From: Stephanie Gharakhanian
To: Clerk, City
Subject: Notice of Appeal of Adopted Earned Sick Time Rules
Date: Wednesday, September 26, 2018 4:30:19 PM
Attachments: PSD Austin Rules Appeal 9.26.18.pdf
WDP PSD Comments 7.20.18.pdf

To whom it may concern:

I write regarding the Rules for Investigation of Complaints and Assessment of Civil Penalties under City Code Chapter 4-19 which were posted on August 27, 2018. Please consider the attached correspondence to be a written notice of an appeal of Adopted Rule 5: Final Determinations on Complaints. I am submitting this notice of appeal to the City Clerk pursuant to Section 1-2-10 of the City Code.

In addition to the attached appeal notice, I have also included the original comments I submitted on behalf of Workers Defense Project in response to the "Notice of Proposed Adoption of Administrative Rules for the City of Austin's Earned Sick Time Ordinance" this past July.

While I do understand that the city has temporarily abated the rule making process relating to Chapter 4-19 because of pending litigation, I wanted to preserve WDP's right to appeal the Adopted Rules by submitting this notice within the original deadline.

Please feel free to contact me at this email address or the phone number below if you have any additional questions or require any additional information.

Best,
Stephanie
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Workers Defense Project
Proyecto Defensa Laboral

September 26, 2018

OCC RECEIVED AT
SEP 27 '18 AM8:24

City Manager Spencer Cronk
Office of the City Manager
301 W. 2nd Street, 3rd Floor
Austin, Texas 78701

Submitted via e-mail to the Office of the City Clerk, city.clerk@austintexas.gov

Re: Notice of Appeal of Earned Sick Time Rules

Dear Mr. Cronk:

I write regarding the Rules for Investigation of Complaints and Assessment of Civil Penalties under City Code Chapter 4-19 which were posted on August 27, 2018. Please consider this correspondence to be a written notice of an appeal of Adopted Rule 5: Final Determinations on Complaints.

On behalf of Workers Defense Project, I request that Rule 5 be modified to establish a right for Respondents and Complaints to appeal decisions of the Administrator. In particular, I request that:

- Rule 5 be renamed "Initial Determinations on Complaints"
- Notices of dismissal issued to Complainants and Respondents pursuant to Rule 5(C)(2) advise of the Complainant's right to appeal the Complaint's dismissal;
- Notices of violation and civil penalty assessment issued to Complainants and Respondents pursuant to Rule 5(C)(3) inform Respondents of their rights to appeal the Administrator's decision;
- Rule 5(F) be modified to require the Administrator to issue a notice of dismissal to the parties which advises the Complainant of their right to appeal;
- Rule 5(G) be modified to provide that parties have the right to appeal the Administrator's initial determination of a Complaint;
- Rule 6, "Assessment and Collection of Civil Penalties" be renumbered Rule 7, and Rule 7, "Closure of Complaint Investigations," be renumbered Rule 8; and
- The Adopted Rules be modified to establish a new Rule 6, titled "Adjudication of Appeals."

In addition, I request that you direct EE/FHO publish interpretive rules which clearly describe what standards and precedent the agency will reference when investigating and adjudicating complaints under Chapter 3-19.

During the notice and comment period regarding the Proposed Adoption of Administrative Rules for the City of Austin's Earned Sick Time Ordinance, Workers Defense Project submitted comments to EE/FHO urging the agency to establish a right to appeal and publish interpretive

rules in order to ensure that investigations under Chapter 4-19 occur in a "fair, impartial, and objective manner". I have included a copy of these comments with this notice for your reference.

It is important to note that many others, representing representing both the concerns of workers as well as the business community, also submitted comments during the notice and comment period urging that EE/FHO include a right to appeal[1] and additional interpretation in its Earned Sick Time Rules.[2]

That being said, in this notice of appeal, I write on behalf of Workers Defense Project, a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing and strategic partnerships. This notice and the original comments I submitted on the Proposed Rules are informed by the hundreds of workers WDP encounters each year through our direct legal services, community outreach, and community organizing programing.

We are filing this appeal because (1) we dispute EE/FHO's assertions that the agency does not have the "authority" to create an appeal process in these Rules; and (2) we believe that the right to appeal is an essential due process right that is necessary for the fair, impartial, and objective administration and enforcement of Chapter 4-19.

1. Chapter 4-19 endows EE/FHO with the authority to establish an appeal process.

Establishing and administering an appeal process as part of EE/FHO's adjudicative process is consistent with the duties assigned to the agency in Chapter 4-19. Section §4-19-6 of the Earned Sick Time Ordinance authorizes EE/FHO to "enforce this Chapter" and "adopt rules necessary to implement this Chapter."

In the past, EE/FHO has alleged that such language does not "authorize" the agency to create an appeal process and cautioned that the Rules cannot exceed the authority found in the Ordinance. In my comments, I acknowledged EE/FHO's belief that the agency lacked the authority under Chapter 4-19 to establish an appeal process that existed outside of its purview, such as a right to seek judicial review of an Administrator's determination. For this reason, WDP proposed that EE/FHO establish Rules that would enable parties to request an appeal from an independent adjudicator housed within EE/FHO.

In my original comment, I wrote:

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[1] *See* Comments #2, 10, 23, 28, 34, 44, 50, 54, 56, 60, 62, 152, 166, 176, 187, 194, 196, 211, "Comments and Responses to the Proposed Adoption of Administrative Rules (Earned Sick Time Ordinance)."

[2] *See id*, Comments #11, 48, 171, 181, 191,195.

> "WDP specifically requests that EE/FHO provide a specific response, including citations to relevant caselaw, which substantiate how establishing a right to appeal in the manner we propose exceeds EE/FHO's authority under the Ordinance."

To this comment, EE/FHO responded:

> "The Ordinance does not authorize the Administrator to create an appeal process, and the Rules cannot exceed the authority found in the Ordinance. The Rules expressly separate investigative functions, assigned to an Investigator, from review and decision-making functions, assigned to the Administrator."

Not only is this response not responsive to my recommendation that an independent adjudicator within EE/FHO review appeals of the Administrator's decisions, I have yet to receive any legal justification from EE/FHO to substantiate this interpretation of Chapter 4-19.

While Chapter 4-19 is silent on whether EE/FHO has the express authority to establish the right to appeal, so too is Chapter 4-19 silent on whether EE/FHO has the authority to adopt many of the posted Rules. EE/FHO is not taking the position that adopting Rules that establish the roles of the Administrator, or the Investigator, or the evidentiary standard for the Complaint investigation process, for example, exceed the bounds of the Ordinance, despite the fact that Chapter 4-19 does not specifically provide that "the Administrator shall determine whether a violation exists" or "EE/FHO shall create the position of 'Investigator' to investigate complaints" or "EE/FHO shall evaluate complaints based on the 'preponderance of the evidence'". Rather, EE/FHO has determined that such Rules are consistent with the provision in § 4-19-6(A) that "*The EEO/FHO* shall . . . enforce this Chapter" and "*The EEO/FHO* shall . . . adopt rules necessary to implement this Chapter" and under § 4-19-6(C) that, "[i]f *the EEO/FHO* finds after investigation of a timely complaint that a violation . . . has occurred," penalties may be assessed.

