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HRW Alert: Massachusetts Attorney General Issues Final Regulations on the New Sick Leave Law

The Massachusetts Attorney General has issued final regulations ("regulations") regarding the new earned sick time (EST) law. The following is a summary of key provisions of the regulations. For additional general information on this law, which goes into effect on July 1, 2015, see our earlier HRW Alert here.

EST runs concurrently with FMLA, SNLA, parental, domestic violence and other statutorily-authorized leaves.

The regulations make clear that EST may run concurrently with time off provided under the FMLA, Small Necessities Leave Act, Massachusetts Parental Leave Act, Massachusetts Domestic Violence Leave Act and other leave laws. Employees may choose to use, and employers may require employees to use, paid EST to receive pay when taking other statutorily-authorized leaves that would otherwise be unpaid.

Employers may choose the leave year for EST accrual purposes.

Although the law itself refers to a "calendar year," employers may choose any consecutive 12-month period, such as a fiscal year, contract year or year running from the employee's anniversary date. This 12-month period is referred to as the employee's "benefit year." The proposed regulations required employers to provide employees with written notice at the onset of employment of what constitutes the calendar year, but this provision was dropped in the final version.

Certain individuals are excluded from coverage.

The regulations specifically exclude certain individuals from coverage, including:

1. true independent contractors (a tough standard to meet in Massachusetts);
2. U.S. government employees;
3. employees of cities, towns or local public employers that have not specifically accepted the EST law by vote or appropriation;
4. certain student workers, including college students on work-study and resident advisors; and
5. adult clients of licensed residential programs performing work duties as part of bona fide educational or vocational training.

The proposed regulations specifically stated that the definition of employee under the law included interns who must be treated as employees under Massachusetts state law. This sentence

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was removed from the final regulations; however, the final regulations do not specifically exclude interns. Whether an intern is covered might depend on the nature of and the length of the internship.

Personal Care Attendants (PCA's) are not excluded, but the regulations clarify that their employer is deemed to be the PCA Quality Home Care Workforce Council. The employer of Family Child Care Providers is deemed to be the Department of Early Education and Care.

EST must be paid at the employee's regular hourly rate.

For employees compensated on an hourly basis, EST must be paid at the employee's regular hourly rate or the minimum wage (now $9.00), whichever is higher.

For employees who receive different pay rates for hourly work from the same employer, EST may be compensated at either (a) the rate the employee would have received had they worked during the hours absent or (b) a blended rate determined by taking the weighted average of all regular rates of pay over the previous pay period, month, quarter or other established period of time customarily used by the employer to calculate blended rates for similar purposes. The employer can elect either (a) or (b), but must apply the method consistently throughout the employee's benefit year.

For employees paid a salary, the hourly rate for EST is determined by dividing the employee's total earnings in the previous pay period by the total hours worked. Exempt employees are assumed to work 40 hours, or the number of hours in their normal workweek.

For fee-for-service employees, the regular rate means a "reasonable calculation" of wages or fees the employee would have received if they had worked.

Employees paid on commission are paid EST at their base wage rate or the minimum wage, whichever is higher.

For tipped employees who ordinarily receive the service rate ($3.00 plus tips as of January 1, 2015), the same hourly rate means the effective minimum wage (currently $9.00).

As is the case with overtime, sums paid as commissions, draws, bonuses, or other incentive pay are not factored in, nor are contributions irrevocably made by an employer to a health insurance, retirement or other bona fide employee benefit plan. Holiday pay, overtime, and "other premium rates" are also excluded. The regulations specifically note, however, that a shift differential (such as extra pay for working at night) is not considered a premium, and must be factored in.

EST must be paid on the same schedule that regular wages are paid. Employers may not delay compensating employees for paid EST.

Employees are eligible to accrue and use EST if their primary place of employment is in Massachusetts.

