New York City Department of Consumer and Worker Protection

Notice of Adoption of Final Rule

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the Commissioner of the Department of Consumer and Worker Protection by Sections 1043 and 2203(f) of the New York City Charter and Chapter 8 of Title 20 of the New York City Administrative Code, and in accordance with the requirements of Section 1043 of the New York City Charter, that the Department amends Title 6 of the Rules of the City of New York.

An initial version of this rule was proposed and published on October 24, 2022. A public hearing was held on November 23, 2022, and comments regarding the rule were received.

Statement of Basis and Purpose

The Department of Consumer and Worker Protection ("DCWP" or "Department") is amending rules related to the Earned Safe and Sick Time Act ("ESSTA"), which is set forth in Chapter 8 of Title 20 of the New York City Administrative Code. After New York State's Paid Sick Leave Law, New York Labor Law § 196–b, was enacted in 2020, the City Council amended ESSTA to bring the City's law into alignment with state law and to add or clarify various notice and enforcement provisions. Local Law 97 of 2020 amended ESSTA by, *inter alia*, increasing the amount of paid safe/sick time available for some employees, eliminating the 120-day waiting period to use safe/sick time, and adding or clarifying various enforcement provisions.

The rule amendments bring the rules into alignment with the statutory amendments made by Local Law 97 of 2020. These rule amendments also provide additional clarification for employers about their compliance obligations, in that they:

- Explain how ESSTA's accrual, use and carryover requirements apply to employees at companies with 100 or more employees, who must now be allowed to accrue up to at least 56 hours of safe/sick time per year.
- Eliminate references to a 120-day waiting period to use safe/sick time.
- Clarify the calculation of employer size for the purpose of determining whether an employer must pay workers for earned safe and sick time and how many hours of safe/sick time an employer must provide.
- Explain how ESSTA applies to workers who work in both New York City and other jurisdictions in light of the 2020 ESSTA amendments' removal of the requirement that an employee work more than 80 hours per calendar year in New York City to be covered.
- Provide additional examples of reasonable notice procedures that employers may ask employees to follow to provide notice of the need for safe/sick time.
- Identify the types of documentation employers may require to determine whether use of safe/sick time was authorized under section 20-914(a) or (b) of ESSTA.
- Clarify limitations on requests for documentation of authorized use of safe/sick time and employers' obligations to reimburse fees or costs incurred to obtain documentation under section 20-914 of ESSTA.
- Explain how employers can comply with section 20-919(c) of ESSTA, which requires that employees be informed of their safe/sick time accruals and balances on a paystub or other written documentation each pay period.
- Remove previous section 7-207 regarding domestic workers, who are now entitled to paid safe/sick time under the same conditions as other covered employees under the amended section 20-913(a)(1) of ESSTA.
- Clarify requirements regarding the rate of pay for safe/sick time under the amended section 20-913(a)(1) of ESSTA.
- Clarify that section 20-913 of ESSTA requires employers to ensure that employees retain their accrued safe/sick time through any business sale, transfer in corporate ownership, or change in subcontracting relationship between corporate entities.

- Notify employers of the employee relief associated with an unofficial or official policy or practice of not providing or refusing to allow the use of safe/sick time in violation of section 20-913.
- Describe and provide examples of an unofficial or official policy or practice of not providing or refusing to allow the use of safe/sick time in violation of section 20-913, including how violations are counted for purposes of the new section 20-924(d)(v).
- Clarify certain defined terms.

The Department received comments on the proposed rules from the public, including from a trade association, a worker advocacy organization, New York City Comptroller Brad Lander, a law firm, and a human resource management association. Various issues raised in the comments resulted in changes that are present in these final rules. These changes include:

- Adding provisions to further clarify how to count the number of employees concurrently employed to determine employer size and adding an illustration of an employer's obligation to provide paid safe/sick time after an increase in the number of employees where the employer has an accrual policy;
- Clarifying various provisions in Section 7-203 regarding ESSTA's application to employees with a primary work location outside of New York City and application of New York Labor Law Section 196-b to hours worked in New York City and New York State;
- Clarifying provisions regarding what reasonable written documentation of use of safe/sick time an employer can require, including removing references to "third party" documentation;
- Adding provisions regarding employers' obligations to reimburse fees or costs incurred to obtain documentation;
- Adding provisions to clarify limits on any delay or denial of payment of safe/sick time pending receipt of documentation or confirmation of use of safe/sick time;
- Adding and removing provisions to clarify the rate of pay for paid safe/sick time under the amended section 20-913(a)(1) of ESSTA and to clarify that the "regular rate of pay" under ESSTA generally means the employee's regular rate of pay at the time the safe/sick time is taken, not the employee's regular rate for the purposes of calculating overtime;
- Clarifying various provisions in Section 7-213 and modifying the basis for a reasonable inference that an employer does not provide or refuses to allow the use of safe/sick time as a matter of official or unofficial policy or practice; and
- Correcting typographical errors.

Sections 1043, 2203(f) and 2203(h)(1) of the New York City Charter and Chapter 8 of Title 20 of the New York City Administrative Code authorize DCWP to adopt these rule amendments.

New material is underlined.
[Deleted material is in brackets.]

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

Rule Amendments

Section 1. Subchapter B of Chapter 7 of Title 6 of the Rules of the City of New York, titled "Earned Safe and Sick Time," is amended to read as follows:

§ 7-201 Definitions.

(a) As used in this subchapter, the terms "calendar year," "department," "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 and section 20-913 of the Administrative Code, 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] “net income” shall have the same meaning as “entire net income” as set forth in section 208 of the New York State Tax Law.

§ 7-202 Employer [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 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.]

(a) Employer size shall be determined based on the employer’s total number of employees nationwide. Employer size during a given calendar year shall be determined by counting the highest total number of employees concurrently employed at any point during the calendar year to date. For the purposes of counting the number of employees concurrently employed:

(1) Part-time employees shall be considered employed each working day of the calendar week;

(2) Employees jointly employed by more than one employer shall be counted by each employer, whether or not their names appear on the employer's payroll; and

(3) Employees on paid or unpaid leave, including safe/sick time, leaves of absence, disciplinary suspension, or any other type of temporary absence, shall be counted as long as the employer has a reasonable expectation that the employee will later return to active employment.

(b) For employers that increase the number of employees during a calendar year from fewer than five to between five to 99 employees:

(1) The duty to provide paid safe/sick time shall be prospective from the date of the increase in the number of employees and shall not entitle an employee to reimbursement for previously used unpaid safe/sick time.

(2) After the increase in the number of employees, an employer must allow an employee to use, and receive pay for, up to 40 hours of accrued safe/sick time, less the number of unpaid safe/sick time hours the employee had previously used in that calendar year.

> Example 1: Liz is hired by an employer with only one other employee on January 1, 2021. The employer has a frontloading policy, so Liz has 40 hours of unpaid safe/sick time immediately available for use from the start of her employment. Liz uses 10 hours of unpaid safe/sick time from January 1 to May 31, 2021, bringing her accrual balance to 30 hours. On June 1, 2021, the employer brings on five additional employees, so the employer is now required to provide each employee with up to 40 hours of

paid safe/sick time per year. If Liz uses any additional safe/sick time in 2021, she must be paid for up to 30 hours of safe/sick time used. The employer is not obligated to pay Liz for the 10 hours of safe/sick time she used before June 1, 2021.

Example 2: Liz is hired by an employer with only one other employee on January 1, 2021. The employer has an accrual policy. Liz works approximately 30 hours per week and accrues 20 hours of unpaid sick time between January and May 2021. She uses 10 of those hours of unpaid sick time in May 2021, bringing her accrual balance to 10 hours as of May 31, 2021. On June 1, 2021, the employer brings on five additional employees, so the employer is now required to provide each employee with up to 40 hours of paid safe/sick time per year. If Liz uses any of the remaining 10 hours of safe/sick time she already accrued as of May 31, 2021, she must be paid for those 10 hours and any additional safe/sick time she accrues and uses, up to the 40-hour per calendar year limits set forth in subdivision f of section 7-214. The employer is not obligated to pay Liz for the 10 hours of safe/sick time she used before June 1, 2021.

