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Audit of the Accrued Sick and Safe Leave Act of 2008

June 19, 2013

A Report by the Office of the District of Columbia Auditor
Yolanda Branche, D.C. Auditor

OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR

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Why ODCA Did This Audit

The Accrued Sick and Safe Leave Act of 2008 requires the Office of the D.C. Auditor to prepare an annual report on the economic impact of the Act on the private sector and to determine the compliance level of businesses with the requirement to post a notice advising employees about the Act.

What ODCA Recommends

To comply with the requirements of the Act, the Department of Human Resources should establish an accrual system to track eligibility for paid sick leave for intermittent District government employees.

To provide employers with a process to seek a hardship exemption from the Act, the Department of Employment Services should finalize the hardship exemption rules.

To determine whether employees received paid sick leave, the Department of Employment Services should monitor employer compliance with the Act.

To ensure that the Auditor has the necessary data to determine whether employers circumvented staffing patterns, the Council of the District of Columbia should amend the Accrued Sick and Safe Leave Act of 2008 to require employers to retain records documenting hours worked by employees, paid sick leave taken by employees and provide the Auditor access to such records.

For more information regarding this report, please contact Lawrence Perry, Deputy Auditor at ODCA@dc.gov or 202-727-3600.

The Act neither discouraged business owners from locating in the District nor encouraged business owners to move their businesses from the District.

What ODCA Found

The District of Columbia's Accrued Sick and Safe Leave Act (Act) of 2008 became effective on May 13, 2008. The Act requires employers to provide employees with paid sick days to care for themselves or family members. Additionally, the Act provides employees in the District access to paid leave for work absences associated with domestic violence or abuse. We conducted this audit to determine whether employers in the District of Columbia complied with the requirement to post a notice of the requirements of the Act. We also reviewed the administration of the Act by District agencies. Finally, we assessed the economic impact of the Act on the private sector.

We found that since the Act became effective in 2008, the Department of Human Resources did not develop a payroll processing system to track paid sick leave for intermittent District government employees. As a result, District government intermittent employees did not receive paid sick leave. The Act required the establishment of rules to provide an exemption if the requirements of the Act created a burden. However, the hardship exemption rules were not finalized. We also found that 91% of the businesses that we inspected complied with the requirement to post the requirements of the Act. Finally, based on interview and questionnaire responses we found that the Act did not discourage owners from basing businesses in the District or encourage owners to move their businesses from the District.

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Summary

The District of Columbia's Accrued Sick and Safe Leave Act (Act) of 2008 became effective on May 13, 2008. The Act requires employers to provide employees with paid sick days to care for themselves or family members. Additionally, the Act provides employees in the District of Columbia with access to paid leave for work absences associated with domestic violence or abuse. The Act applies to full and part-time employees however; certain food service personnel, healthcare workers, and full-time students working less than 25 hours a week at their college or university are exempt.

Employers are required to post the provisions of the Act in a "conspicuous place" that is accessible to employees.

The objectives of this audit were to:

- Determine compliance with the requirement for employers to post the provisions of the Act;
- Determine whether the administration of the Act by District agencies was consistent with the requirements of the Act; and
- Assess the economic impact of the Act on the private sector.

The following are the audit findings:

1. **Intermittent District government employees did not receive paid sick leave;**
2. **Hardship exemption rules were not finalized; and**
3. **91% of employers complied with the posting requirement.**

To ensure that the District complies with requirements of the Accrued Sick and Safe Leave Act, we recommend the Department of Human Resources:

- **Establish an accrual system to track eligibility for paid sick leave for intermittent District government employees.**
- **Provide retroactive accrued sick leave to current District employees that were eligible to accrue paid sick leave under the Accrued Sick and Safe Leave Act but did not receive paid sick leave due to the failure of the Department of Human Resources to track paid sick leave.**

To ensure that employers have a formal procedure to request a hardship exemption from the requirements of the Act, we recommend the Department of Employment Services:

3. **Publish the final Accrued Sick and Safe Leave Act hardship exemption rules in the District of Columbia Register.**

To determine whether employees in the District of Columbia received paid sick leave we recommend the Department of Employment Services:

4. **Establish a process to review employer compliance with the provisions of the Accrued Sick and Safe Leave Act of 2008.**

To ensure that the Auditor has the necessary data to determine whether employers circumvented staffing patterns we recommend:

5. **The Council of the District of Columbia amend the Accrued Sick and Safe Leave Act of 2008 to require employers to retain records documenting hours worked by employees, paid sick leave taken by employees and provide the Auditor access to such records.**

Background

The Accrued Sick and Safe Leave Act of 2008 requires District employers to provide employees with paid sick days

According to a report by the Institute for Women's Policy Research[1] (IWPR), "paid sick days bring a range of economic, social and health benefits for employers, workers, and communities… The benefits of paid sick leave for employers include improvements in productivity, reductions in workplace contagion, and reduced worker turnover." In addition to the District of Columbia, Seattle, Washington, Portland, Oregon, San Francisco, California and Connecticut enacted paid sick leave legislation.

The District of Columbia's Accrued Sick and Safe Leave Act (Act) of 2008 became effective on May 13, 2008. The Act requires employers to provide paid sick leave. Additionally, the Act provides employees with paid leave for absences associated with domestic violence or abuse. The Act applies to full and part-time employees.

The Office of Wage and Hour of the Department of Employment Services administers the Act.

The Act requires that District employers offer one hour of paid leave for every 37 to 87 hours - depending on the size of the firm - to every employee employed for a 12 month period by the same employer. Employers are not required to provide leave to independent contractors, certain students, health care workers who choose to participate in a premium pay program or bar and restaurant workers who work for a combination of wages and tips. After one year on the job and 1,000 hours of work, eligible employees can use paid sick leave for illnesses or to address domestic violence issues.

