

## City of Duluth Earned Sick and Safe Time Administrative Rules

### Contents

Purpose of the Earned Sick and Safe Time (ESST) Ordinance and Rules.....	2
Definitions.....	2
Employees Covered by the ESST Ordinance.....	5
Employees Exempted from the ESST Ordinance.....	6
Accrual and Banking of ESST.....	7
Use of Earned Sick and Safe Time.....	7
Records an Employer Must Keep.....	8
Employer Notice and Posting Requirements.....	9
Paying Employees when they use ESST.....	10
Employer Attendance Policies.....	11
When an Existing PTO Policy Complies with the Ordinance.....	13
Integrated Enterprises.....	14
Staffing Agencies and Temporary Employees.....	14
Sale of Business: Effects on ESST.....	14
Enforcement of ESST Ordinance.....	15
Appeal Process for Either Party.....	16
Remedies for Violations of ESST Ordinance.....	17
Retaliation against Employees is Prohibited.....	17
Civil Enforcement and Private Right of Action.....	18
Effect on Other Leave Such as FMLA.....	18
<b><u>Effect on Collective Bargaining Agreements.....</u></b>	<b><u>19</u></b>

## **Purpose**

### Duluth City Code §29E-1

The purposes of the City of Duluth's Earned Sick and Safe Time (ESST) Ordinance guide the ESST rules and the ESST rules govern the practices of the Duluth City Clerk's Office in administering, and enforcing the Ordinance. Those purposes are:

- 1) To promote the health and safety of the citizens of the city of Duluth by limiting exposure and spread of infectious diseases; and
- 2) To promote the health and welfare of workers in the city of Duluth by making it possible for workers to address their own health needs and the health needs of their families; and
- 3) To reduce healthcare costs by allowing workers to seek medical care for themselves and their family members, preventing minor medical issues from developing into major medical problems; and
- 4) To assist victims of domestic violence and their families by providing paid leave for treatment and protective action; and
- 5) To promote economic security and stability of workers and businesses in the city of Duluth by balancing the needs of both workers and employers.

## **Definitions**

### Duluth City Code §29E-2

Calendar Year: Calendar year means a consecutive twelve-month period as determined by an employer and may be based on an employee's employment anniversary date.

City: City means the city of Duluth

Child: Child means employee's biological, adopted, step or foster child, legal ward or child for whom the employee is legal guardian regardless of age.

Domestic Abuse: Domestic abuse means the following, if committed against a family or household member by a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats, criminal sexual conduct, or interference with an emergency call. Minnesota Statutes Sec. 518B.01

<https://www.revisor.mn.gov/statutes/cite/518B.01>

**Earned Sick and Safe Time:** Earned Sick and Safe Time means leave, including paid time off and other paid-leave systems, paid at the same hourly rate as an employee earns from employment that may be used for the same reasons as prescribed in Section 29E-4.

**Employee:** Employee means any person employed by an employer who performs work within the geographic boundaries of the city for more than fifty percent of the employee's working time in a twelve month period or is based in the city of Duluth and spends a substantial part of his or her time working in the city and does not spend more than fifty percent of their work-time in a twelve month period in any other particular place. Employee does not include (1) independent contractors; (2) student interns; (3) seasonal employees; and (4) any person entitled to benefits under or otherwise covered by the federal Railroad Unemployment Insurance Act.

**Employer:** Employer means an individual, corporation, partnership, association, nonprofit organization, or a group of persons who has five or more employees whether or not the employees work in the city. The number of employees is determined based on the average number of employees per week during the previous calendar year. Absent a contractual agreement stating otherwise, a temporary employee supplied by a staffing agency or similar entity shall be considered an employee of the staffing agency. The following employers are not covered by the Ordinance: (1) the United States government; (2) state governments; (3) county and local governments (excluding the city of Duluth).

**Family Member:** Family member means an employee's (1) child, adopted child, adult child, foster child, legal ward, step child, or child for whom the employee is a legal guardian; (2) spouse or domestic partner; (3) sibling, stepsibling, or foster sibling; (4) parent, stepparent, mother-in-law, father-in-law; (5) grandchild, foster grandchild, grandparent, step-grandparent; and (6) any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

**Independent Contractor:** A person who is asked to perform a job or service for another person or entity but also maintains a degree of control over the job or service.