(c) For employers that increase the number of employees during a calendar year from 99 or fewer to 100 or more, an employee's right to use additional paid safe/sick time up to 56 hours shall be prospective from the date of such increase in the number of employees.

Example 1: An employer with a calendar year of January 1-December 31 has 90 employees. Shane works 40 hours per week. She used 20 hours of safe/sick time in 2020 and carried over 20 hours to 2021. In June 2021, the employer hired several new employees, bringing the total headcount to 110. Shane has not used safe/sick time in 2021, and had worked 1,050 hours between January 2021 and the date the employee headcount went over 99 employees. She therefore has 55 hours of safe/sick time available for immediate use: 35 hours accrued in 2021 (1050 / 30 = 35) plus the 20 hours she carried over from 2020 equals 55.

Example 2: In the same scenario, Shane used 40 hours of accrued safe/sick time in May 2021, before her employer's headcount increased above 100. After her employer's headcount increases in June 2021, Shane has 15 hours of safe/sick time available for immediate use: 35 hours accrued in 2021 plus the 20 hours carried over from 2020, less 40 hours used in 2021.

(d) Reductions in the number of employees working for an employer shall not reduce employee safe/sick time entitlements under section 20-913(b) of the Administrative Code until the following calendar year.

Example: An employer with a calendar year of January 1-December 31 has four employees. On April 1, 2021, the employer hires three new employees, bringing the employer's total number of employees to seven. On November 1, 2021, the employer lays off four employees, reducing the employer's total number of employees to three. The employer must begin providing paid safe/sick time to all employees on April 1, 2021. The employer must continue providing paid safe/sick time to the three remaining employees through at least December 31, 2021, the last day of the current calendar year.

§ 7-203 Employees.

(a) An [individual] employee, as defined by section 20-912 of the Administrative Code, 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] employee performs work, including work performed by telecommuting, [for more than eighty hours] while the [individual] employee is physically located in New York City, regardless of where the employer is located. An employee who only performs work, including by telecommuting, while physically located outside of New York City, is not "employed for hire within the City of New York," even if the employer is located in New York City. As of September 30, 2020, hours worked within New York City also count towards an employee's accrual of sick leave under New York Labor Law section 196-b.

(b) An employee with a primary work location outside of New York City is “employed for hire within the City of New York” if they regularly perform, or are expected to regularly perform, work in New York City during a calendar year. For such an employee, only hours worked within New York City must count toward the accrual of safe/sick time for the purpose of section 20-913(b) of the Administrative Code.

Example 1: A retail business based in New Jersey with locations in both New Jersey and New York City hires a new employee. The employee, who lives in New Jersey, will work primarily at a New Jersey location but may be asked to cover shifts in New York City when needed due to staffing shortages at those locations. The employer estimates that some months, the employee will work one to three six to eight-hour shifts in New York City, but that their New York City hours will vary and some months the employee may not work in New York City at all. This is work that the employer expects the employee to perform regularly, so the employee is employed for hire within the City of New York for the purposes of section 20-912 of the Administrative Code. The employee must accrue one hour of safe/sick time for every 30 hours worked within New York City and must be allowed to use their accrued hours for the reasons provided by section 20-914 of the Administrative Code when scheduled to work within New York City.

Example 2: An employee lives in Florida and works from home for a company based in Manhattan. The employee is required to attend daylong meetings at the Manhattan headquarters approximately twice a year. The employee is not “employed for hire within the City of New York” under section 20-912.

Example 3: A custom cabinetry business based in Massachusetts is commissioned by a New York City resident to build kitchen cabinets. After the cabinets are completed at the company’s Massachusetts studio, a Massachusetts-based employee travels to New York City and spends eight hours installing them in the client’s residence. The employer does not currently expect the employee to go back to New York City in the course of her employment within the remainder of the calendar year. The employee is not “employed for hire within the City of New York” under section 20-912.

