

Late Backup

ORDINANCE NO.**AN ORDINANCE ESTABLISHING EARNED SICK TIME STANDARDS IN
THE CITY; CREATING A CIVIL PENALTY****BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:****PART 1. Findings:**

- (A) The council finds that most workers in the City of Austin will at some time during each year need limited time off from work to care for their own health and safety needs or the health and safety needs of a close family member.
- (B) The council further finds that denying earned sick time to employees:
 - (1) is unjust;
 - (2) is detrimental to the health, safety, and welfare of the residents of the City; and
 - (3) contributes to employee turnover and unemployment, and harms the local economy.

The council further finds that it is within the police power and the responsibility of the City to remedy the problems enumerated in parts (A) and (B) of this Section.

PART 2. Title 4 of the City Code is amended by adding a new Chapter 4-19 to read:**ARTICLE I. – IN GENERAL****§4-19-1. DEFINITIONS.**

In this Chapter:

- (A) *Administrator* means the Equal Employment/Fair Housing Office administrator.
- (B) *Aggravated Assault* means an act that constitutes a violation under Texas Penal Code, Section 22.02.
- (C) *Aggravated Sexual Assault* means an act that constitutes a violation under Texas Penal Code, Section 22.021.
- (D) *Assault* means an act that constitutes a violation under Texas Penal Code, Section 22.01.

- (E) *Calendar year* shall mean a regular and consecutive twelve (12) month period as determined by an employer and may be based on an employee's employment anniversary date.
- (F) *Chain establishment* means an establishment doing business under the same trade name used by two (2) or more establishments, or under the same ownership and doing the same business, whether such other establishments are located in the city or elsewhere and regardless of the type of ownership of each individual establishment.
- (G) *City* means the City of Austin.
- (H) *Dating Violence* has the meaning given in Texas Family Code, Section 71.0021.
- (I) *Earned Sick Time* means leave, paid or unpaid, that may be used for the same purposes and under the same conditions as section 4-19-14.
- (J) *EEO/FHO* means the City of Austin Equal Employment Opportunity/Fair Housing Office.
- (K) *Employee* means any individual employed by an employer, including temporary employees and part-time employees, who performs work within the geographic boundaries of the city for at least eighty (80) hours in a calendar year for that employer. For purposes of this chapter, "employee" does not include the following:
- (1) independent contractors; or
 - (2) unpaid interns.
- (L) *Employer* means a person or entity that employs at least one (1) or more employees whose primary work location is in the City for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. The term includes an individual, company, corporation, firm, partnership, labor organization, association, nonprofit organization, or group of persons. For purposes of this chapter, "employer" does not include any of the following:
- (1) the United States government;
 - (2) a corporation wholly owned by the United States government;
 - (3) the state or a state agency; or
 - (4) a political subdivision of the state, except the city.
- (M) *Exempt employee* means an employee who is exempt from overtime payment requirements under federal or state law.

- (N) *Family member* means the employee's child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, guardian, ward, members of the employee's household, or domestic partner.
- (O) *Family Violence* has the meaning given in Texas Family Code, Section 71.0004.
- (P) *Independent contractor* means a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:
- (1) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
 - (2) is free to determine the manner in which the work or service is performed, including the hours of labor or method of payment to any employee;
 - (3) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
 - (4) possesses the skills required for the specific work or service.
- (Q) *Regular rate of pay* means the employee's hourly rate, including payments for shift differentials, for an hourly employee or an equivalent rate for an exempt employee. Regular rate of pay does not include:
- (1) Tips.
 - (2) Commissions.
 - (3) Reimbursement for expenses incurred on the employer's behalf.
 - (4) Premium payments for overtime work or work on Saturdays, Sundays, holidays, or scheduled days off, if the premium rate is at least one and one-half ($1\frac{1}{2}$) times the normal rate.
 - (5) Bonuses.
 - (6) Cash or other valuables in the nature of gifts on special occasions.
 - (7) Payments made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan.
 - (8) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.
- (R) *Sexual assault* means an act that constitutes a violation under Texas Penal Code, Section 22.011.