In order to determine whether someone is an independent contractor or an employee, the following factors are weighed: does the individual in question (1) file self-employment tax returns; (2) maintain a separate business and use their own tools; (3) have a contract for performance of services with an employer; (4) realize a profit or suffer a loss under the contract to perform services; (5) incur the primary

expenses relating to the work performed; and (6) control the manner and means in which they perform work.

Independent Construction Contractors: In order to determine whether someone is an independent contractor or an employee in the construction industry, the following factors are weighed: does the individual in question (1) maintain a separate business with the individual's own Office, equipment, materials, and other facilities; (2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year; (3) is operating under a contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services; (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract; (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services; (6) receives compensation from the person for the services performed under the contract on a commission on per-job or competitive bid basis and not on any other basis; (7) may realize a profit or suffer a loss under the contract to perform services for the person; (8) has continuing or recurring business liabilities or obligations; and (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Integrated Enterprise: Means separate entities that form a single enterprise. Integrated enterprises are a single employer under the Ordinance. Examples of an integrated enterprise include, but are not limited to, a single entrepreneur with multiple businesses, a corporation with subsidiaries in the city, a corporation with franchisees located in the city, etc.

Piecework Compensation: Means paying employees based on how much they produce, rather than an hourly rate. Piecework compensation is common to agricultural work, call centers, translation, data entry, and manufacturing.

Retaliation: Retaliation means interference with, restraint, or denial of an employee's exercise or attempt to exercise any rights protected under the Ordinance. This includes any adverse employment action or discrimination against an employee due to any use or attempted use of Earned Sick and Safe Time.

Safe Time: Safe time means the need for paid time off for the purposes of providing or receiving assistance because of sexual assault, domestic abuse, or stalking. Minnesota Statutes Section 181.9413(b) <https://www.revisor.mn.gov/statutes/cite/181.9413>;

Seasonal Employee: A seasonal employee is a person employed for no more than ten months during any consecutive twelve month period, but who is expected to return to work year after year. Minn.Admin.Rule 3900.0400 sub. 18 <https://www.revisor.mn.gov/rules/3900.0400/#rule.3900.0400>

Sick Time: Sick time means the need for paid time off for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of the employee or an employee's family member.

Stalking: Means to engage in conduct which the actor knows, or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and the victim. Minnesota Statute section 609.749, <https://www.revisor.mn.gov/statutes/cite/609.749>

Student Intern: Student intern means an unpaid or paid student who is acquiring hands-on training, work experience, or clinical training in connection to a course of study or higher education program for a limited period of time.

Substantial Amount of Time: More than fifty percent of work-time.

### **Employees Covered by the ESST Ordinance**

Duluth City Code §29E-2(f)

1.1 Employees who work in Duluth are covered by the Ordinance so long as they spend more than fifty percent of their working time within the city.

- (a) An employer's reasonable, good-faith estimate of where a worker spends their working time is sufficient to determine whether they spend the majority of their working time in the city.
- (b) If an employee could reasonably dispute a lack of coverage under this threshold, the employer holds the burden to prove otherwise.
- (c) For employees employed for less than a twelve month period, an employer should make a reasonable, good-faith estimate as to where the employee will spend the majority of their time.

1.2 Both full-time and part-time employees are covered by the Ordinance.

1.3 Time spent travelling to work before the employee's shift begins and/or travelling home after the employee's shift has ended is not covered by the Ordinance.

1.4 Employees working from home (or otherwise telecommuting) are covered by the Ordinance for hours worked within the city.

### **Employees Exempted from the ESST Ordinance**

Duluth City Code § 29E-2(f)(1-4)

2.1 Independent contractors are not subject to the ESST Ordinance.

2.2 Student Interns are not subject to the ESST Ordinance.

2.3 Whether a worker is deemed to be an employee or a student intern shall be determined by consideration of the following factors:

- (a) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
- (b) The extent to which the internship provides training that would be similar to that which would be given in an education environment, including the clinical and hands-on training provided by educational institutions.
- (c) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- (d) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- (e) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- (f) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

2.4 Seasonal Employees are not subject to the ESST Ordinance.

2.5 All determinations of employee status, whether they are considered independent contractors, student interns, seasonal employees, etc., will be made by the City Clerk's Office on a case by case basis. When investigating, the City Clerk's Office will examine the entire relationship between the parties.