For this same reason, it is incorrect for EE/FHO to claim that "the Ordinance does not authorize the Administrator to create an appeal process." This position is not only incorrect because there is no mention in the text of Chapter 4-19 regarding role of the Administrator or the Investigator, the scope of their duties, or whether the Administrator's initial determinations should be considered final, but also because establishing the right to accept and review appeals is, in fact, both included within and essential to the mandate given to EE/FHO § 4-19-6 to "enforce this Chapter" and "adopt rules necessary to implement this Chapter".

2. **Establishing a right to appeal is necessary to ensure that the investigation process is fair, impartial, and objective.**

Apart from asserting that the Ordinance does not "authorize the Administrator to create an appeal process", EE/FHO maintains that right to appeal does not need to be incorporated into its administration and enforcement of Chapter 4-19 because the Adopted Rules distinguish the Investigator's functions from the Administrator's functions.

In my original comments to the Proposed Rules, I expressed the concern that excluding a right to appeal under the Rules would result in an adjudication process that inevitably will disadvantage workers. As the Complainant, workers who allege a violation will always have the responsibility of overcoming the preponderance of evidence requirement established by these Rules. It is always easier for an adjudicator to dismiss a Complaint than for an adjudicator to justify that an evidentiary standard has been met. It is always easier for an agency to deny alleged violations than to hold a Respondent accountable for them. This disadvantage can only be corrected through an appeal process that undertakes an independent, de novo review.

Workers Defense Project regularly files administrative claims on behalf of workers. Time and again, we have had to rely on our client's right to appeal to ensure that their claim is adjudicated correctly and that their rights in the workplace are defended. In our experience, the right to appeal becomes increasingly important when the agency is tasked with determining a threshold question of eligibility: Is our client even eligible to claim a certain right? Is their employer even bound to honor that right? When pursuing wage claims before the Texas Workforce Commission, for example, we regularly need to appeal wrongful dismissals based on findings that our client is an "independent contractor" rather an employee. This question of worker classification is one of the many difficult issues that EE/FHO will need to address when adjudicating Complaints under this Ordinance.

Human experience and principles of common sense contemplate that any investigation or adjudication process can be flawed. Separating the Investigator's functions from the Administrator's functions in the Adopted Rules is not sufficient to overcome the inevitability that mistakes will happen and that an Administrator will commit errors in judgement and errors in law. For this reason, many other cities who have adopted paid sick time ordinances have established a right to appeal in their administration of the ordinance, including the cities of St. Paul, Seattle, San Francisco, Minneapolis, and Emeryville, CA, and many agencies, like the Texas Workforce Commission, which adjudicate labor claims like wage claims and unemployment insurance claims also include a right to appeal in their adjudication processes.

3. **WDP recommends that the Adopted Rules be modified to include a new Rule 6, "Adjudication of Appeals" which allows parties to request an independent, de novo review of An Administrator's initial determination of a Complaint under Rule 6.**

WDP recommends that the Adopted Rules be modified to insert a new Rule 6 which provides the procedures by which EE/FHO would receive and review appeals of a decision issued by the Administrator pursuant to Rule 5. WDP recommends that this Rule require that appeals be adjudicated by a member of EE/FHO personnel who is not an Investigator, an Administrator, or otherwise involved in the investigation of a Complaint or the Administrator's decisions to take any of the actions described in Rule 5.

WDP recommends that the Adopted Rules be modified to authorize this appeals adjudicator to:

- Set the date for a de novo hearing and send parties appropriate notice of the hearing in writing. This notice should include a short, plain statement of the issues to be considered during the hearing;

- Have the authority to postpone or continue a hearing for good cause;
- Conduct a de novo hearing to ascertain the substantive rights of the parties, develop the evidence, and address all issues relevant to the appeal;
- Issue a written decision to the parties that is restricted to the matters mentioned in the hearing notice and based exclusively on the evidence entered into the hearing's record. This decision should include findings of fact and conclusions of law reached on the noticed issues, as well as the adjudicator's decision regarding whether the determination reached under Rule 5 is affirmed, reversed, or modified.

WDP suggests that the Adopted Rules be modified to permit this hearing to be conducted either in person or by telephone, depending on the convenience of the parties.

4. WDP urges EE/FHO to propose additional interpretive rules to promote compliance with and facilitate the enforcement of Chapter 4-19.

Without interpretive rules, employers do not have sufficient information to successfully comply with the Ordinance and workers do not have sufficient information to fully understand their rights under the Ordinance. Most importantly, without interpretative rules, it is not clear what standards - if any - EE/FHO will apply when investigating and resolving Complaints. The Ordinance authorizes EE/FHO to "adopt rules necessary to implement this chapter." Interpretive rules are necessary for EE/FHO to implement this Ordinance. In the original comments submitted, WDP and others suggested which terms and provisions of Chapter 4-19 required additional clarification. (*See, e.g.*, pp. 3-11, "WDP's Comments on the Proposed Administrative Rules for the Earned Sick Time Ordinance".)

In responding to these suggestions, EE/FHO routinely offered the response:

> "Although EE/FHO has extensive knowledge of investigative procedures, based on lengthy, substantial experience gained from the administration of regulatory complaint investigations, the Division has limited working knowledge of the extremely wide range of compensation, attendance, and leave practices utilized in private sector employment subject to the Earned Sick Time Ordinance. The routine duties of the Investigator include the duty to make every reasonable effort to obtain all of the relevant, material, and available evidence in the course of the investigation. The City will determine if any given standard is reasonable, in light of all of the facts and circumstances developed in any given investigation."

While I appreciate that EE/FHO acknowledges that employers impacted by the Earned Sick Time Ordinance utilize a wide array of compensation, attendance, and leave practices, in our view, the diversity of employment arrangements in the private sector only underscores the need for EE/FHO to issue clearer, public, and up-front guidance as to how it plans to interpret the ordinance in different cases and circumstances. Such guidance would serve to benefit employees and employers, and ensure just, uniform, and consistent administration and enforcement of the ordinance by EE/FHO.

Let us not forget why fair and proper administration and enforcement of the Earned Sick Time Ordinance is so important. The people of Austin are depending on EE/FHO to ensure that survivors of domestic violence can access needed services, a parent does not forego a day's worth of wages so that they can take a sick child to the doctor, a hospitalized construction worker is not fired for failing to show up to work the day after their injury, or an elderly patient does not find herself on her death bed because her home health aide could not afford to take the day off when he was sick.