- (S) *Stalking* means an act that constitutes a violation under Texas Penal Code, Section 42.072.
- (T) *State* means the State of Texas.

§4-19-2. Annual Report.

Beginning in 2019, and each year thereafter, the administrator shall provide by May 31st, a written report to the city council, or the appropriate committee of the city council, regarding this chapter. The report shall include, but not be limited to, a discussion of the implementation and enforcement of this chapter, including the number and nature of violations, specific violations, industries and occupations with high rates of violations, penalties assessed in the prior year, and the impact on small businesses. The report may also include recommendations for possible improvements to this chapter.

§4-19-3. Preemption.

Nothing in this chapter shall be interpreted or applied so as to create any power or duty in conflict with federal or state law.

§4-19-4. Effective date.

- (A) This chapter is effective August 1, 2018.
- (B) For alleged first violations arising during the first twelve (12) months following the effective date of this chapter, other than violations of section 4-19-16, the EEO/FHO must only mediate disputes and issue warnings and notices to correct. For subsequent violations arising during the first twelve (12) months following the effective date of this chapter and for violations arising after that time period has passed, the administrator may impose the relief and penalties provided in section 4-19-7.
- (C) For employers, other than chain establishments, operating in their first twelve (12) months after the hire date of the employer's first employee are required to provide unpaid sick time but are not required to provide paid sick time. After twelve (12) months, the employer will be subject to the ordinance providing paid sick time.

ARTICLE II. - IMPLEMENTATION AND ADMINISTRATIVE ENFORCEMENT

§4-19-5. Authority.

- (A) The administrator has broad authority to implement, administer and enforce this chapter. The administrator shall have broad authority to investigate possible violations of this chapter whenever it has cause to believe that any violation of this chapter has occurred, either on the basis of a report of a suspected violation or on the basis of any other credible information, including violations found during the course of an investigation.
- (B) The administrator shall promulgate appropriate rules to implement, administer and enforce this chapter. Such rules shall:
- (1) Be consistent with this chapter and may be relied on by employers, employees, and other persons to determine their rights and responsibilities under this chapter.
 - (2) Establish procedures for fair, efficient, and cost-effective implementation and enforcement of this chapter, including rules ensuring timely review of reports of violation and governing procedure for any appeals to an administrative hearing officer under section 4-19-8.
 - (3) Establish procedures for informing employers of their duties and employees of their rights under this chapter and monitoring employer compliance.

The administrator shall publish, maintain, and make available to the public any such initial rules at least ninety (90) days prior to their effective date. Any revisions to published rules shall be published, maintained, and made available to the public at least thirty (30) days prior to their effective date.

§4-19-6. Implementation.

- (A) The administrator shall work with all relevant city departments, state and federal agencies, divisions, departments, bureaus or institution of government to implement, promote and enforce this chapter. The administrator shall explore work-sharing agreements with the other jurisdictions or entities to accomplish the goals of this chapter.
- (B) The administrator shall develop and implement a multilingual and culturally specific outreach and community engagement program to educate employees and employers about their rights and obligations under this chapter. This outreach program shall

include media, trainings and materials accessible to the diversity of employees and employers in the city.

§4-19-7. Enforcement.