Employers are required to post the provisions of the Act in a "conspicuous place" that is accessible to employees. Under the Act the Office of the District of Columbia Auditor (Auditor) must prepare an annual report on the economic impact of the Act on the private sector. The report is to include a sample of District businesses regarding compliance with the requirement to post the provisions of the Act in a conspicuous place and whether companies utilized staffing patterns to circumvent the intent of the Act. While the Act was enacted in 2008, this is the Auditor's first report on the Act. Staffing

[1] Institute for Women's Policy Research, September 5, 2012, Recommendations for an Evaluation of the District of Columbia's Paid Sick

patterns were not addressed in this report. However, staffing patterns will be addressed in subsequent audit reports.

It is interesting to note that according to a 2011 study conducted by the Institute for Women's Policy Research (IWPR), of 1,194 employees and 727 employers in San Francisco, 67.8 percent of the employees reported that their employer did not reduce work hours, increase work demands or reduce compensation in response to the San Francisco Paid Sick Leave Ordinance.[2] Although, according to the same IWPR study one out of 20 employees that used paid sick days reported being assigned fewer or less desirable work hours or worse tasks because they used paid sick days.[3]

Regarding staffing patterns, we note that the San Francisco Paid Sick Leave Ordinance includes the following Employer Records provision:

> Employers shall retain records documenting hours worked by employees and paid sick leave taken by employees, for a period of four years, and shall allow the Office of Labor Standards Enforcement access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter.

Seattle has a similar Employer Records provision.

While the District of Columbia's Accrued Sick and Safe Leave Act requires the Auditor to determine whether companies utilized staffing patterns to circumvent the intention of the Act, the District does not include a provision that is similar to the San Francisco or Seattle provisions which require employers to retain and make available records documenting hours worked by employees and paid sick leave taken by employees.

Without a District of Columbia requirement that employers retain and make available records documenting hours worked and paid sick leave taken by employees, employers may or may not retain records regarding paid sick leave. Similarly, without a clear mandate, employers may or may not provide the Auditor access to paid sick leave records that an employer may or may not have retained. In the absence of an Employer Records provision, it will be extremely difficult for the Auditor to obtain the necessary data to determine whether employers

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[2] Institute for Women's Policy Research, February 2011, San Francisco's Paid Sick Leave Ordinance : Outcomes for Employers and Employees, page 12
[3] Ibid, page 13

utilized staffing patterns to circumvent the intention of the Act.

The Council of the District of Columbia should amend the Accrued Sick and Safe Leave Act of 2008 to require employers to retain records documenting hours worked by employees, paid sick leave accrued and taken by employees and provide the Auditor access to such records.

Objectives, Scope and Methodology

The objectives of this audit were to:

- Determine compliance with the requirement for employers to post provisions of the Act;
- Determine whether the administration of the Act by District agencies was consistent with the requirements of the Act; and
- Assess the economic impact of the Act on the private sector.

Audit Timeframe

The audit period covered Fiscal Year (FY) 2008 through FY 2013, as of November 1, 2012.

Audit Standards

In conducting the audit, we reviewed: (1) the Accrued Sick and Safe Leave Act of 2008; (2) Department of Employment Services (DOES) rulemakings on the implementation of the Act; (3) Notifications from DOES to employers on duties under the Act; (4) DOES policies and procedures for complaints filed by employees with DOES pertaining to the Act; (5) Investigations and court cases related to the administration by DOES of wage-hour laws; (6) Department of Human Resources policies and procedures regarding intermittent employees; (7) results from unannounced site visits to determine compliance with posting requirements; and (8) responses to questions regarding the economic impact of the Act. To gain a further understanding of the Accrued Sick and Safe Leave Act, we interviewed Ari Weisbard, Employment Justice Center, David Goldblatt, Legislative Counsel, D.C. Chamber of Commerce, and Dr. Jeffrey Hayes, Institute for Women's Policy Research. We inspected businesses to determine compliance with posting requirements and interviewed owners of businesses based in the District regarding the economic impact of the Act.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit

objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Audit Findings

1. Intermittent District government employees did not receive paid sick leave

The District of Columbia Department of Human Resources (DCHR) published final rules in the District Register pertaining to the Act. DCHR also updated the District Personnel Manual to include the requirements of the Act.

Intermittent District government employees did not receive paid sick leave, as required by the Accrued Sick and Safe Leave Act of 2008.

We found that since the Accrued Sick and Safe Leave Act of 2008 became effective on May 13, 2008, until the time of the audit, the Department of Human Resources did not develop a system to track eligibility and accrual of paid sick leave for intermittent employees[4]. As a result, eligible intermittent District government employees did not receive paid sick leave.

According to the fiscal impact statement prepared by the Office of the Chief Financial Officer (OCFO) for the Act, the District government had 179 intermittent employees that were eligible to receive paid sick leave benefits under the Act in Fiscal Year (FY) 2009. At the time the fiscal impact statement was prepared the average hourly salary among the 179 employees for FY 2009 was $14.77. Therefore, it was estimated that the total paid sick leave for intermittent employees for FY 2009 would be $88,345. The OCFO's estimated total cost of the paid sick leave for the 179 intermittent employees for FY 2009 through FY 2012 was $476,687.

