



Massachusetts Employers Must Take Action: Attorney General Issues Final Earned Sick Time Regulations

The Massachusetts Attorney General's Office (AGO) has issued final regulations regarding the new Massachusetts Earned Sick Time Law approved by voters last November. The final regulations include many needed clarifications and several employer-friendly provisions intended to allow employers to address employee fraud.

Summary of the Law

As a reminder, employers must provide all employees, including part-time, seasonal, and temporary employees, one hour of sick time for every 30 hours worked, up to a maximum of 40 hours per year. Employers with 11 or more employees must provide paid sick time; employers with fewer than 11 employees must provide unpaid sick time. The law permits employees to take sick leave for the following purposes:

- (1) An employee's own physical or mental illness or injury that requires care;
- (2) To care for the employee's immediate family member suffering from physical or mental illness or injury;
- (3) For the employee's own or employee's immediate family member's attendance at routine medical appointments; or
- (4) To address the psychological, physical, or legal effects of domestic violence against the employee or the employee's child.

Summary of the Final Regulations

We have summarized below some of the most significant new provisions and/or changes in the final regulations.

1. **Sick Leave Runs Concurrently with Other Leaves:** The proposed regulations had stated that earned sick time was "in addition" to other forms of leave. However, the final regulations provide that sick time can run *concurrently* with other forms of required leave (the Family Medical Leave Act, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, the Massachusetts Small Necessities Leave Act, and other leave laws) that allow employers to require concurrent use of leave for the same purposes. Employees may choose to use, or employers may require employees to use, concurrent earned paid sick time, as provided under the Earned Sick Time Law, to receive pay when taking other statutorily-authorized leave that otherwise would be unpaid (to the extent allowed by other leave laws). For example, if an employee is out on medical leave to care for their own illness under the Family Medical Leave Act (FMLA), the employer can require that the employees Earned Sick Time be used at the same time.

Important Note: Although the regulations say that employers may require employees to use sick time if taking those types of leave, the Parental Leave Act specifically states that use sick time is the employee's choice, so employers shouldn't require the exhaustion of sick time during Massachusetts Parental Leave.



2. **Accrual of Earned Sick Time:** The final regulations state that earned sick time is accrued only on *working* time, not on hours paid when not working, such as holidays, vacation time, or other non-working paid time.
 - a. Employees begin accruing earned sick time on the law's effective date or their date of hire, whichever is later, but are not entitled to use any earned sick time until they have been employed for 90 days. Employees who were employed as of April 2, 2015, may begin using time as it accrues beginning on July 1, 2015.
 - b. Employees are eligible to accrue and use time if their primary place of work is in Massachusetts (which does not have to be 50% or more). If employees are eligible to accrue, then all hours worked must be applied to the accrual rate, regardless of location.
 - c. Employers that provide employees with a lump sum of 40 hours or more of sick leave at the beginning of each year do not need to track accrual or allow any rollover as long as the provided leave is otherwise consistent with the law.
 - d. Employers may track accrual at an accrual rate of one hour for every 30 hours worked or any equivalent accrual rate with smaller increments of time (e.g., one minute of sick time per 30 minutes worked).
 - e. Earned sick time does not accrue during vacation, paid time off (PTO), or while using earned sick time. Once 40 hours of earned sick time are accrued during the benefit year, the employee does not accrue additional earned sick time regardless of the additional hours worked.
 - f. Once an employee has a bank of 40 hours of unused earned sick time, the employer may delay further accrual until the bank is reduced to below 40 hours.
 - g. An employee may roll over up to 40 hours of earned sick time to the next benefit year.
3. **Minimum Increments of Time:** A significant change in the final regulations is that the *first* hour taken for earned sick time must be in a minimum one-hour increment. Beyond one hour, employees may use earned sick time in hourly increments or in the smallest increment the employer's payroll system uses to account for absences or use of other time.
4. **Employers with PTO Plans:** Employers that had a policy in place on May 1, 2015, that provided paid time off or paid sick leave will have a temporary "safe harbor," in that they will be deemed in compliance with the Earned Sick Time Law until January 1, 2016, provided certain criteria are satisfied.
 - a. Employers that provide employees with 40 or more hours of paid time off or vacation that also can be used as earned sick time consistent with the Earned Sick Time Law are not required to provide additional sick leave to employees who use all their time for other purposes (i.e., vacation or personal time), provided that the employers' leave policies make clear that additional time will not be provided.
 - b. Employers may have their own sick leave or paid time off policies, so long as all employees can use at least the same amount of time, for the same purposes, under the same conditions, and with the same job protections provided in the Earned Sick Time Law.
 - c. Employers that provide other forms of PTO or vacation time are not required to provide additional paid sick time if employees can use the PTO or vacation time for sick leave on the same terms and conditions provided under the sick leave law. Further, if an employee exhausts the time by using it for purposes other than sick leave (i.e., vacation or PTO), the employer does not need to give

the employee additional sick time, provided it has given employees notice that additional sick time will not be provided in such circumstances.

