MASSACHUSETTS SICK LEAVE LAW

INTRODUCTION

On April 24, 2015 the Massachusetts Attorney General issued draft regulations regarding the Earned Sick Time Law, which was passed by voters in November of 2014 and which takes effect on July 1, 2015. The proposed regulations seek to provide additional guidance to employers on how the law will be implemented and enforced. The final regulations are expected to be issued in late June. That time frame obviously does not give employers much reaction time for any substantive changes. On May 18, the Attorney General issued additional guidance for compliance with the law during the remaining months of 2015 for those employers that already provide eligible sick leave benefits to their employees; that guidance is discussed below.

PAID SICK TIME

The Law requires all employers to allow employees to accrue at least one hour of sick time for every 30 hours worked for a total of 40 hours per year. The sick time will be either paid or unpaid depending on the size of the employer. Employers must provide paid sick time if the employer (a) maintains 11 or more employees on the payroll during 20 or more consecutive or non-consecutive weeks over either the current or preceding calendar year, or (b) maintains 11 or more employees on the payroll during 16 consecutive weeks over the current or preceding calendar year. All of an employer’s employees, whether working in or outside Massachusetts, and regardless of their eligibility to accrue and use earned sick time in Massachusetts, shall be counted for the purpose of determining an employer’s size. Employers that are not required to provide earned paid sick time under the law must provide eligible employees with the right to accrue and use up to 40 hours of unpaid sick leave for each calendar year.

If an employer has a change in workforce size that takes it under the 11 employee threshold and plans to transition from paid to unpaid sick time, the employer must give 90 days’ notice to the employees before the change in status occurs. If an employee has unused earned sick time, the unused paid sick time shall remain paid sick time until exhausted, even though the employee will begin to accrue unpaid sick time.

EMPLOYEES

An employee is considered to be any person who performs services for an employer for wage, remuneration, or other compensation, including full time, part-time, seasonal, interns and temporary employees. An employee is eligible to accrue and use earned sick time if the employee’s primary place of work is in Massachusetts. The state of primary employment is where the employee works the most amount of time. If Massachusetts is the primary place of employment, the employer will be counting all hours worked with the company towards the calculation of their earned Massachusetts sick time benefit. For example, Massachusetts would be considered the primary place of employment for an employee who works 700 hours in...
Massachusetts and 500 hours in New Hampshire. The entire 1200 hours would be credited towards the sick leave benefit.

**ACCRUAL**

The maximum benefit is reached once 40 hours are accrued. Employees who are exempt from overtime requirements will be assumed to work 40 hours in each work week unless their job specifies a lower number of hours per week, such as a salaried part-time employee. In this case, earned sick time will accrue based on that specified number of hours per week.

Earned paid sick time must be compensated at the employee’s regular hourly rate, and must be paid to the employee in the payroll cycle covering the time period when the sick time is used. The rate does not include holiday pay, overtime, bonuses, commissions or other incentive pay. Note that overtime hours worked are counted towards the accrual of benefits but not towards the hourly value of the benefit. For an employee who is paid on a salary or any basis other than an hourly rate, the same hourly rate means the employee’s total earnings in the previous pay period divided by the total hours worked during the previous pay period.

Employees who have been employed by their employer for at least 90 calendar days as of July 1, 2015, begin accruing earned sick time as of July 1, 2015. Accrual for other employees will begin as of their hire date. In subsequent calendar years, earned sick time will accrue the later of the start of calendar year or date of hire. Unpaid time off used prior to July 1, 2015 may not be credited against the 40 hour benefit total.

**EMPLOYEE USE**

Employees may not use more than 40 hours in a calendar year. They are permitted to use sick time beginning 90 calendar days after hire and at that time may use earned sick time as it accrues. Employees may be permitted to use sick time for following reasons:

1. care for the employee’s own physical or mental illness;
2. care for an employee’s child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness;
3. attend the employee’s routine medical appointment or a routine medical appointment for the employee’s child, spouse, parent, or parent of spouse; or
4. address the psychological, physical or legal effects of domestic violence (abuse committed against an employee or the employee’s dependent child).

