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

The Massachusetts Attorney General has issued proposed regulations ("regulations") regarding the new Sick Leave Law. The regulations do not yet have the force of law. There will be a notice and comment period that lasts until June 10, 2015, and public hearings will be held throughout the Commonwealth. While (in our view), the regulations are for the most part logical, helpful and clear, there are some sections that we feel need re-tooling, and about which we plan to testify at the Boston hearing on May 18. The Attorney General has made it clear that her office welcomes and appreciates input from all stakeholders, and has made changes to proposed regulations based on comments from our attorneys in the past. We therefore encourage our readers to contact us if there are particular topics that you feel we should cover in our testimony. The following is a summary of key provisions of the regulations.

All employees with a primary place of employment in Massachusetts are eligible to accrue sick time.

It is important for employers to note that the law applies to all employees, including interns, part-time employees and temporary/seasonal employees. The regulations state that if an employee is on an employer's payroll and the employee's primary place of work is in Massachusetts, the employee is eligible to accrue and use earned sick leave under the law. In order to have a primary place of work in Massachusetts, an employee does not need to work over 50% of the time 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.

Persons who are truly independent contractors – a tough standard to meet in Massachusetts – are not covered.

The regulations clarify that persons who are truly independent contractors, that is, persons who do not meet the very broad definition of employee contained in M.G.L. c. 149, § 148B, are not eligible for sick time under the new law. Employers should remember that this is a tough standard to meet. If you pay an individual to do any task that would ordinarily be performed by an employee, that person would probably not be deemed an independent contractor under Massachusetts law.

Employer size is assessed over a several month period.

The regulations state that all employees—whether or not they work in Massachusetts, or whether or not they are eligible to accrue and use earned sick time—must be counted for the purpose of determining employer size. An employer must pay paid sick time to eligible employees if the employer maintained 11 or more employees on the payroll during 20 or more weeks (whether consecutive or not) over the current or preceding calendar year or if the employer maintained 11

or more employees on the payroll during 16 consecutive weeks over the current or preceding calendar year.

Sick time is paid out based on the employee's regular hourly rate.
The regulations clarify that an employee's hourly rate for paid sick leave purposes is calculated in a similar (though not wholly identical) manner as it is for overtime purposes. If an employee receives different pay rates for different tasks, sick time is paid based on the "blended" rate of the previous pay period. For example, if during the previous pay period the employee worked 20 hours at $10 an hour and 20 hours at $20 an hour, the rate of pay for a day of sick leave taken the following pay period would be $15 per hour (total pay received divided by total hours worked).

As is the case with overtime, sums paid as commissions, draws, bonuses, or other incentive pay are not factored in. Holiday pay, overtime, and "other premium rates" are also excluded. The regulations incorporate by reference the exclusions to the regular rate set forth in the Fair Labor Standards Act. Thus, federal regulations on such topics as the subtle distinction between a "shift differential" (which is included in the regular rate) and "premium pay" (which is not) would likely apply as well.

Employers can substitute their own PTO policies for Massachusetts sick leave provided that those policies are as or more generous than the sick leave law in all respects.
Under the new law, sick leave accrues at a rate of one hour of earned sick time for every 30 hours worked, including overtime hours. Exempt employees earn sick time based on a 40 hour work week, unless their job specifies a lower number of hours per week in which case sick leave accrues based on the specified number of hours per week. Employees have the right to carry over up to 40 hours of accrued sick leave per year.

The regulations clarify that employers can substitute their own sick, vacation, and/or PTO policies for Massachusetts sick time, provided that employees accrue as much or more time as they would receive under the sick leave law. Such policies must be as or more generous as the new law in all other respects too. An employer's existing vacation, sick or PTO policy would not be acceptable as a substitute for Massachusetts sick leave if it did not apply to all employees (including temporary employees), 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.

The regulations state that an employer's sick leave policy will be considered more generous than the law, and therefore acceptable, if it provides a lump sum of 40 hours of job protected earned sick time at the outset of employment and at the start of each subsequent calendar year "rather than tracking the accrual of sick time over time." At the hearing, we will ask the Attorney General to confirm that an employer who has such a policy need not comply with the requirement, set forth later in the regulations, that they keep a record of the "accrual" of sick time, and further that there would be no carryover requirement.

Employees begin accruing earned sick time from the first date of actual work, and may begin using it after they have been employed for at least 90 calendar days.
The regulations clarify that employees begin accruing earned sick time from day one of their employment. They may use that sick time after 90 calendar days. Employees who have already been employed for 90 calendar days as of the law's effective date (July 1, 2015) may start using their sick time as soon as is accrues.

