

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

DECEMBER 9, 2022

### Earned Safe and Sick Time Act Proposal

New York City's Earned Safe and Sick Time Act (ESSTA or Act) provides covered employees with the right to use safe and sick leave as it accrues for a delineated list of circumstances. On Aug. 11, 2022, the New York City Council introduced a proposal to amend the ESSTA's definition of "employee." Under this proposal, certain independent contractors would qualify as employees and receive benefit coverage under the Act. The proposal would require hiring entities to engage in detailed analyses of individuals providing services to determine whether they are independent contractors or employees.

The proposal analyzes an individual's employment status under one of two distinct categories: (1) individuals providing professional services; and (2) individuals providing non-professional services. This information memo explores each of these categories individually, providing separate overviews of the proposal's requirements for hiring entities to carefully analyze individuals being hired to provide services.

#### Individuals Providing Non-Professional Services

For independent contractors providing services other than the professional services listed below, the proposal amends the Act's definition of "employee" to include a *presumption of employment*.

There are two ways for a hiring entity to overcome this presumption. First, a hiring entity may show that an individual is an independent contractor by proving that:

- (1) The individual is free from control and direction in performing the job, both under his or her contract and in fact;
- (2) The service must be performed outside the usual course of business for which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue.

Second, a hiring entity could demonstrate that an individual is considered a separate business entity as defined by the proposal. If successfully asserted, the separate business entity is then categorized as a hiring entity independently subject to the proposal's provisions. As such, the original hiring entity would then pass individuals seeking benefits under the ESSTA to the service provider—the new, applicable hiring entity—for an employment status analysis under the proposal.

#### Individuals Providing Professional Services

The following services are considered "professional services" under the proposal:

- (1) Writers;
- (2) Graphic designers;
- (3) Webpage and digital designers;
- (4) Animators, illustrators, industrial product designers, interior designers, or fashion designers;

- (5) Fine artists;
- (6) Photographers
- (7) Journalists, freelance digital media workers, videographers or audio/podcast producers;
- (8) Software engineers; or
- (9) Musicians and other persons otherwise engaged in the performing arts.

*A presumption of employment does NOT exist* for individuals providing these services; therefore, hiring entities are more likely to succeed in proving that professional service providers are independent contractors. However, a hiring entity attempting to show that an individual providing professional services is an independent contractor still must prove the existence of six enumerated criteria. If these six factors are successfully alleged, an individual's employment status would then become contingent on an analysis of a separate list of eleven independent factors, none of which are determinative.

### **Significance**

Overall, this proposal broadens the Act's definition of "employee," thereby making it more difficult for employers to prove that an individual is an independent contractor exempt from ESSTA benefits. If passed, employers will be required to update employee handbooks and collective bargaining agreements to accord with the proposal's definitional changes. It is also possible that employers would be strongly encouraged or even required to document their analyses of these individuals and retain such documentation, as is done in other New York City laws.

Please contact [Jane Sovern](#) or any attorney in Bond's [labor and employment practice](#) if you have questions about this proposal, or if you would like additional information regarding its development, as well as other employment law updates.

*\*Special thanks to Associate Trainee Paige Carey for assisting with researching and drafting this memo.*