- (A) *Report of violations.* An employee or other person may report to the EEO/FHO any suspected violation of this chapter. A report of a suspected violation may be filed only if the matter complained of occurred after the effective date of this chapter and within three hundred sixty-five (365) days prior to filing of the report.
- (B) *Investigation process.*
- (1) The EEO/FHO has sole discretion to decide whether to investigate or to pursue a violation of this chapter. If the EEO/FHO decides not to investigate or otherwise pursue a report of suspected violation, the EEO/FHO must provide a written notification to any employee or other person who filed the report that the EEO/FHO is declining to further investigate the report and reason for declining. The employee or other person may within twenty-one (21) days, file a request for reconsideration with the administrator. The administrator must provide a written response on the reconsideration within ten (10) days.
 - (2) The EEO/FHO may initiate an investigation pursuant to a complaint or when the administrator has reason to believe that a violation has occurred. To pursue a violation of this chapter, the administrator must serve a notice of investigation setting forth the allegations and pertinent facts upon an employer by U.S. mail. The notice of investigation shall be accompanied by a request for a written position statement and may include a request for records or other information. The notice shall also inform the employer that retaliation for claiming rights under this chapter is a basis for additional monetary damages.
 - (3) An employer's position and response to any request for records must be provided to the EEO/FHO as provided in the EEO/FHO's rules. An employer's failure to provide a position statement or to timely and fully respond to a request for records or any other reasonable request issued by the EEO/FHO pursuant to an investigation creates a rebuttable presumption of a violation of this chapter for the purposes of the investigation and determination of violation. An employer that fails to respond to a request for records may not use such records in any appeal pursuant to section 4-19-8 to challenge the

correctness of any determination of violation by the administrator of damages owed or penalties assessed.

- (4) Investigations shall be conducted in an objective and impartial manner.
- (5) The EEO/FHO shall consider any statement of position or evidence with respect to the alleged violation which the employee or person who filed the report of suspected violation or employer wishes to submit.
- (6) The EEO/FHO may require a fact finding conference or participation in another process with the employer, employee, or other person who filed the report of a suspected violation, and any of their agents and witnesses during the investigation in order to define the issues, determine which elements are undisputed, resolve those issues that can be resolved and afford an opportunity to discuss or negotiate settlement.

(C) *Administrator determination of violation.* Except when there is an agreed upon settlement, the administrator must issue a written determination of violation with findings of fact resulting from the investigation and a statement of whether a violation of this chapter has or has not occurred based upon a preponderance of the evidence before the EEO/FHO. The determination of violation must be issued to the employer and any employee or other person who filed the suspected violation report.

(D) *Relief and administrative fines.* The administrator may order any appropriate relief for a determination including, but not limited to:

- (1) Reinstatement and back pay
- (2) The crediting to an employee of any accrued earned sick time accrued but not credited.
- (3) An administrative warning, a fine payable to the city of up to two-hundred fifty dollars (\$250.00) for a first offence, or up to five hundred dollars (\$500) for subsequent offences for each day, or portion thereof, a violation of section 4-19-17, 4-19-18, or 4-19-19 that has continued following written notice to the employer of such violation with a period of no less than ten (10) business days to comply. Such funds shall be allocated to the EEO/FHO and used to offset the costs of implementing and enforcing this chapter.

(E) *Failure to exhaust administrative remedies.* If there is no appeal of the administrator's determination of a violation, that determination of violation shall constitute the city's final decision. An employer's failure to appeal the administrator's determination of a violation shall constitute a failure to exhaust administrative remedies, which shall serve

as a complete defense to any petition or claim brought by the employer against the city regarding the administrator's determination of a violation.

§4-19-8. Appeal.