A former employee who returns to work after a break in service of up to one year maintains the right to use sick time accrued during the prior period of employment.
The regulations state that in cases where an employee has a break in service of a year or less the employee is entitled to sick time accrued during the prior period of employment. For example, if a college student works during June and July as a paid intern, the student would accrue sick time, but would not have the right to use any of it because the intern was not employed for 90 days. If that same intern graduates from college in May of the following year and starts working for the company as a regular employee, the sick time that the employee accumulated while working as a summer intern would be available to him/her. The regulations further clarify that the date of commencement of employment for the purposes of counting the 90 days is the first date of actual work, prior to the break in service.

Employees may use sick time intermittently.
The statute states that an employee may take sick leave in hourly increments or in the smallest increment the employer's payroll system uses. Thus, an employer could not have a policy stating that, if an employee wishes to use four or more hours of sick time, the employee must take off the entire day. In a nod to employers, however, the regulations state that where 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 to a full shift of earned sick time.

Employers have the option of offering a payout of earned sick time at the end of the calendar year, provided that the employer makes available at least 16 hours at the beginning of the new calendar year.
The regulations state that an employer has the option, but is not required, to offer an employee a payout of up to 40 hours of unused earned sick time at the end of the employer's calendar year as long as the employer makes available to the employee at least 16 hours of sick time at the beginning of the new calendar year. The regulations further state, as is provided in the statute, that accrued sick time need not be paid out on termination, but that employers may choose to do so.

The regulations also state that, by mutual agreement with the employer in writing, employees may use earned sick time before accruing it. Employers and employees may also mutually agree to arrange for an employee to work additional hours to avoid the use and payment of earned sick time; however, if that time is worked during a different week, the employee will remain eligible for overtime pay if the make-up hours bring the employee's total for the week to more than 40 hours.

Employers must post a notice regarding the new law.
Employers must post a notice of the Earned Sick Leave law in a conspicuous location accessible to employees in every establishment where employees with rights under the law work. This notice will be prepared by the Attorney General and posted to the Attorney General's website.

As with the FMLA, employers may define the year for sick leave accrual purposes.
The sick leave law itself refers to accrual based on a "calendar year." Yet, many employers have policies that accrue time based on fiscal or anniversary year. The regulations state that employers may define "calendar year" as any consecutive 12-month period of time so long as they have a written policy that defines this term for its employees. If an employer decides to change the definition of a "calendar year"—changing from an anniversary year to a fiscal year, for example—the employer must provide employees with 90 days written notice in advance of the change.

Employees may be required to comply with an employer's reasonable notification requirements, provided that such requirements do not interfere with the purpose of the leave.
The regulations state in several places that employees can be required to comply with an employer's reasonable notification procedures, provided that such requirements do not interfere with the purposes of the law. The regulations state that, if an employer does not have an existing policy or procedure for providing such notice, the employer "shall establish" one, preferably in writing.

Employers can require up to seven days advance notice if the employee wishes to use earned sick time for a pre-scheduled or foreseeable absence (such as a doctor's appointment), but only if the employer maintains a written policy that contains procedures for providing notice. In cases of multi-day absences, an employer may require notification on a daily basis from the employee or the employee's surrogate (e.g., spouse, adult family member or other responsible party), unless the circumstances make such notification infeasible.

In cases of unforeseeable absences, the employee must report the need to use sick time "as soon as is practicable" and must comply with the employer's notification system, provided, once again, that such system does not interfere with the purposes for which the earned sick time is needed. The regulations note that there may be certain situations such as accidents or sudden illnesses for which such requirements might be unreasonable or infeasible.

Employers may not insist that the employee himself or herself provide the notice. Per the regulations, if an employee is unable to provide notice personally, notice can be provided by a surrogate.

Employer policy requirements with respect to medical documentation are subject to some restrictions.
The regulations echo the statutory provision that, until an employee uses more than 24 consecutive hours of earned sick time, an employer may not request medical or other documentation substantiating that employee's need to use earned sick time. However, an employer may require an employee to submit written verification that they have used earned sick

time for allowable purposes—without requiring documentation or specific detail—after using any amount of sick leave.

Even after the 24 consecutive hour threshold has been met, employers may not require documentation to explain the specific nature of the illness or details of domestic violence necessitating the use of earned sick leave. Further, if an employee does not have a health care provider, the employee may instead provide a signed written statement evidencing the need for sick time without being required to explain the nature of the illness. The Attorney General provides a model form for such purposes.

The regulations also state that documentation may be submitted to the employer by hand or by any other "customarily used" method for employee and employer to communicate—including e-mail, text message and facsimile. This provision is potentially problematic for employers, many of whom do not permit employees to communicate absences by text. At the hearing, we will ask the Attorney General to clarify that an employer may use its policy to define what forms of communication will be considered customary.