Employees can earn and use EST if their primary place of work is in Massachusetts. If, for example, an employee works 40% of the time in Massachusetts, 30% in Rhode Island, and 30% elsewhere, that employee will be considered to have a primary place of work in Massachusetts. Per the regulations, if an employee has a primary place of work in Massachusetts, that employee will accrue earned sick time based on *all* hours worked for the employer, including hours worked outside of Massachusetts. If an employee is permanently transferred into Massachusetts, Massachusetts becomes their primary place of employment as of their first day of actual work. If an employee is permanently transferred out of Massachusetts, they stop accruing EST, but can use any amounts already earned.

Employees accrue EST at the rate of one hour for every 30 hours worked, up to a cap of 40 hours per benefit year.

EST accrues at a rate of one hour of earned sick time for every 30 hours worked, including overtime hours. Sick time, vacation time, and other paid hours that are not actually worked do not count. Employers may, if they choose, track accrual based on smaller increments (e.g., one minute of sick time per 30 minutes worked).

Once an employee has accrued 40 hours of EST, they do not accrue additional EST hours, even if they work additional time. Accrual is capped at 40 hours per benefit year. Up to 40 hours of EST can be carried over into the next benefit year.

The regulations offer some guidance for situations where actual hours worked is difficult to track. Employees working on a fee-for-service basis accrue EST based on a "reasonable measure of the time the employees work," including established practices or billing. Adjunct faculty compensated on a per-course basis are assumed to work three hours for each classroom hour. Family Child Care Providers as defined under Massachusetts law are deemed to work 6 hours for each part day and 10 hours for each full day worked.

Employers and employees may, by mutual *written* agreement, arrange for employees to use ESL before accruing it and for employers to count such use against future accrual.

Employees can use EST in increments.

The regulations note, as does the poster, that the smallest amount of sick time that an employee can use is one hour. For uses beyond one hour, however, employees may use EST in hourly increments or the smallest increment the employer's payroll system uses to account for absences or use of other time. So, for example, if an employee has to take his daughter to an appointment in the morning and is 50 minutes late for work, the employee may be deemed to have used 60 minutes of EST. If the employee comes in 90 minutes late, however, and the employer's payroll system tracks time in 15-minute increments, the employee can use EST of 90 minutes; the employee does not have to use 2 hours.

The regulations provide employers with some tools to prevent abuse.

The regulations state that employees cannot use sick time to be late if the lateness is not for one of the purposes authorized under the law.

In a nod to employers who utilize casual workers, the regulations state that employees may not accept shift assignments with the intention of calling out sick for all or part of the shift.

If an employee's absence from work at a designated time requires the employer to hire a replacement and the employer actually does so, the employer may require the employee to use up an equal number of hours as the replacement works, up to a full shift. If, however, the employee does not have enough EST to cover such time, the employer must provide the employee with sufficient job-protected unpaid leave to make up the difference.

Employers may discipline employees for using EST to engage in activities that are not consistent with the allowable purposes of the law. If an employee is exhibiting a clear pattern of taking leave on days just before or after a weekend, vacation or holiday, the employer may discipline the employee for misuse of earned sick time unless the employee provides verification of authorized use. If an employee has 4 unforeseeable and undocumented absences within a 3-month period, the employer can require a doctor's note or other documentation permitted under the law.

The regulations clarify that employers may continue to have policies that deny holiday pay to employees who are absent on the days immediately before or after a holiday, provided that the employees are not otherwise subject to adverse action for using EST on those days.

If an employee is under 17 years of age and an employee has a "reasonable suspicion" that the employee is misusing EST, the employer may seek verification of authorized use from a parent or guardian, unless verification would create a health or safety risk or hardship to the employee. Employers can also require that employees under the age of 17 submit a doctor's note or other permissible documentation if such employee has 3 unforeseeable and undocumented absences within a 3-month period.

Employers can permit but cannot require employees to make up the missed time.

Employers may not require an employee to make up time off from work as a condition of using EST. An employer and employee may, however, by *mutual* agreement arrange for the employee to work additional hours during the same or next pay period to avoid the use of and payment for EST. Note that if the time is made up during a different pay period, however, a non-exempt employee may become eligible for overtime pay if the total hours worked that week are more than 40.

