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## Proposed Regulations Shed Light on Unanswered Massachusetts Sick Leave Questions

By Adam Forman, Christopher Kaczmarek, and Carie Torrence

On November 4, 2014, Massachusetts voters approved a ballot question that requires all private-sector employers to provide employees with up to 40 hours of sick leave per calendar year.<sup>1</sup> That new law, which goes into effect on July 1, 2015, left many questions unanswered. For example, the law did not specifically address whether multi-state employers with fewer than 11 employees in Massachusetts had to provide paid, as opposed to unpaid, sick leave. The law also did not address whether employers may provide employees with the option of cashing in accrued, paid sick leave.

In an attempt to answer some of these questions, the Massachusetts Attorney General recently proposed regulations interpreting the new sick leave law. As discussed below, the proposed regulations provide answers that may be surprising to employers.

### Which employers must provide paid leave?

Under the new law, all employers, regardless of their size, must provide sick leave to employees. Employers with 11 or more employees, however, must provide paid sick leave. Employers with fewer than 11 employees must provide, at a minimum, unpaid sick leave.

In the proposed regulations, the Attorney General's Office takes the position that, when calculating whether an employer meets the paid sick leave threshold, all full-time, part-time, seasonal and temporary employees must be counted, including employees who work outside of Massachusetts. Thus, for example, an employer with 15 employees would have to provide paid sick leave to its employees in Massachusetts, even if only one employee is based in the Commonwealth.

### What about employees who work outside of Massachusetts?

According to the proposed regulations, employees are eligible to accrue sick leave if their primary place of work is in Massachusetts, even if the employee spends less than 50% of his or her working time in Massachusetts. By way of example, the proposed regulations reference a painter who works for one employer and spends 40% of her hours in Massachusetts, 30% of her hours in New Hampshire, and 30% in other states. According to the Attorney General's Office, Massachusetts would be the painter's primary place of work and, therefore, the painter would be eligible to accrue sick leave for all working hours, including hours worked outside of Massachusetts.

<sup>1</sup> See Adam Forman, Christopher Kaczmarek, and Carie Torrence, *Massachusetts Voters Approve Paid Sick Leave Law*, Littler ASAP (Nov. 7, 2014).

## How do employers calculate the accrual of sick leave?

Beginning July 1, 2015, employers must provide all employees, including full-time, part-time, seasonal and temporary employees, with a minimum of one hour of sick leave for every 30 hours worked, up to a maximum of 40 hours per calendar year. Surprisingly, the proposed regulations state that the term “calendar year” means any consecutive 12-month period designated by an employer. Thus, if adopted as proposed, the regulations will permit employers to choose which 12-month period to designate as the “calendar year” for accrual purposes (e.g., fiscal year, the year running from an employee’s anniversary date, etc.). Upon hire, however, employers must provide employees with a written notice that explains what the calendar year is for sick leave purposes. Any change to an employer’s definition of calendar year must be prospective and cannot result in a loss or forfeiture of any previously accrued sick leave.

The proposed regulations also state that, for accrual purposes, exempt employees are assumed to work 40 hours per week unless their normal work week is less than 40 hours.

## What happens to accrued, unused sick leave if an employee leaves the company?

Under the sick leave law, employers are not required to pay out accrued, unused sick leave upon the termination of the employment relationship. Under the proposed regulations, however, if an employee returns to work within a year from the last date of employment, any sick leave earned prior to the break in service shall be available for the employee to use immediately.

## May employers permit employees to cash out their unused sick leave?

Employees are only entitled to use 40 hours of sick leave per calendar year, but they are statutorily entitled to carry over up to 40 hours of unused sick leave to the next calendar year.

The proposed regulations allow employers to offer, at the employee’s sole discretion, the option to receive payment for any unused sick leave at the end of the calendar year, provided that at least 16 hours of sick leave are available at the beginning of the new calendar year. The proposed regulations, however, prohibit any payout or other forfeiture of sick leave as it accrues during the year.

