in favor of OLPS.
- Clarify that a policy or practice that denies a right established or protected by the laws enforced by OLPS constitutes a violation of the applicable provision of the OLPS law or rule for each employee subjected to the policy or practice.
- Harmonize the Displaced Grocery Worker Rules with new Rules for the Office of Labor Policy and Standards.
- Delete the definition of "appropriate notice," contained in the Displaced Grocery Worker rules, which is revised and included in the rules for the Office of Labor Policy and Standards.
- Delete provisions regarding the posting of notice of change in control by incumbent grocery employers in the Displaced Grocery Worker rules, which is revised and included in the rules for the Office of Labor Policy and Standards.
- Delete provisions regarding enforcement procedures contained in the Displaced Grocery Worker rules, which are included in the rules for the Office of Labor Policy and Standards.
- Place the Transportation Benefits rules in Subchapter C of Chapter 7 and renumber the rules accordingly.
- Place the Freelance Worker rules in Subchapter E of Chapter 7 and renumber the rules accordingly.
- Correct a typo in the Deductions rules, contained in Subchapter G of Chapter 7.

Additionally, these rules clarify parts of the Earned **Safe and** Sick Time Act, Specifically, these rules:

- Include references to safe time, including adding "safe" to the definitions section.
- Clarify that the definition of domestic worker as contained in the Earned Safe and Sick Time Act is limited to employees who are solely and directly employed by individuals or private families for domestic work and does not include workers who are employed, solely or jointly, by agencies.
    - When enacting the Earned Sick Time Act, the City Council relied on a definition

of domestic worker from section 2 of the state Labor Law, which, at the time, only included employees of individual households. The state Labor Law's definition exempts workers employed by agencies or other third-party employers who provide companionship services, as defined by federal regulations issued pursuant to the Fair Labor Standards Act (FLSA). Subsequent to the enactment of the Earned Sick Time Act, the definition of "companionship services" contained in the FLSA regulation was changed to extend the minimum wage and overtime protections of the FLSA to more workers, including home health aides employed by agencies. This change created ambiguity in the definition of "domestic worker" under the city's Earned Sick Time Act.
    - The legislative history of the Earned Sick Time Act makes clear that the City Council intended only employees of individual households to be covered by the definition of "domestic worker." The clarification made by this rule will preserve that legislative intent.
    - A narrow definition of domestic worker is consistent with enhancing and expanding rights—safe and sick leave as well as other labor rights—to workers historically excluded from protections because a narrow definition of "domestic worker" means that more workers are included in the group of workers that receives a full forty hours of paid safe and sick time per year.
- Delete the definition of "temporary help firm," which is in substance included in the rules for the Office of Labor Policy and Standards.
- Delete the rule about joint employers, which is revised and included in the rules for the Office of Labor Policy and Standards.
- Delete the rule that protections of the Earned Sick Time Act extend to all workers, regardless of immigration status, which is revised and included in the rules for the Office of Labor Policy and Standards.
- Delete provisions about how to calculate payment for sick time when an employee is paid on a piecework basis.
- Add a provision about how to calculate payment for sick time when an employee is paid a flat rate.
- State that an employer's written sick time policies must be contained in one writing and they must be distributed, rather than posted or distributed, to employees.
- Clarify that an employer that provides paid time off (PTO) for use as sick time must state so in its written policy.
- Clarify that a Department writing does not constitute an employer's written sick time policy.
- Delete the procedures by which the Department may file a notice of hearing for an employer's failure to respond to a notice of investigation and request for information, which is revised and included in the rules for the Office of Labor Policy and Standards.
- Delete the enforcement procedures, which are revised and included in the rules for the Office of Labor Policy and Standards.
- Delete the retaliation provisions, which are revised and included in the rules for the Office of Labor Policy and Standards.

Sections 1043, 2203(f), 20-a of the New York City Charter and chapters 8, 9, 12, and 13 of Title 20 and section 22-507 of the New York City Administrative Code authorize the Department of Consumer Affairs OLPS to make these rules.

<u>New material is underlined.</u>

[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.

Final Rule

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

Subchapter A: Office of Labor Policy and Standards

§ 7-101 Definitions.

(a) As used in this subchapter, the following terms have the following meanings:

"Employee" means any person who meets the definition of "employee," as defined by section 20-912 of the Code, "eligible grocery employee," as defined by section 22-507 of the Code, "fast food employee," as defined by section 20-1201 or 20-1301 of the Code, or "retail employee," as defined by section 20-1201 of the Code.

"Employer" means any person who meets the definition of "employer," as defined by section 20-912 of the Code, "successor grocery employer" or "incumbent grocery employer," as defined by section 22-507 of the Code, "fast food employer," as defined by section 20-1201 or 20-1301 of the Code, or "retail employer," as defined by section 20-1201 of the Code.

"Freelancers Law and rules" means Chapter 10 of Title 20 of the Code and subchapter E of this chapter.

"OLPS laws and rules" means chapters 8, 12, and 13 of Title 20 and section 22-507 of the Code and subchapters A, B, D, F, and G of this chapter.

"Transportation Benefits Law and rules" means Chapter 9 of Title 20 of the Code and subchapter C of this chapter.

(b) As used in the OLPS laws and rules, the following terms have the following meanings:

"Code" means the Administrative Code of the City of New York.

"Department" means the New York City Department of Consumer Affairs.

"Director" means the director of the office of labor standards established pursuant to section 20-a of the charter.

"Joint employer" means each of two or more employers who has some control over the work or working conditions of an employee or employees. Joint employers may be

separate and distinct individuals or entities with separate owners, managers and facilities. A determination of whether or not a joint employment relationship exists will not often be decided by the application of any single criterion; rather the entire relationship shall be viewed in its totality.

