

# Management Alert



## Hot Off the Press – Massachusetts Attorney General Publishes Final Regulations on Earned Sick Time

By Daniel B. Klein

This afternoon, the Massachusetts Attorney General issued the final Earned Sick Time Regulations ([click here](#)). There are a number of changes from the proposed Regulations, most of which we highlight below. As previously reported, the Earned Sick Time Law (ESTL) takes effect July 1, 2015, although certain employers meeting the Safe Harbor criteria (described in the Regulations) may delay implementation of most of the Law's compliance requirements until January 1, 2016.

Noteworthy changes from the draft Regulations include:

- **Mandatory Notice.** While employers must post this Notice in a conspicuous location accessible to employees in every location where eligible employees work, employers do not have to provide a copy of it to all eligible employees. Rather, employers have a choice of either providing a hard copy or electronic copy of the Notice to all eligible employees, or including the employer's policy on earned sick time (EST) or an allowable substitute paid leave (e.g. PTO) policy in any employee manual or handbook.
- **Interaction with state and federal leave laws.** The Regulations clarify that EST may run concurrently with time off provided by other leave laws (e.g. FMLA, MA Parental Leave Act, MA Domestic Violence Leave Act, and MA Small Necessities Leave Act) that allow employees to make concurrent use of leave for the same purposes as the ESTL. Employees may choose to use, or employers may require employees to use, concurrent paid EST to receive pay when taking other statutorily-authorized leave that would otherwise be unpaid.
- **Accrual caps.** The Regulations clarify that once employees have accrued 40 hours of EST during the benefit year, they do not continue to accrue more hours of EST regardless of the additional hours they work. Further, once an employee possesses a bank of 40 hours of unused EST, the employer may opt to delay further accrual until the employee draws down the bank of EST to below 40 hours.
- **EST may be used for scheduled hours only.** The Regulations clarify that an employee may not use EST if the employee is not scheduled to be at work during the period of use. Further, an employee may not accept a specific shift assignment with the intention of calling out sick for all or part of that shift.
- **The smallest amount of sick time an employee can use is one hour.** For uses beyond one hour, employees may use earned sick time in the smallest increment the employer's payroll system uses for absences or use of other time. According to an example in the Regulations, an absence of less than one hour would result in the use of one hour of EST (the Regulations do not address whether an absence of less than one hour can be denied EST protection alternatively).

- **EST charged where replacement necessary.** The Regulations expand the draft language to provide that where an employee's use of EST requires the employer to hire a replacement or call in another employee, the employer may require the employee to use an equal number of hours as the replacement or call-in employee works, up to a full shift of EST. If the employee lacks sufficient accrued EST to cover such time away from work, the employer must provide sufficient job-protected unpaid leave to make up the difference in that shift.
- **Discipline for misuse or suspicious patterns of use.** If an employee is committing fraud or abuse by engaging in activity not consistent with allowable purposes for EST, an employer may discipline the employee for misuse of sick leave. If an employee is exhibiting a clear pattern of taking leave on days just before or after a weekend, vacation, or holiday, an employer may discipline the employee for misuse of EST, unless the employee provides verification of authorized use.
- **Employee notification.** Employees must notify their employers before they use earned sick time, except in an emergency. Notice for unforeseeable absences is what is reasonable under the circumstances. For foreseeable or pre-scheduled EST, the employer may have a written policy requiring up to seven days' notice, except where the employee learns of the need to use EST within a shorter period.
- **Employee notification during multi-day absences.** In a new provision, the Regulations provide that for multi-day absences, an employer may require notification of the expected duration of the leave or, if unknown, then on a daily basis from the employee or his/her surrogate, unless the circumstances make such notice unreasonable.
- **Tardies.** While the Attorney General's Notice states that sick time cannot be used as an excuse to be late for work without *advance* notice of a proper use, the final Regulations do not require advance notice. Rather, the Regulations state that earned sick time may not be invoked as an excuse to be late for work without an authorized purpose under this law.
- **Third Party Documentation / Certification.** An employer may require third party documentation indicating the need for the EST when the EST: (a) exceeds 24 consecutively scheduled work hours, (b) exceeds 3 consecutively scheduled days; (c) occurs within 2 weeks prior to an employee's final scheduled day of work before termination/resignation (except for temporary workers); (d) occurs after 4 unforeseeable and undocumented absences within a 3-month period; or (e) for employees aged 17 and under, occurs after 3 unforeseeable and undocumented absences within a 3-month period. The latter two provide some measure of prevention of excessive unforeseeable EST within a short period. Employers may not require that an employee provide documentation to explain the nature of an illness or the details of the domestic violence. The Attorney General will be issuing a model certification form; or employers may use their own form, provided that it cannot require any additional information beyond that required by the ESTL. Employees must submit such documentation within 7 days after taking EST, unless good cause for more time exists.
- **Penalties for insufficient documentation / certification.** If an employee fails to comply without reasonable justification, the employer may recoup the sum paid for the EST from future pay, as an overpayment, provided that employees are on notice of this practice. The employer may also deny future use of an equivalent number of hours of accrued EST until documentation is provided, but may not otherwise take adverse action.
- **Health care providers may require third party documentation during states of emergency.** Such employers may require employees using EST during local, state or federally declared emergencies to provide written documentation from a medical provider and to follow additional notification procedures set forth by the employer; and employers may discipline an employee for misuse of sick leave for failure to follow such policies.
- **Employee Verification.** Employers may require employees to personally verify in writing that they used EST for allowable purposes *after* such use, provided that employees shall not be required to explain the nature of the illness or the details of the domestic violence. The Attorney General will be issuing a model verification form; or employers may use their own form, provided that it cannot require any additional information beyond that required by the ESTL.