[4] The following definition of intermittent employee is presented in Title 6B of the D.C. Municipal Regulations, Chapter 12: Hours of Work, Legal Holidays and Leave, Section 1299 Definitions: When Actually Employed (WAE) Appointment – temporary appointment under which the employee serves on an intermittent basis, that is, non-full-time without a prescheduled regular tour of duty. This type of temporary appointment is also referred to as either "intermittent appointment," or as "intermittent service."

Figure 1 presents the CFO's estimates of paid sick leave to eligible intermittent employees (based on the number of hours worked by and the salaries paid) for FY 2009 through FY 2012.

Figure 1 - Paid Sick Leave to intermittent employees

	FY 2009	FY 2010	FY 2011	FY 2012	TOTAL
Total Intermittent Employees	698	698	698	698	
Eligible employees *	179	186	186	186	
Average hours worked	1649	1608	1608	1608	
Average hourly salary**	$14.77	$15.36	$15.97	$16.61	
Average benefit hours	44.56	43.46	43.46	43.46	
Total sick pay estimate	**$88,345**	**$124,939**	**$129,119**	**$134,284**	**$476,687**

Source: Office of Chief Financial Officer Fiscal Impact Statement - Paid Sick and Safe Days Act of 2007[5]

*Employees were eligible for paid leave, after one year on the job and 1,000 hours of work.

**A 4 percent cost of living adjustment is included in the analysis.

District intermittent employees were eligible for paid sick leave after one year on the job and 1,000 hours of work. However, the Department of Human Resources failed to establish a system to track the number of hours worked by intermittent employees to determine eligibility for paid sick leave.

Due to the absence of a system to track hours worked by intermittent District employees, DCHR did not award paid sick leave to eligible intermittent employees. As a result, from FY 2009 through FY 2012, eligible District intermittent employees did not receive an estimated $476,687 in paid sick leave.

Recommendations:

To ensure that the District complies with requirements of the Accrued Sick and Safe Leave Act, we recommend that the District of Columbia Department of Human Resources:

1. **Establish an accrual system to track eligibility for paid sick leave for intermittent District government employees.**

[5] The bill was introduced as the "Paid Sick and Safe Days Act of 2007." It was ultimately amended to be called the "Accrued Sick and Safe Leave Act of 2008."

2. **Provide retroactive accrued sick leave to current District employees that were eligible to accrue paid sick leave under the Accrued Sick and Safe Leave Act but did not receive paid sick leave due to the failure of the Department of Human Resources to track paid sick leave.**

2. Hardship exemption rules were not finalized

The Act states: "The Mayor shall exempt, by rule, businesses that can prove hardship as a result of this chapter. The Mayor shall submit the proposed hardship exemption rules to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within the 45-day review period, proposed rules shall be deemed disapproved." [6]

The District did not provide businesses with a hardship exemption to the requirements of the Accrued Sick and Safe Leave Act.

The Department of Employment Services (DOES) published proposed hardship exemption rules in the District of Columbia Register on December 19, 2008 (55 DCR 12707). The proposed rule was transmitted to the Council of the District of Columbia on December 11, 2008 as part of a Proposed Rulemaking for the Act. The 45-day period of Council review expired on January 24, 2009 without action taken by the Council. Section 3218 was withdrawn from the Council on February 27, 2009.

We found that at the time of the audit, DOES had not published the final hardship exemption rules.[7] As a result, businesses that faced a hardship as a result of the Act did not have recourse to obtain an exemption from the requirements of the Act.

For example, the Alliance for Construction Excellence (ACE) stated that due to the mobility of contractors and subcontractors in the D.C. metropolitan area, the Act created an administrative hardship. Since contractors and subcontractors work for employers in Virginia, Maryland and D.C. it would be difficult for the employer to count the hours that an employee worked in the District to determine paid sick leave accrual. In the absence of finalized Accrued Sick and Safe Leave hardship exemption rules, there is no process for ACE or any other entity to seek an exemption from the requirements of the Act.

[6] D.C Code Section 32-131.14

[7] On May 24, 2013, the Department of Employment Services gave notice of the intent to amend the Sick and Safe Leave Act to establish the criteria for the granting of a hardship exemption from the requirements of the Sick and Safe Leave Act.

Most employers complied with the notice posting requirement of the Accrued Sick and Safe Leave Act.

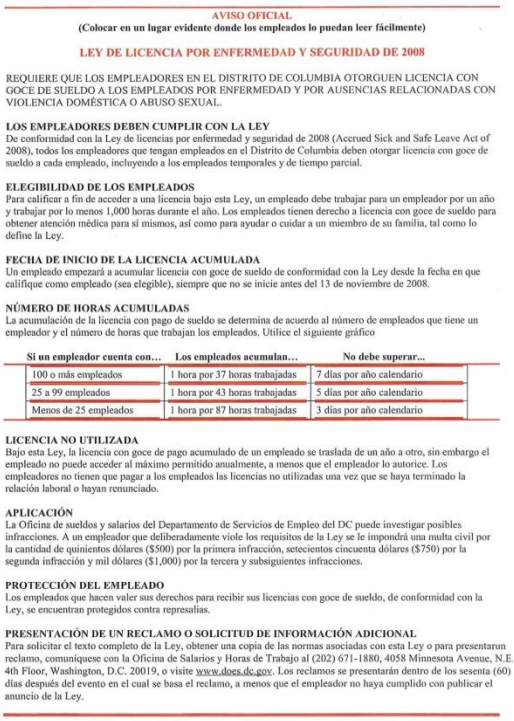
Recommendation:

To ensure that employers have a formal procedure to request a hardship exemption from the requirements of the Act, we recommend that the Department of Employment Services:

3. **Publish the final Accrued Sick and Safe Leave Act hardship exemption rules in the District of Columbia Register.**

3. 91% of employers complied with the posting requirement

All District employers are required to post a notice of the requirements of the Act. The notice must be posted in a conspicuous place. An employer who violates the notice posting requirement is assessed a civil penalty not to exceed $100 for each day the employer failed to post the notice, but not more than a total penalty of $500.