The regulations provide employers with the option to pay out EST, but must make available an equivalent amount of unpaid EST, up to 16 hours, for use the following benefit year.

Employers have the option, but are not required, to pay out employees for up to 40 hours of unused EST at the end of the benefit year or when the employee changes jobs within the employer's employment. If the employer is paying out more than 16 hours, however, the employer must provide the employee with 16 hours of unpaid sick time until the employee accrues new paid time, which replaces the unpaid time as it accrues. Employers paying out less than 16 hours must provide an equivalent amount of unpaid sick time that can be used until the employee accrues new paid time.

Employees retain certain rights to use EST, even if there is a break in service.

The proposed regulations provided that employees could use EST earned prior to a break in service of up to one year. The final regulations are a little less generous. If there is a break in service of up to four months, the employee retains the right to use any unused EST accrued before the break in service. If the break in service is between 4 and 12 months, the employee only maintains the right to use EST accrued before the break if the unused EST bank is 10 or more hours.

Employees may use EST after 90 days following their first day of actual work, regardless of the number of days worked.

The regulations make clear that employees may use their accrued EST 90 days after their first date of actual work, regardless of how many days they work during that period.

If an employee is separated from employment, whether voluntarily or involuntarily, and is rehired within one year, the employee maintains their vesting days from the employer and does not need to restart the 90-day vesting period. This provision is slightly different from the proposed regulations, which stated that if an employee returned from a break in service of up to one year, the date of commencement of their employment would be their first date of actual work prior to the break in service.

The Safe Harbor still applies.

The regulations incorporate the amended Safe Harbor released by the Attorney General earlier this month, which is described in more detail in our earlier HRW Alert here.

Note that employers with the option to utilize the safe harbor may choose full compliance with the law beginning July 1, 2015 for "some or all employees." So, for example, if an employer has an existing policy that provides fulltime employees with one day off per month, but does not wish to provide that same rate of accrual to part-time workers, as the safe harbor requires, the employer may instead adopt a wholly compliant policy just for the part-time workers, but still take until January 1, 2016 to achieve full compliance for the fulltime workers.

Employer size is now based on the average number of employees on the payroll during the previous benefit year.

Under the law, an employer with 11 or more employees must provide paid EST; smaller employers need only provide unpaid time. The final regulations provide a simpler method for determining employer size than was set forth in the proposed regulations. Employer size is now determined by counting all employees (including part-time, seasonal and temporary employees) on the payroll during each pay period in the preceding benefit year, and dividing that number by the number of pay periods. If the employer uses multiple start dates for the benefit year, such as dates based on employees' anniversaries of hire, the employer should calculate employer size based on the previous January 1 to December 31.

Small employers that use temporary staffing agencies take note -- the regulations provide that employees furnished to an employer by a temporary staffing agency and paid by the staffing agency count as employees of *both* the staffing agency and the employer for the purpose of determining employer size. Employers should consider addressing in their contracts with their temporary staffing agencies which entity is responsible for paying EST.

If an employer is changing from paid to unpaid time or vice versa, based on a change in size, the employer must notify all eligible employees at least 30 days in advance of the change. EST accrued prior to such a change is either paid or unpaid depending on the size of the employer at the time it was accrued, not at the time it was used.

Employees must comply with the employer's reasonable notification systems.

The regulations provide that employees "must" notify their employers before they use earned sick time, except in an emergency. The provision in the proposed regulations specifically permitting employees to provide notice through a surrogate, such as a family member, was dropped except in cases where an employer requires notice for each day of a multi-day absence of unknown duration. Note however that, for absences also covered by the domestic leave law, notice may be provided by a surrogate.

The employer may require the employees to use reasonable notification systems that the employer creates, provided that employees are permitted to communicate with the employer in a manner the employee customarily uses to communicate with the employer for absences or requesting leave. The regulations also recognize that there may be situations where compliance with the employer's policy may not be feasible. The employee need not specifically reference the EST law, so long as the employer is on notice that the employee intends to use the time for a purpose allowed under the law.

The provision in the proposed regulations requiring employers to maintain a written policy for providing notice was dropped; however, employers should still consider doing so, so that employees understand the employer's rules.