I respectfully request that you modify the Adopted Rule 5 to include a right to appeal of a determination of the Administrator and that you urge EE/FHO to issue comprehensive interpretive rules as soon as possible. Please do not hesitate to contact me below if you need any additional information

Sincerely,

/s/ Stephanie Gharakhanian

Stephanie Gharkahanian, Esq.
Special Counsel
Workers Defense Project
5604 Manor Road
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(512) 375-0803

Workers Defense Project
Proyecto Defensa Laboral

July 20, 2018

ATTN: Jonathan Babiak
City of Austin Equal Employment/Fair Housing Office
1050 E. 11th St., Ste. 200
Austin, Texas 78702

Submitted via email to jonathan.babiak@austintexas.gov

Re: Comments on Notice of Proposed Adoption of Administrative Rules for the City of Austin's Earned Sick Time Ordinance

To whom it may concern:

Workers Defense Project ("WDP") is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing and strategic partnerships. Founded in 2002, WDP both provides direct legal services to low-wage workers and engages in advocacy to improve worker protections. Much of WDP's advocacy has involved working with enforcement agencies to ensure that existing legal protections are enforced to fulfill their intended benefit for working people.

We wanted to thank the City's Human Resource Department for notifying WDP when the proposed rules for the Earned Sick Time Ordinance was posted and for being so intentional in its outreach to stakeholders during this rulemaking process.

WDP's comments to the proposed Rules for Investigation of Complaints and Assessment Of Civil Penalties under City Code Chapter 4-19 ("Proposed Rules") are informed by the hundreds of workers WDP encounters each year through our direct legal services, community outreach, and community organizing programing. Many of these workers have experienced wage theft, workplace injury, and employment discrimination. Most of the workers we encounter through our legal services program, in particular, are employed by unregistered, sole proprietors, paid by the hour or by the day in cash or personal check, misclassified as "independent contractors", never given any official hiring paperwork, an employee handbook, or a regular pay stub by their employer, and never offered earned paid sick time, vacation time, or any other employment benefit, like health insurance or workers' compensation.

One common scenario that we encounter in our regular legal clinics involves a worker who is injured on the job and taken to the hospital, not paid for that day's work or any lost time thereafter, not able to reach their employer by phone call or text following their injury, unable to return to work, and, without insurance or workers' compensation, is worried how he may pay this month's rent and his mounting medical debt. In reviewing the Proposed Rules, WDP's litmus test is whether the Rules are sufficient to ensure that marginalized workers - like the

worker in this scenario - may avail themselves to the processes, protections, and remedies established.

This Ordinance was intended to benefit all private employees within city limits. EE/FHO has a responsibility to ensure that its final rules are adequate enough to fulfill the Ordinance's intended purpose of guaranteeing earned sick days for all private employees working in this city. WDP is committed to supporting EE/FHO in these efforts. Thus, we have offered extensive comments on the Proposed Rules for you to review.

While we offer more detailed comments below, we wanted to emphasize the following points first:

1. **The process of accepting, investigating, and resolving Complaints must be as accessible as possible.**

Many of WDP's members and clients who stand to benefit from this Ordinance have limited proficiency reading or writing in English or their first language. They may not have regular access to a computer or the internet, or know how to use e-mail or a computer at all. Because of the hours they work, the nature of their employment situation, or their access to reliable transportation, these workers may not be easily reached during regular business hours or be available to attend in-person meetings during the business day. To be effective, the EE/FHO's complaint and investigation process under these Rules needs to account for and accommodate these realities.

2. **Establing a right to appeal is essential to ensuring that the investigation process is "fair, impartial and objective".**

Part 5(G) establishes that there is no right to appeal any determination issued by an Administrator under the Proposed Rules. WDP understands that the Ordinance prohibits EE/FHO from establishing an appeal process which exists outside of the agency's authority. However, WDP urges EE/FHO to establish Rules that would enable parties to request an appeal from an independent adjudicator housed within EE/FHO.

Excluding a right to appeal under the Rules establishes an adjudication process that inevitably will disadvantage workers. As the Complainant, workers who allege a violation will always have the responsibility of overcoming the preponderance of evidence requirement established by these Rules. It is always easier for an adjudicator to dismiss a Complaint than for an adjudicator to justify that an evidentiary standard has been met. It is always easier for an agency to deny alleged violations than to hold a Respondent accountable for them. This disadvantage can only be corrected through an appeal process that undertakes an independent, de novo review.

Workers Defense Project regularly files administrative claims on behalf of workers. Time and again, we have had to rely on our client's right to appeal to ensure that their claim is adjudicated correctly and that their rights in the workplace are defended. In our experience, the right to appeal becomes increasingly important when the agency is tasked with determining a threshold

question of eligibility: is our client even eligible to claim a certain right? Is their employer even bound to honor that right? When pursuing wage claims before the Texas Workforce Commission, for example, we regularly need to appeal wrongful dismissals based on findings that our client is an "independent contractor" rather an employee. This question of worker classification is one of the many difficult issues that EE/FHO will need to address when adjudicating Complaints under this Ordinance. Human experience and principles of common sense contemplate that any investigation or adjudication process can be flawed. Mistakes happen. There will be errors in judgment and errors in law.

Chapter 4-19 defines EE/FHO's authority in §4-19-6. These duties include a mandate to "enforce this Chapter" and a mandate to "adopt rules necessary to implement this Chapter". In the past, EE/FHO has alleged that such language does not "authorize" the agency to create an appeal process and cautioned that the Rules cannot exceed the authority found in the Ordinance.

In its response to this comment, WDP specifically requests that EE/FHO provide a specific response, including citations to relevant caselaw, which substantiate how establishing a right to appeal in the manner we propose exceeds EE/FHO's authority under the Ordinance.

3. **The enforcement process should endeavor to make affected employees whole and resolve Complaints as soon as possible.**

The agency's priority should always be to conduct fair and thorough investigations of a Complaint. However, Complaints do become more difficult to resolve the longer that time passes - locating necessary evidence or testimony becomes more challenging, Respondents may disappear, Complainants may lose hope in the agency's ability to truly address the alleged violations, and achieving meaningful voluntary compliance may no longer prove practicable. Without compromising the integrity of its investigation process, WDP encourages EE/FHO to be mindful that many Complainants alleging violations are doing so in moments of dire need. Some Complaints will allege more complex violations than others, and undoubtedly will require more time to investigate, but many Complaints will allege clear violations that can be resolved expeditiously. EE/FHO owes all Complainants not only a fair and thorough investigation of the violations they allege, but a timely resolution of their Complaint as well.

4. **The suggested civil penalties must be increased to effectively incentivize full compliance with the Ordinance.**

It is in the City's interest and in the spirit of the Ordinance to establish an enforcement scheme through these Rules that incentivizes full compliance with the requirements of the Ordinance. WDP does not believe that the suggested civil penalties in these Rules are high enough to meet that goal. WDP recommends a simplified, universal civil penalty scheme that limits the agency's discretion to adjust the established penalties solely to violations that involve bad faith or malicious conduct. WDP offers more detailed comments regarding Part 6 below.

