

How to Prepare for Duluth, Minnesota's Earned Sick and Safe Time Ordinance

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The City of Duluth, Minnesota's Earned Sick and Safe Time Ordinance (ESST) will go into effect on January 1, 2020, and employers should be preparing for compliance.

The ESST applies to any individual, corporation, partnership, association, nonprofit organization, or group of people that has at least five employees, whether or not all of the employees work in the City. Both full-time and part-time employees are included in this determination. Employers must provide eligible employees in Duluth with one hour of ESST time for every 50 hours worked or frontload 40 hours. (For details, see our article, [Preparing for Duluth, Minnesota's Sick and Safe Time Ordinance Taking Effect January 1, 2020.](#))

The City has published [Final Rules](#) and revised [Frequently Asked Questions](#) implementing the ESST.

Covered Employee

The ESST exempts independent contractors, student interns, and seasonal employees from coverage.

For independent contractors, the Rules outline six factors to determine whether an individual is an independent contractor. The Rules also establish separate factors for independent contractors in the construction industry.

For student interns, the Rules highlight the factors the City Clerk's Office will consider in determining whether an individual is a student intern. The Rules clarify a student intern may be an "unpaid or paid student," however, one consideration is the expectation of compensation. The Rules state, "Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa."

The Rules define a seasonal employee as an individual employed for no more than 10 months during a consecutive 12-month period and who is expected to return to work each year.

Further, employees who work from home are covered under the ESST for hours they work in Duluth.

Overtime Hours

Employees may accrue ESST time for all overtime hours worked and use ESST time for overtime hours they are scheduled or volunteered to work.

Employers need not provide an "overtime pay rate." ESST time used for scheduled overtime is required to be paid only at an employee's regular rate, not at the overtime rate.

Recordkeeping

Under the ESST, employers must keep and maintain for three years an employee's hours worked in Duluth and the ESST time the employee accrued and used.

The Rules create separate recordkeeping requirements based on the type of policy the employer has in place. An employer with an ESST Policy or a substantially equivalent paid time off (PTO) policy has different recordkeeping obligations than an employer with a PTO policy that exceeds the ESST's minimum accrual standard (Unlimited PTO) under the Rules.

ESST Policy or Substantially Equivalent PTO Policy:

- Employee's hours worked in Duluth.
- Accrued ESST hours.
- Used ESST hours.

Unlimited PTO Policy:

- Employee's hours worked in Duluth.
- Used ESST hours.

Employers who already provide a form of PTO that meets the requirements of the ESST may track an employee's *total hours* worked, in lieu of tracking an employee's hours worked solely in Duluth.

If an employee is salaried and works in Duluth for more than 50 percent of their work time on a yearly basis, the employer may maintain records of the employee's regular workweek hours, instead of their hours worked in Duluth, as long as the employee's hours for a normal workweek are used as the actual basis for the employee's accrued and used ESST time.

Lessons Learned from Minneapolis, St. Paul Enforcement Efforts

Duluth follows Minneapolis and St. Paul as the third Minnesota city to enact an earned sick and safe time ordinance. Employers can draw some lessons from the enforcement of the Minneapolis and St. Paul ordinances.

In Minneapolis, noncompliance with the ordinance can become costly quickly for employers. The Minneapolis Labor Standards Enforcement Division of the Department of Civil Rights is responsible for enforcing both the Minneapolis Earned Sick and Safe Time and Minimum Wage ordinances. Since 2017, the Department has collected \$51,571 in monetary remedies for workers under the ordinance and issued \$32,278 in penalties. The Department collected nearly 65 percent of the \$51,571 in 2019 alone. (During the first year of enforcement, the Department focused on education and warnings for first-time violations, unless the violation involved retaliation.) The Department's investigations concentrated on lack of accrual, barriers to accessing accrued time, and failure to post the notice.

While St. Paul has not published its cost of enforcement, it is making enforcement a priority. In 2019, St. Paul received 45 questions, 15 oral complaints, and 38 written complaints relating to its ordinance. Of the complaints, five were dismissed, four are under investigation, and 16 have been resolved (the status of the remaining complaints is unavailable). St. Paul received 53 reports in 2018, and 35 in 2017. It employs one investigator to look into issues.

In August, St. Paul City Council members voted to establish a Division of Labor Standards Enforcement and Education within the Department of Human Rights and Equal Economic Opportunity to enforce laws relating to its ordinance, as well as its minimum wage requirements. The Division will be required to provide annual reports to the City Council on implementation and enforcement of the ordinance. The reports will include the number of violations, details on specific violations, industries and occupations with the highest rates of violations, penalties assessed in the previous 12 months, and number of cases that are open and closed. This move suggests more resources are being directed toward the ordinance.

As enforcement of the Minneapolis and St. Paul ordinances shows, the cities are making compliance with their earned sick and safe time ordinances a priority and investing resources into their enforcement efforts. Duluth employers should review their policies to ensure compliance with the ESST. Jackson Lewis attorneys are available to assist employers in their compliance efforts.

For guidance on leave management issues, please contact a Jackson Lewis attorney. [Register here](#) if you would like to receive information about our workthruIT® Leave & Accommodation Suite. The Leave & Accommodation Suite provides subscribers an expanding array of tools to manage leave and accommodation issues, including electronic access to a state and local leave law database that is developed and updated continually by our Disability, Leave & Health Management attorneys.

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