"Office" means the office of labor standards established pursuant to section 20-a of the New York City Charter and referred to as the Office of Labor Policy and Standards.

"Supplements" means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the New York State Labor Law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training.

"Temporary help firm" means an employer that recruits and hires its own employees and assigns those employees to perform work or services for another organization 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.

"Work week" means a fixed and regularly recurring period of 168 hours or seven consecutive 24 hour periods; it may begin on any day of the week and any hour of the day, and need not coincide with a calendar week.

"Written" or "writing" means a hand-written or machine-printed or printable communication in physical or electronic format, including a communication that is maintained or transmitted electronically, such as a text message.

§ 7-102 Construction.

This chapter shall be liberally construed to permit the Office to accomplish the purposes contained in section 20-a of the New York City Charter. The provisions of this subchapter shall not be construed to supersede any other provision of the OLPS laws and rules, the Freelancers Law and rules, or the Transportation Benefits Law and rules.

§ 7-103 Severability.

The rules contained in this chapter shall be separate and severable. If any word, clause, sentence, paragraph, subdivision, section, or portion of these rules or the application thereof to any person, employer, employee, or circumstance is contrary to a local, state or federal law or held to be invalid, it shall not affect the validity of the remainder of the rules or the validity of the application of the rules to other persons or circumstances.

§ 7-104 Complainants and Witnesses.

(a) All people, regardless of immigration status, may access resources provided by the Office.
(b) Any person who meets the definition of employee in section 7-101 of this subchapter is entitled to the rights and protections provided by this subchapter to employees and any applicable provision of the OLPS laws and rules, regardless of immigration status.
(c) The Office shall conduct its work without inquiring into the immigration status of complainants and witnesses.
(d) The Office shall maintain confidential the identity of a complainant or natural person providing information relevant to enforcement of the OLPS laws and rules and the Transportation Benefits Law and rules, unless disclosure is necessary for resolution of the investigation or matter, or otherwise required by law, and the Office, to the extent practicable, notifies such complainant or natural person that the Office will be disclosing such person's identity before such disclosure.
(e) For purposes of effectuating subdivision (d) of this section, the Office shall keep confidential any information that may be used to identify, contact, or locate a single person, or to identify an individual in context.

§ 7-105 Joint Employers.

(a) Joint employers are individually and jointly liable for violations of all applicable OLPS laws and rules and satisfaction of any penalties or restitution imposed on a joint employer for any violation thereof, regardless of any agreement among joint employers to the contrary.
(b) A joint employer must count every employee it employs for hire or permits to work, whether joint or not, in determining the number of employees employed for hire or permitted to work for the employer. For example, a joint employer who employs three workers from a temporary help firm and also has three permanent employees under its sole control has six employees for purposes of the OLPS laws and rules.

§ 7-106 Determining Damages Based on Lost Earnings.

(a) The following provisions apply to the extent necessary in circumstances described in paragraphs (1) and (2) below for the calculation of damages based on lost earnings in an administrative enforcement action:

(1) When an employer pays a flat rate of pay for work performed, regardless of the number of hours actually worked, an employee's hourly rate of pay shall be based on the most recent hourly rate paid to the employee for the applicable pay period, calculated by adding together the employee's total earnings, including tips, commissions, and supplements, for the most recent work week in which no sick time or other leave was taken and dividing that sum by the number of hours spent performing work during such work week or forty hours, whichever amount of hours is less.

(2) 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 hourly rate of pay shall be the rate of pay that the employee would have been paid during the time that employee would have been performing work but for the employee's absence.

(b) If the methods for calculating the hourly rate described in subdivision (a) produce an hourly rate that is below the full hourly minimum wage, then the employee's lost earnings shall be based on the full hourly minimum wage.

§ 7-107 Required Notices and Postings.

(a) For any notice created by the Office that is made available on the City's website and that is then required by a provision of the OLPS laws and rules to be provided to an employee or posted in the workplace, an employer must provide and/or post such notice in English and in any language spoken as a primary language by at least five percent of employees at the employer's location, provided that the Director has made the notice available in such language. Employers covered by the Earned Safe and Sick Time Act, chapter 8 of Title 20 of the Code, are required to comply with this subdivision in addition to the requirement pursuant to section 20-919 of the Code that an employer provide the notice of rights in an employee's primary language.

(b) (1) For any notice that is not created by the Office and made available on the City's website, that is required to be provided to an employee and/or posted in the workplace by a provision of the OLPS laws and rules, an employer must provide and/or post such notice in English and in any language that the employer customarily uses to communicate with the employee.

(2) For any notice that is not created by the Office and made available on the city's website, that is required to be posted in the workplace by a provision of the OLPS laws and rules, an employer must post such notice in English and in any language that the employer customarily uses to communicate with any of the employees at that location.

(c) Any notice, policy, or other writing that is required by a provision of the OLPS laws and rules to be personally provided to an employee must be provided by a method that reasonably ensures personal receipt by the employee and that is consistent with any other applicable law or rule that specifically addresses a method of delivery.

(d) Any notice, policy or, other writing that is required to be posted pursuant to a provision of the OLPS laws and rules must be posted in a printed format in a conspicuous place accessible to employees where notices to employees are customarily posted pursuant to state and federal laws and, except for notices created by the Office, in a form customarily used by the employer to communicate with employees.

(e) An employer that places employees to perform work off-site or at dispersed job-sites, such as in private homes, building security posts, or on delivery routes, must comply with any applicable requirement to post a notice, policy or other writing contained in the OLPS laws and rules by providing employees with the required notice personally upon commencement of employment, within fourteen (14) days of the effective date of any changes to the required posting, and upon request by the employee, in addition to the requirements in subdivision (c) of this section.

§ 7-108 Retaliation.

