

MILFORD AREA CHAMBER OF COMMERCE

EARNED SICK TIME LAW: WHAT AFFECTED EMPLOYERS MUST DO TO BE IN COMPLIANCE

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A QUICK REVIEW OF THE NEW MASSACHUSETTS EARNED SICK TIME LAW AND ITS REGULATIONS

- On November 4, 2014, the voters of Massachusetts approved “Question 4,” a law providing earned sick time for employees.
- Took effect on July 1, 2015 and is codified at M.G.L. c. 149, § 148C.
- Regulations have been promulgated by the AG at 940 CMR 33.00, *et seq.*

COVERED ABSENCES UNDER NEW LAW AND REGULATIONS

- Employees may use earned sick time for the following purposes:
 - 1) To care for a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care affecting the employee or the employee's child, spouse, parent or parent of a spouse ; or
 - 2) To attend routine medical appointments of the employee or the employee's child, spouse, parent or parent of spouse; or
 - 3) To address the psychological, physical or legal effects of domestic violence on the employee or the employee's child; or
 - 4) Travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

LAW APPLIES TO ALL EMPLOYEES . . . ALMOST

- The new law applies to all types of employees and does not differentiate between full-time, part-time, temporary, or seasonal employees. The new law also applies to per diem and other casual employees.
- There are certain specific exceptions, e.g., cities, towns, U.S. govt.

PAID OR UNPAID?

- Employees who work for employers with *11 or more employees* may earn and use up to 40 hours of paid sick time per calendar year.
- Employees who work for employers with *fewer than 11 employees* may earn and use up to 40 hours of unpaid sick time per year.

DETERMINING EMPLOYER SIZE

- An employer must provide earned paid sick time to all eligible employees if the employer maintained an average of 11 or more employees on the payroll during the preceding benefit year.
- Employees furnished to employers by temporary staffing agencies who are paid by the staffing agency count as employees of both the staffing agency and the employer for the purposes of determining employer size.

DETERMINING EMPLOYER SIZE

- If an employer uses multiple start dates for the benefit year, such as dates based on employees' anniversaries of hire, the employer should calculate employer size based on the previous January 1 to December 31 calendar year.

DETERMINING EMPLOYER SIZE

- All of an employer's employees whether working in or outside of Massachusetts and regardless of their eligibility to accrue and use earned sick time, must be counted for purposes of determining employer size.

EMPLOYER SIZE – MISCELLANEOUS ISSUES

- Employers must provide at least 30 days written notice of change on paid or unpaid.
- When used, earned paid sick time must be paid to the employee on the same schedule as regular wages are paid.
- Employers may not delay compensating employees for earned paid sick time.

WHAT RATE OF PAY DO YOU USE?

- Rule of thumb, must be paid what they would have earned had they worked.
- For tipped employees who ordinarily receive the service rate under M.G.L. c. 151, § 7 (\$3.00 per hour plus tips as of January 1, 2015), the “same hourly rate” means the effective minimum wage under M.G.L. c. 151, § 1 (\$9.00 per hour as of January 1, 2015).

WHAT RATE OF PAY DO YOU USE?

- The hourly rate does not include:
 - a) Sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production;
 - b) Sums excluded under 29 U.S.C. § 207(e), the Fair Labor Standards Act, 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;

WHAT RATE OF PAY DO YOU USE?

- Hourly rate does not include:
 - c) Overtime, holiday pay, or other premium rates (not a differential rate).

DETERMINATION OF ELIGIBILITY BASED ON EMPLOYEE'S PRIMARY PLACE OF WORK

- Employee's "primary place of work" must be located in Massachusetts, regardless of where the employer is located.

CALCULATING EARNED SICK TIME

- Where an employee is eligible to accrue and use earned sick time, all hours the employee works must count toward the accrual of earned sick time, regardless of where the work was performed or where the employer is located.

CALCULATING EARNED SICK TIME

- Employees must accrue at least one (1) hour of earned sick time for every thirty (30) hours worked, including overtime hours, up to a total cap of 40 hours per “benefit year.”

