ML STRATEGIES

Massachusetts Earned Sick Time Law Takes Effect July 1st

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The Massachusetts Earned Sick Time Law, which requires nearly all Massachusetts employers to provide earned sick time to employees, goes into effect on July 1, 2015. Unless they qualify for the limited safe harbor provision (discussed below), employers must be in compliance with the law and allow employees to begin accruing time on July 1. The Massachusetts Attorney General's Office (AGO) issued final regulations on enforcement of the law last Friday, which are available **here**. A summary of the Earned Sick Time Law's provisions and key guidance from the final regulations is below. Our Massachusetts employment attorneys are available to assist you with compliance.

Brief Summary of the Law

- Employers must provide all employees, including part-time, seasonal, and temporary employees, one hour of sick time for every 30 hours worked, up to a maximum of 40 hours per year. Employers with 11 or more employees must provide paid sick time; employers with fewer than 11 employees must provide unpaid sick time.
- Qualifying reasons for taking sick time under the law include (1) caring for a physical or mental illness, injury, or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse; (2) attending routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; or (3) addressing the effects of domestic violence on the employee or the employee's dependent child.
- Employees begin accruing earned sick time on the law's effective date or their date of hire, whichever is later, but are not entitled to use any earned sick time until they have been employed for 90 days. Employees who were employed as of April 2, 2015 may begin using time as it accrues beginning on July 1, 2015.
- Employees may carry over up to 40 hours of sick time from one year to the next, but may not use more than 40 hours of sick time in any one year.
- Employers are not required to pay employees for accrued but unused sick time at the time of termination.
- The use of earned sick time is job-protected leave. Employers may not interfere with, restrain, or deny the exercise of an employee's rights under the law. Employers may not retaliate against employees for exercising their rights under the law.

Guidance from AGO's Final Regulations

Paying Employees at Their "Same Hourly Rate"

- The law requires that employees be paid at the "same hourly rate" when using paid earned sick time.
- For employees paid on an hourly basis, the same hourly rate means the employee's regular hourly rate.
- For tipped employees, the same hourly rate means the minimum wage effective when the time is used.
- For employees paid on commission (whether base wage plus commission or commission only), the same hourly rate means the greater of the base wage or the minimum wage effective when the time is used.
- For salaried employees, the same hourly rate means the employee's total earnings in the previous pay period divided by the total hours worked (which is assumed to be 40 hours unless the employee is regularly scheduled to work less than 40 hours per week).
- The same hourly rate does not include (1) sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production; (2) sums excluded under 29 U.S.C. § 207(e), including contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance, and any other employee

benefit plans; or (3) overtime, holiday pay, or other premium rates.
- Where an employee's regular hourly rate is a "differential rate," meaning a different wage rate paid for the same work performed under differing conditions (e.g. a night shift), the "differential rate" must be paid.

Accrual of Earned Sick Time

- Employees are eligible to accrue and use time if their primary place of work is in Massachusetts (which need not be 50% or more). If employees are eligible to accrue, then all hours worked must be applied to the accrual rate, regardless of location.
- Employers that provide employees with a lump sum of 40 hours or more of sick leave at the beginning of each year do not need to track accrual or allow any rollover as long as the provided leave is otherwise consistent with the law.
- Employees accrue earned sick time only on hours worked, not on hours paid when not working (e.g. vacation, paid time off, or while using earned sick time).
- Employers may opt to delay further accrual for employees who have a bank of 40 hours of earned sick time until the employees draw down the bank to below 40 hours.
- Employers may track accrual at an accrual rate of one hour for every 30 hours worked or any equivalent accrual rate with smaller increments of time (e.g. one minute of sick time per 30 minutes worked).

Use of Earned Sick Time

- The smallest amount of accrued sick time 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 other time.
- Employees may not use earned sick time as an excuse to be late for work without an authorized purpose.
- If an employee commits fraud by engaging in an activity that is not consistent with the allowable purposes for leave, or the employee exhibits a clear pattern of taking leave on days just before or after a weekend, vacation, or holiday, then the employer may discipline the employee for misuse of earned sick time (unless the employee provides verification of authorized use).

Effect of Breaks in Service on Earned Sick Time

- Employees may retain their earned sick time bank upon a break in service, when an employee's employment is terminated and the employee is subsequently rehired. This is particularly important for employers with large numbers of seasonal and temporary employees as well as for summer interns.
  - Following a break in service of up to 12 months, employees maintain their vesting days from the employer so that they do not need to restart the 90-day vesting period.
  - Following a break in service of between 4 and 12 months, an employee maintains the right to use earned sick time accrued before the break in service if the employee's unused bank of earned sick time equals or exceeds 10 hours.
  - Following a break in service of up to 4 months, an employee maintains the right to use any unused earned sick time accrued before the break in service.

Calculating the Employer Size

- All of an employer's employees, including full-time, part-time, seasonal, and temporary employees, and including even those employees working outside Massachusetts, must be counted for the purpose of determining employer size.
- Employees working at an employer through a temporary staffing agency and paid by the staffing agency must be counted as employees of both the staffing agency and the employer.