(a) No person shall take any adverse action against an employee that penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights under the OLPS laws and rules or interfere with an employee's exercise of rights under the OLPS laws and rules.

(b) Taking an adverse action includes, but is not limited to threatening, intimidating, disciplining, discharging, demoting, suspending, or harassing an employee, reducing the

hours of pay of an employee, informing another employer than an employee has engaged in activities protected by the OLPS laws and rules, discriminating against the employee, including actions related to perceived immigration status or work authorization, and maintenance or application of an absence control policy that counts protected leave as an absence that may lead to or result in an adverse action.

(c) An employee need not explicitly refer to a provision of the OLPS laws and rules to be protected from an adverse action.

(d) The Office may establish a causal connection between the exercise, attempted exercise, or anticipated exercise of rights protected by the OLPS laws and rules and an employer's adverse action against an employee or a group of employees by indirect or direct evidence.

(e) For purposes of this section, retaliation is established when the Office shows that a protected activity was a motivating factor for an adverse action, whether or not other factors motivated the adverse action.

§ 7-109 Enforcement and Penalties.

(a) The Office may open an investigation to determine compliance with laws enforced by the Office on its own initiative or based on a complaint, except as otherwise provided by section 20-1309 of Chapter 13 of Title 20 of the Code.

(b) Whether it was issued in person, via mail, or, on written consent of the employer, email, an employer must respond to a written request for information or records by providing the Office with true, accurate, and contemporaneously-made records or information within the following timeframes, except as provided in subdivision (c) of this section, subdivision (c) of section 20-924 of the Code, section 7-213 of this title or other applicable law:

(1) For an initial request for information or records, the employer shall

i. Within ten (10) days of the date that the request for information was received by the employer provide the following information, if applicable:

A. the employer's correct legal name and business form;

B. the employer's trade name or DBA;

C. the names and addresses of other businesses associated with the employer;

D. the employer's Federal Employer Identification Number;

E. the employer's addresses where business is conducted;

F. the employer's headquarters and principal place of business addresses;

G. the name, phone number, email address, and mailing address of the owners, officers, directors, principals, members, partners and/or stockholders of more than 10 percent of the outstanding stock of the employer business and their titles;

H. the name, phone number, email address, and mailing address of the individuals who have operational control over the business;

I. the name, phone number, email address, and mailing address of the individuals who supervise employees;

J. the name and contact information of the individual who the office should contact regarding an investigation of the business and an affirmation granting authority to act; and

ii. Within fourteen (14) days of the date of that the initial request for information or records was received, provide the remaining information or records requested in that initial request.

(2) For all requests for information or records after the initial request, an employer must respond within the timeframe prescribed by the Office in the request, which shall not exceed fourteen (14) days from the date that the request was received by the employer, unless a longer timeframe has been agreed to by the Office.

(3) Upon good cause shown, the Director may extend response timeframes required pursuant to this subdivision.

(c) An employer shall respond to a written request for information or records by providing the Office with true, accurate, and contemporaneously-made records or information in a lesser amount of time than provided in paragraphs 2 and 3 of subdivision b of this section if agreed to by the parties or the Office 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, discrimination, OLPS laws and rules, the Freelancers Law and rules, or the Transportation Benefits Law and rules; or
   (4) More immediate access to records is necessary to prevent or remedy retaliation against employees.

(d) In accordance with applicable law, the Office may resolve or attempt to resolve an investigation at any point through settlement upon terms that are satisfactory to the Office.

(e) The Office may issue a notice of violation to an employer who fails to provide true and accurate information or records requested by the Office in connection with an investigation.

(f) An employer who fails to timely and fully respond to the request for information or records that is the subject of a notice of violation issued under subdivision (e) of this section on or before the first scheduled appearance date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the Office's investigation.

(g) The employer may cure a notice of violation issued in accordance with subdivision (e) of this section without the penalty imposed in connection with subdivision (f) by:
   (1) producing the requested information or records on or before the first scheduled appearance date; or
   (2) resolving, to the satisfaction of the Office on or before the first scheduled appearance date, the investigation that is the basis for the request for information or records.

(h) A finding that an employer has an official or unofficial policy or practice that denies a right established or protected by the OLPS laws and rules shall constitute a violation of the applicable provision of the OLPS laws and rules for each and every employee subject to such policy or practice.

§ 7-110 Service.

Service of documents issued by the Office to employers, including written requests for information or records and notices of violation, shall be made in a manner reasonably calculated to achieve actual notice to the employer. The following are presumed to be reasonably calculated to achieve actual notice: (i) personal service on the employer; (ii) personal service on the employer by regular first-class mail, certified mail, return receipt requested, or private mail delivery services, such as UPS, to an employer's last known business address; or (iii) if an employer has so consented, facsimile, email, including an attachment to an email.

§ 7-111 Recordkeeping.

(a) An employer's failure to maintain, retain, or produce a record that is required to be maintained under the OLPS laws and rules that is relevant to a material fact alleged by the Office in a notice of violation issued pursuant to a provision of the OLPS laws and rules creates a reasonable inference that such fact is true, unless a rebuttable presumption or other adverse inference is provided by applicable law.
(b) An employer that produces records to the department or Office in response to a request for information affirms that the records produced are true and accurate.

§ 2. Subchapter B of Chapter 7 of Title 6 of the Rules of the City of New York is amended to read as follows:

Subchapter B: Earned Safe and Sick Time

§ [7-01] 7-201 Definitions.