5. **EE/FHO needs to establish interpretive rules in addition to procedural rules.**

Without interpretive rules, employers do not have sufficient information to successfully comply with the Ordinance and workers do not have sufficient information to fully understand their rights under the Ordinance. Most importantly, without interpretative rules, it is not clear what standards - if any - EE/FHO will apply when investigating Complaints. The Ordinance authorizes EE/FHO to "adopt rules necessary to implement this chapter." Interpretive rules are necessary for EE/FHO to implement this Ordinance.

WDP also offers these additional comments for your consideration:

Part 2's Definitions and Additional Ordinance Terms that Require Further Clarification

Part 2(C) This rule defines "Complaint" as a "written statement", while Part 3(C)(1) suggests that an in-person or telephone conversation could also constitute a "Complaint". WDP proposes that Part 2(C) be more expansive to capture both written statements made by a Complainant and oral statements made by a Complainant that are memorialized in writing by the Investigator or whomever else receives the Complaint at EE/FHO.

There are additional terms included in Chapter 4-19 that were either not defined in the final Ordinance language or were defined in the final Ordinance language but require further clarification or interpretation from EE/FHO.

§4-19-1(C) defines "Employee" as "an individual who performs at least 80 hours of work for pay within the City of Austin in a calendar year for an employer." Further guidance on the definition of this term is required for employers of employees who are typically based outside of the City of Austin, but who work 80 or more hours within city limits in a calendar year. There should be a presumption that a worker who performs work duties within Austin city limits is eligible for earned sick time under Chapter 4-19 unless that employer can prove that an employee has performed less than 80 hours of work within city limits in the applicable calendar year. This presumption should not apply to employees whose work duties require them to travel through Austin but not perform work duties within the City, or who only make incidental stops inside the City of Austin that are unrelated to their work duties, such as purchasing gasoline or changing a tire. Final rules from EE/FHO should also clarify how transit time to or from the City of Austin apply to the 80 hour employment threshold established in §4-19-1(C).

§4-19-1(C) further provides that "Employee does not include an individual who is an independent contractor." The Rules, however, do not indicate how the EE/FHO will evaluate a worker's proper employment classification. It would be helpful for the Rules to provide additional guidance on this point since controversy around a worker's proper classification is a threshold question in almost any employment matter. Specifically, in accordance with Title 40, Section 821.5 of the Texas Administrative Code, the final rules should articulate that (1) that an employer's classification of a worker or even a worker's classification of herself is not determinative of her proper status; (2) that a determination of proper worker classification shall be conducted of all Complainants, regardless of whether that worker is called an agent, contract laborer, independent contractor, subcontractor, or something else; and (3) that EE/FHO shall

presume all Complainants to be employees unless or until the common law test indicates otherwise.

§4-19-2(A) provides that an employer shall grant an employee one hour of earned sick time for every 30 hours worked for the employer in the City of Austin. Additional guidance from EE/FHO, however, is needed to instruct employers as to how they should compute accrued earned sick time for employees who travel inside and outside of city limits to perform work duties and employees who are not always paid a regular, hourly rate.

In particular, the Rules should clarify that overtime eligible employees do accrue earned sick time while working overtime hours. Salaried employees who are overtime ineligible (that is, employees who are properly exempt from the requirements of the Fair Labor Standards Act) and who regularly work 40 or more hours per work should be assumed to work 40 hours of work per week for the purposes of this section. Salaried employees who are lawfully overtime exempt who regularly work less than 40 hours per week should accrue earned sick time based on their particular regular work week.

As a general comment, other cities offer useful examples in their published rules to demonstrate how employees with different compensation arrangements ought to accrue earned sick time. Providing such examples in the Rules would be incredibly helpful.

§4-19-2(B) requires further clarification to explain how this provision interacts with the 80 day threshold established in §4-19-1(C). For employees whose primary place of employment is within the City of Austin, "Commencement of employment" should be defined as no later than the beginning of first day on which an employee is authorized or required by the employer to be on duty, or otherwise present at the employer's premises or prescribed workplace. For workers typically based outside of the City of Austin, "Commencement of employment" should begin when an employee works 80 hours within the City of Austin in a calendar year.

§4-19-2(C) allows for an employer to restrict an employee from using earned sick time during that employee's first 60 days of work if the employee establishes that the employee's term of employment is at least one year. The Rules should clarify that no employer shall restrict an employee's use of earned sick time under this section if the employer considers that employee to be "at will" or is otherwise able to terminate that employee at any time without cause.

In order to establish an employee's term of employment under this section, the Rules should require an employer to furnish written documentation, dated on or close to the employee's commencement of employment which states that the employee has guaranteed employment for a term of one year or more. Absent any timely writing that establishes an employee's term of employment to be at least one year, an employer should not be able to restrict when earned sick time is available to an employee.

§4-19-2(D) and other sections of the Ordinance utilize the term "scheduled work time" "Scheduled work time" should be further defined to mean hours an employee is required to work, including, but not limited to, regular hours, overtime hours (scheduled or voluntary), hours

an on-call employee is required to work after being contacted by an employer, and employer-mandated training hours.

§4-19-2(E) establishes that an employer may adopt "reasonable verification procedures" following "three consecutive work days" to verify that an employee's request for earned sick time is for a qualifying purpose. Both the terms "reasonable verification procedures" and "use earned sick time for more than three consecutive work days" require further clarification and interpretation by EE/FHO.

WDP suggest that the term "use earned sick time for more than three consecutive work days" mean earned sick time absences for three consecutive days that an employee is required or scheduled to work. For example, if an employee is scheduled to work each Monday, Wednesday, and Friday and uses earned sick time for any portion of a Monday, Wednesday and Friday in the same week, and then requests to use earned sick time the following Monday as well, only then could that employee's employer seek verification.

The Rules should provide that any employer who adopts reasonable verification procedures under **§4-19-2(E)** establish such procedures in a written policy. This policy should be readily available to all employees in a language that they understand, and employers should be required to notify employees of such policy prior to requiring any employee to comply with it.

No reasonable verification procedure should require an employee to explain the nature of the domestic abuse, sexual assault, stalking, injury, illness, health condition, or other health need that necessitates their request for earned sick time. To be reasonable, an employer's verification process must afford an employee adequate time to obtain the required verification and seek to mitigate additional burdens that the verification requirement may place on an employee. WDP recommends that the Rules provide that any verification procedures established pursuant to this section afford employee's at least ten (10) days, beginning on the date of the employee's first consecutive day of requesting earned sick time, to provide the required verification.

Employer required verification for use of earned sick time should not result in an unreasonable expense or burden on the employee. Complying with an employer's established verification procedures could result in such a burden, particularly if that employer does not provide health insurance to its employees yet expects employees to furnish a doctor's note as part of its verification process. If an employer requires verification from an employee, and the employee anticipates that this requirement will result in unreasonable burden or expense, an employee should be able to assert that to their employer, so that the employer and employee can discuss any less-burdensome alternatives that would satisfy the employer's verification requirement, or other ways that the employer can help the employee mitigate the expenses of fulfilling its verification requirement. If an employee is not offered health insurance by their employer and their employer insists that an employee furnish a doctor's note to satisfy its verification requirement, the employer and the employee should each pay half the cost of any out-of-pocket expense incurred by the employee in obtaining the requested verification for use of earned sick time, unless such cost results in an unreasonable burden on the employee.