AVISO OFICIAL
(Colocar en un lugar evidente donde los empleados lo puedan leer fácilmente)

LEY DE LICENCIA POR ENFERMEDAD Y SEGURIDAD DE 2008

REQUIERE QUE LOS EMPLEADORES EN EL DISTRITO DE COLUMBIA OTORGUEN LICENCIA CON GOCE DE SUELDO A LOS EMPLEADOS POR ENFERMEDAD Y POR AUSENCIAS RELACIONADAS CON VIOLENCIA DOMÉSTICA O ABUSO SEXUAL.

LOS EMPLEADORES DEBEN CUMPLIR CON LA LEY
De conformidad con la Ley de licencias por enfermedad y seguridad de 2008 (Accrued Sick and Safe Leave Act of 2008), todos los empleadores que tengan empleados en el Distrito de Columbia deben otorgar licencia con goce de sueldo a cada empleado, incluyendo a los empleados temporales y de tiempo parcial.

ELEGIBILIDAD DE LOS EMPLEADOS
Para calificar a fin de acceder a una licencia bajo esta Ley, un empleado debe trabajar para un empleador por un año y trabajar por lo menos 1,000 horas durante el año. Los empleados tienen derecho a licencia con goce de sueldo para obtener atención médica para sí mismos, así como para ayudar o cuidar a un miembro de su familia, tal como lo define la Ley.

FECHA DE INICIO DE LA LICENCIA ACUMULADA
Un empleado empezará a acumular licencia con goce de sueldo de conformidad con la Ley desde la fecha en que califique como empleado (sea elegible), siempre que no se inicie antes del 13 de noviembre de 2008.

NÚMERO DE HORAS ACUMULADAS
La acumulación de la licencia con pago de sueldo se determina de acuerdo al número de empleados que tiene un empleador y el número de horas que trabajan los empleados. Utilice el siguiente gráfico

Si un empleador cuenta con…	Los empleados acumulan…	No debe superar…
100 o más empleados	1 hora por 37 horas trabajadas	7 días por año calendario
25 a 99 empleados	1 hora por 43 horas trabajadas	5 días por año calendario
Menos de 25 empleados	1 hora por 87 horas trabajadas	3 días por año calendario

LICENCIA NO UTILIZADA
Bajo esta Ley, la licencia con goce de pago acumulado de un empleado se traslada de un año a otro, sin embargo el empleado no puede acceder al máximo permitido anualmente, a menos que el empleador lo autorice. Los empleadores no tienen que pagar a los empleados las licencias no utilizadas una vez que se haya terminado la relación laboral o hayan renunciado.

APLICACIÓN
La Oficina de sueldos y salarios del Departamento de Servicios de Empleo del DC puede investigar posibles infracciones. A un empleador que deliberadamente viole los requisitos de la Ley se le impondrá una multa civil por la cantidad de quinientos dólares ($500) por la primera infracción, setecientos cincuenta dólares ($750) por la segunda infracción y mil dólares ($1,000) por la tercera y subsiguientes infracciones.

PROTECCIÓN DEL EMPLEADO
Los empleados que hacen valer sus derechos para recibir sus licencias con goce de sueldo, de conformidad con la Ley, se encuentran protegidos contra represalias.

PRESENTACIÓN DE UN RECLAMO O SOLICITUD DE INFORMACIÓN ADICIONAL
Para solicitar el texto completo de la Ley, obtener una copia de las normas asociadas con esta Ley o para presentarun reclamo, comuníquese con la Oficina de Salarios y Horas de Trabajo al (202) 671-1880, 4058 Minnesota Avenue, N.E. 4th Floor, Washington, D.C. 20019, o visite www.dcs.dc.gov. Los reclamos se presentarán dentro de los sesenta (60) días después del evento en el cual se basa el reclamo, a menos que el empleador no haya cumplido con publicar el anuncio de la Ley.

The notice provided by the Department of Employment Service states: "all employers employing employees in the District of Columbia must provide paid leave to each employee, including temporary and part-time employees." The notice further states employee eligibility requirements and the number of paid sick leave hours an employee can accrue each year. Information on filing a complaint is also included in the notice.

To determine whether employers complied with the notice posting requirement, the Auditor conducted unannounced inspections of businesses. The Auditor inspected a total of 161 businesses in each ward in the District. The types of inspected businesses included restaurants, banks, grocery retail stores, barber shops, nail salons, auto parts stores, dry cleaners and convenience stores. The inspected businesses employed a total of 2,380 employees.

Of the 161 businesses that were inspected, 148 businesses or 91% of the inspected businesses complied with the posting requirement. 13 of 161 businesses did not comply with the posting requirement. Figure 2 presents employer compliance with the notice posting requirement in each ward:

Figure 2 - Employer Compliance with Posting Requirement

	Employer posted notice	Employer did not post notice	Number of employees of inspected employers*
Ward 1	17	**2**	168
Ward 2	20	**0**	169
Ward 3	19	**1**	317
Ward 4	16	**5**	242
Ward 5	19	**1**	726
Ward 6	20	**1**	243
Ward 7	18	**2**	294
Ward 8	19	**1**	221
TOTAL	**148**	**13**	**2,380**

*As reported by the employer to the Auditor.