(a) As used in this chapter, the terms "calendar year," ["domestic worker,"] "employee," "employer," "health care provider," "paid safe/sick time," "safe time," and "sick time" shall have the same meanings as set forth in section 20-912 of the Administrative Code.
(b) As used in the Earned Safe and Sick Time Act and in this subchapter, the term "domestic worker" means a person who provides care for a child, companionship for a sick, convalescing or elderly person, housekeeping, or any other domestic service in a home or residence whenever such person is directly and solely employed to provide such service by an individual or private household. The term "domestic worker" does not include any person who is employed by an agency whenever such person provides services as an employee of such agency, regardless of whether such person is jointly employed by an individual or private household in the provision of such services.
[(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 another organization 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] 7-202 Business Size.

(a) Business size for 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 80 days immediately preceding the date the employee used safe time or 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 safe time or 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]section, "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) Where two or more employers have some control over the work or working conditions of an employee, the employers may be treated as a "joint employer" of 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 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 and also has three employees under its sole control has six employees for purposes of the Earned Sick Time Act and must provide paid sick time.

(c) In discharging their joint obligations under the Earned Sick Time Act, joint employers may allocate responsibility for the requirements of such Act among themselves.

(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 that temporary employee. For example, a temporary help firm that has 100 employees placed in several different organizations must provide paid sick time to each of its employees placed at the other organizations, regardless of the size of the organization where the temporary help firm places the employee.]

§ [7-04] 7-203 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] 7-204 Minimum increments and fixed intervals for the use of safe time and sick time.

(a) Unless otherwise in conflict with state or federal law or regulations, an employee may decide how much earned safe time or sick time to use, provided however, that an employer may set a minimum increment for the use of safe time and 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 safe time and sick time. The employee has not yet accrued four hours of time, but is entitled to use the 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 safe time or 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 safe time or 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] 7-205 Employee notification of use of safe time or sick time.

(a) An employer may require an employee to provide reasonable notice of the need to use safe time or sick time.

(b) An employer that requires notice of the need to use safe time or 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 safe time or 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 safe time or 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 safe time or 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 safe time or sick time is to begin. The employer may require that such notice be in writing.

§ [7-07] 7-206 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" as used in this subdivision and in section 20-914(a)(2) of the Administrative Code 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] 7-207 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 safe/sick time per year, as provided in this section.
(b) The two days of paid safe/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 safe/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) Safe time and [Sick] sick time accrued by a domestic worker will carry over to the next calendar year.

§ [7-09] 7-208 Rate of pay for Safe Time and Sick Time.

(a) Except as provided in subdivision (b) 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.
(c) An employee is not entitled to compensation for lost tips or gratuities, provided, however, that an employer must pay an employee whose hourly rate of pay or 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 workweek in which no sick time was taken and dividing that sum by the number of hours spent performing the work during such workweek. For purposes of this subdivision, "workweek" means a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods.] When an employer pays a flat rate of pay for work performed, regardless of the number of hours actually worked, an employee's hourly rate of pay shall be based on the most recent hourly rate paid to the employee for the applicable pay period, calculated by adding together the employee's total earnings, including tips, commissions, and supplements, for the most recent work week in which no safe time or sick time or other leave was taken and dividing that sum by the number of hours spent performing work during such work week or forty hours, whichever amount of hours is less.
(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 safe time or sick time.
(g) An employer is not required to pay cash in lieu of supplements for safe time or sick time used if remuneration for employment includes supplements. The fact that an

employer pays cash in lieu of supplements to an employee does not relieve the employer of the requirements of the Earned Safe and Sick Time Act. [For the purposes of this subdivision, "supplements" has the same meaning as provided in section 220(5)(b) of New York State Labor Law.]

(h) Under no circumstance can the employer pay the employee less than the minimum wage for paid safe/sick time.

§ [7-10] 7-209 Payment of safe/sick time.

(a) Safe time and [Sick] sick time must be paid no later than the payday for the next regular payroll period beginning after the safe time or sick time was used by the employee.

(b) If the employer has asked for written documentation or verification of use of safe time or sick time pursuant to section 20-914([c]a), 20-914(b) or 20-914(d) of the Administrative Code, the employer is not required to pay safe time or sick time until the employee has provided such documentation or verification.

§ [7-11] 7-210 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 safe time and 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 safe time and sick time accrued while working for the former employer, until such safe time and sick time is exhausted.

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

§ [7-12] 7-211 Employer's Written safe time and sick time policies.

(a) Every employer shall maintain written safe time and sick time policies in a single writing and follow such written safe time and sick time policies except as allowed in subdivision (d) of this section.

(b) Every employer must distribute [or post] its written [policies on] safe time and sick time [and follow such written sick time] policies personally upon commencement of employment, within 14 days of the effective date of any changes to the policy, and upon request by the employee.

(c) An employer's written safe time and sick time policies must meet or exceed all of the requirements of the Earned Safe and Sick Time Act and this chapter and state at a minimum:

(1) The employer's method of calculating safe time and sick time as follows:

(i) If an employer provides employees with an amount of safe time and sick time that meets or exceeds the requirements of the Earned Safe and 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 safe time and sick time," then the employer's written

safe time and sick time policy must specify the amount of frontloaded safe time and sick time to be provided;

(ii) If the employer does not apply frontloaded safe time and sick time, then the employer's written safe time and sick time policy must specify when accrual of safe time and sick time starts, the rate at which an employee accrues safe time and sick time and the maximum number of hours an employee may accrue in a calendar year;

(2) The employer's policies regarding the use of safe time and sick time, including any limitations or conditions the employer places on the use of safe time and sick time, such as:

(i) Any requirement that an employee provide notice of a need to use safe time and sick time and the procedures for doing so in accordance with section 7-205 of this chapter;

(ii) Any requirement for written documentation or verification of the use of safe time and sick time in accordance with Sections [20-914(c)] 20-914(a)(2), 20-914(b)(2), 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 safe time and sick time; [and]

(iv) Any policy on discipline for employee misuse of safe time and sick time under Section [7-16] 7-215 of this Title; and

(v) A description of the confidentiality requirements of Section 20-921 of the Administrative Code.