**Accrual and Banking of ESST****Duluth City Code §29E-3**

- 3.1 Employees accrue one hour of ESST for every fifty hours worked. For example, if Nadine works one hundred fifty hours, she accrues three hours of ESST. (150 hours worked / 50 = 3 hours of ESST)
- 3.2 Employees begin accruing ESST on their start date.
- 3.3 When calculating how many ESST hours an employee has accrued, employers must count hours actually worked. Employers are not required to count the hours taken off for ESST.
- 3.4 Hourly employees accrue ESST when they work overtime hours. However, there is no requirement to provide an “overtime pay rate” for ESST accrual.
- 3.5 Employees may accrue up to sixty four hours in one year, unless their employer opts to give them more ESST.
- 3.6 Employees may carry over up to forty hours of unused ESST from year-to-year.
- 3.7 Frontloading is permissible so long as it meets the minimum requirements of the Ordinance: at least forty hours of ESST must be provided to employees and they must be permitted to use this time under the same conditions as outlined in the Ordinance and corresponding rules.
- 3.8 If an employer makes paid leave available to employees that may be used for the same purposes and under the same conditions as required by the Ordinance and the use of which could reasonably be expected in practice to exceed the minimum accrual standards of the Ordinance, then accrual of such leave need not be tracked.
- 3.9 Accrual of fractions of hours is allowed for technical purposes provided that accrued ESST is made available for use in hour-units and is not required to be used in fractions of an hour.
- 3.10 An employer may, with the written consent of an employee, provide compensation to that employee for accrued but unused ESST instead of carrying over such ESST into the following year. Such compensation must be at least equal to the value of the accrued ESST if paid at the employee’s standard base pay rate.

**Use of Earned Sick and Safe Time****Duluth City Code §29E-4**

- 4.1 All covered employees can use ESST during times that they are scheduled to perform work in Duluth.

- 4.2 Employees can use ESST for overtime hours that they are scheduled to work or that they volunteered to work. ESST used for scheduled overtime is required to be paid only at an employee's regular rate, not at their overtime rate.
- 4.3 Employers are not required to permit use of ESST when an employee is suspended or otherwise on leave for disciplinary reasons.
- 4.4 Covered employees can begin using ESST ninety days after their start date. "Days" means calendar days, not working days or business days.
- 4.5 Employers may establish their own increments of time for using ESST so long as it is consistent with their existing business practice, provided that their practice complies with the Ordinance and these rules.
- 4.6 The smallest unit of time for ESST use established by the employer may not exceed four hours. However, if an employee has an ESST balance below the minimum time allowed by the employer, the employer must allow the employee to use their balance.

### **Records an Employer Must Keep**

#### Duluth City Code §29-E7

- 5.1 Provided an employer's paid leave plan does not fall under rule 3.8, employers must maintain records of the following three items for a period of three years:
  - (a) Employee hours worked in Duluth;
  - (b) Accrued ESST time;
  - (c) Used ESST Time.
- 5.2 Employers with a plan that falls under rule 3.8 must maintain records of employee hours worked in Duluth and used ESST time.
- 5.3 An employer may make a reasonable, good faith estimate of an employee's time spent working in the city for purposes of ESST coverage, accrual, and use. Documentation of how the estimate was derived may include, but is not limited to, dispatch logs, employee logs, delivery addresses, estimated travel times, or historical averages.
- 5.4 Employers may track total employee hours worked, rather than hours worked just in Duluth, if they already provide some form of paid time off that meets the requirements of the Ordinance.
- 5.5 Once the City Clerk's Office notifies an employer that an investigation has commenced, the employer may not destroy any ESST records until the employer is notified by the City Clerk's Office that the investigation has concluded and records older than three years can be destroyed.

5.6 For salaried workers who work in Duluth for more than fifty percent of their work time on a yearly basis, employers may maintain records of the employee's regular workweek hours, rather than tracking actual hours worked in Duluth, so long as the hours of a normal work week is used as the actual basis for the employee's accrued and used ESST.

5.7 Employers using an accrual-based PTO policy to comply with the Ordinance must track leave accrued and used; however, they are not required to track the specific reasons for the use of PTO.

