Tonya Sapp

General Counsel

D.C Department of Employment Services

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Washington, D.C. 20019

Dear Tonya Sapp:

We write today on behalf of the organizations listed below to suggest revisions to the recently proposed regulations implementing the hardship exemption of the Accrued Sick and Safe Leave Act of 2008 (ASSLA or “the Act”).

Background

On May 24, 2013, your department gave notice of its proposal to amend Chapter 32, entitled “Accrued Safe and Sick Leave,” of Title 7 of the District of Columbia Municipal Regulations (DCMR) to establish the criteria for the granting of a hardship exemption from the requirements of the Act. The purpose of the Act is to require employers in the District of Columbia to provide paid leave for employment absences associated with illness, domestic violence and sexual abuse of employees or their family members.

Proposed Revisions

Under the ASSLA, the purpose of the hardship exemption is to allow businesses that can demonstrate their existence would be threatened if forced to comply with the ASSLA to apply for an exemption. Councilmember Evans, when proposing the amendment, said “this amendment protects the city’s tax base by ensuring that any business that might be overly burdened by the cost of implementation does not go under in an effort to comply with the provisions of the bill.” The purpose of the amendment was thus to protect businesses whose existence would be threatened by the requirement to provide sick leave. However, the Department’s proposed regulations are not limited to this narrow purpose. Rather, the breadth of the proposed regulations risk becoming a loophole through which businesses that can easily afford to provide sick leave to their employees could circumvent the law. To preserve the intent of the hardship exemption, we recommend the following revisions:

I. Maintain the definitions of hardship listed in § 3218.3(a)-(b), but strike the additional definitions of hardship listed in § 3218.3(c)-(d)  
  
§ 3218.3(a) and (b) define “hardship” in the way consistent with the statute and legislative intent. Sections (c) and (d) expand this definition to include highly subjective and arbitrary standards. They should be struck, as they are unnecessary to meet the goals of the hardship exemption, and are susceptible to abuse by businesses that do not need an exemption.

Sections (a) and (b) define hardship as anything that “(a) Threatens or will threaten the financial viability of the employer” or “(b) Jeopardizes the ability of the employer to sustain operations.” Both allow businesses to request hardship exemptions if providing sick leave would put them out of business. This fully covers the narrow exemption the council contemplated when the hardship exemption was proposed, and is therefore the broadest definition of hardship that the regulations should contain.

Section (c) would allow for a hardship exemption if the ASSLA “significantly degrades the quality of the employer’s operations.” Implementing this provision would require DOES to rate a business’s quality before and after they were required to provide sick leave. The provision provides no metric with which to evaluate the quality of a business, nor does anywhere else in the DC Code or Regulations provide such a standard. Granting any exemption under section (c) would therefore be arbitrary, difficult or impossible to administer, and contrary to the legislative purpose of the exemption.

Section (d) would allow for a hardship exemption if the ASSLA “creates a significant negative financial impact on the revenues or income of the employer.” This provision also provides no guidance for evaluating whether a business meets the vague standard it would establish. No rate is specified at which losses would be deemed “significant.” Would a business with a modest negative financial impact as small as a few hundred dollars in lost profit qualify? Again, this provision leaves the door open for arbitrary granting or denying of exemptions and is not necessary to protect the business the hardship exemption was designed to protect.

II. Consider the public health risks of an exemption when evaluating applications  
  
When determining whether to grant a hardship exemption, the DOES should consider the impact such an exemption would have on the public health, rather than limiting its scope to the economic impact on the business seeking the exemption. The ASSLA, in addition to protecting employees, is designed to protect the public health. Sick employees, if forced to come to work, pose a health risk both to their coworkers and to the general public. The degree of risk is likely greater in some industries, and some particular businesses, than others. Thus, before allowing a business to take that risk, the amount of risk posed by sick employees at that particular business should be considered in deciding if an exemption is appropriate.

III. Require public notice of hardship exemptions  
  
Businesses should be required to post public notice of their application for, and receipt of, a hardship exemption from the ASSLA. Given the public health goals of the ASSLA, the public has a right to know if businesses are not covered by its protections. If exempt from the ASSLA, businesses can require their employees to work, even when sick and potentially contagious. Fellow employees and DC residents should have the right to know that, by patronizing exempt businesses, they are risking exposing themselves to sick employees. Additionally, many citizens will likely not want to support businesses that cannot provide the minimal benefit for their employees required under the ASSLA. Requiring businesses to post notice of both their application for and receipt of a hardship exemption would serve that purpose. Alternatively, at the very least, a list of applying and exempt businesses should be made available on the DOES website and in the DC Register.

IV. Offer a public comment period   
  
In addition to the above notice requirement, the public should have the opportunity to give input on any application for a hardship waiver through a public comment period. Residents of the District, as well as neighbors of a business seeking an exemption, will likely have concerns that DOES should consider when deciding whether to grant an exemption. A public comment period for all applications would allow these concerns to be heard. If it is reasonable to allow such a period for consideration of liquor license applications, it is certainly reasonable to allow for public input before granting ASSLA exemptions, which may have even stronger public health implications.

V. Limit hardship exemptions to business in operation prior to the ASSLA

The hardship exemption should only be available to businesses in operation prior to the ASSLA. The purpose of the hardship exemption is to protect businesses whose narrow profit margins could not bear even the small unexpected cost of paid sick leave. Businesses opening after the ASSLA would be aware of the requirements of the ASSLA, which have now been effect for nearly five years, and the low cost of providing the minimal required paid sick leave to employees (only 11.5 cents of leave is accrued for each hour worked by employees with wages of $10 an hour who work for small businesses) would already be factored into the business plans and budgets as expected costs. A similar requirement is already in place for the hardship exemption to the smoking ban, a model the council looked to in creating the ASSLA hardship exemption. Thus, new businesses that began operating or substantially expanded after ASSLA was passed should not be eligible to claim they were unprepared for the costs of the ASSLA and granted exemptions from it.

**Require businesses seeking exemptions longer than a year to reapply every year**

As proposed, § 3218.6 says that the businesses seeking an exemption of greater than one year “may” be required to reapply after a year. This should be a requirement. If a business is jeopardized because they had not prepared for the minimal costs of providing safe and sick leave to their employees, it does not mean they cannot eventually incorporate these requirements into their business model. Thus, businesses should always be required to show ongoing hardship each year in order to obtain a continued exemption.

Through these revisions, the regulations implementing the hardship exemption to the ASSLA will be brought in line with the legislative goals of the hardship exemption, while still safeguarding the protective goals of the ASSLA as a whole for DC workers, customers, and residents. We urge you to include these revisions in the final regulations.

Sincerely,

Ari Weisbard, Deputy Director  
Employment Justice Center  
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On behalf of:

Center for Law and Social Policy   
D.C. Jobs Council  
Employment Justice Center   
Family Values at Work  
Jews United for Justice  
Restaurant Opportunities Center-DC  
Service Employees International Union Local 32BJ