Example 4: A construction business based in Nassau County does business both within New York City and on Long Island. An employee works a total of 300 hours for the employer at a site in Queens from June 1, 2021 to July 26, 2021. The employee is employed for hire within the City of New York for the purposes of section 20-912 of the Administrative Code and accrued 10 hours of safe/sick time. The employee continues working for the employer at a site on Long Island from July 27, 2021 to September 28, 2021, working a total of 450 hours during that timeframe and accruing 15 hours of sick leave under section 196-b of the New York Labor Law. On October 1, 2021, the employee is scheduled to report to work on Long Island but is unable to do so due to illness. The employee is not entitled to use sick time under section 20-914 of the Administrative Code at the time of his illness because he was scheduled to report for work on Long Island. However, the employee is covered by section 196-b of the New York Labor Law, and has a total of 25 hours accrued and available for immediate use under section 196-b from the time worked in New York City and Nassau County.

[a. 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.

b. 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).]

§ 7-204 Minimum increments and fixed intervals for the use of safe/sick [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] safe/sick time [or sick time] to use, provided however, that an employer may adopt a written

policy, as set forth in section 7-211, setting a minimum increment for the use of [safe] safe/sick time [and sick time,] not to exceed four hours per day, provided such minimum increment is reasonable under the circumstances.

> [i] Example 1: [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] An employer has a written policy [set] setting a minimum increment of four hours per day for use of [safe] safe/sick 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] safe/sick time [or sick time] as the minimum increment.
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> [ii] Example 2: 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] 30 minutes or any smaller amount of time for the use of accrued [safe] safe/sick 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)]2 of subdivision (a) of this section arrives to work at 12:17 pm. 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.

§ 7-205 Employee notification of use of [safe] safe/sick time [or sick time].

(a) An employer may require an employee to provide reasonable notice of the need to use [safe] safe/sick time, [or sick time] provided the requirement to provide notice and the method of providing notice are set forth in the written policy required by section 7-211.

(b) An employer that requires notice of the need to use [safe] safe/sick time [or sick time] where the need is not foreseeable shall provide a written policy that contains reasonable 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; (3) send an email to a designated email address; (4) submit a leave request in a scheduling software system, provided the employee has access to such system on non-work time, and has been trained on and given written instructions on how to use the system; or [(3)] (5) 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] safe/sick 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] safe/sick 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] safe/sick time [or sick time] where the need is foreseeable shall have a written policy that contains procedures for the employee to provide reasonable notice,

which may include any of the reasonable procedures set forth in subdivision 7-205(b). Such policy shall not require more than seven days' notice prior to the date such [safe] safe/sick time [or sick time] is to begin. The employer may require that such notice be in writing.

(e) A need is foreseeable when the employee is aware of the need to use safe/sick time seven days or more before such use. Otherwise, the need is unforeseeable.

§ 7-206 Documentation [from Licensed Health Care Provider] of Authorized Use of Safe/Sick Time.

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

(b) "Work days" as used in this [subdivision] section and in [Section] section 20-914[(a)(2)] of the Administrative Code means the days or shifts [parts of days] the employee would have worked had the employee not used [sick] safe/sick time.

(c) [(b)] If an employer requires an employee to provide reasonable 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] in accordance with subdivision (a) of this section, 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.] Unless otherwise required by law, an employer must not require an employee to submit such documentation before returning to work. If an employer requests or requires documentation for sick time and the licensed health care provider charges the employee a fee for the provision of such documentation, such employer shall reimburse the employee for such fee. If an employer requests or requires documentation for safe time, such employer shall reimburse an employee for all reasonable costs or expenses incurred for the purpose of obtaining such documentation for the employer.

(d) [(c)] If an employee provides reasonable 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 additional documentation [from a second licensed health care provider] indicating the need for safe/sick time in the amount used by the employee.

(e) An employer that requires employees to provide reasonable written documentation for uses of safe/sick time in accordance with subdivision (a) of this section must set forth this requirement, along with the types of reasonable written documentation the employer will accept and instructions on how employees can submit the documentation to the employer, in the written safe/sick time policy required by section 7-211.

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

§ 7-207 [Domestic Workers.]Notice of Safe/Sick Time Accruals and Use on Pay Statement.

(a) The pay statement or other form of written documentation required by section 20-919(c) of the Administrative Code must inform the employee of the amount of safe/sick time accrued and used during the

relevant pay period. It must also inform the employee of the total balance of the employee's accrued safe/sick time available for use. As set forth in section 7-214(f), an employee's accrued safe/sick time balance may exceed the amount of safe/sick time the employee has available for use in a calendar year. When this occurs, the pay statement or other form of written documentation must inform the employee of the amount of safe/sick time available for use in the calendar year.