- (A) An employee, former employee, or employer may appeal from a determination of violation by filing an appeal in writing with the EEO/FHO within twenty-one (21) days of the date of service of the determination of violation. Failure by the employer to file a timely, written appeal shall constitute admission to the violation, and the violation shall be deemed final upon expiration of the twenty-one (21) day period.
- (B) Upon an appeal of the administrator's determination of a violation, the EEO/FHO shall refer the matter to an administrative hearing conducted by an administrative law judge who, for purposes of this chapter and pursuant to the EEO/FHO's rules, are authorized to hear such appeals.
 - a. Chapter 2001 (*Administrative Procedure Act*) of the Texas Government Code governs an administrative hearing under this section.
- (C) In such an administrative hearing for an appeal, the administrative law judge shall consider the record submitted to it by the EEO/FHO, the written statements of positions by the parties involved, and may, in the discretion of the hearing officer, take testimony to resolve issues of credibility or factual disputes and hear oral arguments. The administrative law judge shall reverse the EEO/FHO's determination of violation only upon a finding that it is clearly erroneous. At the conclusion of an administrative hearing for an appeal, the administrative law judge shall issue a written decision to the EEO/FHO, including findings of fact. The administrative law judge's decision of the appeal shall constitute the city's final decision without any further right of administrative appeal.
- (D) The EEO/FHO shall notify the employer and the employee or other person who filed the suspected violation report at issue of the administrative law judge's decision.

§4-19-9. Civil enforcement.

Where prompt compliance is not forthcoming with a final determination of violation, the EEO/FHO may refer the action to the city attorney to consider initiating a civil action in a court of competent jurisdiction against an employer, for violating any requirement of this chapter and, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate

to remedy the violation, including, without limitation, the payment of lost wages, the payment of an additional sum as a civil penalty not to exceed twice the amount awarded for lost wages, and reinstatement in employment and/or injunctive relief and shall be awarded reasonable attorneys' fees and costs.

§4-19-10. Interest.

In any determination of violation under this chapter, the administrator or administrative law judge, as the case may be, shall award interest on all amounts due and unpaid at a rate of interest in accordance with Texas Finance Code, Chapter 304: Judgement Interest.

§4-19-11. Remedies cumulative.

The remedies, penalties, and procedures provided under this chapter are cumulative.

ARTICLE III. - PAID TIME OFF AND ACCRUED SICK TIME

§4-19-12. Determination of business size.

- (A) An employer's business size for the current calendar year is based upon the average number of employees per week during the previous calendar year, excluding family members.
- (B) For a new business, the employer's business size for the current calendar year is based upon the average number of employees per week during the first ninety (90) days after its first employee began work, excluding family members.
- (C) In determining the number of employees, all persons performing a substantial portion of their work in the city for compensation on a full-time, part-time or temporary basis shall be counted, excluding family members.
- (D) Employees jointly employed by two (2) employers must be counted by both employers, whether or not maintained on one (1) of the employer's payroll in determining an employer's business size. In those cases in which a professional employer organization is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the professional employer organization, or employees of other clients of the professional employer organization, if the client employer jointly employed those employees.

§4-19-13. Accrual of earned sick time.

- (A) Employees accrue a minimum of one (1) hour of earned sick time for every thirty (30) hours worked within the city. Earned sick time shall accrue only in hour-unit increments; there shall be no accrual of a fraction of an hour of earned sick time.
- (B) Exempt employees are deemed to work forty (40) hours in each work week for purposes of accruing earned sick time, except that such an employee whose normal work week is less than forty (40) hours will accrue earned sick time based upon the employee's normal work week.
- (C) Employers with 49 employees or less are not required to accrue in total for any employee more than that employee's average number of hours worked in a typical week. All other employers are not required to accrue in total for any employee more than that employee's average number of hours worked in a typical week multiplied by 1.5.
- (D) Employers shall permit an employee to carry over accrued but unused earned sick time into subsequent years limited by the amounts defined in (C).
- (E) Earned sick time under this chapter begins to accrue at the commencement of employment of the employee or this chapter's effective date, whichever is later.
- (F) The frequency with which an employer records earned sick time accrual may be in a manner consistent with current payroll practices as defined by industry standards or existing employer policies, provided such practice or policy is no less frequent than a monthly basis.
- (G) An employer may satisfy this section by providing an employee their max accrual of earned sick time after 180 calendar days has passed from their initial date of employment for use in accordance with the other provisions of this chapter.

§4-19-14. Use of accrued earned sick time.

