



# INFO

## Frequently Asked Questions

### **General Questions about Earned Sick and Safe Time (ESST)**

#### ***What is the Duluth Sick and Safe Time Ordinance?***

The sick and safe time ordinance is a law in Duluth that guarantees paid time off work for certain types of employees that work in the city. It does not apply to independent contractors, student interns, seasonal employees or certain railroad workers.

#### ***What is sick time?***

Sick time refers to paid time off that employees may use for medical reasons, such as physical or mental illness, injury, or other health conditions. Employees may use sick time for their own care or for the care of a “family member.”

#### ***What is safe time?***

Safe time refers to paid time off that employees may use due to absences resulting from sexual assault, domestic abuse, or stalking. Employees may use sick time for their own care or for the care of a “family member.”

#### ***When must employers start complying with the ESST Ordinance?***

The Duluth Earned Sick and Safe Time Ordinance goes into effect on January 1<sup>st</sup>, 2020.

#### ***What was the process that led up to the ordinance being enacted?***

The Duluth city council organized a community task force made up of volunteers from across the city to investigate options for a sick leave policy in 2016. The Earned Sick and Safe Time task force gathered information, collected public input, and proposed options for implementing ESST policies based off of the information they collected. They conducted multiple listening sessions across Duluth, took multiple surveys, and invited both employers and employees to contribute to the discussion before presenting their data and subsequent conclusions to the city council, where further debate invited comments, questions, and concerns from the community. In May, 2018 the city council enacted Ordinance 10571, establishing an Earned Sick and Safe Time law to take effect in 2020.

## **Who is covered by the ESST ordinance? Who is NOT covered?**

### ***Who is considered a “family member” under the ordinance?***

A “family member” under the ordinance includes a child, stepchild, adopted child, foster child, legal ward, child for whom the employee is a legal guardian, spouse, domestic partner, sibling, stepsibling, foster sibling, parent, stepparent, mother-in-law, father-in-law, grandchild, foster grandchild, grandparent, step-grandparent, and any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

### ***Which employers must provide ESST?***

The ordinance applies to any individual, corporation, partnership, association, nonprofit organization, or group of people that has 5 or more employees, whether or not all of the employees work in the city.

### ***How is the number of employees in a particular business determined?***

The average number of employees per week during the previous calendar year is deemed to be the total number of employees under the ordinance.

### ***Who does the ESST ordinance apply to?***

Provided that an employer is covered by the ordinance, the ordinance applies to both full-time and part-time employees who perform work within the geographic boundaries of the city for more than 50 percent of their working time in a 12-month period or are based in the city of Duluth and spend a substantial part of their time working in the city and do not spend more than 50 percent of their work-time in a 12-month period in any other particular place.

### ***Who is NOT covered by the ordinance?***

Independent contractors, (paid or unpaid) student interns, seasonal employees, and certain railroad employees are not covered by the ordinance.

### ***Are government workers covered under the ordinance?***

No. The United States government, the state government, and any county or local governments (excluding the city of Duluth) are not covered by the ordinance.

### ***How does the city define “independent contractor?”***

The city looks at whether you:

- (1) File self-employment tax returns;
- (2) Maintain a separate business and use your own tools;
- (3) Have a contract for performance of services with your 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;
- (6) Control the manner and means in which you perform work.

### ***How does the city define “seasonal employee”?***

An employee is considered to be “seasonal” if they are employed for no more than 10 months during any consecutive 12 month period, but are expected to return to work year after year.

***Does an employee have to live in Duluth in order to receive ESST?***

No. An employee does not need to live in Duluth to receive ESST. However, they must work within the city for at least 50% of their working time in a 12-month period.

***Do temporary workers employed by staffing agencies receive ESST? From whom would they receive ESST in this situation?***

Yes. Unless there is a contractual arrangement stating otherwise, workers employed by staffing agencies would receive ESST from the staffing agency with whom they are employed.