(b) If an employer uses an electronic system to issue pay statements or other documentation related to safe/sick time, the employer may comply with the requirements of section 20-919(c) of the Administrative Code by (i) electronically alerting the employee each pay period to the availability of the required information; (ii) making the content required by section 7-212(b)(4) readily accessible by the employee outside of the workplace within the electronic system; and (iii) maintaining accrual, use, and balance information for any past pay period in the electronic system such that it is readily accessible to the employee outside of the workplace.

[(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 time accrued by a domestic worker will carry over to the next calendar year.]

§ 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.] An employer shall pay an employee for paid safe/sick time at the employee's regular rate of pay at the time the paid safe/sick time is taken, provided that the rate of pay shall not be less than the highest applicable rate of pay to which the employee would be entitled pursuant to section 652 of the New York State Labor Law, or any other applicable federal, state, or local law, rule, contract, or agreement.

(b) If the employee uses paid safe/sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate of pay. The employer may only deduct the number of hours of safe/sick time actually used by the employee from the employee's safe/sick time accruals, regardless of whether those hours would have been classified as straight-time or overtime hours.

(c) An employee is not entitled to compensation for lost tips or gratuities, provided, however, that an employer must pay an employee whose [hourly] regular rate of pay [or salary] is based in whole or in part on tips or gratuities at least the [full minimum wage] highest applicable rate of pay to which the employee would be entitled pursuant to section 652 of the New York State Labor Law, or any other applicable federal, state, or local law, rule, contract, or agreement, without allowing for any tip credit or tip allowance, as provided in section 20-913(a)(1) of the Administrative Code.

(d) [For] Unless a higher applicable rate applies pursuant to any other law, rule, regulation, contract, or agreement, when 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) [When] Unless a higher applicable rate applies pursuant to any other law, rule, regulation, contract, or agreement, 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] safe/sick 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 40 [forty] hours, whichever amount of hours is less.

(f) [If] Unless a higher applicable rate applies pursuant to any other law, rule, regulation, contract, or agreement, 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 or rates 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.

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

§ 7-209 Payment of Safe/Sick Time.

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

(b) If the employer [has asked for] requires reasonable written documentation in accordance with section 7-206 or [verification] confirmation of use of [safe] safe/sick time [or sick time] pursuant to [Section] section [20-914(a), 20-914(b) or] 20-914(d) of the Administrative Code, the employer is not required to pay [safe] safe/sick time [or sick time] until the employee has provided such documentation or [verification] confirmation, except that an employer shall not withhold payment of safe/sick time when the required documentation is unattainable by the employee due to associated costs.

(c) If an employer requests or requires documentation and the employee has provided to the employer such documentation and proof of the fee or reasonable costs incurred for the purpose of obtaining such documentation, the employer shall reimburse the employee for such fee or reasonable costs in accordance with subdivision (c) of section 7-206 no later than the payday for the next regular payroll period beginning after the provision of such proof.

(d) An employer that withholds payment of safe/sick time in accordance with subdivision (b) of this section must set forth this policy and instructions on how employees can submit requests for reimbursement and proof of fees or costs to the employer in the written safe/sick time policy required by section 7-211.

§ 7-210 Employer's Sale of Business or Transfer of Employees.

(a) Business sales, transfers in corporate ownership, or changes in subcontracting relationships between corporate entities shall not impact employees' safe/sick time balances. [If an employer sells its business, or the business is otherwise acquired by another business,]When such changes occur, an employee will retain and may use all accrued [safe] safe/sick time [and sick time] if the employee continues to perform work within the City of New York for the successor employer or contractor. Failure to properly transfer an employee's accrued safe/sick time to a successor employer constitutes a policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913 of the Administrative Code. The original and successor employer and any joint employer(s) are individually and jointly liable for the satisfaction of all penalties and employee relief imposed for the violation of section 20-913, regardless of any agreement between the original and successor employer to the contrary.