- (A) Employees are entitled to use accrued earned sick time beginning 180 calendar days following commencement of their employment. After 180 calendar days of employment, employees may use earned sick time as it is accrued.
- (B) An employee may use earned sick time for:
 - (1) An employee's:
 - a. Mental or physical illness, injury, or health condition;
 - b. Need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or

c. Need for preventive medical or health care.

(2) The care of a family member:

- a. With a mental or physical illness, injury, or health condition;
- b. Who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
- c. Who needs preventive medical or health care.

(3) An absence due to domestic abuse (including aggravated assault, aggravated sexual assault, assault, dating violence, family violence), sexual assault or stalking of the employee or employee's family member, provided the absence is to:

- a. Seek medical attention related to physical or psychological injury or disability caused by domestic abuse, sexual assault, or stalking;
- b. Obtain services from a victim services organization;
- c. Obtain psychological or other counseling;
- d. Seek relocation due to domestic abuse, sexual assault, or stalking; or
- e. Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic abuse, sexual assault, or stalking.

(C) If the need for use is foreseeable, an employer may require advance notice of the intention to use earned sick time, but in no case shall require more than seven (7) days' advance notice. If the need is not foreseeable, an employer may require an employee to give notice of the need for earned sick time as soon as practicable.

(D) It is not a violation of this ordinance for an employer to require reasonable documentation that the earned sick time is covered by paragraph (B) for absences of three (3) or more consecutive days in which the employee was scheduled to work.

(E) An employer may not require, as a condition of an employee's using earned sick time, that the employee seek or find a replacement worker to cover the hours during which the employee uses earned sick time.

(F) An employer must allow an employee to use earned sick time in increments consistent with current payroll practices as defined by industry standards or existing employer policies, provided such increment is not more than four (4) hours.

(G) An employer with six (6) or more employees must compensate the employee at the same hourly rate with the same benefits as employee's regular rate of pay for the hours the employee was scheduled to work during the time the employee uses their

accrued earned sick time. Compensation is only required for hours that an employee is scheduled to have worked.

- (H) An employer with five (5) or less employees must allow employees unpaid use of accrued earned sick time.
- (I) An employee may only use earned sick time for hours the employee has been scheduled to work.
 - a. An employee who is not scheduled to work but requests additional work hours is not entitled to use earned sick time for those additional hours if such request comes three (3) business days or less from the requested work hours. This restriction does not apply if the employee's shift is part of a voluntary exchange of hours or trade shifts as described in section 4-19-22.
- (J) An employer may opt to satisfy the requirements of this Chapter for employees by:
 - (1) Agreement with an organization representing at least 25% of the employer's eligible employees under this ordinance that establishes rights and terms for pay and benefits; or
 - (2) Adopting an alternative earned sick time or leave policy that is substantially compliant with this ordinance and approved by the administrator

§4-19-15. Confidentiality and nondisclosure.

If, in conjunction with this chapter, an employer possesses health or medical information regarding an employee or an employee's family member or information pertaining to domestic abuse, sexual assault, or stalking of an employee or an employee's family member, the employer must treat such information as confidential and not disclose the information except with permission of the employee, when ordered by a court or administrative agency, or when otherwise required by federal or state law.

§4-19-16. Exercise of rights; retaliation prohibited.

- (A) It shall be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter.
- (B) An employer shall not take adverse employment action or discriminate against an employee because the employee has exercised rights under this chapter. Such rights include, but are not limited to, requesting accrued earned sick time, using accrued earned sick time, informing any person about any employer's alleged violation of this

chapter, making a complaint or filing an action to enforce a right to accrued earned sick time under this chapter.

§4-19-17. Notice and posting.