### **Employer Notice and Posting Requirements**

#### **Duluth City Code §29E-6**

6.1 Employers must give notice to all covered employees of their rights and protections under the Ordinance.

6.2 The City Clerk's Office will produce a standard workplace notice poster for employers. Employers may comply with the Ordinance's notice requirements by posting the standard workplace notice poster in a conspicuous place where employees can reasonably be expected to see it, such as in a breakroom, by a punch clock, or at some common work meeting place.

6.3 If an employer does not utilize the City's standard workplace notice poster, but rather provides their own written notice, it must contain, at a minimum, the following information:

- (a) Employees are entitled to earned sick and safe time;
- (b) The amount of earned sick and safe time to which employees are entitled;
- (c) The terms of ESST use guaranteed under the Ordinance, as applicable:
  - When accrual starts;
  - When employees may begin using ESST;
  - The rate at which an employee accrues ESST;
  - The maximum number of hours an employee may accrue in a calendar year;
  - How ESST carries over to the next year;
  - That the employee can file a complaint with the City Clerk's Office;
  - That employer retaliation is prohibited and an employee may file a civil action for retaliation
- (d) If the employer provides ESST at the beginning of the year, in the form of frontloading, then the employer's written ESST policy must specify this to the employees.

6.4 Employer notification to employees must be likely to reach all employees, should enable an employee to provide reasonable notice of their desire to use ESST, and must be documented.

## **Paying Employees when they use ESST**

### Duluth City Code §29E-4(d)

- 7.1 Earned Sick and Safe Time must be paid on the date which the employee would have been paid for work, had the employee not used ESST.
- 7.2 Both hourly and salaried employees earn ESST.
- 7.3 When using ESST, hourly employees are compensated at their standard hourly rate.
  - (a) If an employee was scheduled to work overtime but uses ESST for the scheduled overtime, their employer is not required to pay the employee at the overtime rate.

## **Calculating hourly ESST rates for salaried employees**

- 7.4 To calculate the hourly rate of ESST for salaried employees:

- (b) Take the employee's total annual salary
- (c) Divide the annual salary by the number of weeks worked per year. This is the employee's weekly salary.
- (d) Divide the weekly salary by the number of hours of the employee's normal work week.

**Example:** Cadence earns \$80,000 salary and is not paid by the hour, but on average works 40 hours per week. Cadence's annual salary is \$80,000. Her weekly salary is \$1,538.46 ( $\$80,000 / 52 = \$1,538.46$ ). Her hourly ESST rate would be \$38.46.

## **Tips, Commissions, and Fluctuating Wages**

### Duluth City Code §29E-4(d)

- 7.5 Employees are not entitled to compensation for lost tips or commissions. ESST is required only for hours that an employee is scheduled to have worked.
- 7.6 For employees who are paid on a commission or with tips, the hourly rate of pay is the base wage.
- 7.7 For employees whose rate of pay fluctuates within a single job title depending on what duties they are performing for the employer, the hourly ESST rate is the standard hourly rate for the employee.

**Example:** Adriana is paid \$9.00 per hour as a barista, but sometimes receives a "premium" rate of \$11.00 per hour for shifts where she is scheduled as a coffee roaster. Adriana is

scheduled to work as a barista but calls in sick and uses ESST. Her ESST is paid out at \$9.00 because that is her standard rate of pay for the role which she was scheduled to perform.

7.8 For employees who are scheduled to work a shift of uncertain length (such as a shift that is defined by business needs rather than a specific number of hours), the employer may determine payment for ESST based on hours worked by a replacement employee. The replacement employee must have either worked the same shift or a similar shift. The employer must demonstrate this by way of documentation if there is an investigation.

### **Piecework Compensation**

7.9 For employees who are paid on piecework basis, the employer calculates the employee's rate of pay by doing the following:

- (a) Add together the employee's total earnings for the most recent workweek in which no sick time was taken. This is the employee's total weekly earnings.
- (b) Divide the total weekly earnings by the number of hours worked during the most recent workweek with no sick time used. This is the employee's hourly ESST rate.

