

CLIENT ALERT: Massachusetts Attorney General Issues Final Regulations Governing Earned Sick Time

On Friday, June 19, 2015, the Massachusetts Attorney General released the final Regulations governing the application of the Earned Sick Time law that voters approved last November. These Regulations are intended to provide guidance – beyond the terms of the law itself – as to the practical application of the law.

This alert highlights the key provisions in the Regulations that address the most common and challenging questions facing employers as they attempt to implement the law. While this alert is much longer than our usual alerts given the amount of information to cover, it cannot address every detail of the Regulations or all possible scenarios. Please contact your MBJ lawyer with questions.

Remember, for employers not taking advantage of the safe harbor, this law goes into effect on July 1, 2015. Employers should endeavor to update their policies and practices as close to that date as possible given the very short compliance period remaining.

- **Do all employers have to provide earned sick time and how much time must they give to eligible employees?**

Employees of employers with 11 or more employees can earn and use up to 40 hours of *paid* sick time per calendar year. Employees of employers with fewer than 11 employees can earn and use up to 40 hours of *unpaid* sick time per calendar year.

To determine an employer's number of employees, all employees performing paid work on a full-time, part-time, seasonal or temporary basis, whether working in or outside of Massachusetts, must be counted.

The law applies to both private and public employers. However, cities, towns, school committees and regional schools will be considered "employers" only if this law is accepted by vote of the appropriate legislative body.

- **What amount of leave do employers have to provide during the transition year (2015)?**

An employer does not have to provide more than 40 hours even during the transition year. For example, if an employee used 15 hours of paid leave as of July 1, 2015, the employee is allowed only to earn and use up to 25 hours of earned sick time for the remainder of the benefit year.

- **Which employees get to take earned sick time?**

Full-time, part-time, seasonal and temporary employees are entitled to accrue and use earned sick time.

The following are *not* considered “employees”:

- students of an institution of higher education in MA who are on work-study;
- students of an institution of higher education in MA providing support services to residents of a residence hall or similar housing; and
- adult clients residing in a MA licensed program and working within the program.

Employees are eligible for sick leave if their “primary” place of employment is in Massachusetts.

- **For what purposes can earned sick time be used?**

An employee can use earned sick time if he or she has to miss work for any of the following reasons:

- (1) to care for the employee’s child, spouse, parent or parent of a spouse, who is suffering from a physical or mental illness, injury or medical condition that requires home care, professional medical diagnosis or care or preventative medical care;
- (2) to care for the employee’s own physical or mental illness, injury or medical condition that requires home care, professional medical diagnosis or care or preventative medical care;
- (3) to attend the employee’s routine medical appointment or a routine medical appointment for the employee’s child, spouse, parent or parent of spouse;

Remember that “child” and “parent” are defined broadly. Employers are advised to seek counsel if the request for leave relates to a child or parent to whom the employee is not related by blood, marriage or legal process.

- (4) to address the psychological, physical or legal effects of domestic violence; or
- (5) travel to and from an appointment, a pharmacy or other location related to the purpose for which the time is taken.

- **How does the sick time accrue and get carried over?**

Employees must earn a minimum of one hour of sick time for every 30 hours worked, up to a cap of 40 hours per benefit year.

Employees that are exempt from the overtime requirements of the Fair Labor Standards Act are assumed to work 40 hours in each work week for purposes of earning sick time. However, if their normal work week is less than 40 hours, earned sick time will accrue based on that normal work week.

Once an employee has accrued 40 hours during the benefit year, the employer may delay further accrual until the employee draws down the bank of earned sick time to below 40 hours.

At the end of a benefit year, an employee who has accrued time in this manner may carryover up to

40 hours of unused earned sick time.

- **Are there alternative approaches for employers that do not want to track accrual by the hour?**

Employers that prefer not to track accrual may instead offer a lump sum of benefit time that is pro-rated based on the average hours worked. The Regulations provide schedules for providing lump sums of sick leave or paid time off. For example, for employees working 24 hours per week, the employer would provide four hours per month for 10 months.

