



## Earned Sick Time: Tips for Compliance

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### **Practice Tips**

Against a backdrop of income inequality and stagnating wages of working class families, policymakers across the country are considering more generous, family-friendly workplace policies. President Obama has called on Congress to pass legislation mandating earned sick time and appropriating funds to help states pay for similar programs. The President has also issued directives requiring federal agencies to advance up to six weeks of paid leave for parents with a new child.

In November 2014, Massachusetts voters put the Commonwealth in the vanguard by approving a ballot initiative entitling almost all employees in the state to earned sick time. Massachusetts is now one of few states with an earned sick time labor standard.

Before the Earned Sick Time Act, to be codified at G.L. c. 149, s. 148C, becomes effective on July 1, 2015, lawyers should be aware of the following to ensure compliance.

### ***What Employers Are Subject to the New Law?***

The law applies to almost all public and private employers. For employers with 11 or more employees (including full-time, part-time and temporary workers), earned sick time is paid at the employee's standard hourly rate. For employers with 10 or fewer employees, sick time does not

have to be paid. The law does not cover federal employees working in Massachusetts or municipal employees, unless the city or town votes to adopt or appropriates funding to cover the costs attributable to the earned sick time labor standard.

### ***How Is Earned Sick Time Accrued and How Can It Be Used?***

Employees will earn (“accrue”) one hour of sick time for every 30 hours worked up to a maximum of 40 hours of sick time in a calendar year. Accruals will begin on the later of July 1, 2015 or the employee’s date of hire, and may not be used until the 90th calendar day after accrual begins.

Employees may use up to 40 hours of earned sick time in a calendar year, either in hourly increments, or in the smallest increment that the employer’s payroll system uses to account for absences. If the employer already has a paid time off (PTO) or other paid leave policies, the new law does not require the employer also to provide additional paid sick time, so long as the employer allows the employee to use at least 40 hours per calendar year for the purposes allowed under the earned sick time law.

Employees can use earned sick time, whether paid or unpaid, to:

1. care for a physical or mental illness, injury or medical condition affecting the employee or the employee’s child, spouse, parent, or parent of a spouse;
2. attend routine medical appointments of the employee or the employee’s child, spouse, parent, or parent of a spouse; or
3. address the effects of domestic violence on the employee or the employee’s dependent child.

### ***Can Earned Sick Time Be Carried Over to the Next Calendar Year?***

Yes. Although employees are not entitled to use more than 40 hours in one calendar year, they may carry over up to 40 hours of unused earned sick time to the next calendar year. Thus, an employee could start a new calendar year with a “sick time bank” from the prior year that would be available for use immediately. Unlike vacation time, which is considered a form of wages, accrued unused sick time does not have to be paid upon termination of employment.

### ***How Does an Employee Request Use of Earned Sick Time?***

When the need for sick time is foreseeable, employees must provide “good faith notice” of their intent to use earned sick time.

### ***What Medical Documentation May an Employer Require?***

For sick time exceeding 24 consecutive work hours, an employer may request “reasonable” medical documentation, but may not require information regarding the nature of the illness. Moreover, an employer may not delay an employee’s use of, or payment for, earned sick time for failure to provide the requested documentation.

### ***What Are Consequences of Non-Compliance?***

Like other wage and hour laws, the Attorney General is charged with enforcing the new earned sick time law, and employees have an individual right of action. Non-compliant employers may be subject to civil penalties up to \$25,000 per violation, treble damages, attorney’s fees and costs.

### ***Will the Attorney General’s Office Provide Guidance on Compliance?***

Yes. The new law also requires the Attorney General to prepare a notice that employers must post conspicuously in their workplaces. Health care facilities, child care centers, and schools also must post the notice.

### ***What Questions Remain Unresolved?***

Some of the outstanding issues that may be resolved by regulations to be promulgated by the Attorney General or settled by the courts include:

- How is employer size determined if its workforce fluctuates during the year?
- May an employer decline requested sick time where the employee fails to provide “reasonable” medical documentation?
- What constitutes “good faith notice” of foreseeable need for sick time by an employee?
- How does the new earned sick time law interact with the requirements and rights under other wage and hour laws, such as the Family Medical Leave Act (“FMLA”) and the new Act Relative to Domestic Violence, G.L. c. 149, § 52E?
- Does the federal Labor Management Relations Act preempt a claim under the new law for more sick time than afforded a union member under a collective bargaining agreement?

### ***Conclusion: What Steps Should Employers Take?***

Lawyers can advise their clients to encourage compliance before the July 1, 2015 effective date.

Employers should review existing employee handbooks and Paid Time Off (PTO) policies covering all types of paid leave (e.g., sick, vacation, personal days) to determine whether changes are needed to meet the new earned sick time standards. The new law allows employers to maintain their existing PTO policies if the existing policies provide at least the minimum rights under the new law, such as allowing employees to accrue sick time from the first day of employment and at the rate provided under the new law, to use at least 40 hours per

calendar year for the purposes authorized under the new law, and to allow employees to carry over at least 40 hours of unused earned sick time to the next calendar year.

Before July 1, 2015, employers should ensure that managers, supervisors and human resources administrators are informed about the requirements of the new earned sick time law, the new law's definition of "sick time" (which is considerably more expansive than the FMLA), and the unresolved issues, including the level of medical documentation an employer is permitted to require under the new law.

The Earned Sick Time Act will bring significant changes as Massachusetts steps forward at the vanguard of states adopting mandatory sick time labor standards.

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