OFFICIAL NOTICE
(Post Where Employees Can Easily Read)

ACCRUED SICK AND SAFE LEAVE ACT OF 2008
REQUIRES EMPLOYERS IN THE DISTRICT OF COLUMBIA TO PROVIDE PAID LEAVE TO EMPLOYEES FOR ILLNESS AND FOR ABSENCES ASSOCIATED WITH DOMESTIC VIOLENCE OR SEXUAL ABUSE.

EMPLOYERS REQUIRED TO COMPLY WITH THE ACT
Pursuant to the Accrued Sick and Safe Leave Act of 2008, all employers employing employees in the District of Columbia must provide paid leave to each employee, including temporary and part-time employees.

EMPLOYEE ELIGIBILITY
To become eligible to access leave under this Act, an employee must work for the employer for one year and work at least 1,000 hours during the year. Employees are entitled to paid leave for their own medical care and also to aid or care for a family member as defined by the Act.

ACCRUAL START DATE
An employee shall begin to accrue paid leave pursuant to the Act on the date the individual qualifies as an employee (becomes eligible), provided that accrual shall not commence prior to November 13, 2008.

NUMBER OF HOURS ACCRUED
Accrual of paid leave is determined by the number of employees an employer has and the number of hours employees work. Use the following chart:

If an employer has…	Employees accrue …	Not to Exceed…
100 or more employees	1 hour per 37 hours worked	7 days per calendar year
25 to 99 employees	1 hour per 43 hours worked	5 days per calendar year
Less than 25 employees	1 hour per 87 hours worked	3 days per calendar year

UNUSED LEAVE
Under this Act, an employee's accrued paid leave carries over from year to year but employees cannot access more than the maximum allowed per year, unless employer allows. Employers do not have to pay employees for unused leave upon termination or resignation of employment.

ENFORCEMENT
The Office of Wage-Hour of the DC Department of Employment Services can investigate possible violations. An employer who willfully violates the requirements of the Act shall be assessed a civil penalty in the amount of five hundred dollars ($500) for the first violation, seven hundred and fifty dollars ($750) for the second violation, and one thousand dollars ($1,000) for the third and any subsequent violations.

EMPLOYEE PROTECTION
Employees who assert their rights to receive paid leave pursuant to the Act are protected from retaliation.

TO FILE A COMPLAINT OR FOR ADDITIONAL INFORMATION
To request full text of the Act, to obtain a copy of the rules associated with this Act, or to file a complaint, contact the Office of Wage-Hour at (202) 671-1880, 4058 Minnesota Avenue, N.E., 4th Floor, Washington, D.C. 20019, or visit www.does.dc.gov. Complaints shall be filed within sixty (60) days after the event on which the complaint is based unless the employer has failed to post notice of the Act.

While most of the employers inspected by the Auditor complied with the notice posting requirement, it is important to note the distinction between posting the requirements of the Act and implementing the requirements of the Act. It must not be assumed that a posted notice of the requirements of the Act resulted in an employee actually receiving paid sick leave.

The Department of Employment Services established a procedure to accept complaints from employees for violations of the Act. We found that since enactment of the Act, two complaints were filed with DOES.

DOES did not establish a process to review employer compliance with the Act. To determine whether employees received paid sick leave, DOES should actively monitor employer compliance.

Recommendation:

To determine whether eligible employees in the District of Columbia received paid sick leave we recommend that the Department of Employment Services:

4. **Establish a process to review employer compliance with the provisions of the Accrued Sick and Safe Leave Act of 2008.**

Other Issues

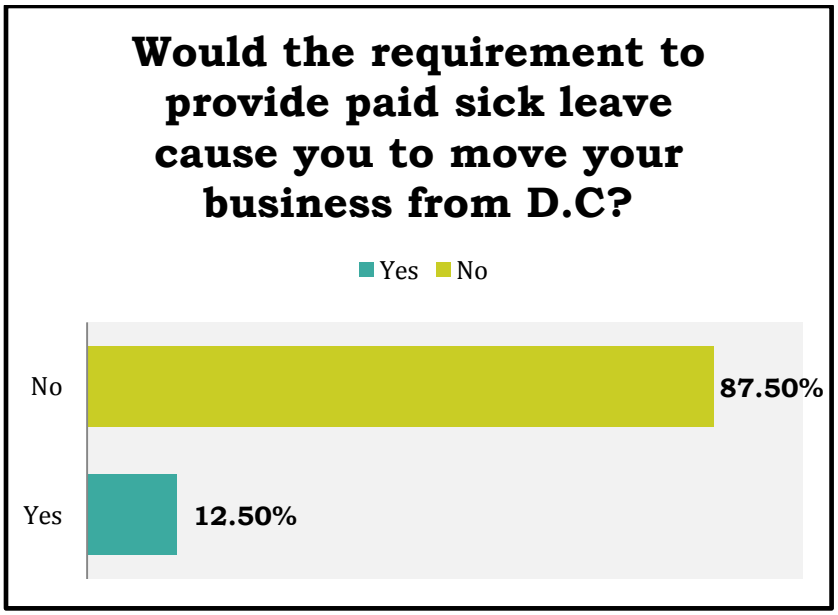
To determine whether the Accrued Sick and Safe Leave Act had the economic impact of encouraging business owners to move their businesses from the District or discouraging business owners from locating businesses in the District, we sent a questionnaire to 800 District-based businesses. The questionnaire posed the following question:

- Would the requirement to provide paid sick leave benefits cause you to move your business from the District of Columbia?