§4-19-2(F) requires further clarification and interpretation. "Scheduled work time" should be defined using the suggested definition mentioned above. In addition, EE/FHO should clarify what constitutes a "timely request" and provide additional guidance for employers who establish policies pursuant to this section. For a foreseeable absence, WDP recommends that a request to use earned sick time should be considered "timely" if an employee provides at least seven (7) days advance notice of their intent to use paid sick time to their employer, or otherwise notifies their employer as soon as is practical, unless the employer's policy allows for less advance notice.

EE/FHO should clarify that employers may require employees to comply with certain procedures in order to make a request to use earned sick time, as long as such procedures do not interfere with an employee's lawful use of earned sick time.

When absence from work is unforeseeable, it is possible that it will not be practicable for an employee to provide an employee with notice of their absence. In such instances, an employer should permit someone else to provide notice of the absence to the employer on the employee's behalf as soon as it is practicable to do so.

If an employer seeks to implement policies that describe any requirements of an employee to make a "timely request" to use earned sick time or otherwise provide notice of a qualifying absence in accordance with this section, the EE/FHO should require in these Rules that such policies be established in writing. These Rules should require that an employer inform its employees of any notification policy prior to requiring that any employee complies with it. Employers should ensure that this policy is readily available to all employees in a language that they understand.

§4-19-2(J) seeks to establish the proper rate of pay owed to employees who use earned sick time, yet requires further interpretation to capture the breadth of compensation arrangements that exist between employers and employees. The Rules should describe in further detail how employers should calculate the proper compensation due to employees who earn tips, who earn a commission, who are salaried, who are overtime eligible but paid an hourly rate, who are paid a daily rate, who earn a piece rate, or whose rate of pay fluctuates (e.g. workers on a prevailing wage site, or workers who earn a higher rate during a "night shift" vs a "day shift"). The final rules published by the Seattle Office of Labor Standards to implement that city's Paid Sick and Safe Time Ordinance contemplate many methods of compensation and can provide helpful guidance to EE/FHO as the agency clarifies this provision further.

It is important to note that vulnerable employees who have the most to gain from successful implementation of this Ordinance are also most likely to be compensated through an unconventional compensation scheme. It is also not uncommon for these workers to have no documentation of the promised wage offered by their employer, not due to any fault of their own, but because of their employer's failure to comply with other provisions of state or federal law. When determining the proper compensation owed for an absence under this Ordinance, the EE/FHO should, like other provisions of state and federal wage and hour law, establish a rebuttable presumption in favor of the employee's stated rate of pay if the employer is not able to

provide proof of the employee's pay rate, such as through an offer letter, employment contract, or pay stub.

In addition to clarifying the proper rate of pay for earned sick time, EE/FHO should articulate when payment for earned sick time is due when in its education and outreach efforts undertaken pursuant to the Ordinance so that employers may avoid unintended violations of other provisions of state or federal law.

§4-19-2(K) requires that employers shall, on no less than a monthly basis, provide employees a statement showing the amount of available earned sick time. EE/FHO should provide additional clarification in these Rules about the information that this statement should contain. For example, any statement prepared in accordance with this section should include the name of the employee and the employer, the statement's date (e.g. June 6, 2018), the statement period (e.g. May 1 - May 31, 2018), the number of eligible hours worked in the City of Austin during the statement's period, the amount of earned sick time accrued during the statement's period, the amount of earned sick time used during the statement's period, and the amount of earned sick time currently available to the employee.

In addition, the Rules should specify an employer's obligations to maintain and retain records under this section of the Ordinance, and the employer's obligation to retain such records during an investigation conducted under the Ordinance. The Rules should make clear that once an employer is notified by an Investigator that an investigation has commenced pursuant to **Part 4(C)(2)**, the employer may not destroy any employee records maintained pursuant to this section until the employer is notified by EE/FHO that the Complaint's investigation has closed under **Part 7.**

Part 4 authorizes EE/FHO to request or subpoena records of a Respondent as part of the investigation process. The Rules should clearly articulate that the failure of an employer to satisfy EE/FHO's requests for records which a Respondent is required to maintained under the Ordinance during the course of an investigation creates a rebuttable presumption that the employer has violated **§4-19-2(K).**

§4-19-2(L) requires that an employer handbook include "a notice of employee rights and remedies under this Chapter." The final rules should further define precisely what is meant by the term "employee handbook" and "employee rights and remedies under this Chapter". WDP suggests that the notice required in an employee handbook include: (1) that employees are entitled to earn paid sick time; (2) when an employee begins to accrue time and at what rate, whether the employer makes the yearly cap of earned sick time available to employees at the beginning of a year, and when that year begins; (3) the yearly cap of earned sick time available to employees; (4) when an employee may begin using earned sick time; (5) when the employer will (5) the employer's procedures for an employee to make a timely request to use earned sick time or otherwise provide the employer with notice of an absence under the Ordinance, if applicable; (6) the employer's reasonable verification procedures, if applicable; (7) how and when the employer will provide employees with notice of their available earned sick time; (8) notice that employees can file a Complaint alleging violations of the Ordinance to EE/FHO; (9)

notice that employer retaliation is prohibited; and (10) the employer's disciplinary policy for unauthorized use of earned sick time, if applicable.

It would be helpful if EE/FHO developed model employee handbook language which satisfies the requirements of the Ordinance and this Rule as a resource for employers.

EE/FHO should also encourage employers to inform its employees when they should expect payment for used earned sick time in the employee handbook.

EE/FHO's final rules should also clarify that it is a violation of this section if the notice included in the employee handbook is not in a language that the employee understands, or if the employer cannot provide evidence (such as an signed acknowledgment form) that a Complainant received an employee handbook containing the required notice prior to the date of the alleged violation.

§4-19-2(Q) The Rules should specify that successor employers must provide employees with all required written earned sick policies either at the time of acquisition or as soon as practicable.

§4-19-5 should be clarified in the Rules to further describe what constitutes prohibited retaliation under the Ordinance. EE/FHO should consider applying an expansive definition to "retaliation" to encompass any efforts by an employer to interfere with an employee's lawful use of earned sick time. Any attempt to discipline, demote, discharge, suspend, reduce hours or otherwise directly threaten an employee who satisfies the requirements of this Ordinance, of the Rules, and other lawful policies of an employer should constitute "retaliation" under this section.

The Rules should also provide employers with clearer guidance as to how they may address instances of unauthorized use of earned sick time without running afoul of **§4-19-5.** Community education efforts conducted by EE/FHO should advise employers how they can address instances of unauthorized use of earned sick time without running afoul of the Texas Payday Law or other relevant provisions of the Texas Labor Code.

