Office of the Attorney General Issues Final Regulations on the Massachusetts Earned Sick Time Law

June 23, 2015

On June 19, 2015, the Office of the Attorney General issued final regulations relating to the Massachusetts Earned Sick Time law, which takes effect on July 1, 2015. The law requires all employers to provide up to 40 hours of sick time to employees. The final regulations reflect a number of significant changes from the proposed regulations, and below is a description of the key changes. (A summary of the law can be **found here**, and a summary of the initial proposed regulations can be **found here**.)

The final regulations make clear that Earned Sick Time may run concurrently with time off under other statutes, such as the federal Family and Medical Leave Act, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act and the Massachusetts Small Necessities Leave Act. Employers may require that an employee use paid sick time to receive pay when taking unpaid leave under another statute.

The final regulations explain that employees do not accrue sick time when they are receiving pay but not working, such as when they are on vacation. For employees who are paid on a fee-for-service basis, accrual may be based upon a reasonable measure of the time the employees work. The regulations specifically provide that adjunct faculty compensated on a per-course basis are deemed to work 3 hours for each classroom hour. The final regulations also make clear that an employer is not required to track accrual or allow employees to rollover time from one year to the next if it grants a lump sum of 40 hours or more of sick time to employees at the beginning of each benefit year. Further, for variable hour employees, the regulations contain schedules on which employers may rely in determining the amount of sick time accrued.

The final regulations specify that the smallest amount of sick time that an employee may use is one hour. For uses beyond one hour, employees may use sick time in hourly increments or in the smallest increment used by the employer's payroll system to account for absences. However, if an employer is required to call in a replacement, the employer may require the employee to use an equal number of sick time hours as the replacement works. If an employee does not have enough accrued sick time to cover the entire time worked by the replacement, the employer must provide job-protected, unpaid leave to make up the difference.

Many employers had concerns regarding the proposed regulations' treatment of the rate of pay for paid sick time. The general rule – that an employee is entitled to pay at the same rate as his or her regular hourly rate – remains unchanged. However, the final regulations provide a number of important clarifications when an employee's pay is more complicated. If an employee receives different rates of pay from an employer, the employee is entitled to either the wages he or she would have been paid during the period of the absence or pay at a blended rate, determined by taking the weighted average of all regular rates of pay over the prior pay period, month, quarter or other period customarily used by the employer. For employees paid on a piece work or a fee-for-service basis, the same hourly rate means a "reasonable calculation" of the wages or fees the employee would have received during the period of absence, if the employee had worked. Tipped employees who normally receive the service rate ($3 per hour) must receive the effective minimum wage rate ($9 per hour) for paid sick time. Employees paid on commission are entitled to the greater of their base wage (if they receive one) or the minimum wage rate. Finally, although the proposed regulations excluded premium rates from the calculation of the rate of pay for sick time, the final regulations clarify that shift differentials are not premium rates and thus must be included.

The final regulations also impose a complicated set of rules related to breaks in service. If the employee's break in service is 4 months or less, the employee is entitled to his or her bank of sick time accrued before the break. If the break in service is between 4 and 12 months, the employee is entitled to the bank if the amount of unused sick time is 10 hours or more. An employee who has a break in service of 12 months or less is not required to wait 90 days after reemployment to use sick time.

Employers with fewer than 11 employees are not required to provide paid sick time. In determining whether an employer meets this

threshold, the final regulations provide that temporary employees furnished by and paid for by a staffing company are treated as employees of both the user company and the staffing company for purposes of the calculation. Employers must give employees at least 30 days' notice if earned sick time is changing from paid to unpaid or unpaid to paid due to a change in employer size.

The statute provides that an employer may not request documentation regarding the use of sick time until the employee's absence exceeds 24 consecutive hours of scheduled work time. The final regulations clarify that documentation may be requested after the employee has missed more than three consecutive days of scheduled work, the absence occurs within two weeks' of the employee's final day of employment, or if the employee has four unforeseeable and undocumented absences within a three-month period. An employer may request a fitness-for-duty certification or other documentation from a medical provider before an employee returns to work, provided that such certification is customarily required and reasonable safety concerns exist.

The following is only a summary of the key substantive changes from the proposed regulations. Employers need to review the regulations to ensure that they are in compliance with the law. However, as **previously reported**, the Office of the Attorney General has established a Safe Harbor for employers who are not yet in full compliance that will be in effect until the end of the year.

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