

# Management Alert



## If Pain, Yes Gain—Part XXIV: Montgomery County, MD Paid Sick Leave Is Here

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**Seyfarth Synopsis:** Montgomery County's Earned Sick and Safe Leave Act will be going into effect this weekend, on October 1, 2016. Unlike most municipal paid sick leave laws, which are enacted to cover a specific city or town, this law applies to all of Montgomery County, Maryland.<sup>1</sup> The law provides a generous amount of paid sick and safe leave to virtually all employees working in the County.

Montgomery County's Earned Sick and Safe Leave Act (the "Act") was enacted in mid-2015, and will become effective on October 1, 2016. Some of the primary requirements of the Act are:

- Employers with one or more employees who are not owners must provide earned sick and safe time to their Montgomery County employees.
- Employees only need to regularly work in the County more than eight hours each week in order to earn sick and safe time.
- Employees must accrue paid sick and safe leave at a rate of at least one hour for every 30 hours worked in the County by the employee.
- Employers with **five or more employees** must allow each employee to **accrue up to 56 hours of paid sick and safe leave**, while employers with fewer than five employees must provide up to 32 hours of paid and 24 hours of unpaid sick and safe leave.
- Employees, regardless of employer size, **may use up to 80 hours** of earned sick and safe leave in a year.
- Employers must provide employees with a written statement of available earned sick and safe leave **each time the employer pays wages to the employee**.

### Which Employers Are Covered Under the Act?

Employers who are required to provide paid sick and safe leave include any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs one or more persons in the County in addition to the owners. This includes the Montgomery County government, but does not include the United States, any state, or other local government.

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<sup>1</sup> Montgomery County includes the following municipalities: Barnesville; Brookeville; Chevy Chase Town; Chevy Chase View; Chevy Chase Village; Friendship Heights; Gaithersburg; Garrett Par; Glen Echo; Kensington; Laytonsville; Martin's Additions; North Chevy Chase; Oakmont; Poolesville; Rockville; Somerset; Takoma Park; Village of Chevy Chase (Sections 3 and 5); Village of Drummond; and Washington Grove.

## Which Employees Are Covered Under the Act?

The Act provides earned sick and safe leave to virtually all employees who work in Montgomery County and who regularly work in the County more than eight hours for their employer each week. It does not apply to independent contractors or individuals who (1) do not have a regular work schedule with the employer, (2) contact the employer for work assignments and are scheduled to work the assignments within 48 hours after contacting the employer, (3) have no obligation to work for the employer if they do not contact the employer for work assignments, and (4) are not employed by a temporary placement agency.

## How Much Sick Time Can Employees Use, Accrue, and Carry Over?

**Accrual:** Accrual begins on an employee's date of hire or the Act's effective date for current employees. Paid sick and safe leave accrues at a rate of at least one hour for every 30 hours the employee works in the County but, as noted above, accrual caps differ based on the size of the employer. Employers with fewer than five employees must allow paid sick and safe leave hours to accrue before unpaid hours. For purposes of accrual, employers must assume exempt employees under the Fair Labor Standards Act work their normal number of hours per workweek, up to 40 hours each workweek. Sick and safe leave is paid at the same rate and with the same benefits as the employee normally earns.<sup>2</sup>

**Frontloading:** Importantly, the Act explicitly allows employers to provide a lump sum grant of the required full amount of paid sick and safe leave at the start of each benefit year. Frontloading sick and safe leave excuses employers' accrual and year-end carryover obligations.

**Use:** Employers may prevent an employee from using earned sick and safe leave during an initial 90-day probationary period. The Act is silent on whether this 90-day usage waiting period applies to employees who have worked for the employer for more than 90 days on the Act's effective date. Given the ambiguity, employers likely should take a conservative approach and treat the 90-day usage waiting period as only applying to employees hired after the Act's effective date.

Employees may use up to 80 hours of earned sick and safe leave in a year. Employees may take earned sick and safe leave in the smallest increment that the employer's payroll system uses to account for absences or work time, but this increment cannot be more than four hours.

**Carry Over:** Employers who award sick and safe leave as it accrues must allow employees to carry over up to 56 hours of unused, earned sick and safe leave to the next year. As noted above, the year-end carryover requirements do not apply if the employer provides the required amount of sick and safe leave through a frontloading system.