**INCREMENTS OF USE**

Employees are allowed to use sick time in increments of the smaller of (i) one hour or (ii) the smallest increment that the employer’s payroll system uses to account for absences or use of other time. In most cases, this will mean one hour. If you are an employer, however, that accounts for time in quarter-hour intervals, your employees will be able to account for sick time taken in the same quarter-hour intervals for which time worked is accounted.
If an employee’s absence from work at a designated time requires the employer to hire a replacement and the employer does so, the employer may require the employee to use up to a full shift of earned sick time. The following is an example of that provision:

A food broker’s fleet departs from the employer’s principal place of business at 3:00 AM Monday through Friday to ensure timely delivery of perishable items to scheduled customers. The drivers’ shifts vary slightly depending on the route, but average 8 hours with loading and unloading. The employee responsible for deliveries arrives at the employer’s principle place of business at 5:00 AM after spending the night in the ER with a sick child. The employer was notified by phone of the emergency, and called in an off-duty employee to cover the deliveries for the absent driver’s shift. In this example, the employer may require the absent employee to use an entire 8-hour shift to cover the sick time used for that day.

If an employee uses sick time, and if both the employer and employee agree, the employee may work an equivalent number of additional hours during the same or next pay period as the hours not worked due to illness. In this case, the employee is not required to use accrued sick time for his/her absence nor is the employer required to pay sick time for the time the employee was absent. An employer cannot require an employee to work additional hours nor make the employee find a replacement.

**BREAK IN SERVICE**

An employee has the right to use any accrued earned sick time after a break in service of up to one year from the last date of actual work. A break in service is defined as a period of time of up to one year extending from the date an employee last worked for the employer until the employee’s return to employment with the same employer, whether the separation was voluntary or involuntary.

**UNUSED SICK TIME**

Employees must be allowed to carry over up to 40 hours of unused sick time to the next calendar year, but may not use more than 40 hours of sick time in a calendar year. Employers may not require an employee to work additional hours or to make up for missed time.

Employers are not obligated to pay out accrued, unused paid sick time either at the end of the year or upon termination. However, the proposed regulations specifically state that an employer can pay out sick time either at year-end or upon termination. If an employer does not pay out sick time at year-end, it must allow employees to carry over up to 40 hours of earned and unused sick time. If an employer does pay out sick time at year-end, it must also make available at least 16 hours of paid sick time available to the employee immediately at the beginning of the next year. Again, the annual accrual will stop when the employee reaches 40 hours of benefits.
Because the proposed regulations contemplate scenarios under which an employer elects to pay out unused sick time, employers who do not want to pay out such time should have policies explicitly stating that unused sick time is not paid out either upon year-end or upon termination.

**NOTICE**

An employee must make a good faith effort to provide advanced notice to employer when using earned sick time. This may include compliance with an employer’s reasonable notification system that the employee customarily uses to communicate for absences or requesting leave. If the employer does not have a policy for providing notice, the employer must establish a policy or procedure, preferably in writing.

If the employee’s need for the use of earned sick time is unforeseeable, the employee must report this need to the employer as soon as it is practicable and must comply with an employer’s absent notification system. If the employee cannot communicate the need to use sick time, notice may be provided by the employee’s spouse, adult family member or other responsible party.

**DOCUMENTATION**

Employers can require employees to submit written verification that they have used earned sick time for allowable purposes after they have used it. In no event, may an employer request additional medical or other documentation from an employee substantiating the need to use earned sick time until the employee uses more than 24 hours of earned sick time. In these cases, employers are limited in what documentation they can require. For example, if an employee does not have a health care provider, the employee may provide a signed written statement evidencing the need for the use of the earned sick time, without being required to explain the nature of the illness. If an employee fails to provide documentation, the employer may delay or deny future use of accrued sick time by the employee until the documentation is provided.

**ABUSE**

If an employee is committing fraud or abuse by engaging in an activity that is not consistent with allowable purposes for leave (e.g. being sick, caring for an ill family member) or by exhibiting a clear pattern of taking leave on days when the employee is scheduled to perform duties perceived as undesirable, the regulations permit an employer to discipline the employee for misuse of sick leave.

**CALENDAR YEAR**

For the purposes of administering the Earned Sick Time Law, a calendar year is defined as any consecutive 12-month period of time as determined by an employer. The regulations state that most employers will find it helpful to use the "calendar year" that they use for calculating wages and benefits, including, for example: a year that runs from January 1 to December 31, tax year,
fiscal year, Union contract year, or the year running from an employee’s anniversary date of employment. The definition differs, however, for the purposes of determining employer size. In that instance, the term “calendar year” shall mean a year that runs from January 1 to December 31.