WDP recommends that the Rules require that any disciplinary policy regarding the unauthorized use of earned sick time be in writing and be made readily available to all employees in a language that they understand. WDP also suggests that the Rules forbid employers from deducting any unauthorized earned sick time hours used from an employee's legitimately accrued, unused earned sick time if the employer chooses, as part of its disciplinary policy, to lawfully withhold payment from an employee for sick time used for an unauthorized purpose.

§4-19-6(A)(2) requires EE/FHO to "investigate complaints...alleging a violation of this Chapter". The Proposed Rules are silent as to the meaning of this term "alleging a violation". WDP recommends that EE/FHO interprets the term broadly so that all Complaints which are filed in accordance with the Rules are presumed to "allege a violation" of the Ordinance until the investigation process described under **Part 4** is exhausted and EE/FHO determines that issuance of written notice of dismissal pursuant to **Part 5(C)(2)** is appropriate. Complainants should not be expected to be experts in the Ordinance or these Rules, and should therefore not be expected

to specifically allege how a Respondent has violated the requirements of the Ordinance or these Rules in order for an investigation of their Complaint to be initiated.

Additionally, the investigation process described in **§4-19-6(A)(2)** and **Part 4** should not be restricted solely to allegations mentioned in a Complaint. Requests for additional information from either party during the investigation process may surface additional potential violations that merit investigation and remedy under these Rules. In seeking voluntary compliance or assessing civil penalties pursuant to **§4-19-6(A)(3) and §4-19-6(A)(4),** it is incumbent upon EE/FHO to address any and all violations identified in the investigation of a Complaint, regardless of whether such violations were initially alleged by the Complainant.

§4-19-6(A)(4) directs EE/FHO to "seek voluntary compliance" before collecting a civil penalty, and **Part 5** explains, in part, how an Administrator will do this through the Complaint determination process. WDP applauds EE/FHO for proposing rules that encourage the resolution of Complaints through the voluntary compliance process. We believe that it is in the interest of all parties to a Complaint for a violation to be remedied as soon as possible and for workers directly affected by a violation to have the opportunity to be made whole, which is often not possible if a civil penalty is assessed. To the extent that is feasible, however, we encourage EE/FHO to establish rules that provide clearer guidelines as to how the agency will fulfill the mandate created in **§4-19-6(A)(4).**

Neither Part 5, or any other section of the Proposed Rules interpret what "voluntary compliance" actually means, the bounds of discretion which an Administrator has to determine what constitutes "voluntary compliance" in a particular instance, and how the Administrator might determine whether a Respondent has, in fact, adequately remedied a violation through the voluntary compliance process.

We encourage these guidelines to require that voluntary compliance of a violation that resulted in specific harm to a Complainant, such as violations of the Ordinance's anti-retaliation provisions or other violations of an employee's right to accrue or use earned sick time, be designed to provide relief to the individual affected and remedy the harm caused to them. We further suggest that these guidelines address violations that do not involve direct interference with an employee's lawful use of earned sick time, such as failure on the part of the employer to post the required signage or satisfy the other notice provisions in the statute, be forward-looking. In order to verify whether a Respondent has established voluntary compliance with the ordinance for the purposes of **Part 5(D)**, EE/FHO, whenever practicable, should communicate with the Complainant or other employees of the Respondent who may have personal knowledge of the matter.

§4-19-7(C) authorizes EE/FHO to inform employees at a worksite of any investigation of a Complaint from that worksite. The Rules should explain when EE/FHO shall exercise this authority and how.

WDP suggests that informing employees under this section is especially appropriate when investigating violations suggestive of grave misconduct, especially when such violations are

alleged in anonymous Complaints, unless EE/FHO has reasonable belief that doing so may cause harm to the Complainant.

In circumstances like these, WDP recommends that the Rules authorize EE/FHO to post notices under this section in conspicuous locations of a worksite for a delineated period of time, such as 21 days. Notices posted under this section should (1) state that EE/FHO has received a Complaint alleging a violation of the Ordinance at this worksite; (2) provide instructions explaining how employees can report potential violations of the Ordinance to EE/FHO; (3) remind employees that the Ordinance forbids employers from retaliating against employees who report violations; and (4) clearly and conspicuously specify the earliest date that the employer can remove this posting from the prescribed location at the worksite. Similar to the signage required under **§4-19-4,** any postings made pursuant to **§4-19-7(C)** should be displayed in all appropriate languages. The size and location of notices posted under this section should equal the signage specifications prescribed by EE/FHO in accordance with **§4-19-4(B).**

Part 3. Filing of Complaints

Part 3(A) provides that EE/FHO will only investigate timely Complaints. We suggest that this Proposed Rule be revised to allow for late-filed Complaints to be considered if the Complainant, in writing, demonstrates good cause. Good cause should include retaliation by the employer under **§4-19-5** or failure of an employer to comply with **§4-19-2(L),** if applicable, or **§4-19-4** of the Ordinance.

Part 3(B) provides that an Administrator both may prescribe forms for filing a Complaint and additional administrative procedures. To ensure that the process established in Part 3 is as accessible as possible, WDP suggests that the final rules clearly establish the Administrator's obligation to ensure that the procedures for filing a Complaint are accessible to those who speak, read, or understand languages other than English with various levels of proficiency, and to those with various degrees of access to or familiarity with computers or the Internet.

WDP recommends that EE/FHO reviews earned sick time complaint forms developed by other cities and seek input from stakeholders before prescribing Austin's form. WDP would be happy to provide additional feedback regarding the content of this form. To be effective, WDP recommends that the form encourage Complainants to provide not only their own contact information but that of an emergency contact that can be reached by an Investigator or Administrator if EE/FHO is otherwise unable to reach the Complainant. The complaint form should also inquire about the preferred method of communication between EE/FHO and the Complainant (such as phone, email, snail mail, text message) and the time of day that the Complainant is most likely to be available. In WDP's experience, forms that list the potential violations under the Ordinance and allow the Complainant to indicate which of the potential violations may apply to them has proven useful in educating the public about what constitutes a violation under the Ordinance and ensuring that investigators are provided with sufficient information at the outset to conduct a thorough investigation of all potential claims.

Finally, in developing the prescribed form under this Rule, EE/FHO should be mindful of how the form can assist the agency in collecting data that will be useful for its preparation of the annual report to be published under **§4-19-8**.

The Rules should include additional provisions under **Part 3** to establish how the EE/FHO will receive anonymous complaints alleging a violation of the Ordinance pursuant to **§4-19-6(A)(2)**. At the very least, **Part 3** should establish that a Complainant need not disclose identifying information in order for their Complaint to be deemed filed.

WDP also recommends that an additional provision be added under **Part 3** that shall require EE/FHO, except when not practicable in the case of anonymous complaints, to provide a written notice to the Complainant to inform them (1) when EE/FHO received their Complaint (2) whether their Complaint was "timely filed", and if so, (3) summarizes the next steps in the investigation process.

Part 4. Investigation of Complaints

Investigating Anonymous Complaints
The Proposed Rules do not seem to address how EE/FHO will fulfill the mandate established in **§4-19-6(A)(2)** to investigate anonymous complaints. For example, the investigation process described in **Part 4(C)** seems conditional on an Investigator's ability to interview a Complainant, which is not likely to be possible if a Complaint has been filed anonymously.

