November 23, 2022

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

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

Dear Commissioner Mayuga:

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

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

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

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

HR departments and professionals are essential stakeholders in organizations because they are the uniting "bridge" between employees and employers. These roles encompass workforce development, talent acquisitions, worker support, and creating and implementing competitive employee benefit programs to attract talent. HR must use an objective lens when advising on benefits offerings and support while keeping costs in mind because of the profession's unique

seat at the intersection of work, workers, and the workplace. SHRM members implement and comply with critical workplace policies every day.

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

Determining Employer Size and Staffing Fluctuations

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

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

ESSTA establishes a standard, 'employed for hire within the City of New York,' which should apply to determining employer size instead of examining the total number of employees nationwide. Specifically looking at how the standard applies to *Employees Who Occasionally Work in NYC* if an employee with a primary work location outside of the city regularly performs or is expected to perform duties in NYC regularly, they are eligible for safe/sick leave under ESSTA for the hours worked in the city. **SHRM recommends** that the "employed-for-hire-within" standard also applies to determining employer size to make it easier for smaller organizations to strategize on how to right-size their organization and create employment opportunities based on their needs and for HR to ensure compliance with ESSTA. Employers also need this clarification when the hiring need may trigger a threshold requiring the immediate availability and accrual of safe/sick time without any corresponding usage waiting period.

Further, applying a "nationwide" rather than "employed-for-hire-within" standard to determining employer size would be inconsistent with a number of existing state and local paid sick and safe time and paid personal leave mandates, including but not limited to those in Connecticut, Maine, Maryland, Nevada, Oregon, Rhode Island, Washington, D.C., Emeryville (CA), and Santa Monica (CA).

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

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

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

Transfers in Corporate Ownership and Employees

SHRM urges the Department to reconsider holding successor employers individually and jointly liable for penalties related to poor recordkeeping or disclosure by the original employer. The *Fair Labor and Standards Act* ("FLSA") already applies to asset acquisitions as a potential liability on pay and worker classification to the buyer despite the negotiated contractual terms. While due diligence will likely uncover hidden liabilities, a grace period for the successor organization to adapt its HR practices and philosophy to ensure compliance with NYC regulations immensely benefits employers.

Fractional Accrual Requirement

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

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

Enforcement and Penalties

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

In addition to the above general considerations involving the impact of ESSTA penalties on small and mid-size businesses, the expanded scope of potential penalties under the proposed rules is quite excessive and unduly burdens employers. In particular, § 7-211(h) of the proposed rules would create a reasonable inference that an employer, as a matter of official or unofficial policy or practice, does not provide ESST in accordance with the right to ESST and accrual section of ESSTA, § 20-913 of the Administrative Code, where an employer fails to maintain

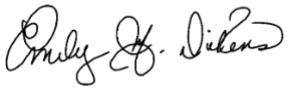
and distribute an ESST policy to employees.[1] Similarly, § 7-213(c) would create a reasonable inference that an employer, as a matter of official or unofficial policy or practice, does not provide ESST in accordance with the right to ESST and accrual section of ESSTA, § 20-913 of the Administrative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

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

Conclusion

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

Respectfully,



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