***Are union members covered by the ordinance if they are already subject to a collective bargaining agreement?***

Yes. Collective bargaining agreements do not exempt employers or employees from the ESST ordinance.

***In regards to construction workers, how does the prevailing wage exemption apply?***

The prevailing wage exemption allows contractors to waive the requirements of the ESST ordinance for all hours for which they pay the equivalent of the prevailing wage rate for the craft or trade at issue. The prevailing wage rate must be based on a Minnesota Department of Labor and Industry wage decision published within the last three years. If at any time a construction worker is not paid the prevailing wage rate, they start to earn and accrue ESST.

**Accruing Earned Sick and Safe Time**

***How do employees get ESST hours?***

An employer can decide whether they want to let ESST “accrue” over time or “front load” ESST for employees.

***What is “front loading”?***

Front loading is an alternative method of accrual for employers who want to reduce the calculations and record keeping required of per-pay-period (e.g. weekly, bi-weekly, twice-a-month, or monthly) accrual. This option allows employers to record accrual only once per year and avoid carry over from year to year.

In order to comply with the ordinance using a “front loading” method of accrual, the employer must provide at least 40 hours of ESST following the initial 90 days of employment for use by the employee during the first year, and provide at least 40 hours of ESST beginning each subsequent year.

***For employers who choose to “front load,” how many hours must be “front loaded?”***

An employer who chooses this option must front-load at least forty hours (after the employee’s first ninety days of employment) for use during the first year of employment. At least 40 hours must be awarded at the beginning of each subsequent year.

***What does “accrual” mean?***

Accrual describes how something increases or “adds up” (accrues). As time passes and an employee works more hours, they accrue or accumulate more ESST hours. Under the ESST ordinance, employees must accrue at least one hour of ESST for every fifty hours worked (employers are free to enact more generous policies).

***When do employees begin to accrue paid sick and safe time?***

Employees begin accruing paid sick and safe time on their first day of employment. However, an employer may limit use of ESST to 90 days after the start of employment.

***Must an employer allow for ESST hours to accrue when an employee is not working (e.g. on vacation or out sick)?***

No. ESST hours only accrue when an employee is working.

***How frequently must an employer calculate and record sick and safe time hours?***

Employers may calculate and record sick and safe time hours at the same frequency as the employer's other typical payroll practices (e.g. per pay period, weekly, bi-weekly, twice-per-month, etc.)

***How quickly does an employee earn ESST?***

Employees earn one hour of ESST for every 50 hours worked. ESST accrues in hour-unit increments. Accruing ESST in fractions of an hour is not permitted.

***How many hours of ESST can an employee earn in a year?***

An employer must allow employees to accrue up to 64 hours of ESST per year. An employer is free to allow for more hours to accrue, but they may not cap accrual at less than 64 hours.

***What happens to unused ESST at the end of the year?***

Employees can carry over up to 40 hours of earned but unused sick and safe time into the following year. Note that if an employer chooses to "front-load" ESST, they are not required to allow for ESST hours to carry over.

***What happens to accrued ESST if a business is bought out or otherwise "taken over" by another business?***

All employees of the original employer who remain employed by the successor employer retain ESST. The new employer is responsible for ensuring that all of the employee's existing hours worked, accrued ESST, and used ESST is sufficiently documented to establish compliance with the ordinance.

**Using Earned Sick and Safe Time**

***Under what circumstances may an employee use "sick time?"***

An employee may use "sick time" for an absence from work resulting from the employee's own mental or physical illness, injury or health condition. This includes the employee's need for medical diagnosis, care, treatment, or preventative medical care.

An employee may also use "sick time" to provide care for a family member with a mental or physical illness, or health condition. This includes care for a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury, health condition or preventative care.

***Under what circumstances may an employee use "safe time?"***

An employee may use "safe time" in the event of an absence due to domestic assault, sexual assault, or stalking of the employee or of the employee's family member.

***Can an employer require employees to use a minimum amount of ESST?***

Yes. However, an employer may not limit use to increments of more than four hours.