- **Fitness-for-duty certifications.** In a new provision, the Regulations provide that employers may require employees to provide a fitness-for-duty certification, a work release, or other documentation from a medical provider before returning to work after EST use if such certification is customarily required and consistent with industry practice or state and federal safety requirements *and* reasonable safety concerns exist regarding the employee's ability to perform duties (*i.e.* a reasonable belief of significant risk of harm to the employee or others).
- **Hourly rate paid for employee receiving different rates.** For employees who receive different pay rates for hourly work from the same employer, the Regulations clarify that such employees may be paid either: the wages the employee would have been paid if the employee had worked those hours, or the blended rate, determined by taking the weighted average of all regular rates of pay over the previous pay period, month, quarter, or other established period of time the employer customarily uses to calculate blended rates for similar purposes. Whichever method the employer elects to use must be consistent for each employee throughout a benefit year.
- **Shift differentials.** The Regulations clarify that for employees who receive a "differential rate" for the same work performed under differing conditions (e.g. a night shift), the "differential rate" must be paid for EST if it would have been paid for working those particular hours.
- **Tipped employees.** The regulations clarify that tipped employees must be paid the effective minimum wage under State law (\$9.00 as of January 1, 2015) rather than the tip-credit minimum wage.
- **Hourly rate for piece of work or fee-for-service employees.** For employees paid on a piece of work or a fee-for-service basis, the hourly rate is a reasonable calculation of the wages or fees the employee would have received for the piece work, service, or part thereof, if the employee had worked. The rate shall not be less than the effective minimum wage, however.
- **Accrual for employees paid on a piece of work or fee-for-service basis.** Such employees accrue EST based on a reasonable measure of the time the employees work, including established practices or billing.
- **Employees whose primary place of work changes.** While the Regulations did not change the criteria for eligible employees – *i.e.* that the employee's primary place of work is in Massachusetts if the highest percentage of the employee's work is in Massachusetts, the Regulations clarified that if an employee transfers to Massachusetts, upon the first date of actual work in Massachusetts, the employee becomes eligible for and begins accruing EST. In contrast, eligible employees permanently transferred by the same employer to another state from Massachusetts will no longer accrue EST but may use their accrued EST.
- **Cash out option.** The Regulations tweaked the circumstances and requirements when an employer may opt to pay out employees for up to 40 hours of unused EST. Employers have this option at the end of the benefit year or when the employee changes jobs within the employer's employment. However, employers paying out 16 hours or more shall provide 16 hours of unpaid sick time until the employee accrues new paid time, which shall replace the unpaid time as it accrues. Employers paying out less than 16 hours shall provide an amount of unpaid sick time equivalent to the amount paid out until the employee accrues new paid time, which shall replace the unpaid time as it accrues.
- **Recordkeeping requirements for lump sum EST.** Employers that provide a lump sum of 40 or more hours of sick leave or PTO at the beginning of each benefit year do not need to track accrual or allow any rollover.
- **Recordkeeping requirements for unlimited EST.** Employers that provide unlimited sick leave are not required to track accrual of sick leave or allow any rollover.
- **Recordkeeping requirements for compliant PTO policies.** Employers providing time off under a PTO, vacation or other policy that complies with the ESTL are not required to track and keep a separate record on accrual and use of EST.
- **No additional sick leave after 40 hours of PTO used for other purposes.** Employers that provide 40 or more hours of PTO or vacation that also may be used as EST are not required to provide additional sick leave to employees who use all their time for other purposes (e.g. vacation or personal time) and have a need for sick leave later in the year, *provided that the employers' leave policies make clear that additional sick time will not be provided.*

- **Break in service changes.** The Regulations change the rules surrounding preservation of EST balances after a break in service. Following a break in service of up to four months, an employee shall maintain his or her unused EST balance accrued before the break in service. However, following a break in service of between four and 12 months, an employee shall maintain the right to use EST accrued before the break in service only if the unused bank of EST equals or exceeds 10 hours. (Following a break in service of up to 12 months, employees maintain their vesting days from the employer and do not need to restart the 90-day vesting period.)
- **Benefit year.** The Regulations clarify that an employer may use multiple start dates for the 12-month benefit year, such as dates based on employees' anniversaries of hire. The Regulations suggest that employers might find it helpful to use the year that they use for determining wages and benefits.
- **Alternative lump sum schedule of EST.** The Regulations provide a new alternative for employers that prefer not to track accrual of sick time over the course of the benefit year. They may use a particular schedule for providing lump sums of EST or PTO in installments over the course of the year. See Section 33.07(8) for the compliant schedule.
- **Work-study student workers excluded.** The definition of eligible employees excludes students attending an institution of higher education who are participating in a federal work-study program or a substantially similar financial aid or scholarship program, or who are providing support services to residents in exchange for a waiver or reduction of room, board, tuition or other education-related expenses.

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