(3) The employer's policy regarding carry-over of unused safe time and sick time at the end of an employer's calendar year in accordance with Section 20-913(h) of the Administrative Code; and,

(4) If an employer uses a term other than "safe/sick time" or "safe and sick time" to describe leave provided by the employer to meet the requirements of the Earned Safe and Sick Time Act, the employer's policy must state that such leave may be used by an employee for any of the purposes set forth in the Earned Safe and Sick Time Act without any condition prohibited by the Earned Safe and Sick Time Act. Terms used to describe such leave may include, but are not necessarily limited to, "paid time off" ("PTO"), vacation time, personal days, or days of rest.

[(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

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)] (d) Nothing in this chapter shall prevent an employer from making exceptions to its written safe time and sick time policy for individual employees that are more generous to the employee than the terms of the employer's written policy.

[(d)] (e) Requirements relating to an employer's additional and separate obligation to provide employees with a Notice of Rights under the Earned Safe and 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] or any other department writing in lieu of distributing or posting its own written safe time and sick time policies as required by this section.

[(e)] (f) An employer that has not provided to the employee a copy of its written [policy] safe time and sick time policies along with any forms or procedures required by the employer related to the use of safe time and sick time shall not deny safe time or sick time or payment of safe time or sick time to the employee based on non-compliance with such a policy.

§ [7-13] 7-212 Employer records.

(a) Employers must retain records demonstrating compliance with the requirements of the Earned Safe and 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, for each employee:

(1) The 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 the employee, unless the employee is exempt from the overtime requirements of New York State labor laws and regulations and has a regular work week of forty hours or more;

(3) The date and time of each instance of safe time or sick time used by the employee and the amount paid for each instance;

(4) Any change in the material terms of employment specific to the employee; and

(5) The date that the Notice of Rights as set forth in section 20-919 of the Administrative Code was provided to the employee and proof that the Notice of Rights was received by the employee.

(c) If the [department] office issues a [subpoena or document demand] written request for information or records, an employer shall provide the [department] office with [access to records documenting its compliance with the requirements of the Earned Sick Time Act and the provisions of this chapter] such information or records, upon appropriate notice, at the department's office.

[(d)] Alternately, [in the absence of a subpoena or document demand,] an employer shall provide the [department] office with access to such information or records upon appropriate notice and at a mutually agreeable time of day at the employer's place of business.

[(e)] (d) "Appropriate notice" shall mean 30 days' written notice, unless the employer agrees to a lesser amount of time, the office's request for the information or records is a second or subsequent request made to the same employer during the same investigation or case as the first request, or the [department] office 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 an OLPS law or rule; or

(4) more immediate access to records is necessary to prevent retaliation against employees.

(f) The [department] office 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 (d) of this section. If these attempts are not successful, the [department] office 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] 7-213 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:

(3) producing the requested information or records on or before the first scheduled hearing date; or

(4) 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.

(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

the investigation is part of a coordinated enforcement effort with other state, local or federal agencies to protect employee rights.]

[(f)] (a) A finding that an employer has an official or unofficial policy or practice of not providing or refusing to allow the use of safe time or sick time as required under the Earned Safe and 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) of the Code.

[(g)] (b) For purposes of Section 20-924(e) of the Administrative Code, penalties shall be imposed on a per employee basis.

[(h)] (c) If an employer, as a matter of policy or practice, does not allow accrual of safe time and sick time as required under the Earned Safe and Sick Time Act, the relief granted to each and every employee affected by the policy or practice must include either application of 40 hours of safe time and sick time to the employee's safe time and sick time balance or, where such information is known, application of the number of hours of safe time and sick time the employee should have accrued to the employee's safe time and sick time balance, provided that such balance does not exceed 80 hours.

§ [7-15] 7-214 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 Safe and Sick Time Act.

(b) For employees who are paid on a piecework basis, accrual of safe time and 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 safe time and 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 safe time or sick time used upon the hours worked by the replacement employee for the same shift. If this method is not possible, the hours of safe time or 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 safe time and 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 July 30, 2014, [the effective date of the Earned Sick Time Act,] whichever is later, except for that an employer is not required to allow an employee to begin to use safe time before May 5, 2018.

(f) An employee may carry over up to 40 hours of unused safe and sick time from one calendar year to the next, unless the employer has a policy of paying employees for

unused safe time and sick time at the end of the calendar year in which such time is accrued and providing the employee with an amount of paid safe time and sick time that meets or exceeds the requirements of the Earned Safe and 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 safe time and sick time in a calendar year. If an employee's safe time and 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 in such calendar year.

Example: An employee accrues 40 hours of safe time and sick time in calendar year one and uses 20 hours of safe time and 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 safe time and 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] 7-215 Employee Abuse of Safe Time and Sick Time.

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

§ 3. Subchapter C of Chapter 7 of Title 6 of the Rules of the City of New York is amended to read as follows:

Subchapter C: Transportation Benefits

§ [8-01] 7-301 Definitions.

As used in this chapter and, where applicable, in the Transportation Benefits Law, the following terms have the following meanings:

"Chain business" means a group of establishments that share a common owner or principal who owns a majority of each establishment where such establishments (i) engage in the same business or (ii) operate pursuant to franchise agreements with the same franchisor as defined in general business law section 681.

"Commuter highway vehicle" means a "commuter highway vehicle" as such term is defined in Section 132(f)(5)(B) of the Internal Revenue Code.

"Cure period" means the ninety-day period immediately following a finding of a first violation.

"Department" means the Department of Consumer Affairs of the City of New York.