Employers using these schedules will be in compliance even if an employee's hours vary from week to week.

If these schedules are used, employees will be able to rollover sick leave up to 40 hours and accrual may be delayed while an employee maintains an unused bank of 40 hours.

Another option for employers is to provide a lump sum of 40 or more hours of sick leave or paid time off at the beginning of each benefit year.

Employers that choose this option do not need to track accrual or allow any rollover.

- **At what rate do employees get compensated for paid sick time?**

Employees must be paid at the same "regularly hourly rate" they would have earned if the employee had been working. This does not include overtime, commissions, bonuses or holiday or other premium pay.

The Regulations provide additional guidance on the appropriate rate in different contexts (differential rates, tipped employees, etc.). Please review the Regulations or call with questions.

- **How can the earned sick time be used?**

Employees hired on or after July 1, 2015, begin accruing sick time hours on their first date of actual work and may begin to use any accrued earned sick time on their 90th day of employment. On and after the 90th day, employees may use earned sick time as it accrues.

Employees who have been employed for at least 90 days as of July 1, 2015 (meaning their first dates of actual work occurred on or before April 2, 2015), may use earned sick time as it accrues.

The smallest amount of sick time that an employee can use is one hour. For uses beyond one hour, employees may use earned sick time by the hour or by smaller increments as permitted by the employer's time and attendance system.

Where an employee's use of earned sick time requires the employer to call in a replacement, and the employer does so, the employer can require the employee to use an equal number of hours as the replacement works (up to a full shift of earned sick time).

Note that the fact that there is a break in service does not in and of itself result in the cancelling out of earned sick time that had been accrued before the break in service. Specifically:

- following a break in service of up to four months, an employee has the right to use earned sick time that had accrued before the break in service;
- following a break in service of between four and 12 months, an employee has the right to use earned sick time that had accrued before the break in service if the unused bank of earned sick was at or above 10 hours;
- separate and apart from the ability to use previously accrued sick time, employees who have a break in service of up to 12 months, do not need to restart the 90-day vesting period; and
- employees who are re-hired after a break in service of 12 months or longer are treated like new hires.

Are cash payouts permissible?

Employers may provide a cash payout of accrued but unused earned sick time for up to 40 hours at the end of the benefit year.

Employers paying out *16 hours or more* must provide 16 hours of unpaid sick time until the employee accrues new paid time (which shall replace the unpaid time as it accrues).

Employers paying out *less than 16 hours* shall provide an amount of unpaid sick time equivalent to the amount paid out until the employee accrues new paid time (which shall replace the unpaid time as it accrues).

Remember though, employers do not have to pay out any accrued but unused earned sick time at separation.

• Can employers maintain pre-existing sick time/paid time off policies?

Yes, employers may maintain their own sick leave or paid time off policies – and substitute leave provided under those policies for earned sick time – as long as all employees can use at least 40 hours of that time (or a lesser amount if the employee might earn less under the earned sick time law) for the same purposes, under the same conditions and with the same job protections as they would get under the earned sick time law.

Note: if an employer provides at least 40 hours of paid time off which may also be used as earned sick time in accordance with the requirements of this law, that employer does not have to provide any additional sick leave to employees who use all their time for other purposes (i.e. vacation or personal time). If those employees use all of their time and then need sick leave later in the year, the employer does not have to provide more time for that as long as the employer's policies make it clear that such additional time will not be provided.

Also, if by its policies an employer offers more than 40 hours of sick time, it is acceptable for the employer to maintain separate policies for earned sick time hours and hours in excess of that time.

Employees must be permitted to designate which time is taken as earned sick time.

It is acceptable for employers to maintain different paid leave policies for different groups of employees as long as all employees get at least what is required under the earned sick time law.

- **What if an employer has an unlimited sick leave policy?**

Employers that have an unlimited sick leave policy do not have to track accrual or use of sick leave or allow any rollover as long as the sick leave is offered consistent with this law. The AG recommends a written policy that provides that such leave is unlimited and includes leave taken pursuant to this law.