Employers can require documentation to verify proper use of EST.

There was formerly some confusion around when an employer could require a doctor's note. The regulations permit employers to require a doctor's note or other permissible documentation to verify the absence if:

(a) the employee is absent for 24 consecutively scheduled work hours,
(b) the employee's absence exceeds 3 consecutive days on which the employee was scheduled to work,
(c) the absence 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,
(d) the absence occurs after 4 unforeseeable and undocumented absences within a 3 month period, or
(e) for employees aged 17 or younger, the absence occurs after 3 unforeseeable and undocumented absences within a 3 month period.

If the absence is due to medical reasons, the employee may submit documentation from a variety of different healthcare providers, as is the case with the FMLA. Chiropractors authorized to practice in Massachusetts or any other state are specifically included. If the employee does not have health coverage through any source, the employee may instead provide a signed, written statement evidencing the need for the use of the EST. For absences due to domestic violence, employees have the option to submit a variety of documents, including a simple signed written statement attesting to the abuse. In all cases, employers cannot require that the documentation explain the nature of the illness or the details of the domestic violence.

The regulations state that the employee may be required to submit required documentation within 7 days, rather than the 30 specified in the proposed regulations. Note that, under the domestic violence leave law, 30 days may be permitted in some situations. The employee may submit the documentation in hand or by "any reasonable method, including e-mail." The proposed regulations specifically mentioned text messages, but that reference was dropped.

There has also been confusion around what an employer can do if timely documentation is not submitted. The regulations state that if an employee fails "without reasonable justification" to comply with the employer's documentation requirements, the employer may recoup the sum paid for use of EST from future pay, as an overpayment, but only if the employer puts employees on notice of this practice. If the EST is unpaid and the employee does not provide the required documentation, the employer may deny future use of an equivalent number of hours of accrued EST until the documentation is provided, but may not otherwise take adverse action.

Employers can require employees to personally verify in writing that they have used EST for an allowable purpose after using any amount of EST, provided that the employee is not required to explain the nature of the illness or details of the domestic violence. The Attorney General will provide a model form that employers can use for this purpose.

Employers may impose certain stricter notice requirements on public employees during severe weather events or other emergencies and on healthcare providers during local, state or federally declared emergencies.

Employers may require a fitness-for-duty certification as a condition of the employee's returning to work, but only if such certification is customarily required and consistent with industry practice or state and federal safety requirements and "reasonable safety concerns" exist regarding the employee's ability to work, specifically, that there is a reasonable belief of "significant risk of harm to the employee or others". An example would be an employee who was absent due to a highly communicable and dangerous disease, as contrasted with absence due to the common cold.

Employers can have their own sick leave, vacation or PTO policies, provided those policies give employees the same or greater rights than the EST law.

Employers may have their own paid time off polices, 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 as are in the EST law. An employer's existing vacation, sick or PTO policy would not be acceptable, for example, if it did not apply to all employees (including temporary employees), did not allow employees to accrue time at the same rate (even if the employee would ultimately get to 40 by the end of the year), did not pay out time at the same hourly rate as the law (including shift differentials), was not accessible for all authorized uses under the statute (for example, if it could not be used for the illness of a child), came with more onerous notice requirements, or failed to provide the same job protections. Employers may have different policies for different groups of employees, so long as all employees have no fewer rights than they would have under the law.

The regulations affirmatively confirm that if an employer provides employees with vacation, personal, or other paid time off that the employee could have used for purposes permitted under the EST law, and the employee uses up all of that time, the employer does not need to provide additional sick time later in the year; however, the employer's leave policies need to make this clear. Note also that even if an employer is not required to provide EST, because the employee has used it all up, time off may be required under other laws, such as the FMLA or ADA.

Employers have a variety of options for tracking and recording accrual.

Employers are required to keep records of the accrual and use of EST, but there are different options for doing so.

