Massachusetts Attorney General Issues Proposed Regulations Regarding Earned Sick Time Law

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On April 24, 2015, the Massachusetts Office of the Attorney General issued proposed regulations regarding the Earned Sick Time law. The law, which was passed by voters on November 4, 2014 and takes effect on July 1, 2015, requires all employers to allow employees to accrue at least one hour of sick time for every 30 hours worked, up to 40 hours per year. For employers with at least 11 or more employees, the sick time must be paid. A summary of the law can **found here**.

Employers have many questions about the Earned Sick Time law and its implementation. The proposed regulations offer clarification as to how the law will be enforced. However, the proposed regulations are subject to change after public comment. Employers are encouraged to provide comments to the Office of the Attorney General or to attend a public hearing on the regulations. Nonetheless, the proposed regulations provide some guidance for employers as they prepare for the July 1 effective date.

Who counts as an "employee" under the law?

The proposed regulations clarify that *all* employees, including full time, part-time, seasonal, temporary employees, and interns, are eligible to accrue and use sick time. Further, all of these employees count toward the 11-employee threshold for paid sick time.

An employee whose primary place of work is Massachusetts is covered by the law. The regulations explain that that an employee does not need to spend a majority of his or her time in Massachusetts for the state to be the primary place of work. For example, if an employee works 40 percent of her hours in Massachusetts, 30 percent in New Hampshire and 30 percent in other states, then Massachusetts is her primary place of work.

How will the 11-employee threshold for paid sick time be calculated?

The proposed regulations state than any employer who either (a) maintains 11 or more employees on the payroll during 20 or more weeks (whether consecutive or not) over either the current or preceding calendar year; *or* (b) maintains 11 or more employees on the payroll during 16 consecutive weeks over the current or preceding calendar year will be obligated to offer paid sick time under the law. Furthermore, all of an employer's employees, *whether working in or outside Massachusetts*, and regardless of their eligibility to accrue and use earned sick time, shall be counted for the purpose of determining employer size.

If an employer has a change in workforce size that takes it under the 11-employee threshold and plans to transition from paid to unpaid sick time, the employer must give 90 days' notice to its employees of the change. Further, if an employee has unused, earned paid sick time in that situation, the unused paid sick time shall remain paid sick time until exhausted, despite the fact that the employee will begin to accrue unpaid sick time.

What happens to employees with a break in service?

The proposed regulations provide that if the employee returns to work after a break in service of up to one year from the last day of actual work, the employee is entitled to use earned sick time accrued prior to the break in service. This means that an employee who quits but is later rehired, is entitled to her prior earned sick time, so long as the break in service is one year or less in length.

What does a "calendar year" mean under the Earned Sick Time law?

For the purposes of administering the Earned Sick Time law, a calendar year is defined as any consecutive 12-month period of time as

determined by an employer. The regulations state that most employers will find it helpful to use the "calendar year" that they use for calculating wages and benefits, including, for example: a year that runs from January 1 to December 31, tax year, fiscal year, contract year, or the year running from an employee's anniversary date of employment.

The definition differs, however, for the purposes of determining employer size. In that instance, the term "calendar year" shall mean a year that runs from January 1 to December 31.

Will there be a transition year and, if so, what does that mean?

The proposed regulations provide that the period from July 1, 2015 to the beginning of the *employer's* next calendar year (defined as the 12-month period the employer uses for calculating wages and benefits) will be a "transition year" under the law. While employers still must start complying with the law as of July 1, there will be some differences in the transition year. Specifically:

- An employer shall not be required to provide more than 40 hours of earned paid sick time during the transition year, and any paid leave given prior to July 1, 2015, will be credited.
- For employers who must provide earned paid sick time, employees who took unpaid sick leave earlier in the calendar year shall still be entitled to accrue and use up to 40 hours of earned paid sick time.

The proposed regulations offer the following example: If an employer adopts a January 1 to December 31 method of tracking accrual and the employee has used 16 hours of paid sick time in 2015 before July 1, 2015, the employer must allow the employee to use up to 24 hours of earned paid sick time in the remainder of the year. Any unused, earned paid sick time accrued beyond 24 hours may be carried over into 2016.

At what rate must the sick time be paid?

Paid sick time must be paid at the same rate as if the employee were working. For hourly employees, the same hourly rate means base rate wages and any other benefits paid or accrued on an hourly basis. The rate does not include holiday pay, overtime, bonuses, commissions or other incentive pay. For an employee who receives different pay rates for hourly work for the same employer, the employee must be paid a "blended" rate, which is the weighted average of all rates paid to the employee during the previous pay period.

For an employee paid on a piece work basis, salary, fee or any basis other than an hourly rate, the same hourly rate means the employee's total earnings in the previous pay period divided by the total hours worked during the previous pay period.

Earned sick time must always be paid at a rate at least equal to the Massachusetts minimum wage. For an employee paid on commission (whether base wage plus commission or commission only), the employee must be paid an hourly rate of the greater of the base wage or the Massachusetts minimum wage.

Employees who earn unpaid sick leave are permitted to substitute other paid time off such as vacation time for any absence due to the use of sick time.

In what increments must an employer allow an employee to use sick time?

The law states that employees are entitled to 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. The proposed regulations reiterate this part of the law, but they also create a key exception for employers: If an employee's absence from work at a designated time requires the employer to hire a replacement and the employer does so, the employer may require the employee to use up to a full shift of earned sick time.

Can an employer offer more generous leave policies and, if so, under what circumstances?

