

Management Alert



A Preliminary Diagnosis: The Attorney General Issues Proposed Regulations on the Massachusetts Earned Sick Time Law

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On April 24, 2015, the Massachusetts Attorney General released *proposed regulations* to clarify practices and policies in the administration and enforcement of the Massachusetts Earned Sick Time Law (“ESTL”), M.G.L. c. 149 § 148C. As *previously reported*, the Earned Sick Time Law, which becomes effective July 1, 2015, allows all employees in Massachusetts to earn and use of up to 40 hours of sick time per year under certain conditions.

While final guidance is months away and the regulations will be revised before final implementation, the proposed regulations reveal how the Attorney General’s Office is interpreting various provisions within the ESTL and how it views practical application of the ESTL’s various requirements. Accordingly, while not final, the proposed regulations are not likely to change significantly and can help employers navigate and plan the implementation of this far-reaching employee entitlement. Of particular significance, the proposed regulations provide clarification on the following topics:

Interaction Between the ESTL and Other Leave Laws:

Leave pursuant to the ESTL is provided “in addition to” other state and federal leave laws such as the Family and Medical Leave Act, the Massachusetts Parental Leave Act, the Small Necessities Leave Act, and the like. This suggests that employers cannot require employees to use sick time concurrently with other protected leave. However, if an employee opts to use paid time off for one of these other types of leave and the reason for leave falls within one of the reasons covered by the ESTL, it would follow that the employer would be able to require the employee to use paid sick time concurrently. This may be an issue requiring further clarification in the final regulations.

Calculation of Employer Size:

The ESTL provides that employers with 11 or more employees must provide paid, as opposed to unpaid, sick time. The Proposed Regulations clarify that all of an employer’s employees, including those working outside of Massachusetts, must be counted in determining whether the 11-employee threshold is met.

Eligible Employees:

The ESTL covers any person who performs services for an employer for wage, remuneration, or other compensation. An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts. The employee need not spend more than 50% of working time in Massachusetts as long the employee spends more working time in Massachusetts than in any other single state. If the employee is eligible, then all hours worked regardless of the location of the work must be applied toward accrual of earned sick time.

Calculation of the Hourly Rate at Which to Pay Sick Time:

While the ESTL requires sick leave to be paid at the "same hourly rate" as the employee received at the time of the sick leave, the Attorney General clarified as follows. For employees who receive different hourly pay rates from the same employer, sick leave is paid at the "blended" rate of the previous pay period (i.e. the weighted average of all rates during the prior pay period). For employees paid on a piecework, salary, or fee basis, employers must add the total earnings from the previous pay period and divide it by the total number of hours worked to determine the "hourly rate" at which to pay sick time. For employees paid by commission (including base rate plus commission or commission only), the hourly rate is the greater of the base rate or minimum wage. Commissions, bonuses, and other incentive pay shall not be included when determining the hourly rate at which to pay employees for sick time. Also, the "same hourly rate" does not include overtime, holiday pay, or other premium rates.

Increments of Sick Time Used:

While the ESTL provides that employees must be able to use sick time in the smaller of hourly increments or the smallest increment the employer's payroll system uses, the proposed regulations state that if the employee's absence at a designated time requires the employer to hire a replacement and the employer does so, the employee can be required to use up to a "full shift" of sick time at once.

Provision of Sick Time During the Transition Year:

Any *paid* leave provided before July 1, 2015 shall be credited such that employers are not required to provide more the 40 hours of sick time during the transition year, which runs from July 1, 2015 until the beginning of the next calendar year.

Notice of Use of Sick Time:

The ESTL states that employees need only make a "good faith effort" to notify employers of their intent to use earned sick time when such use is foreseeable. The proposed regulations, however, add some heft to the law's notice standard:

- If use of sick time is unforeseeable, employees must report the need to use sick time "as soon as practicable" and must comply with the employer's "reasonable notification system" and "call in system" customarily used to report absences or request time off, provided that such requirements "do not interfere with the purpose for which sick time is needed."
- If use of sick time is foreseeable, employers may require up to 7 days advance notice.
- Employers may require employees who anticipate multi-day absences to provide daily notification of use of earned sick time, unless such notice is "infeasible."
- Employers may require employees to submit written verification that they have used earned sick time for allowable purposes after using any amount of sick time.
- Employers may discipline employees for misuse of earned sick time.

Certification of Use of Sick Time:

Employees have 30 days to submit the health care provider or domestic violence certification required of employees who use more than 24 consecutively scheduled hours of sick time. If an employee fails to provide such certification without "reasonable justification," an employer may delay or deny future use of sick time until the certification is provided.

Crediting Already Existing Plans Against the Requirements of the ESTL:

Employers that already provide paid time off need not provide additional sick time if the policies already in place: are more generous than or meet the ESTL's accrual requirements; allow employees to use time off for the same purposes and under the same conditions as the ESTL; afford the same job protections as the ESTL; and do not have notice requirements more restrictive than the ESTL.

Alternatives to Use of Sick Time:

The proposed regulations clarify that by mutual, written agreement with the employer, an employee may use earned sick time before accruing it. An employer also shall have the option but is not required to offer an employee a payout of up to 40 hours of unused earned sick time at the end of the employer's calendar year provided the employer makes available to the employee at least 16 hours of sick time at the beginning of the new calendar year.

The Attorney General's Office also announced six public hearings to discuss the Proposed Regulations and invited the submission of written comments to Assistant Attorney General Mike Firestone. Seyfarth Shaw will continue to provide updates as the Attorney General's Office finalizes its regulations.

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