Example: Company A is in the business of operating a call center in Brooklyn. Company B, a staffing agency, provides Company A with workers to answer its phones. The phone operators are nominally employees of Company B. After one year of answering Company A's phones as an employee of Company B, a phone operator is informed that Company A has shifted its business to Company C, and so her nominal employer will now be Company C. Her job duties and the location of her work do not change. The phone operator's accrued safe/sick time must be transferred to Company C. If this does not occur, Company A, Company B, and Company C are jointly and severally liable for the violation of section 20-913 of the Administrative Code.

(b) If the successor employer falls within a smaller employer size threshold from the former 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] safe/sick time [and sick time] accrued while working for the former employer, until such [safe] safe/sick time [and sick time] is exhausted.

Example: Fast Food LLC is a franchisee of a national fast food chain with 500 employees in New York City. Fast Food LLC frontloads employees with 56 hours of safe/sick time per calendar year. Quick Pizza LLC, a new company seeking to enter the fast food franchising market in Brooklyn, acquires a subset of Fast Food LLC's locations in August 2021. After the acquisition, Quick Pizza LLC has 80 employees. Jimmy, an employee at one of the acquired locations, had used 46 hours of safe/sick time in 2021 prior to the transfer. He is entitled to use and be compensated for 10 hours of safe/sick time he had remaining in his safe/sick time balance at the time of the transfer. If Jimmy does not use any of the 10 hours of his remaining safe/sick time at the end of the calendar year, his employer must allow him to carry the unused hours over to the next calendar year pursuant to section 20-913(h) of the Administrative Code.

(c) A successor employer must provide employees with its written [safe] safe/sick 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.

§ 7-211 Employer's Written Safe Time and Sick Time Policies.

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

(b) Every employer must distribute its written [safe] safe/sick time [and sick time] policies to employees 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] safe/sick time [and sick time] policies must meet or exceed all of the requirements of the Earned Safe and Sick Time Act and this [chapter] subchapter and [state at a minimum] must address the following:

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

(i) If an employer provides employees with an amount of [safe] safe/sick 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] the first 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] safe/sick time [and sick time]," then the employer's written [safe] safe/sick time [and sick time] policy must specify the amount of frontloaded [safe] safe/sick time [and sick time] to be provided and that such frontloaded time is immediately available for use;

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

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

(i) Any requirement that an employee provide notice of a need to use [safe] safe/sick time [and sick time] and the procedures for doing so in accordance with [6 RCNY §] section 7-205;

(ii) Any requirement for reasonable written documentation or [verification] confirmation of the use of [safe] safe/sick time [and sick time] in accordance with [Sections] sections 20-914(a)(2), 20-914(b)(2), or 20-914(d) of the Administrative Code and section 7-206, and the employer's policy regarding any consequences of an employee's failure or delay in providing such documentation or [verification] confirmation;

(iii) Any reasonable minimum increment or fixed period for the use of accrued [safe] safe/sick time [and sick time] as set forth in section 7-204;

(iv) Any policy on discipline for employee misuse of [safe] safe/sick time [and sick time] under [6 RCNC § 7-215] section 7-215; and

(v) [A description of the confidentiality requirements of Section 20-921 of the Administrative Code] A statement that the employer will not ask the employee to provide details about the medical condition that led the employee to use sick time, or the personal situation that led the employee to use safe time, and that any information the employer receives about the employee's use of safe/sick time will be kept confidential and not disclosed to anyone without the employee's written permission or as required by law.

(3) The employer's policy regarding carry-over of unused [safe] safe/sick time [and sick time] at the end of an employer's calendar year in accordance with [Section] 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.

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

(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] section 20-919 of the Administrative Code. An employer may not distribute the Notice of Rights required by [Section] section 20-919 of the Administrative Code or any other department writing in lieu of distributing [or posting] its own written [safe] safe/sick time [and sick time] policies as required by this section.

(f) An employer that has not provided to the employee a copy of its written [safe] safe/sick time [and sick time] policies along with any forms or procedures required by the employer related to the use of [safe] safe/sick time [and sick time] shall not deny permission to use [safe] safe/sick time [or sick time], [or] payment of [safe] safe/sick time [or sick time], or take adverse actions as set forth in section 20-918 of the Administrative Code against [to] the employee based on non-compliance with such a policy.