- (A) The EEO/FHO shall, by the effective date of this chapter, publish and make available to employers, in all languages spoken by more than five (5) percent of the workforce in the city (as calculated by the EEO/FHO), notices suitable for posting by employers in the workplace informing employees of their rights under this chapter. The EEO/FHO shall update this notice on December 1 of any year in which there is a change in the languages spoken by more than five (5) percent of the city workforce.
- (B) Every employer shall post, in a conspicuous place at any workplace or job site where any employee works, the notices required by subsection (A). Every employer shall post this notice in English, and any language spoken by at least five (5) percent of the employees at the workplace or job site if published by the EEO/FHO.
- (C) An employer that provides an employee handbook to its employees must include in the handbook notice of employee rights and remedies under this chapter.

§4-19-18. Required statement to employee.

Upon request by an employee, the employer must provide, in writing or electronically, information stating the employee's then-current amount of:

- (1) Accrued earned sick time available to the employee; and
- (2) Used earned sick time.

Employers may choose a reasonable system for providing this notification, including, but not limited to, listing information on each pay stub or developing an online system where employees can access their own information.

§4-19-19. Employer records.

- (A) An employer must maintain accurate records for each employee showing:
 - (1) For non-exempt employees, hours worked.
 - (2) Hours of leave available for earned sick time purposes.
 - (3) Hours of leave used for earned sick time purposes.
- (B) The records required by this section must be retained for a period of not less than three (3) years in addition to the current calendar year.

- (C) An employer must allow an employee to inspect records required by this section and relating to that employee at a reasonable time and place.
- (D) The EEO/FHO shall have access to the records required by this section, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this chapter, including, but not limited to, inspection and copying of books and records, interviewing employees and former employees, and investigating alleged violations of this chapter. Social Security numbers and employees' personal addresses shall not be a matter of public record.
- (E) If an employer fails to maintain or retain adequate records or does not allow the EEO/FHO reasonable access to the records and an issue arises as to an alleged violation of an employee's rights under this chapter, it shall be presumed that the employer has violated this chapter, absent clear and convincing evidence otherwise.

§4-19-20. Termination; transfer; separation.

- (A) Nothing in this chapter may be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued earned sick time that has not been used.
- (B) If an employee is transferred to a separate division, entity, or location within the city, but remains employed by the same employer, the employee is entitled to all accrued earned sick time accrued but not used at the prior division, entity, or location and is entitled to use all accrued earned sick time as provided in this chapter.
- (C) When there is a separation from employment and the employee is rehired within ninety (90) days of separation by the same employer, previously accrued earned sick time that had not been used must be reinstated. An employee is entitled to use accrued earned sick time and accrue additional sick and safe time at the commencement of reemployment.

§4-19-21. Employer succession.

When a different employer succeeds or takes the place of an existing employer, all employees of the original employer who remain employed by the successor employer are entitled to all accrued earned sick time accrued but not used when employed by the original employer, and are entitled to use all accrued earned sick time previously accrued but not used.

§4-19-22. Employee exchange of hours.

- (A) Nothing in this chapter shall be construed to prohibit an employer from establishing a policy whereby employees may voluntarily exchange hours or trade shifts.
- (B) Nothing in this chapter shall be construed to prohibit an employer from establishing an incentive program whereby employees are incentivized to exchange hours or trade shifts.

§4-19-23. No effect on more generous earned sick time policies.

- (A) Nothing in this chapter shall be construed to discourage employers from adopting or retaining other leave policies, including accrued earned sick time policies, that provide for greater accrual or use by employees of earned sick time or that extends other protections to employees.
- (B) Employers, who provide their employees earned sick time under a paid time off policy or other paid leave policy that is substantially compliant with the accrual requirements for earned sick time under section 4-19-13 and may be used by the employee for the same purposes and under the same conditions as earned sick time under section 4-19-14, are not required to provide additional earned sick time.
- (C) Nothing in this chapter shall be construed to prohibit an employer from establishing a policy whereby employees may donate unused accrued earned sick time to another employee.
- (D) Nothing in this chapter shall be construed to prohibit an employer from advancing earned sick time to an employee prior to accrual by such employee.