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Client Alert: Attorney General Issues Final Regulations under Massachusetts Earned Sick Time Law



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On June 19, 2015, Attorney General Maura Healey issued the final regulations (the "Regulations") further defining the provisions of the new Massachusetts Earned Sick Time Law (the "Law"). As reported in our previous Client Alert, the Law requires that all employers provide employees with a minimum of 40 hours of sick time each year. The Regulations clarify some of the issues left open under the law itself.

Whether the sick leave is paid or unpaid is determined based upon the number of employees, with employers of eleven or more employees within the prior benefit year being required to provide *paid* sick leave. How to "count to eleven" then was an important but unanswered question under the Law. The Regulations answer this question, providing that the "average number of employees" is calculated "by counting the number of employees, including full time, part-time, seasonal, and temporary employees, on the payroll during each pay period, and dividing by the number of pay periods" in the previous benefit year. If an employer has fewer than 11 employees, the employer is obligated to provide the same 40 hours of sick time to each employee, but it need not be paid.

Under the Regulations, all of an employer's employees, whether working inside or outside Massachusetts, will be counted for the purpose of determining employer size. Thus, it does not matter if a company has only a single employee in Massachusetts; if the company has 10 or more employees elsewhere, the employer is obligated to provide 40 hours of paid earned sick time to the single Massachusetts employee.

The term "employee" is defined broadly and includes *full time, part-time, seasonal and temporary employees*. The definition does not include students participating in a federal work-study program or a substantially similar financial aid programs, employees of the United States government, and certain municipality employees and public employees, or personal care attendants.

The Regulations provide additional guidance on the appropriate rate of pay for paid sick leave. As a general rule, an employee should be paid his or her regular rate of pay as if he or she had actually been working during the sick leave. If an employer uses a "blended" rate of pay, the blended rate should be determined by "taking the weighted average of all regular rates of pay over the previous pay period, month, quarter, or other established period..." Salaried employees should be paid at an hourly rate equaling the employee's total earnings for the last pay period divided by the total hours worked during that

pay period. In determining the total number of hours worked for employees that are exempt from overtime compensation under the Fair Labor Standards Act and Massachusetts law, the Regulations assume that each exempt employee works 40 hours in each pay period unless the employee's normal work week is less than 40 hours per week. The Regulations also provide guidance for employees paid on a fee-for-service basis.



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An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts. However, an employee need not spend more than 50% of working time in Massachusetts for it to be his or her primary place of work. For example, a salesman might spend 40% of his time in Massachusetts, 30% in Connecticut and 30% in other states. Even though he works outside of Massachusetts 60% of the time, it is still considered his primary place of work under the Regulations. Further, if an employee is eligible to accrue and use earned sick time, then all hours the employee works must be applied toward accrual of earned sick time, regardless of the location of the work.

The Regulations provide that, when an employee uses earned sick time, he or she must make a good faith effort to provide notice to the employer in advance. If an employer has an existing policy that covers notification for absences or leave requests, the Regulations permit continued use of that system. The employer may also institute additional notification procedures when earned sick time will be used, including requiring up to seven days' advance notice if the reason for earned sick time is for a pre-scheduled or foreseeable absence. If an employer requires such advance notice, the employer must maintain a written policy that contains procedures for the employee to provide notice. It is advisable for all employers to adopt a written policy or procedure requiring notice from an employee when using sick leave.

Under some circumstances, an employer may require that the employee provide documentation from a health care provider that confirms the sick leave was used properly. These instances include times when an employee uses more than 24 consecutive hours of sick leave or the leave exceeds more than three consecutive days on which the employee was scheduled to work. Employees that do not have a health care provider can submit instead a signed written statement evidencing the need for use of the earned sick time. An employer may never require any such documentation to explain the nature of the illness, or details of the domestic abuse. An employer may not require an employee to "make up" any sick time taken by forcing the employee to work additional hours later.

In one somewhat controversial provision, the Regulations include the notion of "breaks in service," which is defined as "a period of time extending from the date an employee last worked for the employer until the employee's return to employment, whether the separation was voluntary or involuntary." Employers of seasonal or temporary workers should pay particular attention to this provision, as upon return to work, the employee maintains the right to use any sick time that was accrued during her previous period of employment. Under this provision, an employee retains his or her earned sick time previously accrued following a break in service lasting up to four months. An employee may also use his or her earned sick time following a break in service lasting between four months and twelve months *provided* that, prior to the break in service, the employee had an unused sick time bank containing ten or more hours. If the break in service is twelve months or less, the employee does not need to restart the 90-day vesting period to use his or her accumulated sick time.

Apart from simply being a best practice, the Regulations require that employers keep a true and accurate record of the accrual and use of earned sick time in accordance with the employee recordkeeping requirements in M.G.L. c. 151, § 15, for a period of three years.

The Regulations stress that the Law is a floor, not a ceiling. For employers that have existing paid time off policies in place with more generous benefits, the Regulations encourage them to be maintained.

On May 18, 2015, the Attorney General announced a safe harbor provision that applies to employers that, as of May 1, 2015, have a paid time off policy providing at least 30 hours of paid leave per year. To remain in compliance during this extra six month period, any paid time off, including sick leave, used by an employee from July 1, 2015 to December 31, 2015, must be job protected leave subject to the law's non-retaliation and non-interference provisions. This grace period expires on January 1, 2016, when all employers must fully comply with the Law.

An employer may not retaliate against an employee that elects to use earned sick time for a proper purpose by subjecting them to adverse action for the use of the sick time. However, the Regulations also explicitly state that earned sick time must be used for a proper purpose and "may not be invoked as an excuse to be

late for work without an authorized purpose under G.L. c. 149, § 148C." The Regulations allow an employer to discipline an employee that is "exhibiting a clear pattern of taking leave on days must before or after a weekend, vacation, or holiday..."

Given the many changes in the area of sick leave, it is advisable for employers to immediately conduct a full review of all time off policies. It is also a perfect opportunity to review an employee handbook to assure full compliance with the ever-changing employment laws.

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This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice.

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