

July 18, 2018

ATTN: Jonathan Babiak
City of Austin Equal Employment/Fair Housing Office
1050 East 11th Street, Suite 200
Austin, Texas 78702
(512) 974-3200

RE: Comments on Notice of Proposed Adoption of Administrative Rules for Investigation of Complaints and Assessment Of Civil Penalties under City Code Chapter 4-19

To Whom It May Concern:

The Center for Public Policy Priorities (CPPP) respectfully submits the following comments to the City of Austin Equal Employment/Fair Housing Office (EE/FHO) in response to the notice of proposed adoption of administrative rules for investigation of complaints and assessment of penalties under City Code Chapter 4-19, related to the City of Austin's Earned Sick Time Ordinance, posted on June 18, 2018.

The Center for Public Policy Priorities is an independent, 510(c)3 public policy organization that uses data and analysis to advocate for solutions that enable Texans of all backgrounds to reach their full potential. We believe in a Texas that offers everyone the chance to compete and succeed in life. CPPP is also a member of Work Strong Austin, a coalition of community organizations dedicated to improving the lives of working families in Austin.

CPPP appreciates the opportunity to provide comments on the proposed rules for the City of Austin's Earned Sick Time Ordinance. We strongly support the City Council's efforts through this ordinance to improve the health and well-being of working people and the health, safety, and welfare of all Austin residents. In addition to ensuring that complaints under Chapter 4-19 are taken seriously and investigated thoroughly and expeditiously, the rules adopted by the Equal Employment/Fair Housing Office (EE/FHO) should also ensure that workers understand the earned sick time benefits they are entitled to under this policy and that employers have the clarity they need to comply with the ordinance.

Accordingly, the Center for Public Policy Priorities offers the following comments to the recent rules that EE/FHO has released for its implementation of Austin's Earned Sick Time ordinance:

EE/FHO should resolve complaints in a timely manner and seek a resolution that makes employees whole. Many workers likely to file complaints under this ordinance do so in a moment of great need and put themselves in a vulnerable position by doing so. Without sacrificing the thoroughness or integrity of the investigation process, EE/FHO should attempt to resolve complaints as quickly as possible, but no more than 90 days after the complaint is assigned to an investigator.

Furthermore, to the extent possible, the final rules should provide additional clarity regarding how EE/FHO will try to seek voluntary compliance to correct a violation, deter additional violations in the future, and make workers whole if their rights under the law have been violated. Without such assurances, the draft rules provide little incentive for workers to file complaints alleging violations of the law. Without complaints from the workers who are supposed to benefit from this law, enforcement becomes all but impossible. Low-wage and part-time workers in particular are often extremely fearful of bringing complaints against their employers because they know they risk their jobs, working hours, and more if they do so.

The complaint and investigation process should be as accessible as possible. EE/FHO should ensure that its complaint form is available in multiple languages and formats (i.e., both mobile-friendly digital and hard copy), is easy to access (e.g., mobile friendly and easy to find on the city website), easy to understand (e.g., 8th grade reading level), and easy to submit. Whenever possible, EE/FHO investigators should attempt to conduct interviews over the phone and outside of regular business hours, in order to accommodate people who may not have access to reliable transportation or whose work schedules make it difficult for them to be reached during the work day.

The civil penalties should be designed to deter violations and ensure consistency in enforcement. Austin's proposed penalties are low in comparison to other cities around the country, and the proposed rules create uncertainty for employers regarding what to expect from the EE/FHO regarding assessment of penalties if a violation occurs. The final rules should both simplify and increase the civil penalty amounts for all violations. For example:

- Except for cases involving retaliation or bad faith, civil penalties for a first time violation by any employer should be \$250.
- Civil penalties for any subsequent violation by an employer - regardless of the size of the employer or when this subsequent violation occurred - should be \$500.
- Any violation of the retaliation provision - whether it be a first or subsequent violation - should result in the assessment of a \$500 penalty.

While the final rules should grant EE/FHO the discretion to assess higher penalties for violations that involve bad faith or malicious conduct, penalties should not be lower than those established in the rules.