**Example:** Kenzie works in a call center. She takes calls and does data entry. Kenzie is paid \$1.00 for every call she takes. She is paid \$1.00 for every 30 entries she makes. Last week, Kenzie took 700 calls and entered 3000 lines of data. She worked 30 hours. Kenzie was paid \$700 for her phone calls and \$100 for data entry. Her total earnings were \$800 ( $\$700 + \$100 = \$800$ ). Her hourly rate is \$26.67 ( $\$800 / 30 \text{ hours} = \$26.67 \text{ per hour}$ ). Kenzie requests ESST the following week. Her employer must reimburse her at a rate of \$26.67 per hour.

### **Employer Attendance Policies**

#### **Duluth City Code §29E-4(e)**

8.1 An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for absences and/or requesting leave, provided that such requirements do not interfere with the purposes for which the leave is needed.

8.2 If the reason for ESST is unforeseeable, the employee must provide notice as soon as is practicable. Notice may be provided on behalf of the employee by the employee's spokesperson, e.g., a spouse, coworker, adult family member, or other responsible party.

8.2.1 An employer may ask whether the absence qualifies for ESST, provided that the employer does not violate the privacy and confidentiality provisions of the Ordinance.

8.2.2 An employee may provide reasonable notice of an absence for ESST without explicitly referencing the Ordinance or using the terms “earned sick and safe time.”

8.3 For absences exceeding three days, an employer may take reasonable measures to verify or confirm that an employee’s use of ESST is for an authorized purpose as outlined in the Ordinance and these rules. This may include requiring that an employee provide reasonable documentation of the reasons for their use of ESST.

8.4 Reasonable documentation for sick time includes any documentation that indicates the employee sought and received medical treatment. This includes, but is not limited to, a doctor’s note.

8.5 Reasonable documentation for safe time must communicate that the employee or the employee’s family member is experiencing domestic violence, sexual assault, or stalking and that the leave as taken was for a purpose covered by the Ordinance. Reasonable documentation may include a police report, court order, or an employee’s written statement.

8.6 Reasonable documentation for ESST may not result in an unreasonable burden or expense on the employee. If an employer requires verification, and the employee anticipates that the requirement will result in an unreasonable burden or expense, the employee must be allowed to provide an oral or written explanation to their employer which asserts:

- (a) That the employee’s use of ESST was for an authorized purpose; and
- (b) How the employer’s verification requirement creates an unreasonable burden or expense on the employee.

The employer must consider the employee’s explanation. Within ten calendar days of the employee providing an explanation to their employer about the existence of an unreasonable burden or expense, the employer must make a reasonable effort to identify and provide alternatives for the employee to meet the employer’s verification requirement in a manner which does not result in an unreasonable burden or expense to the employee.

A reasonable effort by the employer to identify and provide alternatives could include, but is not limited to:

- (a) Accepting the oral or written explanation provided by the employee; or
- (b) Mitigating the employee’s out-of-pocket expenses associated with obtaining verification.

If after the employer considers the employee's explanation, the employer and employee disagree that the employer's verification requirement results in an unreasonable burden or expense on the employee:

- (a) the employer and employee may consult with the City Clerk's Office regarding the verification requirement; and/or
- (b) the employee may file a complaint with the City Clerk's Office.

8.7 "Three Consecutive Days" means three consecutive days that an employee is scheduled to work.

For example, if an employee is scheduled to work on Mondays, Wednesdays, and Fridays, and then the Employee uses ESST for any portion of those three work days in a row. If the employee uses ESST again on the following Monday, the employee would have absences exceeding three days.

8.8 If an employee works between using ESST absences, the employer may only request additional documentation for the second absence if at least two weeks have passed. For example, Henry pulls a muscle in his back and tells his employer that he will be on leave for three days, from Monday-Wednesday, and provides a doctor's note. Henry returns to work on Thursday. On Thursday night, Henry's back flares up again, and he uses ESST again on Friday. His employer may not require additional documentation for the second absence as less than two weeks have passed.

8.9 If an employer obtains any records or information about an employee or an employee's family member related to an employee or employee's family member's mental or physical illness, injury, or other health condition, domestic violence, harassment, sexual assault, stalking, or other safety related issues, such records or information are confidential and may not be released without express written permission of the employee, unless specifically required otherwise by law.

8.10 Upon mutual agreement by the employer and employee(s) involved, an employee may work additional hours or shifts, or trade shifts with another employee in lieu of using available ESST for missed hours or shifts that qualify for the use of ESST.