Employers may offer more generous policies. The proposed regulations provide the following examples of more generous policies:

- A policy that provides more job protected sick time than the 40 hours of earned sick time required under the statute;
- A policy that provides an accrual of job protected sick time at a faster rate than that required under the statute and provides at least 40 hours of earned sick time each calendar year;
- A policy that provides a lump sum of 40 hours of job protected earned sick time at the outset of employment and at the start of

each subsequent calendar year rather than tracking the accrual of earned sick time over time;

- A policy that provides employees with at least 40 hours of job protected paid time off that may be used without restriction and accrues as least as fast as the one hour per 30 hours worked rate; or
- A policy that permits employees to use job protected sick time before it has been accrued and provides at least 40 hours of earned sick time each calendar year.

In addition, by mutual agreement with the employer, an employee may be permitted to use sick time in advance of accrual.

The regulations also state that an employer's vacation or other PTO policy may comply with the law, if the PTO:

- Accrues at a rate of no less than one hour of PTO for every 30 hours of work;
- Is paid at the employee's same hourly rate;
- Is accessible on the same basis, meaning time may be taken for the authorized uses under the statute;
- Comes with the same notice requirements to employees; and
- Is afforded the same job protections.

Because of these requirements, most employers seeking to rely on their existing vacation or PTO policies in order to comply with the Earned Sick Time law will need to review those policies.

Must accrued, unused sick time be paid out either at the end of the year or upon termination of employment?

Employers are not obligated to pay out accrued, unused paid sick time either at the end of the year or upon termination. However, the proposed regulations specifically state that an employer *can* pay out sick time either at year-end or upon termination. If an employer does not pay out sick time at year-end, it must allow employees to carry over up to 40 hours of earned but unused sick time. If an employer does pay out sick time at year-end, it must also make available at least 16 hours of paid sick time available to the employee at the beginning of the next year.

Because the proposed regulations contemplate scenarios under which an employer elects to pay out unused sick time, employers who do not want to pay out such time should have policies explicitly stating that unused sick time is not paid out either upon year-end or upon termination.

May employers continue (or implement) incentive programs that reward employees for not using sick time?

Employers may have policies that reward employees for good attendance so long as employees who exercise their rights under the Earned Sick Time law are not subject to any adverse actions. An employee's inability to earn a reward for good attendance based on his or use of earned sick time does not constitute an adverse action under the law.

What notice must an employee give in order to use earned sick time?

Employees who plan to use sick time must give the employer "reasonable notice." Reasonable notice may include compliance with an employer's absence notification system, provided that the requirements of such system do not interfere with the purposes of the leave. If an employer does not have an existing policy or procedure for providing notice of an absence, the regulations require that the employer establish such a policy or procedure, preferably in writing.

If an employee's need for the use of earned sick time is unforeseeable, the employee must report this need to the employer as soon as is practicable and must comply with an employer's absence notification system. If the employee cannot communicate the need to use sick time, notice may be provided on the employee's behalf by the employee's spouse, adult family member or other responsible party.

Employers may require employees who plan to use sick time for a planned purpose to request that time off up to seven (7) calendar days in advance. Notably, whether using sick time for a foreseen or unforeseen purpose, an employee need *not* specifically state that he or she is using earned sick time under the law in order to use it.

Can employers ask employees for documentation of their need to use earned sick time?

An employer can request that any employee using any amount of earned sick time submit written verification that he or she has used earned sick time for allowable purposes. However, an employer cannot ask for medical documentation of the need for sick time unless an employee has used more than 24 consecutive hours of earned sick time. Even once an employee exceeds 24 consecutive hours of earned sick time, however, employers are somewhat limited in what documentation they can require. For example, if an employee does not have a health care provider, the employee may provide a signed written statement evidencing the need for the use of the earned sick time, without being required to explain the nature of the illness. If an employee fails to provide documentation, the employer may delay or deny future use of accrued sick time by the employee until the documentation is provided.

If an employee is committing fraud or abuse by engaging in an activity that is not consistent with allowable purposes for leave (e.g. being sick, caring for an ill family member) or by exhibiting a clear pattern of taking leave on days when the employee is scheduled to perform duties perceived as undesirable, the regulations permit an employer to discipline the employee for misuse of sick leave.

What notice must an employer provide to its employees?

Employers must post a notice of the Earned Sick Time law and the regulations, prepared by the Attorney General, in a conspicuous location accessible to employees in every establishment where employees with rights under this law and these regulations work. Employers must also provide a copy to their employees.

Moreover, employers are required by the regulations to inform their employees by way of a written notice at the onset of employment what 12-month period constitutes a "calendar year." Any change by an employer in the designation of what a calendar year means for purposes of accrual and use must be prospective and must not cause a loss or forfeiture of any employee's accrued earned sick time.

What are the penalties for a violation of the Earned Sick Time law?

Under enforcement actions brought by the Attorney General, employers, as well as their officers, agents, superintendents, foremen, or employees thereof, or staffing agencies or work site employers, may face both criminal and civil penalties for violation of the Earned Sick Time law. Penalties vary based upon whether the violation is willful or not willful. Willful violations are punishable by $25,000, up to one year of imprisonment, or by both for a first offense. Repeat willful violations are punishable by a fine of not more than $50,000, by imprisonment or up to two years, or by both. For non-willful violations, first offenses are punishable by a fine of not more than $10,000 or by imprisonment for not more than six months. Subsequent non-willful violations are punishable by a fine of not more than $25,000, by imprisonment for not more than one year, or by both.

Moreover, the statute creates a private right of action for employees to sue over alleged violations of the Earned Sick Time law. Similar to prevailing plaintiffs in Wage Act cases, prevailing plaintiffs in cases involving the Earned Sick Time law will be entitled to treble damages for any lost wages and other benefits, as well as the costs of the litigation and reasonable attorneys' fees.

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