§ 7-212 Employer Records.

(a) Employers must create and 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] subchapter, 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 40 [forty] hours or more;

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

(4) For each pay period, the amount of safe/sick time accrued and used during the pay period, the employee's total balance of accrued safe/sick time, and the amount of accrued safe/sick time available for use by the employee;

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

[(5)] (6) The date that the Notice of Rights as set forth in [Section] 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 [office] department issues a written request for information or records, an employer shall provide the [office] department with such information or records, upon appropriate notice, at the department's office. Alternately, an employer shall provide the [office] department 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.

(d) "Appropriate notice" shall mean [30] 14 days' written notice, unless the employer agrees to a lesser amount of time, the [office's] department'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 [office] department has reason to believe that:

(1) the employer will destroy or falsify records;

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

(3) the employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers' compensation, discrimination, or [an OLPS law or rule] any matter under the jurisdiction of the department; or

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

(e) The [office] department will make two attempts by letter, email or telephone to arrange a mutually agreeable time of day for the employer to provide access to its records in accordance with subdivision [(d)](c) of this section. If these attempts are not successful, the [office] department may set a time to access records at the employer's place of business during regular business hours, upon two days' notice.

§ 7-213 Enforcement and Penalties

(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.

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

For the purpose of section 20-924(d)(v) of the Administrative Code, an employee shall be considered "covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913" if they were employed by the employer during the time period that the official or unofficial policy or practice that violated section 20-913 was in effect. If the unlawful policy or practice was in effect for multiple calendar years, a separate violation of section 20-913 shall be considered to have occurred for each calendar year the policy or practice remained in effect.

(c) There shall be a reasonable inference that the employer, as a matter of official or unofficial policy or practice, does not provide or refuses to allow the use of accrued safe/sick time in violation of section 20-913 of the Administrative Code, if an employer:
(1) Fails to maintain or distribute a written safe/sick time policy as required by section 7-211 of this subchapter; and
(2) Fails to maintain adequate records of employees' accrued safe/sick time use and balances as required under section 7-212 of this subchapter.

(d) Additional evidence that an employer maintains a policy or practice of not providing or refusing to allow the use of accrued safe/sick time may include, but is not limited to:

(i) Unlawful barriers to employees' use of safe/sick time, whether written or unwritten, such as requirements that workers find replacement workers to cover shifts missed due to safe/sick time, unreasonable notice requirements, requirements that workers provide medical documentation of absences of three consecutive days or fewer, or other unlawful limits on use;
(ii) Probation periods, waiting periods, blackout days, or other measures that prevent employees from using safe/sick time as it is accrued;
(iii) Prohibitions on use of safe/sick time for purposes authorized by law, whether written or unwritten, such as prohibitions on use of safe/sick time for leave to care for a family member pursuant to section 20-914(a)(1)(b) of the Administrative Code;
(iv) Failure to pay employees entitled to paid safe/sick time for time off due to safe/sick time authorized reasons;
(v) Failure to provide for the accrual of safe/sick time at the rate required by section 20-913(b) of the Administrative Code;
(vi) Failure to properly carry over safe/sick time hours at the end of an employer's calendar year, if the employer does not properly utilize a frontloading system;
(vii) Official or unofficial absence control policies that penalize the use of safe/sick time, such as points systems that do not differentiate between safe/sick time absences and other absences; or
(viii) Failure to inform employees that safe/sick time is available.

Example 1: An employer with 83 employees does not maintain or distribute a written safe/sick time policy and does not provide employees with paystubs or other written documentation showing their

safe/sick time accruals. Employees may take time off due to illness on an ad hoc basis and are paid for this time off at their supervisors' discretion. As a result, some employees are paid for sick time and others are not. The employer has a policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913 of the Administrative Code. Each employee is entitled to relief in the amount of $500 per calendar year the unlawful policy or practice remains in effect under section 20-924(d)(v) of the Administrative Code.