#### **When an Existing Paid Time Off (PTO) Policy Complies with the Ordinance**

##### **Duluth City Code §29E-3(d)**

9.1 If an employer has a PTO policy in place that meets the minimum requirements of the Ordinance, the PTO policy is sufficient and the employer does not need to provide additional ESST.

9.2 If an employee uses all paid leave under a general PTO policy for a reason unrelated to ESST, the employer does not need to provide additional leave for ESST under the Ordinance.

9.3 An employer providing a combined or universal leave policy, such as PTO, that meets the minimum requirements of the Ordinance, is not required to maintain records showing employee reasons for using PTO (e.g. vacation, sick time, safe time, etc.), only that the PTO was used and how much was used.

9.4 If an employer makes paid leave available to employees that may be used for the same purposes and under the same conditions as required by the Ordinance and the use of which may be reasonably expected in practice to exceed the minimum accrual standards of the Ordinance, then such a policy may be deemed compliant.

### **Integrated Enterprises**

10.1 The City Clerk's Office will determine the existence of an integrated enterprise by assessing the degree and control exercised by one entity over the operation of another entity. The factors in this assessment include, but are not limited to:

- (a) Degree of interrelation between the operations;
- (b) Degree to which the entities share common management;
- (c) Centralized control of labor relations; and/or
- (d) Degree of common ownership or financial control over the entities.

10.2 If the City Clerk's Office determines an integrated enterprise exists, the integrated employer must provide ESST to every covered employee working within the city.

### **Staffing Agencies and Temporary Employees**

Duluth City Code §29E-2(g)

11.1 An employee supplied by a staffing agency is an employee of the staffing agency for purposes of the Ordinance, unless there is a contractual agreement stating otherwise.

### **Sale of Business: Effects on ESST**

Duluth City Code §29E-8(c)

12.1 If an employer sells its business or the business is otherwise acquired by another business, employees retain and may use all accrued ESST if the employee continues to work within the city for the successor employer.

## **Enforcement of ESST Ordinance**

### **Duluth City Code §29E-10**

13.1 An employee or other person may report to the City Clerk's Office any suspected violation of the Ordinance. A report of a suspected violation must be filed within one year of the suspected violation.

13.2 The City Clerk's Office has sole discretion to decide whether to investigate or pursue a suspected violation of the Ordinance.

- (a) If the City Clerk's Office decides not to investigate or otherwise pursue a report of a suspected violation, the City Clerk's Office will provide a written notification within fifteen days to the employee or person who filed the report that the City Clerk's Office is declining to further investigate the report.
- (b) The employee or other person may, within twenty one days, file a request for reconsideration with the City Clerk's Office. The City Clerk's Office will provide a written response on the reconsideration within 20 days.

13.3 If the City Clerk's Office decides to pursue a violation of this chapter, the City Clerk's Office will serve a notice of investigation setting forth the allegations and pertinent facts upon an employer by U.S. mail within twenty one days. The notice of investigation will be accompanied by a request for a written position statement and a request for records or other information.

- (a) The written position statement must specifically state the employer's position regarding the allegations set forth in the notice of investigation
  1. If the employer admits to violating the Ordinance, they must answer how they will remedy the violation and make the complainant whole.
  2. If the employer denies the allegations, they must specifically state how the employer is in compliance with the Ordinance.
  3. The employer may provide any additional information it believes is relevant to the investigation and the City Clerk's Office will consider it.
- (b) An employer's position and response to any request for records will be provided to the City Clerk's Office within thirty days.
  1. 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 City Clerk's Office pursuant to an investigation creates a rebuttable presumption of a violation of the Ordinance.

2. An employer that fails to respond to a request for records may not use such records in any appeal to challenge the correctness of any determination of violation by the City Clerk's Office, of damages owed, or penalties assessed.

13.4 Except where there is an agreed upon settlement, the City Clerk's Office will issue a written determination of violation/no violation.

13.5 The determination will include:

- (a) Findings of fact;
- (b) Conclusions of law;
- (c) Remedy; and
- (d) Notice of the right to appeal.

13.6 The determination of violation will be issued to the employer and any employee or other person who filed the suspected violation report.

