

The Attorney General Issues Proposed Regulations on the Massachusetts Earned Sick Time Law

By Daniel B. Klein and Anne S. Bider,
Seyfarth Shaw, LLP

On April 24, 2015, the Massachusetts Attorney General released proposed regulations on the administration and enforcement of the Massachusetts Earned Sick Time Law (“ESTL”), M.G.L. c. 149 § 148C. The ESTL, 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 pending, the proposed regulations reveal how the Attorney General’s Office views practical application of the ESTL and 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. Employers, however, may require employees to use sick time and other types of leave concurrently, where applicable.

Calculation of Employer Size: Only employers with 11 or more employees must provide *paid* sick time. 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: To be eligible for sick time, an employee need only spend more working time in Massachusetts than in any other state. All hours that an eligible employee works must be applied toward accrual of earned sick time regardless of the work location.

Calculation of the Hourly Rate at Which to Pay Sick Time: Employers required to provide *paid* sick time must pay it at the “same hourly rate” as the employee received at the time of the sick leave. If an employee receives different hourly rates from the same employer, the “same hourly rate” is the weighted average of all rates during the previous pay period. If an employee is paid on a piecework, salary, or fee basis, the “same hourly rate” is the total earnings from the previous pay period divided by the total hours worked. If an employee is paid by commission, the “same hourly rate” is the greater of the base rate (if applicable) or minimum wage. Commissions, bonuses, and other incentive pay shall not be included in the hourly rate. Nor does the hourly rate include overtime, holiday pay, or other premium rates.

Increments of Sick Time Used: Employees must be able to use sick time in the smaller of hourly increments or the smallest increment the employer’s payroll system uses. If an absence at a designated time requires an employer to hire a replacement, however, the employee can be required to use up to a “full shift” of sick time.

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.

Notice of Use of Sick Time: While the ESTL states that employees need only make a “good faith effort” to notify employers of their intent to use sick time, the proposed regulations add heft to this standard:

- Employees must report the need to use sick time “as soon as practicable” and may be required to comply with the employer’s “reasonable notification system” customarily used to report absences unless such requirements “interfere with the purpose for which sick time is needed.”
- If use of sick time is foreseeable, employers may require up to 7 days’ notice.

- Unless “infeasible,” employees taking multi-day absences may be required provide daily notification of sick time use.
- Employees may be required to submit written verification that they have used earned sick time for allowable purposes.
- Employers may discipline employees for misuse of earned sick time.
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Certification of Use of Sick Time: Employers may require employees who use more than 24 consecutively scheduled hours of sick time to provide, within 30 days, certification from their health care provider that use of sick time was for a valid purpose. Failure to timely provide certification without “reasonable justification” may result in delay or denial of future use of sick time until certification is provided.

Alternatives to Use of Sick Time: By mutual, written agreement with the employer, an employee may use sick time before accruing it. An employer also shall have the option to offer a payout of up to 40 hours of unused earned sick time at the end of the calendar year provided the employer makes available at least 16 hours of sick time at the beginning of the new calendar year.