***If an employer uses ESST, how much are they paid?***

An employer must employ employees using ESST at their standard hourly rate. Employees are not entitled to additional compensation for lost tips or commissions and compensation is only required for hours that they are scheduled to work.

***If an employee is paid a salary, how is their hourly rate calculated for ESST pay?***

Divide the employee's salary by the number of weeks worked per year to get their weekly salary and then divide the weekly salary by the number of hours in a normal work week.

Example: Adam is a salaried employee for a company in downtown Duluth. He earns \$65,000 annually working 52 weeks a year and generally works 50 hours a week. Adam's rate of pay for ESST is:  $\$65,000/52 \text{ weeks} = \$1,250/50 \text{ hours} = \$31.25/\text{hour}$ .

***If an employee has two jobs with different hourly rates for the same employer, what should the rate of pay be for ESST?***

The employee should be paid the hourly rate they would have earned had they worked the scheduled shift.

Example: Abigail works for Brooks Sisters Coffee. She typically works as a barista but occasionally takes a shift roasting coffee. She is paid at a higher rate when working as a roaster. Abigail calls in sick for a shift when she is scheduled as a roaster. Her hourly rate for ESST is calculated based on what she earns as a roaster as that is what she would have been doing had she gone in to work.

***Can an employee work additional hours or swap shifts instead of using ESST?***

Yes, but only if agreed upon by both the employer and employee(s). An employer cannot require that an employee swap shifts.

***Can an employer require an employee to telecommute or work from home instead of taking paid sick and safe time?***

No, but the employer can offer the employee the option of working from home instead of taking ESST.

**Retaliation and ESST Abuse**

***Can an employer require documentation for use of ESST?***

Only if the absence is for *more than* three consecutive days.

***Can an employer require employees to find a replacement worker when they use ESST?***

No.

***Can an employer punish or discipline an employee for using ESST?***

Only if ESST has been abused by an employee. An employer may take reasonable, disciplinary actions 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 legitimate ESST balance.

***How does the city determine whether an employee has abused ESST?***

An employer should be able to provide documented facts and circumstances to show that an employee is abusing ESST. A “clear instance” of abuse might include (a) using ESST hours on days when a request for vacation has been denied, (b) a contemporaneous social media photo or post that conflicts with the stated reason for using ESST, or (c) a consistent pattern of circumstantial evidence (e.g. repeatedly calling in sick on Fridays).

***Does an employer have to “cash out” or pay employees for unused ESST when they leave their job?***

No. An employer is not required to “cash out” or pay employees for unused ESST.

***What sort of records must an employer keep of Earned Sick and Safe Time?***

An employer must keep accurate records documenting (1) the total number of hours worked by each employee, (2) the number of ESST hours accrued by each employee, and (3) the number of ESST hours used by each employee. **These records must be kept for a period of three years.**

**How to file a complaint or report a suspected violation**

***How are complaints filed? How do I report a suspected violation of the ESST ordinance?***

Complaints and reports of suspected violations should be submitted to the city clerk’s office.

***Who can file a complaint? Who can report a suspected violation?***

Anybody who believes that the ordinance has been violated may submit a complaint or report a violation to the city clerk’s office, whether they are the alleged victim or not.

***When can a complaint or report of a suspected violation be filed?***

A complaint or report of a suspected violation must be filed within one year from the date of the alleged violation. If the alleged violation occurred over a period of several days, the one year period begins on the last day of the alleged violation.

***Can a complaint be filed anonymously?***

Yes, an anonymous complaint can be filed with the city clerk’s office. If the complainant’s identity must be disclosed in order to continue the investigation, the city clerk’s office will request their permission before disclosing.

***What are potential penalties for non-compliant employers?***

The City Clerk’s Office is committed to first attempt to resolve all disputes through negotiation and mediation. However, there are a number of potential penalties and administrative remedies that could be employed to address violations. Fines may be levied under the city’s Administrative Enforcement Program. These fines start at \$200 per violation and are cumulative. In addition to fines, city-issued permits and licenses may be suspended or revoked. The City Attorney’s Office also has the authority to file a civil action against non-compliant employers for violations of the ordinance.