"Employee" means an "employee," "manual worker," "railroad worker," "commission salesman," or "clerical or other worker" as such terms are defined in § 190 of the New York State Labor Law. "Employee" does not include partners, sole proprietors, independent contractors, or two-percent shareholders of S-corporations.

"Employer" means an "employer" as such term is defined in § 190 of the New York State Labor Law and hat employs twenty or more full-time employees in New York City. The common owner or principal of a chain business shall be considered the employer of the full-time employees of such chain business.

"First violation" means the first finding by the administrative tribunal that a particular employer has violated the Transportation Benefits Law since July 1, 2016.

"Full-time employee" means an employee who has worked an average of 30 hours or more per week in the most recent four weeks as of any date of counting, any portion of which was in New York City, for a single employer.

"Earnings" shall have the same meaning as the term "gross income" as used in § 132 of the Internal Revenue Code.

"Month" means an employer's regularly established fiscal month.

"Recidivist violation" means any new finding by the administrative tribunal that a particular employer has violated the Transportation Benefits Law, after the first finding by the administrative tribunal that the employer had violated the Transportation Benefits Law since July 1, 2016.

"Subsequent violation" means each continuous thirty-day period after the expiration of the cure period, or after the finding of a recidivist violation by the administrative tribunal, in which the employer has not demonstrated to the department's satisfaction that it is complying with the Transportation Benefits Law.

"Temporary help firm" means an employer that recruits, hires and supplies employees to perform work or services for another organization 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.

"Transportation Benefits Law" means Chapter 9 of Title 20 of the Administrative Code of the City of New York.

"Transportation fringe benefits" means qualified transportation fringe benefits, other than qualified parking, that may be purchased using pre-tax earnings in accordance with § 132 of the Internal Revenue Code.

"Week" means an employer's regularly established payroll week.

§ [8-02] 7-302 Determination of Size of Employer.

(a) An employer's number of full-time employees is determined by calculating the average number of full-time employees for the most recent consecutive three- month period, provided that for an employer that has operated for less than three months, the number of full-time employees is determined by calculating the average number of full-time employees per week for the period of time in which the employer has been in operation.

(b) Full-time employees at all of an employer's or a chain business's locations in New York City shall be counted in determining the number of full-time employees of the employer.

§ [8-03] 7-303 Temporary Help Firms.

(a) Where a temporary help firm supplies a full-time employee to another organization, the temporary help firm shall be the employer of the full-time employee for purposes of the Transportation Benefits Law and must comply with its provisions, regardless of the size of the other organization.

(b) To determine the number of hours worked each week by an employee working for a temporary help firm, the employer must aggregate the number of hours worked by the employee in the most recent four weeks at all placements.

§ [8-04] 7-304 Employee Eligibility.

(a) An employer must offer its full-time employees the opportunity to use pre-tax earnings to purchase transportation fringe benefits by January 1, 2016, or four weeks after such employee's commencement of employment as a full-time employee of the employer, whichever is later.

(b) If an employer's work force is reduced to fewer than 20 full-time employees, the employer must continue to offer the opportunity to use pre-tax earnings to purchase transportation fringe benefits to full-time employees who were employer's full-time employees before the work force was reduced.

§ [8-05] 7-305 Maximum Deductions.

Employers must offer full-time employees the opportunity to use the maximum amount of

pre-tax earnings permitted under federal law for the purchase of transportation fringe benefits.

§ [8-06] 7-306 Recordkeeping Requirements.

Employers must retain records for two years sufficient to demonstrate (i) that each full-time employee eligible for transportation fringe benefits pursuant to the Transportation Benefits Law and this chapter was offered the opportunity to use pre-tax earnings to purchase transportation fringe benefits in accordance with this chapter; or (ii) records sufficient to demonstrate that the employer provides, at the employer's expense, a transit pass or similar form of payment for transportation on public or privately-owned mass transit or in a commuter highway vehicle at the maximum federal transportation fringe benefit amount that may be excluded from pre-tax earnings. Employers may use the form provided by the department and available on the department's website to document compliance.

§ [8-07] 7-307 Employer-Funded Transportation Benefits.

(a) As an alternative to offering the opportunity to use pre-tax earnings to purchase transportation fringe benefits, an employer may provide at the employer's expense a transit pass or similar form of payment for transportation on public or privately-owned mass transit or in a commuter highway vehicle.

(b) If the employer-provided transit pass or similar form of payment is less than the maximum transportation fringe benefit that may be excluded from pre-tax earnings under federal law, then the employer must offer employees the opportunity to use pre-tax earnings to purchase transportation fringe benefits for an amount equal to the difference between the value of the employer-provided transit pass or similar form of payment and the maximum amount that may be excluded from gross earnings under federal law.

§ [8-08] 7-308 Financial Hardship Exemption

(a) The department may waive the requirements of the Transportation Benefits Law for an employer if such employer demonstrates to the department's satisfaction that offering the opportunity to use pre-tax earnings to purchase transportation fringe benefits would be a financial hardship for such employer.

(b) To qualify for a waiver, an employer must present compelling evidence that complying with the Transportation Benefits Law would be impracticable and create a severe financial hardship.

§ [8-09] 7-309 Enforcement and Penalties

(a) The department may issue a notice of violation pursuant to section 20-926(b) of the Administrative Code.

(b) Any employer found to be in violation of the Transportation Benefits Law will be liable for a civil penalty of two-hundred fifty dollars payable to the city of New York for the first violation, for any and each subsequent violation, and for any and each recidivist violation.

(c) A civil penalty will not be imposed on an employer for the first violation if the employer demonstrates to the satisfaction of the department within the cure period that it is complying with the Transportation Benefits Law.