## Under What Circumstances May Employees Use Sick Time?

Employees may use paid sick and safe leave for the following purposes:

- to care for or treat the employee's or the employee's family member's mental or physical illness, injury, or condition;
- to obtain preventive care for the employee or the employee's family member;
- if the employer's place of business, or if the school or child care center for the employee's family member has closed by order of a public official due to a public health emergency;
- to care for a family member if a health official or health provider has determined that the family member's presence in the community would jeopardize the health of others; or
- certain absences from work due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member.

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<sup>2</sup> Tipped employees must be paid the County minimum wage for each hour the employee uses earned sick and safe leave.

Family member is defined broadly and includes: (1) an employee's child (biological, adopted, foster, stepchild, child for whom the employee has legal or physical custody or guardianship, or child for whom the employee is a primary caregiver); (2) biological parent, adoptive parent, foster parent, or stepparent of the employee or the employee's spouse; (3) an employee's legal guardian; (4) an individual who served as the primary caregiver of the employee when the employee was a minor; (5) an employee's spouse; (6) an employee's grandparent; (7) spouse of a grandparent of the employee; (8) an employee's grandchild; (9) an employee's sibling (biological, adopted, foster); and (10) an employee's sibling's spouse.

## What Employers Can and Cannot Do:

**Verification of the Need for Sick Time:** Employers can require an employee who uses more than three consecutive days of earned sick and safe leave to provide reasonable documentation to verify that the leave was used appropriately. However, the employer cannot require the employee to disclose the specific details of the illness, injury, or health condition of the employee or employee's family member.

**Employee Notice of Need for Sick Time:** To use earned sick and safe time, an employee must take these steps: (1) request leave from the employer as soon as practicable after the employee determines the need to take leave; (2) notify the employer of the anticipated duration of the leave; and (3) comply with any reasonable procedures established by the employer when requesting and taking leave. Unlike provisions in the majority of paid sick leave laws, the Act does not differentiate between employee notice requirements for foreseeable and unforeseeable absences.

**Retaliation Prohibited:** Employers may not retaliate against an employee for lawfully opposing a violation of the earned sick and safe leave law or for filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the paid sick and safe leave law. Employers also may not obstruct or prevent enforcement or compliance with the Act.

**Separation of Employment:** Upon separation of employment, an employer is not required to "cash out" an employee's accrued, unused paid sick and safe time. An employer is obligated to reinstate any accrued, unused sick and safe time if an employee is rehired within nine months of separation, unless the employee left employment voluntarily and without good cause.

## What Should Employers Do Now?

If not already done, businesses with operations in Montgomery County should take steps immediately to ensure that they achieve full compliance with the Act in light of the imminent October 1, 2016 effective date. This includes (1) reviewing existing paid leave policies to ensure that they meet the Act's minimum standards, (2) reviewing and, as necessary, revising anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the Act, and (3) training supervisory and managerial employees, as well as human resources, on the Act's requirements.

Additionally, employers must be aware of the Act's notice, posting, balance notification, and record retention requirements.

**Notice and Posting:** Employers must notify employees that they are entitled to sick and safe leave under the Act. Employers may provide notice in any of these ways: (1) displaying the model notice in a conspicuous and accessible area in each work location in the County; (2) including the model notice in an employee handbook or other written guidance that is distributed to all employees; or (3) distributing the model notice to each employee upon hiring. The Montgomery County model notice can be found [here](#).

**Available Balance Notification:** Employers must provide employees with a written statement of available earned sick and safe leave each time the employer pays wages to the employee. Employers may fulfill this requirement through an online system where employees can access their own earned sick and safe leave balances.

**Record Retention:** Employers must maintain records for at least three years containing the earned sick and safe leave accrued and used by each employee.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally.

To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list.

If you would like further information, please contact your Seyfarth attorney, [Johanna T. Wise](mailto:jwise@seyfarth.com) at [jwise@seyfarth.com](mailto:jwise@seyfarth.com), [Joshua D. Seidman](mailto:jseidman@seyfarth.com) at [jseidman@seyfarth.com](mailto:jseidman@seyfarth.com), or Needhy Shah at [neshah@seyfarth.com](mailto:neshah@seyfarth.com).

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