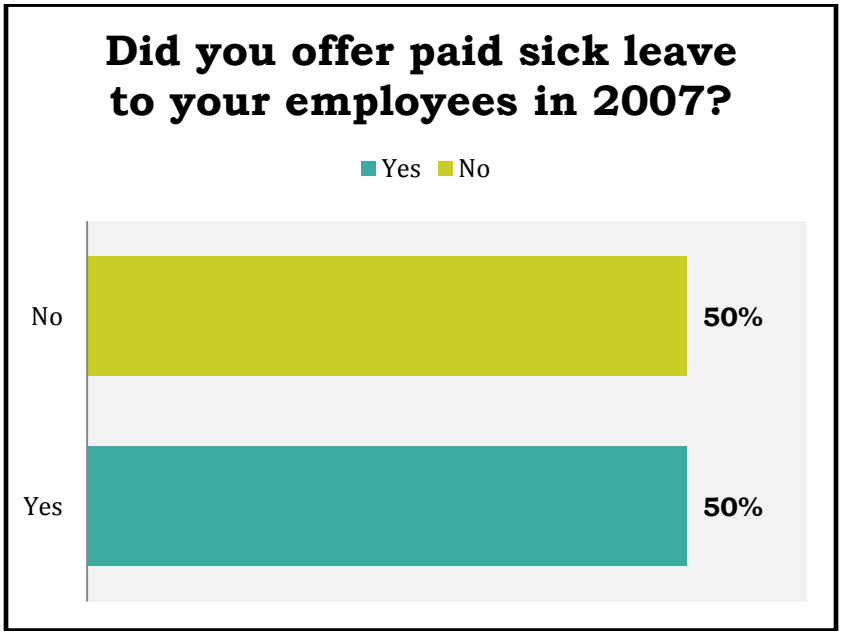
The questionnaire also included the following questions:

- In 2007 did your business provide paid sick leave benefits?
- In 2012 did your business provide paid sick leave benefits?

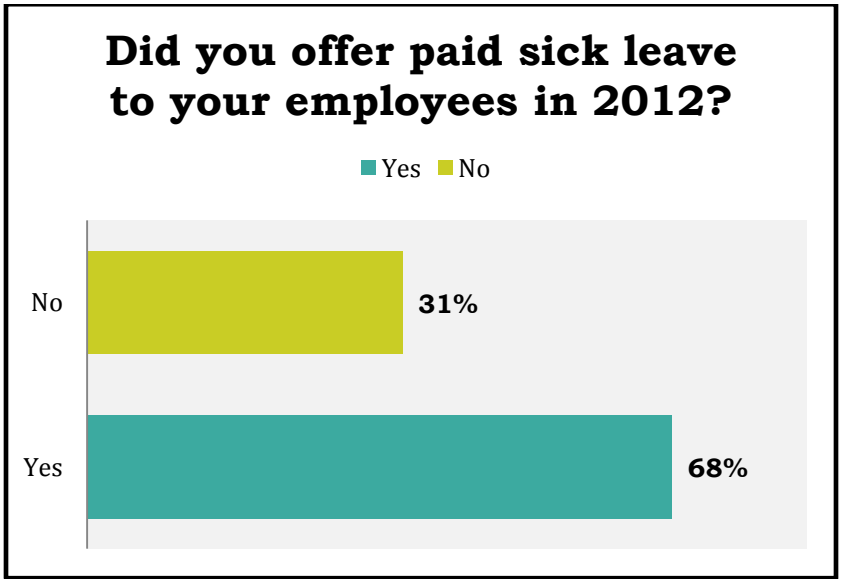
Of the respondents to the questionnaire, 87.5 % stated that the requirement to provide paid sick leave benefits would not cause the owner of the business to move the business from the District.



It is interesting to note that 50% of the respondents to the questionnaire did not provide paid sick leave in 2007 before the Act became effective on May 13, 2008.



However, 68% of the respondents reported providing sick leave benefits in 2012; four years after the Act became effective.



To further assess whether the Act had the economic impact of encouraging business owners to move their businesses from the District or discouraging business owners from locating businesses in the District, we interviewed owners of businesses based in the District. According to a report by students at The George Washington University for the D.C. Chamber of Commerce[8], in addition to operating costs there are additional baseline costs for a business to comply with District rules and regulations:

> Businesses that operate within the borders of DC face various licensing fees and taxes. Licensing fees that allow businesses to operate in DC vary depending on the type of businesses; the range of licensing fees range from $0 to $2,700 (DC CFO 2007). Besides licensing fees, DC businesses also are levied various taxes including the corporate franchise tax or the un-incorporated business franchise tax, which is levied at a rate of 9.975%. In addition, DC businesses face property taxes, both class 2 real property taxes and personal property taxes. In addition to the above listed mandatory fees and taxes, there are other fees and taxes that apply to some but not all businesses. For example, businesses may need to pay a building permit fee, depending on the type of construction, including the certificate of occupancy, which totals $75, and trade name registration or renewal, which totals $50. Some businesses are also burdened with an economic interest tax of 2.2% of consideration or fair market value. In some cases, businesses must pay for public space rental. Also, businesses may face public utility taxes, which range from 10-11%, depending on whether they are residential or non-residential.

[8] The Paid Sick and Safe Days Act of 2007, A Report to the D.C. Chamber of Commerce, Fall 2007 Capstone Research Fellows, Supervised by Dr. Julia Freidman, The George Washington University.