CALCULATING EARNED SICK TIME

- The term “calendar year” is defined by the regulations as “[a]ny consecutive 12-month period of time as determined by an employer.” Permissible approaches include:
 - January 1 – December 31 calendar year;
 - the tax year;
 - Fiscal year;
 - Contract year; or
 - Year running from an employee’s anniversary date of employment.

CALCULATING EARNED SICK TIME

- Employees accrue earned sick time only on hours worked. They do not accrue earned sick time for hours paid for periods when the employee performs no work.
- FLSA Exempt employees – 40 hours.

ACCRUAL OF EARNED SICK TIME

- Employees begin accruing earned sick time on the later of either (a) their respective date of hire, which the regulations define as “the first date of actual work,” or (b) July 1, 2015.
- Employees, however, “shall not be entitled to use accrued earned sick time until the 90th calendar day following commencement of their employment.”

ACCRUAL OF EARNED SICK TIME

- The final regulations clarify that employees who have been employed for at least 90 days as of July 1, 2015 (i.e., their first dates of actual work occurred on or before April 2, 2015) may use earned sick time as it accrues.

PTO POLICIES PERMITTED

- May avoid need to track accrual under certain PTO policies.
- PTO policies must otherwise be consistent with the Act.
- Different PTO policies for different groups of employees are permissible.

USE OF EARNED SICK TIME

- Increments of one hour.
- Beyond one hour may use smaller increments.
- Permissible, by agreement, to allow employees to borrow against future accruals.

CAP ON ACCRUAL

- Max of 40 hours of earned sick time during the benefit year.
- Can carry over a max of 40 hours into the next benefit year, but still cannot use more than 40 hours in a given year.

LIMITATIONS ON EMPLOYEE USE/MISUSE OF EARNED SICK TIME

- Earned sick time may not be invoked as an excuse to be late for work without an authorized purpose under the new law.
- Cannot accept a specific shift assignment with the intention of calling out sick for all or part of that shift.

LIMITATIONS ON EMPLOYEE USE/MISUSE OF EARNED SICK TIME

- Calling in a replacement
 - Can require use of time for the full shift
 - If the employee lacks sufficient accrued, earned sick time to cover such time away from work, the employer must provide sufficient job-protected *unpaid* leave to make up the difference in that shift.
- Ok to discipline if Fraud or Abuse.
- Impermissible to require make up time or to find a replacement.

NOTICE OF USE OF EARNED SICK TIME

- If foreseeable, employees are required to “make a good faith effort to notify the employer in advance.”
- Can require up to 7 days’ notice by written policy, except where the employee learns of the need to use earned sick time within a shorter period.

NOTICE OF USE OF EARNED SICK TIME

- The amount of notice required for unforeseeable absences is what is reasonable under the circumstances.
- Additional notice permissible for multi-day absences.
- Can use reasonable notification systems.
- Notice doesn't need to reference earned sick time.

SICK TIME AT SEPARATION FROM EMPLOYMENT

- Employers are not required to pay an employee for any remaining unused earned sick time at separation from employment.

THE “TRANSITION YEAR” AND “SAFE HARBOR” FOR EMPLOYERS WITH EXISTING POLICIES

- Employers who on May 1, 2015 already had a policy that provides paid time off or paid sick leave will be deemed to be in compliance with the new law and regulations until January 1, 2016 provided that each of the following requirements are met:
 1. Full-time employees under the policy 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; and

THE “TRANSITION YEAR” AND “SAFE HARBOR” FOR EMPLOYERS WITH EXISTING POLICIES

2. 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:
 - i. Accrue paid time off at the same rate of accrual as covered full-time employees; or

THE “TRANSITION YEAR” AND “SAFE HARBOR” FOR EMPLOYERS WITH EXISTING POLICIES

- ii. If the policy provides lump-sum allocations, receive a prorated lump-sum allocation based on the provision of lump sum paid time off/paid sick leave to covered full-time employees. Such lump-sum allocations may:
 - 1) Where lump sums of paid time off are provided annually, be halved for employees who receive coverage as of 7/1/15, and proportionately reduced for employees hired after 7/1/15; and/or
 - 2) Be proportionate for part-time employees;

THE “TRANSITION YEAR” AND “SAFE HARBOR” FOR EMPLOYERS WITH EXISTING POLICIES

3. 30 hours of paid time off/paid sick leave or such lesser amounts as are earned or used by employees under the “safe harbor” regulation must be:
 - a) Job-protected leave subject to the new law’s anti-retaliation provisions;
 - b) Available for all allowable purposes under the new law; and
 - c) 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.