(d) For the purposes of this section, "satisfaction of the department" with reference to an employer's compliance with the Transportation Benefits Law means proof that the employer has offered its full time employees the opportunity to use pre-tax earnings to purchase

transportation fringe benefits or that the employer provides, at the employer's expense, a transit pass, or similar form of payment, for transportation on public or privately-owned mass transit or in a commuter highway vehicle at the maximum federal transportation benefit amount that may be excluded from pre-tax earnings.

(e) An employer seeking to demonstrate that it is complying with the Transportation Benefits Law may do so by submitting the compliance form provided by the department and available on the department's website. The department may require submission of additional information, including documentary evidence, reasonably necessary to prove that a first violation was cured within the cure period.

§ 4. Chapter 10 of Title 6 of the Rules of the City of New York is renumbered as Subchapter D of Chapter 7 of Title 6 and is amended to read as follows:

Subchapter D: Displaced Grocery Workers

§ [10-01] 7-401 Definitions.

(c) As used in this chapter, the following terms have the same meanings as set forth in section 22-507 of the Administrative Code: "change in control," "city," "department," "eligible grocery employee," "grocery establishment," "incumbent grocery employer," "person," "successor grocery employer," and "transitional employment period."

(d) As used in this chapter, the following terms shall have the following meanings:

[**"Appropriate notice"** means 30 days' written notice to the grocery employer, unless the grocery employer agrees to a lesser amount of time or the department has reason to believe that:

(i) the grocery employer will destroy or falsify records;

(ii) the grocery employer is closing, selling, or transferring its business, disposing of assets, or is about to declare bankruptcy;

(iii) the grocery employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers' compensation, discrimination, or paid sick leave; or

(iv) more immediate access to records is necessary to prevent retaliation against employees for exercising their rights under the Grocery Worker Retention Act.]

"Continuous employment" means uninterrupted employment. Separations from employment six months or less in duration for any reason, including, but not limited to, transfer from a grocery establishment that is subject to a change in control to a grocery establishment with the same incumbent grocery employer, paid or unpaid leaves of absence, paid or unpaid time off, and work schedule changes, shall not constitute interruptions in employment.

"Grocery employer" means incumbent grocery employers and successor grocery employers.

"Grocery Worker Retention Act" means section 22-507 of the Administrative Code.

§ [10-02] 7-402 Eligible Grocery Employees.

(a) For purposes of the definition of “eligible grocery employee” in section 22-507(a) of the Administrative Code, “a period” means “a period of continuous employment.”

(b) For purposes of section 22-507(a) of the Administrative Code, “confidential employee” means “confidential employee” as defined in the federal Labor Management Relations Act, 22 U.S.C.A. § 4102(6).

(c) An employee’s length of continuous employment at a grocery establishment with the same incumbent grocery employer as the grocery establishment subject to a change in control preceding an employee’s transfer to the grocery establishment subject to a change in control shall count towards that employee’s continuous employment at the grocery establishment subject to the change in control.

[§ 10-03 Incumbent grocery employer’s posting of notice of change in control.

The incumbent grocery employer may meet the posting requirement of section 22-507(b)(1)(B) of the Administrative Code by posting the required notice of change in control conspicuously in prominent and accessible places customarily frequented by the employees at the grocery establishment subject to a change in control. Each incumbent grocery employer must take reasonable steps to ensure that such notice is not altered, defaced, or covered by other material.]

§ [10-04] <u>7-403</u> Determining Seniority.

For purposes of section 22-507(b)(3) of the Administrative Code, an employee attains seniority as a result of that employee’s length of continuous employment in the grocery establishment subject to a change in control, regardless of job position and regardless of full-time or part-time status, or, in the case of an employee transferred to a grocery establishment subject to a change in control, that employee’s total length of continuous employment in any of the incumbent grocery employer’s grocery establishments.

§ [10-05] <u>7-404</u> Recordkeeping.

(a) Grocery employers must retain records demonstrating compliance with the requirements of the Grocery Worker Retention Act for a period of three years unless otherwise required by any other law, rule, or regulation.

(b) Incumbent grocery employers must maintain, in an accessible format, contemporaneous, true, and accurate records that document:

(1) The list of eligible grocery employees required under section 22-507(b)(1)(A) of the Administrative Code, the date the list was provided to the successor grocery employer, and written proof that the list was provided to the successor grocery employer; and

(2) The notice of change in control required under section 22-507(b)(1)(B) of the Administrative Code, the date it was posted, and proof of posting.

(c) Successor grocery employers must maintain, in an accessible format, contemporaneous, true, and accurate records that document:

(1) The list of eligible grocery employees received by the successor grocery employer pursuant to section 22-507(b)(1)(A) of the Administrative Code and the date it was received, and the names of those eligible employees retained for the transitional employment period pursuant to section 22-507(b)(2) of the Administrative Code;

(2) The preferential hiring list required under section 22-507(b)(3) of the Administrative Code, the date eligible employees on the preferential hiring list were given the right of first refusal to jobs that become available during the transitional employment period, and proof that the right of first refusal was given; and

(3) The written performance evaluations as required under section 22-507(b)(5) of the Administrative Code.

§ [10-06] 7-405 Enforcement.

(a) [If the department issues a subpoena or document demand upon appropriate notice, a grocery employer must provide the department with access to records documenting its compliance with the requirements of the Grocery Worker Retention Act and the provisions of this chapter at the department's office.

(b)]If the grocery employer fails to timely respond to [the subpoena or document demand issued], written request for information or records from the department, a grocery employer must provide the department with access to records and at a mutually agreeable time of day at the employer's place of business. [

(c)] (b) The department will make two attempts by any combination of letter, email, or telephone to arrange a mutually agreeable time of day for the grocery 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 grocery employer's place of business during regular business hours, upon two days' notice to the grocery employer. [

(d) A grocery employer's failure to maintain, retain, or produce pursuant to a subpoena or document demand by the department any record otherwise required to be maintained under these rules that is relevant to a material fact alleged by the department in a notice of violation issued pursuant to the Grocery Worker Retention Act or these rules will create a reasonable inference that such fact is true.