It would contradict the intent of **§4-19-6(A)(2)** if the Rules established a process that summarily rejected any Complaints filed anonymously. Whether or not a Complaint is filed anonymously, a Complainant interview is not always going to be necessary for EE/FHO to fully of fairly investigate many violations of the Ordinance.

To to ensure that EE/FHO complies with the mandate established in **§4-19-6(A)(2)**, the Rules should require the agency to investigate anonymous complaints to the fullest extent practicable. Furthermore, the Rules should prohibit EE/FHO from dismissing an anonymous Complaint until the agency has exhausted all reasonable efforts to investigate the anonymous Complainant's allegations.

Ensuring Complaints Are Investigated in a Timely Manner
While ensuring a thorough investigation of Complaints is essential, **Part 4** should reduce the likelihood that Complaints will languish unnecessarily with EE/FHO. EE/FHO should remain mindful that many people filing Complaints under the Ordinance may be experiencing extreme financial hardship as a result of the violations alleged in the Complaint or the circumstances that have necessitated their need for earned sick time. EE/FHO should make all reasonable efforts to resolve their Complaints expeditiously without compromising the integrity of the investigation process.

In addition, EE/FHO should endeavor to fastrack Complaints that allege violations of **§4-19-5** or otherwise allege violations that may necessitate an urgent remedy. Many other labor

enforcement agencies have established protocols to ensure that retaliation investigations occur on a faster timeline than other investigations in recognition of the time-sensitive nature of these complaints.

Ensuring that All Parties Feel Safe Participating in the Investigation Process
The Rules should reiterate that the Ordinance applies to all employees, regardless of immigration status. **Part 4,** in particular, should clearly state that, during the course of an investigation, parties will neither be required to provide, nor will EE/FHO request, information regarding the immigration status of any Complainant, witness, or Respondent.

Part 4(C)(1). WDP recommends that this section be revised to say "Within 5 business days of receiving the assignment, the Investigator will make all reasonable efforts to schedule an initial in-person or phone interview with the Complainant, unless the Complainant has filed anonymously and scheduling a follow-up interview is not possible."

Part 4(C)(2). It is possible that the initial Complaint will contain insufficient information about the Respondent or insufficient information for a Respondent to meaningfully respond to the violations alleged in the Complaint until the Investigator is able to solicit additional information from the Complainant pursuant to Part 4(C)(1).

WDP recommends the following revised language for this Rule:

> "Within 5 business days of receiving the assignment or confirming the employer implicated in the Complaint, the Respondent will be sent a copy of the Complaint and a request for responsive information. The Respondent will be given 14 days from the date of receipt to respond.
>
> This written response must specifically state the Respondent's position regarding the allegations set forth in the Complaint. If the Respondent admits to violating the Ordinance, their response must address how the Respondent will remedy this violation and, if applicable, make the Complainant whole. If the Respondent denies the allegations, they must specifically state how the Respondent is in compliance with the Ordinance and provide the responsive information requested. The Respondent may also provide any additional information it believes is relevant to the investigation of the Complaint."

To ensure the timely resolution of Complaints, the Rules should permit and encourage Respondents who admit to violating the Ordinance in their written response to proactively remedy the violations alleged in the Complaint. Upon confirming satisfactory remedy of the violation in consultation with the Complainant, if possible, EE/FHO should issue a notice of dismissal so that the Respondent may avoid receiving a violation notice under **Part 5(C)(3)(c).**

Part 4 should require EE/FHO to send to the Complainant copies of any written response to a Complaint furnished by a Respondent under **Part 4(C)(2) or Part 4(D)**.

Part 4 should provide additional guidance as to how a Respondent's failure to provide a written response to the Complaint or other information requested under these Rules will impact the

investigation of a Complaint. Part 4 should establish that if the Respondent fails to provide a timely written response to the Investigator pursuant to **Part 4(C)(2)** or fails to timely provide information requested pursuant to **Part 4(C)(2) or Part 4(D),** the EE/FHO will rely only on the information provided to the agency when making a final determination.
Part 4 should permit a Respondent to request additional time to submit the written response or the information requested under these Rules, and require such request to include the amount of additional time the Respondent needs provide its response and any requested information, and the reasons why the Respondent cannot respond in the the time allowed. The Rules should establish that EE/FHO's grant or denial of this request is not appealable.

Part 4(E) should be revised to state "The Complainant and the Respondent may submit witness statement and documents during the investigation that prove or disprove the allegations of the Complainant or the Respondent. The Investigator may request additional witnesses or documents from either the Complainant or the Respondent during the investigation and shall designate the deadline in which such testimony or documents should be provided. Additional witnesses or documents must be provided to the Investigator within 21 days from the date of the Investigator's request. Prior to recommending a final determination, the Investigator will make a final request for information from the Complainant and the Respondent. Information received from either party after the deadline prescribed in these Rules will not be considered by the Investigator or the Administrator."

Part 5. Final Determinations on Complaints

Part 5(B) should be revised to read that the recommended final determinations shall be made to the Administrator within 45 days of assignment of the Complaint to the Investigator. The Investigator shall provide the Complainant, Respondent, and Administrator written justification concerning any Complaint for which a recommended final determination is not made within 45 days of the date the Complaint is assigned. This written justification shall include the date the Investigator needs to complete its recommended final determination of the Complaint."

Part 5(C)(2) should require that any written notice of dismissal of a Complaint be issued to "the Complainant and the Respondent." Such notices of dismissal should include a brief statement which explains the Administrator's justification for dismissing the Complaint. In addition, written notices issued under the Rules should advise Complainants of their rights to file a future complaint with EE/FHO within the statutory period with additional evidence that supports the allegations alleged in their Complaint. Notices issued under this section should also advise of the Complainant's right to appeal the Complaint's dismissal.

Part 5(C)(3) should be revised to ensure that written notices issued under this Rule are sent to both the Respondent and the Complainant, include a brief statement justifying the Administrator's decision to issue a violation notice, and advise of the Respondent's right to appeal the Administrator's decision.

Part 5(D): WDP reiterates its recommendation that, whenever possible, an Administrator should consult with the Complainant or other employees with personal knowledge when seeking to

determine whether the Respondent has satisfactorily remedied the violation and voluntarily complied with the Ordinance within the required timeline.

Part 5(F) allows for an Administrator to dismiss a Complaint if it concludes that the Respondent is exempt from the Ordinance or the Ordinance does not otherwise apply to the Respondent. Any dismissal issued pursuant to this Rule should be sent to both the Complainant and the Respondent and advise the Complainant of their right to appeal. It is imperative that Complainants have the right to appeal dismissals issued pursuant to this Rule.