## **Existing Leave Policies and ESST**

***If an employer offers a paid time off (PTO) plan or other sick and vacation leave, does that satisfy the requirements of the ordinance?***

The name of the employer's paid time off plan or other leave policy does not matter. A PTO plan (or other type of leave, including sick or vacation time) can satisfy the ESST ordinance if the plan is "substantially equivalent." This means that so long as the employer's leave plan meets the basic requirements of the ordinance it is in compliance with the ordinance. Specifically, the employer's plan must guarantee that (1) employees begin accruing ESST from their first day of employment, (2) ESST accrues at a rate of *at least* 1 hour for every 50 hours worked, and (3) employees are permitted to accrue a minimum of up to 64 hours of ESST and can carry over up to *at least* 40 hours of earned but unused ESST into the next year.

***An employer has a paid personal time off (PTO) policy that meets or exceeds the ESST ordinance's requirements. The PTO combines earned sick and safe time and vacation time into one policy. Must the employer provide additional Earned Sick and Safe Time?***

No. If the amount of PTO provided by the employer meets or exceeds the minimum requirements of the ESST ordinance, the employer's PTO plan will be considered to be compliant.

***Example:*** Stanley's Milk Bar provides 40 hours of PTO every year. The company's policy states that it may be used for vacation, earned sick and safe time, and other miscellaneous requests for time off such as funerals, child care, etc. Because Stanley's Milk Bar (1) provides the minimum amount of paid time off and (2) the leave may be used for all paid sick and safe time purposes, the company's PTO policy is "substantially similar" and is in compliance with the ordinance.

***Example:*** Bateman Brother's Financial Services provides 120 hours of PTO every year to its employees. This time may be used for vacation or sick time, but the company requires that employees provide a notice at least 2 weeks prior to using PTO. This policy is not in compliance with the ordinance. In order for the policy to be considered "substantially similar" it would have to be amended to allow for employees to take "safe time" as well. Additionally, the 2 week notice requirement would be still be allowable but only so long as it did not interfere with the purposes for which the employee's requested leave is needed.

***If an employer provides a PTO policy whose terms are more generous than what is mandated in the ESST ordinance, does that employer have to separate ESST hours from vacation hours for record-keeping and reporting purposes?***

No. However, if an investigation were begun the employer would still need to demonstrate that all employees received the required amount of paid time off to satisfy the ordinance.

***Under a PTO policy, can employees use all of their accrued time for vacation and not leave a "cushion" for sick leave or safe leave?***

Yes. If the plan meets the basic requirements of the ordinance then nothing further is required. An employee's failure to plan for future circumstances does not impose any additional obligations upon the employer under the ordinance.

***Can an employer provide a more generous leave policy to some employees and not others?***

Yes, provided that such differences in treatment do not violate any other laws such as the State of Minnesota Human Rights Statute or any Federal laws prohibiting discrimination.

***If an employee's only form of compensation is commission, are they exempt from the law?***

Yes

**Miscellaneous Questions**

***If an employer chooses to front-load employees with ESST, can they "prorate" ESST for part-time workers rather than front-load the full 40 hours annually?***

No. If an employer chooses to front-load employees with ESST, they must front-load at least 40 hours annually.

***Can employees use ESST for absences due to snow or increment weather?***

Only if an employer allows for such use. There is no provision in the Duluth Earned Sick and Safe Time ordinance which allows for use of ESST under circumstances such as school closures due to winter weather. However, employers are free to allow for employees to use ESST under such circumstances if they so choose.

***Does the city of Duluth require that an employee's ESST balance be reported on their paystub?***

No, the city does not require for ESST to be reported on a paystub. However, please be advised that the state of Minnesota may have additional requirements which exceed those of the city. Please consult with the Minnesota Department of Labor to ensure that you are in compliance with state requirements.