

Attorney General Issues Final Regulations to the New Earned Sick Leave Law

June 24, 2015

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On June 19, 2015, the Office of the Attorney General (the "AGO") published the final regulations (940 CMR 33.00 *et seq.*) to the Massachusetts Earned Sick Leave Law (G.L. c. 149, § 148C). The final regulations provide much needed clarity and guidance on the implementation of the new law. They also contain some significant changes from the draft regulations originally published this spring and many of these changes benefit employers. As the countdown to July 1st nears, here are nine issues addressed in the final regulations that employers should keep in mind:

1. **Concurrent Leave:** In a sharp departure from the proposed regulations, sick leave now may run concurrently with time off provided under the Family Medical Leave Act and other leave laws that allow employees to take concurrent leave for the same purposes as G.L. c. 149, § 148C. Employees may choose to use, or employers may require employees to use concurrent earned paid sick time to receive pay when taking other statutorily authorized unpaid leave.
2. **Same Hourly Rate:** The AGO also amended the definition of the "same hourly rate" for sick pay purposes. For example, contrary to the proposed regulations, the "same hourly rate" for employees who are compensated on an hourly basis specifically excludes the value of any additional benefits accrued on an hourly basis. Likewise, employers now may elect to pay employees who receive different pay rates for hourly work either the wages the employee would have been paid for the hours absent had the employee worked or a blended rate. Additional changes impact exempt and tipped employees, and those paid on a piece work or fee-for-service basis.
3. **Accrual/Use of Earned Sick Time:** The final regulations currently provide that employers may cap accrual of sick time at 40 hours per benefit year. Employers also may delay further accrual until the employee draws down her bank to below 40 hours.
4. **Employer Size:** For purposes of determining the employer's size, employees furnished to an employer by a temporary staffing agency and paid by the staffing agency now will be counted as employees of both the employer and the staffing agency.
5. **Break in Service:** The AGO further revised the "break in service" rules. Under the final regulations, after a break in service of up to 4 months, employees may use any unused earned sick time that accrued before the break in service. After a break of service between 4 and 12 months, employees may use earned sick time that accrued before the break in service if the unused bank of earned sick time equals or exceeds ten hours. After a break in service of up to one year, employees do not need to restart the 90-day vesting period, but may not use prior accrued but unused sick days.

6. Allowable Substitution of PTO Policies: The final regulations also refine the rules for employers who wish to use their own sick leave or paid time off ("PTO") policies. In particular, the regulations allow employers to:

- Have different PTO or sick leave policies for different groups of employees, so long as all the employees can use at least the same amount of time, for the same purposes, under the same conditions, and with the same job protections as required by the Earned Sick Leave Law.
- Maintain separate use policies for PTO in excess of forty hours, so long as they allow employees to designate which time is taken as earned sick time.
- Avoid tracking accrual or providing rollover if they give employees a lump sum of at least 40 hours of sick leave or paid time off at the beginning of the year.
- Rely on a schedule of accrual rates provided in the regulations rather than tracking accrual over the course of a year.

7. Documentation: In addition, the AGO expanded the circumstances in which an employer can require written documentation for an employee's use of earned sick time. The categories now include situations where the employee's use of sick time: (a) exceeds twenty-four consecutively scheduled work hours; (b) exceeds three consecutive days on which the employee was scheduled to work; (c) occurs within two weeks prior to an employee's final scheduled day of work before termination of employment (except temporary workers); or (d) occurs after four unforeseeable and undocumented absences (three in the case of employees aged 17 and under) within a three-month period.

8. Certification: The final regulations also specifically provide that, under particular circumstances, an employer may request certification from a health care provider that an employee is able to return to work from an absence in which earned sick time was used.

9. Discipline: Finally, employers may discipline employees for misuse of earned sick time, if there is a clear pattern of taking leave on days just before or after a weekend, vacation or holiday (unless employees provide verification of authorized use).

The foregoing highlight many of the changes set forth in the final regulations to the Earned Sick Leave Law. As always, if you have questions about the final regulations or any aspect of the Earned Sick Leave Law, we encourage you to contact one of the authors of this advisory or your usual G&S attorney.

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