

CLIENT ALERT: Massachusetts Voters Approve Earned Sick Leave

On November 4, 2014, Massachusetts voters approved Ballot Question 4, which proposed earned sick time for employees. Massachusetts joins Connecticut and California – as well as a growing number of municipalities across the country – in requiring employers to provide earned sick time for employees. The following is a summary of the information employers need to know to comply with this law.

- ***When does this law go into effect?***

The law goes into effect on July 1, 2015.

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

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, or temporary basis must be counted. For a Massachusetts employer who has employees inside and outside of Massachusetts, the law does not explain whether to count only employees in Massachusetts or all of an organization's employees. We will look forward to instruction on this from the Attorney General.

Note that the law applies to both private and public employers. However, cities and towns are considered "employers" for the purpose of the law only if the municipal legislative body votes to accept the law or there is a subsequent vote of the Massachusetts legislature.

- ***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; or
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; or
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; or
4. to address the psychological, physical, or legal effects of domestic violence.

Interestingly, "child" is defined as "a biological, adopted, or foster child, a stepchild, a legal ward, *or a child of a person who has assumed the responsibilities of parenthood.*" "Parent" is defined as "a biological, adoptive, foster or step-parent of an employee or of an employee's spouse; *or other person who assumed the responsibilities of parenthood when the employee or employee's spouse was a child.*"

We anticipate discussion and debate over the meaning of the italicized phrases. The Attorney General likely will issue guidance to assist in the implementation of this law. MBJ will keep you apprised of any further guidance on the meaning of these phrases, as well as other developments.

- ***How does the sick time accrue and how can it be used and carried over?***

Employees must earn a minimum of one hour of sick time for every 30 hours worked. Note that employees who 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.

Employees begin accruing sick time hours on their date of hire or on July 1, 2015, whichever is later. Employees can begin using 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 can use earned sick time in the smaller of: (1) hourly increments or (2) in the smallest increment that the employer's payroll system uses to account for absences or use of other time.

Employees may carry over up to 40 hours of unused sick time to the next calendar year, but cannot use more than 40 hours in a calendar year. If an employee is absent for one of the permissible reasons for use of earned sick time, but agreed with the employer to work an equivalent number of hours during the same or next pay period as the hours missed, the employee would not have to use earned sick time for that missed period of time and the employer would not have to pay for that missed time.

- ***Does an employer have to pay out for accrued but unused sick time when the employee separates from employment?***

No. Unlike accrued but unused vacation time, which an employer must pay out at the time of separation, employers are not required to pay out unused earned sick time.

- ***May an employer require certification from an employee using earned sick time, and what notice must an employer provide?***

An employer may require certification of the need for the sick time, but only if an employee used sick time for more than 24 consecutively scheduled work hours. Note that an employer may not require that this notice detail the nature of the illness or the details of the domestic violence. Finally, an employer may not delay the use of sick time, or the payment for it where required, because the employer has not received the certification yet. Employees must make a good faith effort to notify the employer in advance of the need for leave, unless the need was not foreseeable.

- ***How does this law impact an employer that already offers paid time off?***

Some employers who will be required to provide paid sick time to their employees under the new law may already be providing employees with paid time off pursuant to some type of a paid time off policy. In those cases, employers do not have to do more under this law as long as their current policy is set up in a way that meets the accrual requirements of this law and permits employees to take that paid time for the same reasons and with the same conditions as this law.

While we hope the Attorney General will provide guidance on this in the near future, employers should be mindful that they may need to earmark a portion of paid time off policies to the accrual of paid sick time to be used in accordance with this new law. This can be accomplished through the revision of company policy.

Nothing in this law overrides an employer's obligations to comply with any collective bargaining agreement, contract, or benefit plan if that contract or plan provides more generous benefits than the law.

- ***How do the requirements of this law intersect with the Family and Medical Leave Act, the Small Necessities Leave Act, and the new Domestic Leave Law?***

First, remember that the FMLA and SNLA apply only to employers with 50 or more employees and employees are not eligible for those types of leave until 12 months of employment (as opposed to the 90 days required before one can take earned sick time). Also, bear in mind that the FMLA and SNLA provide only for unpaid time and the earned sick leave law provides for paid time (for employers with 11 or more employees). However, there may be situations where leave taken for a permissible purpose under the earned sick time law also will be qualified leave under the FMLA and/or SNLA. When that is the case, and all requirements are met, leave taken pursuant to the earned sick time law may run concurrent with leave taken pursuant to the FMLA and/or SNLA. Similarly, the new **Domestic Violence Leave Law** provides for an unpaid leave of absence of up to 15 days to allow an employee to seek relief that is directly related to domestic violence. Under the Domestic Violence Leave Law, an employee seeking leave under this section is required to exhaust all annual and paid leave available to the employee, prior to requesting or taking leave under the Domestic Violence Leave Law. However, the Domestic Violence Leave Law also provides that an employer may waive that requirement that all annual and paid leave be taken first. The employer's decision about how to approach this issue will dictate whether time off pursuant to the new earned sick time law must be exhausted first or can run concurrently with Domestic Violence Leave where qualifying.

- ***What else does an employer need to know to fully comply?***

An employer is prohibited from interfering with an employee's right to take earned sick time and from considering the taking of earned sick time as a negative when it comes to employment actions such as evaluations, promotions, or any type of disciplinary actions.

It is also a violation of the law for an employer to retaliate against any employee for having opposed any action by the employer that the employee believes to be in violation of this law, or because an employee supports another employee's exercise of his or her rights under this law.

Finally, employers will be required to post a written notice about this law in a conspicuous location and to provide a copy to their employees.

MBJ will continue to monitor any guidance issued in advance of the implementation of this new sick leave law. In the meantime, please contact your MJB attorney with any questions.

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This alert was prepared on November 5, 2014.

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