Example 2: An employer with 10 employees maintains a written safe/sick time policy that provides that covered employees will have "at least 40 hours of sick leave available at the beginning of a given year." However, the policy is not distributed to all employees. The employer does not provide employees with paystubs or other written documentation showing their safe/sick time accruals. Employees are generally only paid for sick leave if they provide medical documentation of the reason for their absence, regardless of the length of the absence. This employer has a policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913 of the Administrative Code, and each employee is entitled to relief in the amount of $500 per calendar year the unlawful policy or practice remains in effect under section 20-924(d)(v) of the Code.

[(c)] (e) If an employer, as a matter of official or unofficial policy or practice, does not [allow accrual of safe time and sick time as required under the earned Safe and Sick Time Act] provide or refuses to allow the use of accrued safe/sick time in violation of section 20-913 of the Administrative Code, 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] safe/sick time [and sick time] the employee should have accrued to the employee's [safe] safe/sick time [and sick time] balance, provided that such balance does not exceed [80 hours] two times the maximum number of hours available for use in a calendar year, in addition to monetary relief in the amount of $500 per employee per calendar year the policy or practice was in effect, as provided in section 20-924(d)(v).

(f) For the purposes of this section, an employer's calendar year shall be the 12-month period from January 1 through December 31, unless the employer has determined a different calendar year, uses this calendar year in its administration of its safe/sick time policy, and has communicated this to employees in its written policy and in the notice required by section 20-919 of the Administrative Code.

§ 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] safe/sick 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] safe/sick time [and sick time] is measured by the actual length of time spent performing work.

(d) Per diem employees may use safe/sick time for hours they were scheduled to work or for hours they would have worked absent a need to use safe/sick time. For per diem employees or employees with indeterminate shift lengths (e.g., a shift whose length is defined by business needs), an employer shall base the hours of [safe] safe/sick 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] safe/sick 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 and the 120th calendar day following the start of employment or July 30, 2014, 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] An employer shall base the amount of safe/sick time used upon the amount of time the employee would have worked on the day they were absent for a covered reason.

(f) An employee of an employer with ninety-nine or fewer employees may carry over up to 40 hours of unused [safe and sick] safe/sick time from one calendar year to the next, and an employee of an employer with one hundred or more employees may carry over up to 56 hours of unused safe/sick time from one calendar year to the next, unless the employer has a policy of paying employees for unused [safe] safe/sick 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] safe/sick 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] 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 with ninety-nine or fewer employees is only required to allow employees to accrue up to 40 additional hours of [safe] safe/sick time [and sick time] in a calendar year, and an employer with one hundred or more employees is only required to allow employees to accrue up to 56 additional hours of safe/sick time in each calendar year. If an employee's safe/sick time [safe time and sick time] balance exceeds 40 or 56 hours in a single calendar year, as applicable, an employer is only required to allow the employee to use up to 40 or 56 hours in such calendar year.

> Example 1: An employee of an employer with 50 employees accrues 40 hours of [safe] safe/sick time [and sick time] in calendar year one and uses 20 hours of [safe] safe/sick 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] safe/sick time [and sick leave] balance at the end of calendar year two is 60 hours (20 hours carried over from calendar year [two] one plus 40 hours [from] accrued in 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. However, she may only use 40 hours in calendar year three.
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> Example 2: An employee of an employer with 300 employees accrues 56 hours of safe/sick time in calendar year one and uses six hours of safe/sick time in calendar year one. She carries over 50 hours from calendar year one to calendar year two, accrues 56 hours in calendar year two, and does not use any hours in calendar year two. Her safe/sick time balance at the end of calendar year two is 106 hours (50 hours carried over from calendar year one plus 56 hours accrued in calendar year two). She may carry over 56 of those 106 hours into calendar year three and accrue another 56 hours in calendar year three. However, she may only use 56 hours in calendar year three.

(g) 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 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.

§ 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] safe/sick time [or sick time] provided under the Earned Safe and Sick Time Act for purposes other than

those described in sections 20-914(a) and [section] 20-914(b) of the Administrative Code. Indications of abuse of [safe] safe/sick time [and sick time] may include, but are not limited to a pattern of: (1) use of unscheduled [safe] safe/sick time [and sick time] on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day, (2) taking scheduled [safe] safe/sick time [and sick time] on days when other leave has been denied, and (3) taking [safe] safe/sick time [and sick time] on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.