Since employers bear the cost of paid sick leave, the Accrued Sick and Safe Leave Act established an additional cost for a business to operate in the District. The report further notes:

> Another assertion made by opponents of the Paid Sick and Safe Days Act[9] is that it will cause businesses to be driven out of Washington, D.C. due to the prohibitive costs. **If the additional costs and necessary adjustments they need to make are too excessive for them to afford, they may be forced to seek out a more economically conducive environment***, such as one just outside of the District of Columbia's borders where the Paid Sick and Safe Days Act would not affect them. This could have an especially harmful effect on small and independent businesses that are currently operating within the borders of the District of Columbia. Smaller businesses operate on a tighter budget due to economies of scale, and may be unable to survive the additional costs that they would be subject to under this bill.
>
> *Auditor's Emphasis

According to District businesses owners interviewed by the Auditor, the paid sick leave requirement of the Act did not discourage owners from establishing businesses in the District. Additionally, the business owners stated that the paid sick leave requirement of the Act did not encourage owners to move their businesses from the District.

In conclusion, based on interviews and responses to a questionnaire it appears that the Accrued Sick and Safe Leave Act did not have the economic impact of encouraging business owners to move a business from the District nor did the Act have the economic impact of discouraging business owners to locate a business in the District of Columbia.

[9] The Accrued Sick and Safe Leave Act was introduced as the Paid Sick and Safe Days Act of 2007.

Recommendations

To ensure that the District complies with requirements of the Accrued Sick and Safe Leave Act, we recommend the District of Columbia Department of Human Resources:

- **Establish an accrual system to track eligibility for paid sick leave for intermittent District government employees.**
- **Provide retroactive accrued sick leave to current District employees that were eligible to accrue paid sick leave under the Accrued Sick and Safe Leave Act but did not receive paid sick leave due to the failure of the Department of Human Resources to track paid sick leave**.

To ensure that employers have a formal procedure to request a hardship exemption from the requirements of the Act, we recommend the Department of Employment Services:

- **Publish the final Accrued Sick and Safe Leave Act hardship exemption rules in the District of Columbia Register.**

To ensure that employees receive paid sick leave we recommend the Department of Employment Services:

- **Establish a process to review employer compliance with the provisions of the Accrued Sick and Safe Leave Act of 2008.**

To ensure that the Auditor has the necessary data to determine whether employers circumvented staffing patterns we recommend:

- **The Council of the District of Columbia amend the Accrued Sick and Safe Leave Act of 2008 to require employers to retain records documenting hours worked by employees, paid sick leave taken by employees and provide the Auditor access to such records.**

Agency Comments

On May 3, 2013, the Office of the District of Columbia Auditor submitted the draft report titled, "Audit of the Accrued Sick and Safe Leave Act of 2008" for review and comment to the Director of the Department of Employment Services and the Director of the Department of Human Resources.

The Auditor received comments from the Department of Employment Services and the Department of Human Resources on May 24, 2013. The written comments of the Department of Employment Services and the Department of Human Resources are attached to this report.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Human Resources

Office of the Director

MEMORANDUM

TO: Yolanda Branche
District of Columbia Auditor

FROM: Shawn Y. Stokes, Director

DATE: May 24, 2013

SUBJECT: DCHR Response to Audit Report dated May 3, 2013

Background

The Accrued Sick and Safe Leave Act of 2008 ("Act"), effective May 13, 2008 (D.C. Law 17-152; D.C. Official Code § 32-131.01 *et seq.*) is administered by the Department of Employment Services (DOES). The Notice of Final Rulemaking implementing the regulations that governs the Act were published in the *D.C. Register* (57 DCR 5231) effective June 18, 2010. The Act was amended in March 2009 by a technical change to correct inconsistencies within its provisions.

The Act requires District employers, including the District government, to provide employees with paid leave to care for themselves and family members, and it extends access to paid leave for absences associated with domestic violence or abuse. The Act also requires the District of Columbia Auditor (D.C. Auditor) to prepare an annual report on the economic impact of the Act on the private sector, and to sample District businesses to determine: (1) the compliance level of businesses with the posting requirements, and (2) whether companies are utilizing staffing patterns to circumvent the intention of the Act.

Findings

The District Government employs approximately 34,000 employees in 84 agencies, only 68 of which operate under the personnel authority of the Mayor; and DCHR exercises that personnel authority for those agencies. Employees of the District are either fulltime, part-time or intermittent employees (and that would include seasonal, temporary and regular intermittent employees who are also known as When Actually Employed (WAEs.)) All of these employee groups are subject to the ASSLA of 2008 provided they have worked for at least 1000 hours and were employed for a 12 month period by the District of Columbia Government.

Fulltime and part-time employees get paid leave benefits; however, seasonal and temporary employees more than likely do not meet the eligibility requirements of 12 months of consecutive employment and 1000 hours of work. The only employee group that has not been evaluated by DCHR to determine whether they are eligible under the ASSLA of 2008 is the WAE population, and thus these intermittent employees have not received paid leave benefits. A WAE appointment is defined as a temporary appointment under which the employee serves on an intermittent basis, that is, non-fulltime without a prescribed regular tour of duty. This type of appointment is also referred to as either "intermittent appointment" or "intermittent service".

Response

DCHR has a clear process and system in place that ensures paid leave benefits, in accordance with ASSLA of 2008, are in place for all employee groups except for the WAE intermittent employees. There are only 1401 such WAEs currently employed in the District government, only 87 of them are employed in agencies under the personnel authority of the Mayor. The WAEs represent less than 5% of the District's employee population and less than .5% of the employee population under the Mayor's authority. And as noted above, all other employee groups receive paid leave and that leave can be and is tracked. More specifically, contrary to the audit finding that paid sick leave was not extended to part-time employees, the District of Columbia does indeed provide sick leave to part-time employees.

While DCHR currently has not provided paid leave benefits to its very small population of WAE intermittent employees, we have begun the following:

1. Evaluating which of its intermittent employees might be eligible for paid leave pursuant to the Act
2. Dialogue with the Office of Payroll and Retirement (OPRS) and the Office of the Chief Technology Officer (OCTO) to determine the best methods for tracking eligibility and consistently executing the paid leave benefit when applicable for intermittent employees.