The regulations state that employees must submit such documentation within 30 days of the date they took the earned sick time. An employer may not delay compensating employees for earned paid sick time until they receive written the verification or documentation; however, they may delay or deny future use of sick time pending receipt.

The regulations offer employers some latitude to discipline employees for misuse of sick leave.

An employer may discipline an employee for misuse of sick leave in situations where the employee is committing fraud or abuse by engaging in an activity not consistent with the law's allowable purposes for leave or in situations where the employee exhibits a clear pattern of taking leave when the employee is scheduled to perform duties perceived as undesirable. The regulations do not mention other possible types of abuse—such as a pattern of taking sick days after holidays or on Mondays and Fridays. We intend to ask the Attorney General to amend the regulations to clarify that an employer has the right to discipline an employee for any misuse of sick leave, not just misuse of sick leave to avoid undesirable duties.

The regulations further state that if an employee fails to comply with an employer's reasonable documentation requirements, and further that there is no reasonable justification for the failure to comply, the employer may "delay or deny the future use of accrued sick time by the employee until the documentation is provided." In our view, this provision is vague, and we may ask the Attorney General to amend the regulations to clarify that an employee's failure to comply with sick leave documentation requirements can result in disciplinary action, not just a delay or denial of future sick time use.

Employers may not retaliate against employees for using earned sick time, or otherwise interfere with employee rights under the law.

Employers may not interfere with employee rights under the law. Put simply, an employer may not punish an employee for exercising his/her 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.

Employers should also be careful that they do not use the taking of earned sick leave as a negative factor in an employee's evaluation, or as a basis for discipline or termination. For example, an employer should not give an employee a negative rating for "attendance" if the employee has taken five or fewer days off per year, and such absences were all for purposes covered by the sick leave law.

Employees who use earned sick time need not receive a "perfect attendance" bonus.
The regulations state that attendance policies that reward employees for good attendance are permissible, so long as employees who exercise their right to use earned sick time are not penalized. The regulations also specifically clarify that denying an employee a reward for good attendance based on his or her use of earned sick time does not constitute an adverse action or interference with an employee's rights under the law.

Sick leave under the law is "in addition to" time off provided by the FMLA, SNLA, MPLA and Domestic Violence Leave Law.
The regulations inexplicably state that the time off provided by the sick leave law is "in addition to" time off provided by the Family Medical Leave Act, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, the Small Necessities Leave Act, and "the like." In our view, this language is confusing, and also inconsistent with the FMLA regulations, which specifically permit employers and employees to apply earned paid time against absences taken for an FMLA-qualifying purpose. We intend to request that the Attorney General amend this provision to clarify that, if an employee takes time off that qualifies both as Massachusetts sick leave and as leave under the FMLA or another law, the two leaves can run concurrently.

Employees begin to accrue sick leave beginning on July 1, 2015; however, paid leave given prior to that date can be credited.
While employees will begin to accrue time under the earned sick leave law on July 1, 2015, employers are not required to provide more than 40 hours of earned paid sick time during the transition year. Employers who utilize a January 1-December 31 method of tracking accrual, for example, are not required to allow an employee to use 40 hours of paid sick time prior to July 1 and then begin accruing and using up to 40 hours more paid sick time after the law goes into effect. All paid sick time taken during the employer's current calendar year and before the July 1 implementation date will be credited in such situations.

However, in situations where an employee used unpaid sick time for an employer required to offer paid sick time under the earned sick leave law, the employee will still be entitled to accrue and use up to 40 hours of paid sick time after July 1, 2015.

Employers must keep accurate records of the accrual and use of paid sick time.
Employers must keep true and accurate records of the accrual and use of earned sick time, and must maintain such records for three years. These records are subject to inspection by the Attorney General on demand. As noted above, at the hearing we will ask the Attorney General

to clarify that an employer who provides the full 40 hours of sick time at the beginning of the year need not specifically track accrual. Since many employers adopt a PTO system whereby employees can take time off for any reason they like, we intend to additionally request that the regulations be clarified to state that an employer who complies with the accrual requirements of the law through a vacation or PTO policy need not keep records of the specific reason an employee takes a day off, but only whether or not the employee used accrued paid time off in accordance with the employer's policies.

Next steps for employers.

Although the Attorney General is still seeking comments on the regulations, and may change parts of them based on the public hearings, experience suggests that most of the current provisions are likely to be adopted as is. The law goes into effect on July 1, 2015, and the Attorney General is likely to strongly resist any effort to delay implementation. Now is the time for employers to update their policies to comply with the new law and regulations. Our attorneys are here to help.