- **What can an employer do if the employee is suspected of abuse of earned sick time?**

The Regulations provide that earned sick time may not be invoked as an excuse to be late for work. However, if an employee invokes one of the permissible reasons to take leave under this law and abides by the notice requirements, that tardiness must be excused.

If an employee is exhibiting a clear pattern of taking leave on days just before or after a weekend, vacation or holiday, an employer may discipline the employee for misuse of earned sick time (unless the employee provides verification of authorized use for one of the permissible reasons for use of earned sick time).

If an employee is found to commit fraud or abuse by engaging in some activity that is not consistent with the permissible reasons for use of earned sick time, the employer may discipline the employee.

Employees will not be permitted to accept a shift assignment with the intention of calling out sick for all or part of that shift.

- **What notice must employees provide of their intent to use earned sick time?**

An employee must notify the employer before using earned sick time, except in an emergency.

For foreseeable absences, the employer can have a written policy requiring up to seven days' notice (unless the employee learns of the need to use earned sick time in a shorter period).

For unforeseeable absences, "reasonable" notice is required. What is "reasonable" will vary depending on the circumstances.

For multi-day absences, an employer can require notification of the expected duration of the leave. If unknown, the employer can require daily notification from the employee (or the employee's family member) unless the circumstances make that unreasonable.

Employers can require employees to provide notice in the manner preferred by the employer as long as this is consistent with the customary mode of communicating absences or request for leave.

An employee does not have to use the magic words "earned sick time" or reference to the statute to

take earned sick time leave. The employer just needs to be on notice that the employee intends to use accrued time for a purpose allowed under the law.

- **Can an employer require documentation to substantiate the use of earned sick time?**

An employer can require documentation for an employee's use of earned sick time when the leave:

- exceeds 24 consecutively scheduled work hours;
- exceeds three consecutive days on which the employee was scheduled to work;
- occurs within two weeks prior to an employee's final scheduled day of work before termination of employment (except in the case of temporary workers); or
- occurs after four unforeseeable and undocumented absences within a three-month period.

The type of written documentation that an employer can require is as follows:

- written documentation signed by a health care provider indicating the need for the earned sick time taken; and
- with regard to the need for leave related to domestic violence, the Regulations offer a list of acceptable forms of documentation including but not limited to a restraining order, a police record or a signed written statement from the employee attesting to the abuse.

Despite the foregoing, an employer may never seek documentation that explains the nature of the illness or details the domestic violence. Rather, all that is permitted is documentation that indicates the need for the leave sought or taken.

Employees may provide this documentation by any reasonable method including in hand or by email and within seven business days after taking the time (unless there is good cause for a longer period).

If the employee fails to comply with the documentation requirements, the employer may recoup the sum paid for earned sick time from future pay as an overpayment. (Employees must be put on notice of this practice). The employer also can deny future use of an equivalent number of hours of accrued earned sick time until documentation is provided (but no other adverse actions are permitted).

Note: there are special documentation requirements for public employers performing essential public health and safety functions, and health care providers.

Finally, a fitness-for-duty certification can be required from a medical provider before an employee returns from earned sick time absence if such certification is customarily required and reasonable safety concerns exist, which means the employer has a reasonable belief that the employee could pose a significant risk of harm to the employee or others in attempting to perform the duties of the job.

- **Other important notes and posting and recordkeeping requirements**

Earned sick leave can run concurrently with Family Medical Leave Act, Small Necessities Leave Act,

Domestic Violence Leave and Parental Leave.

Employers must comply with any contract, collective bargaining agreement or employee benefit program in effect on July 1, 2015 that provides greater earned sick time rights.

The AG has drafted a notice and employers must post such a notice in conspicuous location. Employers also must provide a copy of that notice or its policy with that information to employees. Employers' policies must define the "calendar" or "benefit" year.

Employers are required to maintain records related to sick leave for at least three years after each pay period.

A reminder that the foregoing is only a summary of some of the key points of the law and final Regulations. We strongly encourage you to contact your M&J lawyer with questions about your particular workplace and policy. That is the only way we can be sure you have all the information you need specifically. We look forward to working through this with you.

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This alert was published on June 23, 2015.

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