One option is to simply do as the law requires – track actual hours worked, and provide 1 hour of EST for every 30 hours worked. If an employer does so, they must keep accurate records of an employee's accrual and use of sick time. These records must be maintained for three years, and provided on demand to the Attorney General's office. An employee who requests such records must be provided a copy within 10 business days *and* allowed to inspect the original paper or electronic records at a reasonable time and place.

Employers that prefer not to track accrual of sick time over the course of the benefit year may instead use one of following vesting schedules based on average hours worked:

For employees working an average of:

a) 37.5-40 hour per week, provide 8 hours per month for 5 months.
b) 30 hours per week, provide 5 hours per month for 8 months.
c) 24 hours per week, provide 4 hours per month for 10 months.
d) 20 hours per week, provide 4 hours per month for 9 months.
e) 16 hours per week, provide 3 hours per month for 10 months.
f) 10 hours per week, provide 2 hours per moth for 10 months.
g) 5 hours per week, provide 1 hour per month for 10 months.

If the employer opts to use one of these vesting schedules, the employees will still have a right to rollover up to 40 hours of unused time, but further accrual may be delayed while an employee maintains an unused bank of 40 hours.

Employers that comply with the law by having a PTO, vacation or other policy generally need not track and keep a separate record on accrual and use of EST. If, however, the employer wishes to maintain a separate policy for paid time off in excess of 40 hours, the employer must permit employees to designate which time is taken as EST.

Employers that provide employees with a lump sum of 40 hours or more of EST the start of each benefit year, and all the other protections of the law, do not have to track accrual or carryover. Similarly, employers with unlimited time off policies that otherwise comply with the law need not track accrual or carryover.

Employers should remember that, even if they are not required to track accrual (for example, if they provide 40 hours of sick time at the start of each benefit year or unlimited time off), the employer is subject to other record-keeping requirements under federal and state wage and hour laws, including the requirement to specifically track the hours worked each day by non-exempt employees.

Employers may not punish employees for using EST.

Employers may not take adverse action against employees for exercising their rights under the law by, for example, disciplining the employee, denying or delaying use of accrued time, taking away work hours, giving the employee undesirable assignments, giving false negative references for future employment, making false criminal reports, reporting the employee to immigration authorities, or threatening to do any of these things.

The regulations specifically list as a prohibited adverse action “disciplining an employee under the employer’s attendance policy.” Employers with strict attendance policies should take care that absences of 40 hours or fewer are not held against the employee in any way, including noting them negatively in a performance evaluation.

It is not considered an adverse action for an employer to deny holiday pay to an employee who uses EST on the days immediately before or after a holiday, provided that the employee is otherwise not subject to any adverse action for taking the time. Similarly, it is not considered an adverse action to deny an employee who uses EST a reward for good attendance.

Employers must provide employees with notice of their rights under the law.

The Attorney General has released a poster (found here) that must be posted in conspicuous places accessible to employee in every location where eligible employees. Employers must also provide a hard copy or electronic copy of this notice to all eligible employees or, in the alternative, include a policy on earned sick time or the employer's allowable substitute paid leave policy in any employee manual or handbook.

There are good reasons for employers to have a clear, written EST policy.

The regulations do not specifically require employers to adopt a written policy. Posting and distributing the notice is enough. There are, however, many good reasons for employers to do so. An employer is better able to take the position that an employee did not comply with its reasonable notification procedures if such procedures are in writing. An employer can require up to seven days' notice for foreseeable or pre-scheduled use of EST, but only if the employer has a written policy to that effect. Employers can recoup EST paid to employees who fail (without reasonable justification) to comply with the employer's documentation requirements, but only if employees are put on notice of this practice. If an employer provides vacation or PTO to comply with the law, and an employee uses up all of that time for personal reasons not covered by the law (for example, to go on a cruise), the employer need not provide additional time off if the employee becomes sick later in the year – but only if the employer has a leave policy to that effect. Employers can also use their policy to comply with the requirement that employees be provided with individualized notice of the EST law.

Employers need to get into compliance by July 1.

The law goes into effect on July 1. By that date, employers must post the poster, and either adopt a legally compliant EST policy, or confirm that they have complied with the Safe Harbor. Our attorneys are here to help.