(e) The department, after conducting an investigation pursuant to section 22-507(d)(1)(A) of the Administrative Code, may issue a notice of violation for any violation of the Grocery Worker Retention Act.

(f) Additionally, the department may issue a notice of violation to a grocery employer who fails to provide records or access to records as required by section 10-05 of this chapter, provided that the department notifies the grocery employer that failure to provide requested information, records, or access to records may result in a notice of violation charging the grocery employer with failure to maintain, retain, or produce records as required by the Grocery Worker Retention Act.

(g) A grocery employer who fails to respond to the notice of violation issued under subdivision (f) 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.]

(c) [(h)] The grocery employer may cure a notice of violation issued to a grocery employer for failure to provide requested information, records or access to records as required by section 7-405 of this chapter [in accordance with subdivision (f) of this section]without penalty by producing the requested information or records on or before the first scheduled hearing date.

(d) [(i)] The department may settle a complaint at any time prior to the conclusion of an adjudication. Prior to settling any complaint filed by an eligible grocery employee pursuant to section 22-507(d)(1), the department shall provide each complainant with notice of the proposed settlement.

(e) [(j)] A complainant who intends to opt out of a settlement pursuant to section 22-507(d)(1)(E) of the Administrative Code must do so in writing to the department.
[(k)] A complainant who intends to withdraw his or her complaint with the department pursuant to section 22-507(d)(2) of the Administrative Code must do so in writing to the department prior to bringing a civil action.

§ 5. Chapter 12 of Title 6 of the Rules of the City of New York is renumbered as Subchapter E of Chapter 7 of Title 6 and is amended to read as follows:

Subchapter E: Freelance Workers

§ [12-01] 7-501 Definitions.

(a) As used in this chapter, the terms “director,” “freelance worker,” and “hiring party” shall have the same meanings as set forth in section 20-927 of the Administrative Code.
(b) As used in this chapter, the term “adverse action” means any action by a hiring party, their actual or apparent agent, or any other person acting directly or indirectly on behalf of a hiring party, that would constitute a threat, intimidation, discipline, harassment, denial of a work opportunity, or discrimination, or any other act that penalizes a freelance worker for, or is reasonably likely to deter a freelance worker from, exercising or attempting to exercise any right guaranteed under chapter 10 of Title 20 of the Administrative Code (“the Freelance Isn't Free Act”).

§ [12-02] 7-502 Coverage.

A freelance worker is entitled to the protections of the Freelance Isn't Free Act regardless of immigration status.

§ [12-03] 7-503 Contract Value.

(a) For purposes of section 20-928(a) of the Administrative Code, the value of a contract between a freelance worker and hiring party, either by itself or when aggregated with all other agreements for services between the same hiring party and freelance worker during the 120 days immediately preceding the agreement that constitutes the contract, shall include the reasonable value of all actual or anticipated services, costs for supplies, and any other expenses under the contract.
(b) For purposes of section 20-933(b) of the Administrative Code, the value of the underlying contract between a freelance worker and hiring party shall include the reasonable value of all services performed and/or anticipated, and reasonable costs for supplies and any other expenses reasonably incurred by the freelance worker.

§ [12-04] 7-504 Retaliation.

(a) Retaliation shall include but is not limited to any adverse action relating to perceived immigration status or work authorization.
(b) A freelance worker may establish a causal connection between the exercise of rights guaranteed under the Freelance Isn’t Free Act and a hiring party’s adverse action either circumstantially, such as with evidence that the protected activity was followed closely by the adverse action, or directly, with evidence of an intention by a hiring party to retaliate against a freelance worker. For purposes of section 20-930 of the Administrative Code,

retaliation may be established when a freelance worker shows that the exercise or attempt to exercise any right under the Freelance Isn't Free Act was a motivating factor for an adverse action, even if other factors also motivated the adverse action.

(c) Any person who denies a work opportunity to a freelance worker who exercises or attempts to exercise any right guaranteed under the Freelance Isn't Free Act, or that takes any action reasonably likely to deter a freelance worker from exercising or attempting to exercise any such right, shall be liable for retaliation regardless of whether that person previously has been a party to a contract with the freelance worker or has been the subject of a complaint by the freelance worker.

§ [12-05] 7-505 Waivers of Rights.

(a) Any contract entered into by a hiring party and freelance worker shall not include any prospective waiver or limitation of rights under the Freelance Isn't Free Act. Any such waiver or limitation shall be invalid as a matter of law.

(b) If a contract includes language that waives or limits a freelance worker's right to participate in or receive money or any other relief from any class, collective, or representative proceeding, said waiver or limitation is void.

(c) Wherever a hiring party asks a freelance worker to waive or limit, via contract, any other procedural right normally afforded to a party in a civil or administrative action, any such contractual waivers and limitations are void under section 20-935 of the Administrative Code. Such rights include but are not limited to procedural rights of parties to a civil action established by the New York Civil Practice Law and Rules, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure.

(d) A freelance worker has the right to disclose the terms of a contract with a hiring party to the director. Any private contractual agreement that purports to waive or limit a freelance worker's right to communicate the terms of such a contract to the director is void as against public policy.

§ 6. The definition of "valid authorization" in Section 7-701(b), Subchapter G of Chapter 7 of Title 6 of the Rules of the City of New York is amended to read as follows:

"Valid authorization" means a written authorization from a fast food employee to deduct wages from the fast food employee's paycheck for remittance to a not-for-profit that complies with section 20-1302 of the New York City Administrative Code and sections [15-03] 7-702 and 7-703 of these Rules.