13.7 If there is no appeal of the City Clerk's Office's determination of a violation, that determination of violation shall constitute the City's final decision. An employer's failure to appeal the City Clerk's Office'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 City Clerk's Office's determination of a violation.

### **Appeal Process for Either Party**

#### Duluth City Code §29E-11

14.1 An employee, former employee, or employer may appeal the determination of a violation by the City Clerk's Office.

- (a) Appeals are heard by the Duluth Chief Administrative Officer
- (b) Appeals must be made in writing within fifteen days of the date of service of the determination of violation

14.2 In the event of an appeal, the City's Chief Administrative Officer will consider:

- (a) The record submitted by the City Clerk's Office;
- (b) The written statements of positions by all parties involved;

14.3 At the discretion of the Chief Administrative Officer, the following may also be considered to resolve issues of credibility or factual disputes:

- (a) Testimony of all parties;
- (b) Oral arguments;

14.4 The Chief Administrative Officer will reverse the City Clerk's Office's determination of a violation only upon a finding that it is clearly erroneous.

14.5 The Chief Administrative Officer's decision of the appeal will constitute the City's final decision.

### **Remedies for Violations of ESST Ordinance**

Duluth City Code §29E-10(d)

15.1 The City Clerk's Office may order appropriate relief for a determination of a violation including, but not limited to:

- (a) Reinstatement and back pay;
- (b) The crediting to an employee of any accrued ESST accrued but not credited;
- (c) The payment of any accrued ESST unlawfully withheld;
- (d) An administrative penalty for each individual violation set in accordance with the Duluth Administrative Enforcement Program;
- (e) Suspension or revocation of city-issued licenses.

### **Retaliation against Employees is prohibited**

16.1 Employers may not retaliate against any employee for exercising any rights under the Ordinance.

Employers also may not interfere with employee rights under the Ordinance.

- (a) Protection against retaliation includes, but is not limited to, an adverse action by the employer after the following employee actions:
  1. Requesting ESST;
  2. Using ESST;
  3. Providing information to another employee about ESST;
  4. Otherwise assisting another employee trying to use ESST;
  5. Making a complaint to the employer or a government agency about ESST;

16.2 Adverse action means any action taken or threatened by an employer against an employee for their exercise of rights under the Ordinance, which may include but is not limited to:

- (a) Denying use of, or delaying payment for, paid sick leave, wages, tips, gratuities, and service charges, except those service charges itemized as not being payable to the employee or employees servicing the customer;
- (b) Terminating, suspending, demoting, or denying a promotion;
- (c) Reducing the number of work hours for which an employee is scheduled;
- (d) Altering the employee's preexisting work schedule;
- (e) Reducing the employee's rate of pay; and
- (f) Threatening to take, or taking action, based upon the immigration status of an employee or an employee's family member.
- (g) Counting used ESST as an unexcused absence from work.

16.3 It is not retaliation for an employer to investigate an employee's suspected abuse of ESST (such as using it as vacation time rather than as sick or safe time). However, these investigations may not interfere with the employee's ability to use ESST.

16.4 The Ordinance's protections for exercise of rights and prohibition against retaliation do not prevent an employer from taking reasonable action (e.g., discipline) when an employee's use of ESST is not in good faith, such as a clear instance of abuse. Disciplinary actions may not include deductions from an employee's legitimately accrued ESST hours.

### **Civil Enforcement and Private Right of Action**

#### Duluth City Code §29E-12

17.1 The City Clerk's Office will refer investigations for civil enforcement to the Duluth City Attorney's Office if more than sixty days have passed since a final determination, including exhaustion of all appeals.

17.2 Employees may file a lawsuit in district court if they allege that their employer interfered with their right to use ESST, or retaliated against them for exercising their rights under the Ordinance.

### **Effect on Other Leave Such as FMLA**

18.1 An employee's use of ESST may qualify for concurrent leave under federal, state, or other local laws (e.g. US Family Medical Leave Act). The ESST Ordinance operates independently of any other leave such as FMLA.

Effect on Collective Bargaining Agreements

19.1 Collective Bargaining Agreements negotiated and enacted prior to the effective date of the Ordinance shall be deemed to be in compliance with the Ordinance.

19.2 Collective Bargaining Agreements enacted or renegotiated after January 1, 2020 shall include a substantially equivalent paid leave policy.