Parties should be able to appeal an initial determination of a complaint. To ensure that everyone's due process rights are respected, parties should have the opportunity to appeal EE/FHO's initial determination of a complaint. Benchmark cities such as Minneapolis and St. Paul offer examples for an appeal process. The administrative rules from St. Paul, MN, for example, allow either party to appeal the enforcing agency's grant or denial of a request for consideration of a complaint within 21 days of date of the department's response.¹

EE/FHO's final rules should both interpret the ordinance and outline the agency's investigation and enforcement procedures. Without interpretative rules, it will be difficult for employers to successfully comply with the ordinance, for workers to fully understand their rights under the ordinance, and for EE/FHO to enforce the ordinance fairly and effectively.

For example, these interpretive rules should provide additional guidance on:

- How employers should compensate different types of employees who use earned paid sick time, including salaried workers, overtime eligible workers, on-call workers, and workers whose compensation is not based on a “regular rate” - such as workers who are “on-call,” workers who are paid piece rate, workers who can receive a differential rate, workers who are salaried but also overtime eligible and workers whose pay fluctuates based on the kind of work they are doing. The City of St. Paul includes good examples of this type of clarification.ⁱⁱ
- When compensation for earned sick time is due to an employee. For example, Seattle’s rules specify that employer must pay earned sick time to an employee no later than the payday for the pay period in which earned sick time was used by the employee. If verification is required, earned sick time must be paid to the employee no later than the payday for the pay period during which verification is provided to the employer by the employee.ⁱⁱⁱ
- What constitutes “reasonable” verification procedures for employees who request to use earned sick time for more than three consecutive work days, including clarification that “three consecutive work days” means three consecutive days on which the employee is required or scheduled to work. Again, Seattle’s paid sick and safe time rules can serve as a benchmark for providing employers with clear guidance, protecting the medical privacy of employees and their family members, and ensuring that employer-required verification does not result in an unreasonable burden or expense for the employee.^{iv}
- How much advance notice employers can require for a “timely request” from an employee to use earned sick time for foreseeable absences, the requirements for notifying employees of such a policy or agreement, and obligations of employers to ensure such a policy does not interfere with an employee’s lawful use for earned sick time for unforeseen absences. The rules for the District of Columbia’s Accrued Sick and Safe Leave Act of 2008 include helpful language.^v
- The information that should be included in an employee handbook, if the employer provides a handbook, about employee rights under Austin’s ordinance and the employer’s own policy.
- The signage that employers are required to post, including size, display specifications, required languages, and what employers should do if displaying the sign is not feasible.

Over thirty cities have passed similar policies, and the EE/FHO should review the rules of other jurisdictions to determine the appropriate approach for Austin.^{vi}

Thank you for consideration of our comments on these important rules. If you have any questions regarding these comments, please contact Mia Ibarra, Deputy Legislative and Policy Director with the Center for Public Policy Priorities at ibarra@cphp.org or (512) 823-2880.

Sincerely,

Mia Ibarra
Deputy Legislative and Policy Director
Center for Public Policy Priorities

ⁱ City of Saint Paul – Rules for ESST Enforcement 3 Last revised October 31, 2017, effective November 30, 2017, <https://stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/ESST%20Rules%20Update.9.29.2017.pdf>.

ⁱⁱ City of Saint Paul – Rules for ESST Enforcement 3 Last revised October 31, 2017, effective November 30, 2017, <https://stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/ESST%20Rules%20Update.9.29.2017.pdf>.

ⁱⁱⁱ Seattle Office of Labor Standards Seattle Human Rights Rules (SHRR) Chapter 70 Practices for administering the Paid Sick and Safe Time Ordinance under SMC 14.16, https://seattle.gov/Documents/Departments/LaborStandards/2018%20PSST%20Rules_06-29-18.pdf.

^{iv} Seattle Office of Labor Standards Seattle Human Rights Rules (SHRR) Chapter 70 Practices for administering the Paid Sick and Safe Time Ordinance under SMC 14.16, https://seattle.gov/Documents/Departments/LaborStandards/2018%20PSST%20Rules_06-29-18.pdf.

^v District of Columbia Department of Employment Services – Notice of Final Rulemaking, Accrued Sick and Safe Leave Act of 2008, https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/Accrued_Sick_and_Safe_Final_Rules.pdf. These rules apply to the original 2008 act.

^{vi} Center for Law and Social Policy, Inc. (CLASP), Enforcing Sick Days: Laws and Regulations, <http://enforcingsickdays.org/laws-and-regulations/>.