At this time, it is not clear whether each of the 87 WAE employees has met the requirements for eligibility for the paid leave benefit. Until that evaluation is completed, any finding that DCHR had failed to provide a paid leave benefit in accordance with ASSLA of 2008, is premature. Moreover, Chapter 12, Section 1240 and 1247 only permits a payout of annual leave and FLSA compensatory time. There is no regulation for the payout of sick leave.

Below is a chart that provides the language edits that were discussed and agreed to be updated in the audit report.

Edit 1:	Revise report to use "intermittent" instead of "part-time" throughout the report.
Edit 2:	Define "intermittent" in a footnote that states: temporary appointment under which the employees serves on an intermittent basis, that is, non-full-time without a prescheduled regular tour of duty. This type of temporary appointment is also referred to as "when actually employed" or "WAE" service or appointment.
Edit 3:	Revise Recommendation 1 to "DCHR will establish an accrual system to track what employees are eligible to receive benefits under the Accrued Sick and Safe Leave Act of 2008.
Edit 4:	Revise Recommendation 2 to "DCHR will provide sick leave to current District employees that should have been eligible to accrue sick leave under the Accrued Sick and Safe Leave Act of 2008.

Finally, DCHR has already begun to take action to ensure we are able to track and ensure eligible WAE intermittent employees receive paid leave benefits in accordance with the ASSLA Act of 2008.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

May 24, 2013

Yolanda Branche
District of Columbia Auditor
Office of the District of Columbia Auditor
717 14th Street, NW Suite 900
Washington, DC 20005

RE: Comments to the D.C. Auditor's Draft Report Entitled "Audit of the Accrued Sick and Safe Leave Act of 2008," Dated May 3, 2013

Dear Ms. Branch:

Thank you for furnishing the Department of Employment Services (DOES) with your draft report, Audit of the Accrued Sick and Safe Leave Act of 2008. Enclosed you will find the agency's comments to two recommendations.

As recommended, DOES submitted proposed rules to the hardship provision of this law in previous years, but they were never finalized. The proposed rules are published in the May 22, 2013 D.C. Register and a resolution has been sent to the Council of the District of Columbia for approval. Final rules will be submitted for publication once the 30-day comment period ends.

Secondly, DOES' established process to investigate employer compliance is outlined in the statute and in Section 3216.4 of final rulemaking of the Accrued Sick and Safe Leave Act of 2008. Procedurally, leave accrual may not be kept on payroll records thus reviewing them may not be advantageous. DOES will continue to seek all relevant documents needed to ensure compliance, including reviewing payroll records if appropriate. Additionally, DOES has mapped out the business processes of the Office of Wage and Hour to improve employer compliance and customer service. DOES will also add two full-time program analysts (FTEs) and will leverage all resources in the agency, including information technology solutions, and jointly utilizing other employer violation enforcement activities of the agency as appropriate.

We look forward to continuing to implement these recommendations to continue to transform the agency and the effectiveness of the Office of Wage Hour. If you have any questions or require additional information, please do not hesitate to contact me at 2020-671-1900 or via email at lmm@dc.gov.

Sincerely,

Lisa María Mallory
Director

Audit of the Accrued Sick and Safe Leave Act of 2008

Recommendation	**Agency Agrees** **Date Agency will Implement Recommendation**	**Agency Disagrees** **Alternative Recommendation**
1. Establish a payroll processing system to track paid sick leave for part-time employees	DCHR to respond	
2. Provide retroactive paid sick leave to current employees that should have accrued paid sick leave due to failure of the Department of Human Resources to track paid sick leave as required by the Accrued Sick and Safe Leave Act.	DCHR to respond	
3. Publish the final Accrued Sick and Safe Leave Act hardship rules in the District of Columbia Register.	DOES agrees. The proposed rules have been published in the May 24, 2013 District of Columbia Register. Additionally, the proposed resolution was transmitted to the Council of the District of Columbia on May 22, 2013 for approval.	
4. Establish a process to review employer compliance with provisions of the Accrued Sick and Safe Leave Act of 2008, including the review of payroll records.		DOES' established process to investigate employer compliance is outlined in the statute and in Section 3216.4 of final rulemaking of the Accrued Sick and Safe Leave Act of 2008. Procedurally, leave accrual may not be kept on payroll records thus reviewing them may not be advantageous. DOES will continue to seek all relevant documents

		needed to ensure compliance, including reviewing payroll records if appropriate. Additionally, DOES has mapped out the business processes of the Office of Wage and Hour to improve employer compliance and customer service. DOES will also add two full-time program analysts (FTEs) and will leverage all resources in the agency, including information technology solutions, and jointly utilizing other employer violation enforcement activities of the agency as appropriate.

Auditor's Response to Agency Comments

The Auditor appreciates the comments provided by the Department of Employment Services and the Department of Human Resources.

Where appropriate, the draft report on the Audit of the Accrued Sick and Safe Leave Act was revised to incorporate comments from the Department of Human Resources.

The Department of Employment Services did not suggest revisions to the draft report. Rather, the Department of Employment Services, in the May 24, 2013 response to the Auditor, stated: "We look forward to continuing to implement these recommendations to continue to transform the agency and the effectiveness of the Office of Wage and Hour."

We are certain that the recommendations presented in the Audit of the Accrued Sick and Safe Leave Act report will improve the operations of the Department of Employment Services and the Department of Human Resources. We await the continued implementation of our recommendations by the Department of Employment Services and the Department of Human Resources.