5. **Documentation and Employee Notice:** The final regulations are significantly longer and more detailed than the proposed regulations, and there are other provisions that could affect different employers. Employers may require daily notice if an employee is absent for multiple days. In addition, the final regulations may allow for an employer to require certain written certification of leave from a “health care provider” (as defined by the Family and Medical Leave Act of 1993, 29 U.S.C. sections 2601 to 2654) under certain conditions.
 - a. Employers can require written documentation for an employee’s use of earned sick time when the time (1) exceeds 24 consecutively scheduled work hours; (2) exceeds 3 consecutive days on which the employee was scheduled to work; (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; (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.
 - b. Employers also may require employees to verify in writing that they used earned sick time for allowable purposes after using sick leave, *but* employers cannot require employees to explain the nature of an illness or details of domestic violence.
 - c. Employees must submit such documentation within 7 days of taking the earned sick time, unless, for good cause shown, an employee requires more time to provide such documentation.
 - d. Employers may require an employee to provide a fitness-for-duty certification from a medical provider before returning to work after using earned sick time if such certification is customarily required and consistent with industry practice or state or federal safety requirements, and the employer has a reasonable belief that the employee may pose a significant risk of harm to himself or herself or others.

6. **Rate of Pay:** The final regulations clarify that the rate paid for earned sick time for hourly employees is at the employee’s regular hourly rate and excludes overtime compensation, holiday pay, or other premium pay (but it would include a shift differential, if applicable). (A shift differential refers to the extra compensation an employee receives for hours worked outside of the normal workday.)
 - a. The law requires that employees be paid at the “same hourly rate” when using paid earned sick time.
 - b. For employees paid on an hourly basis, the same hourly rate means the employee’s regular hourly rate.
 - i. When an employee earns two different hourly wages, employers may choose to pay either a blended rate or the rate the employee would earn during the missed hours of work, but the employer must use the same method for the entire benefit year.
 - c. For tipped employees, the same hourly rate means the minimum wage effective when the time is used.
 - d. For employees paid on commission (whether base wage plus commission or commission only), the same hourly rate means the greater of the base wage or the minimum wage effective when the time is used.



- e. For salaried employees, the same hourly rate means the employee's total earnings in the previous pay period divided by the total hours worked (which is assumed to be 40 hours unless the employee is regularly scheduled to work less than 40 hours per week).
 - f. The same hourly rate does not include (1) sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production; (2) sums excluded under 29 U.S.C. § 207(e), 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; or (3) overtime, holiday pay, or other premium rates.
 - g. Where an employee's regular hourly rate is a "differential rate," meaning a different wage rate paid for the same work performed under differing conditions (e.g., a night shift), the "differential rate" must be paid.
 - h. Employees who miss a shift that would have paid a differential must be paid the shift differential in addition to their regular rate.
 - i. Employees on a piece rate (payment for each item produced) may be paid a "reasonable calculation" of what they would have earned during the missed time, but it cannot be less than the minimum wage.
7. **Required Notice of Employee Rights and Recordkeeping:** Employers must post a notice of the Earned Sick Time Law prepared by the Attorney General in a conspicuous place in every location where eligible employees work.
- a. Employers must keep records of the accrual and use of earned sick time for three years.
 - b. Employers also must do at least one of the following: (a) provide a hard or electronic copy of the notice to all eligible employees, or (b) include their policy on earned sick time (or their allowable substitute paid leave policy) in their employee manual or handbook.
 - c. Employers providing time off to employees under a paid time off, vacation, or other policy that complies with the law are not required to track and keep a separate record on accrual and use of earned sick time.

Next Steps for Employers

1. By January 1, 2016, all employers operating under the safe harbor provision must adjust their policies to conform to the law.
 - a. If you are a current full-service client of HR Knowledge, we will review your paid time off policies and help you adopt a policy that is compliant with the law. Please email your Client Account Manager.
 - b. If you are not a full-service client and are interested in obtaining our assistance in updating your time off policies, we are happy to assist you; however, there will be an hourly rate charge. Please email HR@hrknowledge.com if you are interested in learning more about becoming a full-service client.
2. Massachusetts employers with one or more employees are required to post the Earned Sick Time Notice of Employee Rights.
3. The notice is now available for downloading on the Attorney General's Earned Sick Time [website](#). Notices in other languages will be coming soon. We advise employers to post this notice as soon as possible and update it with the new All-in-One poster.



- a. The HR Knowledge All-In-One poster satisfies the posting requirements for employers of all sizes. Displaying the posters informs your employees about their labor and employment rights and helps them better understand their requirements. Failure to post required federal and state labor law notices may result in both federal and state fines.
 - i. If you are a full-service client of HR Knowledge, we will provide these updated All-in-One posters at no charge, except for shipping fees.
 - ii. If you are not a full-service client and are interested in ordering new posters, please complete the order form on our website, which you can access [here](#).
 - iii. Please Note: The Earned Sick Time Notice of Employee Rights requires a new All-In-One poster instead of the Peel-N-Post overlay. If you have already ordered a Peel-N-Post overlay for the Fair Employment Posting Requirement, we will cancel that order as you will need to order the full poster.

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