Notice of Use of Earned Sick Time

- Employees must notify their employers before they use earned sick time, except in an emergency.
- For foreseeable use of earned sick time, employers may require up to 7-days' notice, except where an employee learns of the need to use the earned sick time within a shorter period.
- Employers may require employees to use the reasonable notification system customarily used to communicate with the employer for absences or requesting leave.
- For multi-day absences, an employer may require notification of the expected duration of the leave or, if unknown, then on a daily basis from the employee or the employee's surrogate, unless the circumstances make such notice unreasonable.

Documentation of Use of Earned Sick Time

- Employers can require written documentation for an employee's use of earned sick time when the time (1) exceeds 24 consecutively scheduled work hours; (2) exceeds 3 consecutive days on which the employee was scheduled to work; (3) occurs within 2 weeks prior to an employee's final scheduled day of work before termination of employment, except in the case of temporary employees; (4) occurs after 4 unforeseeable and undocumented absences within a 3-month period; or (5) for employees aged 17 and under, occurs after 3 unforeseeable and undocumented absences within a 3-month period.
- Employers also may require employees to personally verify in writing that they used earned sick time for allowable purposes after using sick leave, but employers cannot require employees to explain the nature of an illness or details of domestic violence.
- Employees must submit such documentation within 7 days of taking the earned sick time for which such documentation is required, unless, for good cause shown, an employee requires more time to provide such documentation.
- Employers may require an employee to provide a fitness-for-duty certification from a medical provider before returning to work after using earned sick time if such certification is customarily required and consistent with industry practice or state or federal safety requirements, and the employer has a reasonable belief that the employee may pose a significant risk of harm to himself or herself or others.

Allowable Substitution of Employer's Current Paid Leave Policies

- An employer-provided PTO policy may be substituted for earned sick time as long as 40 hours of time off provided under the policy (or a lesser amount the employee might earn if the employer were not substituting their policy) complies with the following:
  - Accrual at the rate of no less than one hour for every 30 hours of work;
  - Of the same job protections;
  - Access for all uses authorized under the law;
  - Availability under the same conditions of notice and documentation; and
  - Pay at the employee's same hourly rate.
- Employers may have different paid leave policies for different groups of employees if the employees can use at least the same amount of time, for the same purposes, under the same conditions and with the same job protections required by the law.
- Employers may use following schedule of compliant accrual rates for employees based on numbers of hours worked per week:
  - 37.5 – 40 hours per week, provide 8 hours per month for 5 months.
  - 30 hours per week, provide 5 hours per month for 8 months.
  - 24 hours per week, provide 4 hours per month for 10 months.
  - 20 hours per week, provide 4 hours per month for 9 months.
  - 16 hours per week, provide 3 hour per month for 10 months.
  - 10 hours per week, provide 2 hours per month for 10 months.
  - 5 hours per week, provide 1 hour per month for 10 months.
- Employers that provide employees with a lump sum of 40 hours or more of sick leave or paid time off at the beginning of the year do not need to track accrual or allow rollover.
- Employers may maintain separate use policies for paid time off in excess of 40 hours if they allow employees to designate which time is taken as earned sick time.

Recordkeeping

- Employers must keep records of the accrual and use of earned sick time for three years.
- Employers must post the Earned Sick Time Notice, available **here**, in all locations where eligible employees work.
- Employers must provide a hard copy or electronic copy of the notice or include their leave policies in an employee manual or handbook.
- Employers providing time off to employees under a paid time off, vacation, or other policy that complies with the law are not required to track and keep a separate record on accrual and use of earned sick time, except employers must keep records of the time designated as earned sick time where the employer chooses to maintain separate use policies as described above.

The Safe Harbor for July 1, 2015 – December 31, 2015

- Employers with a policy in existence as of May 1, 2015 that provides paid time off or paid sick leave will be deemed 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/paid sick leave between January 1, 2015 and December 31, 2015;
- The 30 hours of paid time off/paid sick leave or the lesser amounts described above must be (1) job-protected and subject the law's anti-retaliation provisions; (2) available for the allowed purposes of the leave under the law; and (3) available to the employee after January 1, 2016 if unused during the Transition Year unless the policy provides lump sum allocations that make rollover unnecessary.
- On and after July 1, 2015, all employees not previously covered by the policy, including part-time employees, seasonal employees, temporary employees, new employees, and per diem employees must either (1) accrue paid time off at the same rate as covered full-time employees; or (2) if the policy provides lump-sum allocations, receive a prorated lump-sum allocation of paid time off/paid sick leave. Such lump sums may be halved for the calendar year 2015 for employees who receive coverage as of July 1, 2015, and proportionately reduced for employees hired after July 1, 2015 and/or be proportionate for part-time employees; and
- By January 1, 2016, all employers operating under the safe harbor provision must adjust their policies to conform with the law.

Authors

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