Part 5(G). As mentioned above, WDP recommends that this Rule be reversed and that parties have the right to appeal an initial determination of a Complaint. Because EE/FHO is not empowered to authorize Rules that exceed the bounds of the Ordinance, WDP recommends that persons assigned to adjudicate appeals under these Rules be EE/FHO personnel who do not have any involvement in the investigation of a Complaint, or any involvement in an Administrator's decision to take any of the actions described in **Part 5(C)(1)-(3).**

WDP recommends that this appeals adjudicator:

- Set the date for a de novo hearing and send parties appropriate notice of the hearing in writing. This notice should include a short, plain statement of the issues to be considered during the hearing;
- Have the authority to postpone or continue a hearing for good cause;
- Conduct a de novo hearing to ascertains the substantive rights of the parties, develop the evidence, and address all issues relevant to the appeal;
- Issue a written decision to the parties that is restricted to the matters mentioned in the hearing notice and based exclusively on the evidence entered into the hearing's record. This decision should include findings of fact and conclusions of law reached on the noticed issues, as well as the adjudicator's decision regarding whether the determination reached under Part 5(C) is affirmed, reversed, or modified.

WDP suggests that the Rules permit this hearing to be conducted either in-person or by telephone, depending on the convenience of the parties.

Part 5(H). WDP recommends that that final determination of a Complaint under **Part 5(C)** be made within 90 days of assignment to an Investigator and that the written justification described in this Rule be provided to both the parties and the Administrator within 90 days of the date a Complaint is assigned to an Investigator.

Part 6. Assessment and Collection of Civil Penalties.

Part 6(A). We find the proposed civil penalty scheme confusing. In **Part 6(A)(1)(d),** does EE/FHO intend to establish that a $500 penalty shall be assessed any time an employer commits more than one violation in a 12-month period? Or, in this Rule, does EE/FHO suggest that there shall be a $500 penalty for the fourth and any subsequent violation found within a 12-month period? We have a similar questions about the intended interpretation of **Part 6(A)(2)(c).** We

also are unsure how the proposed penalty scheme applies to Complaints where more than one violation is found.

WDP also does not believe that the proposed penalties are high enough, especially when compared with the impact that many violations of the Ordinance have on employees and their families. The cost that a Respondent's violation can have on an employee - losing a day's wages, being unable to be at the bedside of a loved one, or having to forego needed medical care - are certainly greater than many of the civil penalties proposed.

WDP recommends removing any distinction between smaller and larger employers as a matter of fairness and practicality. By designing the civil penalty scheme based on employer size, the Proposed Rules will require EE/FHO to confirm the number employees employed by the employer on the date the Complaint is filed for every single Complaint. Determining the number of employees present at the time of Complaint filing for every single Complaint is not only time-consuming, but likely unnecessary. Many potential Complaint investigations would not otherwise require a determination of employer size. Complaint investigations that do already require a determination of employer size task the Investigator with confirming the number of employees employed potentially at a different point in time than the date established under **Part 6(A)**.

Except as provided in **Part 6(B)**, WDP recommends that **Part 6(A)** establish for all employers: (1) a $500 civil penalty for any violation of **§4-19-5;** (2) a $250 civil penalty per violation for any first-time violation, other than a violation of **§4-19-5;** and (3) a $500 civil penalty per violation for any subsequent violation.

Part 6(B) provides EE/FHO with discretion to increase or decrease the penalties proposed in **Part 6(A).** While WDP supports the Rules providing EE/FHO with some degree of discretion to adjust the penalties established in **Part 6(A)**, the discretion granted in the Proposed Rule seems excessive and unwieldy. WDP recommends limiting EE/FHO's discretion to increase penalties only when the determined violations indicate bad faith or malicious misconduct on the part of the Respondent. WDP does not believe that EE/FHO should have the discretion to decrease the amount of penalties proposed under 6(A).

Part 7. Closure of Complaint Investigations

Part 7(A). This Rule should require EE/FHO to issue written notice of closure to the Respondent and the Complainant. This notice should be sent within 5 days of the date an investigation is closed pursuant to this Rule, briefly state the reason for the investigation's closure, and advise the Respondent that any records retained beyond the required period pursuant to **§4-19-2(K)** may now be destroyed.

Part 7(A)(1) WDP also recommends that the Rules amend this section to account not only for instances where a Complaint is withdrawn, but also instances where a Respondent voluntarily remedies a violation prior to receiving a notice of violation and civil penalty assessment under **Part 5(C)(3)(c).**

Part 7(A)(2) provides for the closure of Complaints upon a determination that the preponderance of evidence does not establish a violation of Chapter 4-19. WDP recommends that the Rules clarify that Complainants whose Complaint is closed pursuant to this section not be prejudiced from refiling within the statute of limitations.

Part 7(A)(5) WDP recommends that this Rule be rephrased to prevent any Complaint from being unjustly or prematurely closed. Prior to closing any Complaint pursuant to this Rule, WDP recommends that the Rule require EE/FHO to issue a written notice to the Complainant which advises the Complainant that their Complaint shall be closed unless the Complainant communicates with the EE/FHO within 21 days of receipt of the notice. If, following this 21-day period, the Complainant fails to respond to this notice and further attempts by EE/FHO to reach Complainant, the Administrator may determine that the Complainant has abandoned the Complaint. We suggest revising this Rule to state:

(5) The Administrator determines that the Complainant has abandoned the Complaint. A Complainant abandons a Complaint only after:
  (i) The Administrator determines that the Complainant has failed to reasonably cooperate with an Investigator's attempts to reach the Complainant or obtain information from the Complainant;
  (ii) An Investigator sends the Complainant written notice informing Complainant that their Complaint is at risk of closure under this section unless the Complainant communicates with the Investigator within 21-days of receipt of this notice; and
  (iii) The Complainant fails to respond to this notice or other attempts by the Investigator to reach the Complainant during this 21-day period.

Additional Comments Concerning Confidentiality and Privacy

In order to protect employees from being retaliated against for pursuing their rights under this Ordinance, EE/FHO should articulate, in these Rules, that the agency will seek to maintain the confidentiality of a Complainant whenever practicable. Suggested language for this Rule could be: "EE/FHO shall maintain the confidentiality of a Complainant unless disclosure of Complainant's identity is necessary for resolution or investigation of a Complaint, or is otherwise required by law. To the extent practicable, an Investigator or Administrator shall notify Complainant that the agency will be disclosing their identity prior to such disclosure."

These Rules and other outreach and education efforts conducted by EE/FHO shall also advise of an employer's duties to ensure that employees' right to privacy is protected. Employers should not disclose any information they obtain about an employee's need to use earned sick time unless such disclosure is requested or consented by an employee, ordered by a court or administrative agency, or otherwise required by law. If an employer happens to obtain any health information about an employee or an employee's family member, the employer should treat such information in a confidential manner and protect such information from disclosure, as required by applicable privacy laws.

Thank you for your consideration of these comments. Austin's workers deserve access to earned sick time and faithful implementation and enforcement of this Ordinance. WDP is always eager to work with EE/FHO to ensure that all eligible workers in this City are able to avail themselves to their right to earned paid sick time.

Sincerely,

/s/ Stephanie Gharakhanian

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