THE “TRANSITION YEAR” AND “SAFE HARBOR” FOR EMPLOYERS WITH EXISTING POLICIES

- On or before January 1, 2016, all employers operating under the safe harbor provision must adjust their policies to fully conform with the new law and regulations.

DOCUMENTATION OF USE OF EARNED SICK TIME

- Under the regulations, an employer may request written documentation from a health care provider where an employee's use of earned sick time:
 1. Exceeds 24 consecutively scheduled work hours;
 2. Exceeds 3 consecutive days on which the employee was scheduled to work;

DOCUMENTATION OF USE OF EARNED SICK TIME

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 (i.e., "temp workers");
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.

DOCUMENTATION OF USE OF EARNED SICK TIME

- Written documentation that may be required by employers includes:
 - Written documentation signed by a “health care provider” indicating the need for the earned sick time taken;
 - Specific documentation associated with leave relating to domestic violence.
- Employee written statement if no health care coverage.
- Can always ask for a verification form.

DOCUMENTATION OF USE OF EARNED SICK TIME

- Can deny the future use of an equivalent number of hours of accrued earned sick time until documentation is provided, but may not otherwise take adverse action.
- In certain circumstances, can ask for Fitness-for-duty certification, a work release, or other documentation from a medical provider before return to work.

LIMITATIONS ON REQUIRING DOCUMENTATION

- Employee shall not be required to explain the nature of the illness or the details of the domestic violence.
- Cannot delay an employee's taking of earned sick time or delay pay for the period in which earned sick time was taken on the basis that the employer has not yet received the certification.

PROHIBITION AGAINST INTERFERENCE, RESTRAINT, DENIAL, OR RETALIATION

- Law prohibits employers from interfering with, restraining or denying an employee's exercise of, or the attempt to exercise, any right provided under or in connection with the law or regulations.
- Can't retaliate because the employee opposes certain practices that the employee reasonably believes to be in violation of the law or its regulations, or because the employee supports the exercise of rights of another employee under the law.

ATTENDANCE POLICY REWARDS AND HOLIDAY PAY INCENTIVES

- Good attendance and holiday pay incentives are permissible.
- An employee's inability to earn a reward for good attendance or to receive a holiday pay incentive based on an employee's absence due to the use of earned sick time shall not constitute an adverse action or interference with an employee's rights under the regulations.

INTERACTION WITH STATE AND FEDERAL LEAVE LAWS

- The final regulations provide that earned sick time under the new law “may run concurrently with time off provided by” the FMLA, and other leave laws that may allow employees to make concurrent use of leave for the same purpose as the earned sick time law.
- Employees may choose to use, or employers may require employees to use, concurrent earned paid sick time under the new law to receive pay when taking other statutorily-authorized leave that would otherwise be unpaid.

ENFORCEMENT BY ATTORNEY GENERAL

- The AG may obtain injunctive or declaratory relief under the law.
- The AG website includes model notice of rights, FAQs, model policy, and verification forms.

RECORDKEEPING AND DISCLOSURE REQUIREMENTS

- Employers must maintain records for 3 years and must provide copies upon demand by the AG or a designee from the AG's Office.
- An employee who requests such records pertaining to the employee must be provided with a copy within 10 business days, and, if the employee so requests, shall be allowed to inspect the original paper or electronic records at a reasonable time and place.

VIOLATIONS OF EARNED SICK TIME LAW

- Civil Penalties.
- Individual Officers potentially liable.
- Private right of action that provides for recovery of treble damages and attorney's fees.

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QUESTIONS?