

HR & Benefits Compliance Alert



Massachusetts Releases Final Regulations on Earned Sick Time Law

On June 19, Massachusetts' Attorney General released [final regulations](#) (“Regulations”) implementing Massachusetts' [Earned Sick Time Law](#) (the “Law”) (M.G.L. c. 149, § 148C). The law takes effect July 1, 2015; however, as discussed below employers with existing earned sick time policies may qualify for a safe harbor that delays the effective date until January 1, 2016. A [Notice of Employee Rights](#) is available, which must be posted in the workplace.

Background

The Law entitles employees in Massachusetts to earn and use sick time under certain conditions. Employees who work for employers with eleven or more employees can earn up to 40 hours of earned sick leave per year, at a rate of one hour for every 30 hours worked. Employers may impose a 90 day waiting period before accrued sick leave may be used. The Law applies to all employees – full-time, part-time, temporary and seasonal (certain exceptions apply to governmental employers).

An employee may use earned sick time if required to miss work in order to:

1. Care for an illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse;
2. Attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; or
3. Address the effects of domestic violence on the employee or the employee's dependent child.

Employees may carry over up to 40 hours of unused sick time to the next year, although an employer may limit an employee's use of earned sick time to no more than 40 hours per year. Employers may, but are not required to, pay employees for unused sick time upon termination of employment. Retaliation against employees taking earned sick time is prohibited, as is requiring an employee to work additional hours to make up for missed time, or find a replacement employee. Employers may require certification of the need for sick time taken in excess of 24 consecutively scheduled work hours; however, employers cannot delay the taking of or payment for earned sick time because they have not received the certification, nor can they require documentation explaining the nature of the illness or details of domestic violence. Employees must make a good faith effort to notify an employer in advance if the need for earned sick time is foreseeable. CONTINUE>>



The Final Regulations

Accrual and Use of Earned Sick Time

The Regulations clarify that an employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts, regardless of the location of the employer.

For example, an employee relocating to an employer's Massachusetts location will have all hours applied toward accrual of earned sick time regardless of the location of the work performed earlier in the year. Employees who transfer outside of Massachusetts no longer accrue earned sick time; however, they may use their accrued time. The Regulations provide that employees accrue earned sick time only on hours worked, not on hours paid when not working. For example, employees do not accrue earned sick time during vacation, paid time off, or while using earned sick time.

The Regulations also prohibit employees from using earned sick time if the employee was not scheduled to be at work during the period of use. In response to concerns from employers, the Regulations and the Notice of Employee Rights provide that earned sick time may not be invoked as an excuse to be late for work (unless the use of sick time was authorized under the Regulations). Further, an employee may not accept a specific shift assignment with the intention of calling out sick for all or part of that shift. Employers may discipline employees for misuse of earned sick time (e.g., if an employee is exhibiting a clear pattern off taking leave on days just before or after a weekend, vacation, or holiday, and the employee has not provided verification that the leave was authorized).

When employees use sick time, the smallest amount an employee can use is one hour. For uses beyond one hour, employees may use earned sick time in hourly increments or in the smallest increment the employer's payroll system uses to account for absences or use of other time. For example, an employer uses a payroll system that tracks time in 15-minute increments. For this employer, an employee with a 90-minute absence would be treated as using 90 minutes of sick time (one hour for any amount of time up to the first hour, then in 15 minute increments thereafter). (CONTINUE >>>>)



Payment of Earned Sick Leave

The Regulations provide that employees receiving paid sick leave must be compensated at their regular hourly rate. For commissioned employees (whether base wage plus commission or commission only), the regular rate is the greater of the base wage or the minimum wage under Massachusetts law (\$9.00 per hour as of January 1, 2015). For tipped employees who ordinarily receive the service rate under Massachusetts law (\$3.00 plus tips as of January 1, 2015), the regular rate is minimum wage (\$9.00 as of January 1, 2015). An employee's hourly rate excludes overtime, holiday pay, commissions, draws, bonuses, or other incentive pay based on sales or production. Note that when an employee's regular rate varies based on certain conditions (e.g., a night shift), the different rate is the regular rate if the employee uses paid sick leave during that time.

Breaks in Service

Employees who experience a break in service may maintain their earned sick leave under certain conditions. An employee returning to work within four months maintains the right to use any unused earned sick time that was accrued before the break in service. If the break in service is between four and 12 months, a returning employee maintains the right to use earned sick time accrued before the break in service if the employee's unused bank of sick time is at least 10 hours. Also, employees who return to work within 12 months do not need to re-satisfy the 90-day waiting period before taking paid sick leave.

Other State and Federal Leave Laws

The Regulations clarify that earned sick time may run concurrently with time off provided by other state and federal laws, including FMLA, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, and the Small Necessities Leave Act. Employers may require employees to use earned sick time when taking other approved unpaid leave.

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Documentation of Earned Sick Time

An employer may require written documentation for an employee's use of earned sick time that exceeds 24 consecutively scheduled work hours or 3 consecutive days on which the employee was scheduled to work, or that occurs within two weeks prior to an employee's final scheduled day of work before termination of employment (except in the case of temporary employees). Also, documentation may be required if use of sick time occurs after four unforeseeable and undocumented absences within a 3-month period

Written documentation that may be required includes a doctor's note indicating the need for the earned sick time taken, or certain other documentation indicating the leave related to domestic violence, such as a restraining order, police report documenting the abuse, medical documentation of the abuse, or a signed written statement from the employee attesting to the abuse. Note, however, that an employer may never require that an employee provide documentation to explain the nature of the illness or the details of the domestic violence as a condition of granting earned sick time.

Employees generally must submit such documentation within 7 days after taking earned sick time. If an employee fails to comply with the employer's documentation requirements without reasonable justification, the employer may recoup amounts paid for earned sick time from future pay, as an overpayment. Employees must be notified of this practice.

Recordkeeping

Employers must maintain records for three years. Employers must give employees access to their own earned sick time records. Employers must post a notice of the Law in each workplace and include a copy of their earned sick time or other paid leave policy in their employee handbook.

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Transition Year Rule

Employers with a policy in effect on May 1, 2015 that provides paid time off or paid sick leave, are considered to be in compliance with the Law until January 1, 2016, provided that:

- Full-time employees have the right to earn and use at least 30 hours of paid time off/sick leave during calendar year 2015; and
- On and after July 1, 2015, all employees not previously covered by the policy must either:
 - a. accrue paid time off at the same rate of accrual as covered full-time employees; or
 - b. if the policy provides lump sum allocations, receive a prorated lump sum allocation based on the lump sum provided to covered employees.

Earned sick leave granted pursuant to the transition rule is subject to the Law's non-retaliation provisions and may be carried over to 2016 if unused during 2015. In all other respects, employers qualifying for the transition period may continue to administer paid time off under policies in place as of May 1, 2015. On or before January 1, 2016, all employers operating under the transition period must adjust their paid time off policy to conform to the Law's requirements.

What Employers Should Do

The Law takes effect July 1, 2015, although many employers may qualify for a delayed effective date of January 1, 2016 under the transition rule mentioned above. Employers should review the Regulations and their current leave policies with their employment counsel to ensure compliance with either the Regulations or the transition rule. Non-compliance can result in civil penalties of up to \$25,000 per violation, individual executives can be personally liable for failures, and employees may file lawsuits to preserve their rights. Successful employees may recover treble damages and associated costs and attorneys' fees—so compliance is extremely important.

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