**TRANSITION YEAR**

The proposed regulations address the transition year as the period from July 1, 2015 to the beginning of the employer’s next calendar year. During this time period, an employer is not required to provide more than 40 hours of earned paid sick time and any paid leave given prior to July 1, 2015 will be credited. Employees can start using accrued time as soon as they have 90 days of service (includes both work and non-work days). The proposed regulations offer the following example:

If an employer adopts a January 1 to December 31 method of tracking accrual and the employee has used 16 hours of paid sick time in 2015 before July 1, 2015, the employer must allow the employee to accrue and use up to 24 hours of earned paid sick time in the remainder of the year. Any unused, earned paid sick time accrued beyond 24 hours may be carried over into 2016.

**PAID LEAVE PLANS**

Employers who provide their employees paid time off under a PTO, vacation, or other paid leave policy with time sufficient to meet the accrual requirements of the new law are not required to provide additional earned paid sick time. Additionally, the new law does not diminish, curtail or impair an employer’s existing obligation under a collective bargaining agreement, contract or employment benefit program that provides more generous provisions than those in the proposed law.

The proposed regulations provide the following examples of more generous policies:

- A policy that provides more sick time than the 40 hours of earned sick time required under the statute;
- A policy that provides an accrual of sick time at a faster rate than that required under the statute and provides at least 40 hours of earned sick time each calendar year;
- A policy that provides a lump sum of 40 hours of earned sick time at the outset of employment and at the start of each subsequent calendar year rather than tracking the accrual of earned sick time over time;
- A policy that provides employees with at least 40 hours of paid time off that may be used without restriction and accrues as least as fast as the one hour per 30 hours worked rate; or
- A policy that permits employees to use sick time before it has been accrued and provides at least 40 hours of earned sick time each calendar year.
The regulations also state that an employer’s vacation or other PTO policy may comply with the law, if the PTO:

- Accrues at a rate of no less than one hour of PTO for every 30 hours of work;
- Is paid at the employee’s same hourly rate;
- Is accessible on the same basis, meaning time may be taken for the authorized uses under the sick leave statute;
- Comes with the same notice requirements to employees; and
- Is afforded the same job protections.

Because of these requirements, most employers seeking to rely on their existing vacation or PTO policies in order to comply with the Earned Sick Time Law will need to review those policies. Earned sick time under the new law is in addition to leave provided under the Family Medical Leave Act, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, and the Massachusetts Small Necessities Leave Act.

**AG SAFE HARBOR FOR EXISTING TIME OFF POLICIES**

On May 19th the Attorney General issued further guidance for the 2015 Transition Year for those employers who currently provide a paid time off policy that was in existence as of May 1, 2015. It shall apply to employers with plans that provide employees the right to use at least 30 hours of paid time off during the calendar year 2015 and which are in compliance with respect to the same conditions at the Earned Sick Time Law. To remain in compliance, any paid time off including sick time used by an employee from July 1 to December 31, 2015 must be protected leave subject to the law’s non-retaliation provisions. In all other respects, during the transition period, the employer may continue to administer paid time off under policies in place as of May 1, 2015. On January 1, 2016, all employers covered under this provision must adjust their paid time off policy to conform with the earned sick time law.

**RECORDKEEPING/NOTICE**

Employers must do the following for recordkeeping and compliance:

- Provide written notice of employer’s earned sick time calendar year to each employee at the time of hire and provide employees with reasonable access to their records;
- Post a multilingual notice of the Earned Sick Time Law and the regulations and provide a copy to employees;
- Keep true and accurate record of accrual and use of earned sick time and maintain the records for 3 years.
VIOLATIONS

Employers may not interfere with or retaliate based on an employee’s exercise of earned sick time rights or an employee’s support of another employee’s exercise of such rights. An employer may not use the taking of earned sick time under the statute as a negative factor in any employment action, such as an evaluation, promotion or disciplinary action.

The Attorney General will enforce the new law, using the same enforcement procedures applicable to other state wage laws, and employees may file suits in court to enforce their earned sick time rights. Violations of the earned sick time law may subject employers to civil penalties up to $25,000 per violation. Additionally, employees may file civil suits against employers for violations of this law and may recover treble damages, the cost of litigation and reasonable attorney fees.

CONCLUSION

To ensure compliance with the new law employers should perform the following steps:

1. Review existing sick time policies to ensure they are in compliance with the new law;

2. If there is no existing policy, then develop sick time policies and procedures, including:
   a. Establishing a sick time calendar year;
   b. Establishing a sick time notification policy;
   c. Whether unused, earned sick time is paid out at end of calendar year

3. Discuss accrual tracking and carryover calculator with payroll provider

4. Educate supervisors about regulations and policies and procedures concerning:
   a. Approved uses
   b. Notification requirements
   c. Documentation requirements
   d. Confidentiality