

CLIENT ALERT: Governor Baker Signs New Bill Providing COVID-19 Emergency Paid Sick Leave

On May 28, 2021, Governor Charlie Baker signed into law new legislation ordering Massachusetts employers to provide employees up to 40 hours of COVID-19 emergency paid sick leave. Employers are eligible for reimbursement for this leave through a new COVID-19 Massachusetts Emergency Paid Sick Leave Fund established by the law, unless the employer is otherwise eligible for reimbursement under the federal Families First Coronavirus Response Act. The paid sick leave benefit is capped at \$850 per week per eligible employee. This new COVID-19 emergency paid sick leave must be provided as of May 28, 2021, and such leave is available until September 30, 2021, or until the program funds expire, whichever is earlier. Virtually all employees, including those employed by the Commonwealth of Massachusetts and municipalities, are eligible for this emergency paid sick leave. Additional information and guidance should be forthcoming to clarify the full scope of the law.

Eligible Reasons for Leave

Employees are entitled to take COVID-19 emergency paid sick leave for the following COVID-19 related reasons:

(1) the need to:

- (i) self-isolate and care for themselves because they have been diagnosed with COVID-19;
- (ii) obtain a medical diagnosis, care, or treatment for COVID-19 symptoms; or
- (iii) obtain or recover from a COVID-19 immunization; or

(2) the need to care for a family member who:

- (i) must self-isolate due to a COVID-19 diagnosis; or
- (ii) needs a medical diagnosis, care, or treatment for COVID-19 symptoms;

(3) a quarantine order or similar determination regarding the employee by a local, state, or federal public official, a health authority having jurisdiction, or a health care provider;

(4) an employee's need to care for a family member due to a quarantine order or similar determination regarding the family member by a local, state, or federal public official, a health authority having jurisdiction, the family member's employer, or a health care provider; or

(5) an employee's inability to telework because the employee has been diagnosed with COVID-19 and the symptoms prevent the employee from teleworking.

Note, "family member" for the purposes of this law refers to an employee's spouse, domestic partner, child, parent, grandchild, grandparent, or sibling, a parent of a spouse or domestic partner of the employee, or a person who stood *in loco parentis* to the employee when such employee was a minor child.

Leave Periods

(1) Employers must provide 40 hours of COVID-19 emergency paid sick leave to their employees who work 40 or more hours per week.

(2) For employees who regularly work fewer than 40 hours per week, employers must provide leave in

an amount that is equal to the average number of hours that such employee works per week over a 14-day period of their regular schedule.

(3) For employees whose schedule and weekly hours vary from week to week, employers must provide leave that is equal to the average number of hours that the employee was scheduled to work per week over the previous 6-months, including hours for which the employee took leave of any type.

(4) If an employee with a variable schedule has not worked for the employer over the preceding 6-month period, the employer must provide leave that is equal to the number of hours per week that the employee reasonably expected to work when hired.

COVID-19 emergency paid sick leave is compensated at the employee's regular rate of pay. The maximum amount an employer is required to pay per employee, and the maximum amount for which the employer may seek reimbursement for any one employee, is \$850 per week (including cost of benefits). Employees are entitled to maintain their employment benefits during the leave period, and may use COVID-19 emergency paid sick leave on an intermittent basis, and in hourly increments.

Note, *employers generally may not require employees to use other types of available paid leave before they use COVID-19 emergency paid sick leave.* Likewise, employers may not require employees to substitute other paid time off for COVID-19 emergency paid sick leave. This new leave is in addition to all job protected time off, paid and unpaid, that the employer is required to provide employees under the Massachusetts Earned Sick Time law (M.G.L. c. 149, § 148C), under any existing policy or program of the employer, pursuant to a collective bargaining agreement, or under federal law, unless the aggregate amount the employee would receive would exceed their average weekly wage. COVID-19 emergency paid sick leave may, however, be reduced by the amount of wages or wage replacement an employee receives for that period under any government program or law.

Nothing in the COVID-19 emergency paid sick leave law prohibits employers from adopting more generous leave policies than that which is required by the law. Further, the law requires employers with COVID-19 sick leave policies already in place to make available an amount of COVID-19 sick leave at least equal to the law's requirements; employers with such policies are not required to provide additional COVID-19 emergency paid sick leave.

Processing Requests For Leave and Reimbursements

While the law does not specify the time frame or form of submission for employer reimbursement requests, the Executive Office for Administration and Finance (or its designee) will promulgate a reimbursement application for employer use. In the meantime, employers planning to seek reimbursement from the COVID-19 Massachusetts Emergency Paid Sick Leave Fund must require their employees to submit requests for such leave in writing that include the following information:

- (1) the employee's name;
- (2) the date(s) for which leave is requested and taken;
- (3) a statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- (4) a statement that because of the COVID-19 related reason the employee is unable to work or telework.

For leave requests related to a quarantine order or self-quarantine advice, the statement from the employee must also provide:

- (1) the name of the governmental entity ordering quarantine or the name of the health care provider

advising self-quarantine; and

(2) if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

Note, a standard form is in development and will be posted for use at employers' option at Mass.gov. The law indicates that employers will be reimbursed directly in a timely manner after receipt of their application.

Importantly, employers who are eligible for a tax credit for qualified sick leave wages provided under the federal Families First Coronavirus Response Act, or any subsequent extensions via the federal Consolidated Appropriations Act, 2021 and the federal American Rescue Plan Act of 2021 *are not* eligible for reimbursement from the COVID-19 Massachusetts Emergency Paid Sick Leave Fund.

Employers must treat health information regarding an employee or their family member as confidential medical records in accordance with applicable state and federal law, and must not disclose such information to any third parties without the employee's express permission.

Employee Notice

Employees must provide their employers notice of the need for COVID-19 emergency paid sick leave as soon as practicable or foreseeable. After the first workday an employee receives leave, an employer may require the employee to follow reasonable notice procedures. Employers may not require employees to search for or find a replacement worker to cover the time the employee will miss while using COVID-19 emergency paid sick leave.

Employer Notice

On or before June 4, 2021, the Executive Office of Labor and Workforce Development, in consultation with the Executive Office for Administration and Finance, will issue a notice regarding COVID-19 emergency paid sick leave. The notice is expected to be available in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, and Russian.

Once available, employers must post the notice in a conspicuous location accessible to employees in every establishment where eligible employees work. A copy of the notice must also be provided to each employee. If an employer does not maintain a physical workplace, or an employee teleworks or performs work through a web-based platform, notification can be provided via electronic communication or a conspicuous posting in the web-based platform.

Non-Retaliation

Employers may not interfere with an employee's ability to use COVID-19 emergency paid sick leave or retaliate against an employee for exercising rights under the program.

Additional guidance is expected in the coming weeks, including further information on how employers may apply for reimbursement. MBJ will continue to monitor and update clients on these important developments concerning this legislation. Employers are encouraged to work with their MBJ attorney to prepare to comply with employer obligations under this new paid leave law.

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