## What if an employee already received paid sick time prior to July 1, 2015?

Employees must begin to accrue sick leave on July 1, 2015. The proposed regulations, however, permit employers with existing sick leave policies to credit any paid sick leave taken prior to July 1st against their statutory obligations. For example, if an employee takes two hours of paid sick leave between January 1, 2015 and June 30, 2015 pursuant to his or her employer’s existing sick leave plan, the employer may treat those two hours of sick leave as though they were taken pursuant to the Massachusetts law. As a result, for the transition year from July 1 through the beginning of the next calendar year, the employee would be entitled to only 38 hours of paid sick leave, not the 40 hours of sick leave provided for in the statute.

## At what rate must paid sick leave be paid?

Under the Massachusetts sick leave law, an employer must pay an employee for paid sick time “at the same hourly rate as the employee earns from the employee’s employment at the time the employee uses the paid sick time.” In the proposed regulations, the Attorney General states that, if an employee is paid on an hourly basis and receives different pay rates for hourly work, then the employer must pay sick leave using a “blended” rate, *i.e.*, the weighted average of all straight-time rates of pay during the prior pay period. For employees paid on any other basis (e.g., piece work, salary) the base rate is calculated by dividing the previous pay period’s gross pay by the hours worked. For employees paid on a commission basis, whether base wage plus commission or commission only, the hourly rate is the greater of the base wage or the effective minimum wage. Under the proposed regulations, amounts paid as commissions, bonuses, or other incentive pay or overtime, holiday pay, or other premium rates are not included in the paid sick leave calculation.

## How may employees provide notice of the need for sick leave?

When the need for sick leave is foreseeable, employees must make a “good faith effort” to provide advance notice, but the law does not define “good faith effort” or establish any minimum notice period. Similarly, the law is silent as to when an employee must notify his or her employer that an absence was covered by the sick leave law when the absence was not foreseeable. The proposed regulations offer employers some guidance regarding acceptable notice requirements.

The proposed regulations clarify that reasonable notice may include compliance with an employer’s existing notification system that employees use to communicate other absences, provided those notice requirements do not interfere with the purposes of the law. According to the proposed regulations, if an employer does not have a notification policy in place, the employer must establish one, preferably in writing, so employees know how to provide notice of the need for leave.

Where the need for sick leave is pre-scheduled or foreseeable, the proposed regulations allow employers to require up to seven days’ advance notice. If the leave is not foreseeable, employers can require employees to report the need as soon as practicable using the employer’s notification system for unplanned absences or call-in procedures, recognizing certain situations such as accidents or sudden illness may make such requirements unreasonable or infeasible. If an employee cannot personally provide notice, the employer must accept notice from the employee’s spouse, adult family member or other responsible party.

Employers may require employees to submit written verification that they used sick time for allowable purposes. However, employers cannot require an employee to provide a doctor’s note or other form of certification unless the employee is absent for more than 24 consecutively scheduled work hours. If the employer requests certification, the employee must provide it within 30 days. Employers may not require that the employee provide certification prior to taking leave or delay payment for time taken pending receipt of the certification.

Employers cannot require a certification that explains the nature of the illness. Rather, employers are limited to seeking medical notes that simply excuse the employee from work. Employees who do not have a health care provider may provide a written statement signed by the employee documenting the need for the sick leave.

## How does the law affect an employer’s good attendance bonus program?

Under the law, employers are strictly prohibited from interfering with employees’ rights to use sick leave, including, but not limited to, disciplining an employee for sick leave use or considering use of sick leave as a negative factor in any employment decision. An employer also cannot require an employee to make up hours missed because of a covered absence or require an employee to search for or find a replacement.

The proposed regulations explain that attendance policies that reward employees for perfect attendance are permissible if the policy does not subject employees to an adverse action based on the use of sick leave. The proposed regulations also expressly state that the denial of a perfect attendance award for an employee who uses protected sick leave is not an adverse action.

## Does the law impose a posting requirement?

Employers will be required to post a multi-lingual notice to be prepared by the Attorney General. In addition, employers must provide employees with copies of the notice.

## What should employers be doing now?

The Attorney General’s Office has scheduled six public hearings to discuss the proposed regulations at various locations across the Commonwealth between May 18th and June 5th. Additionally, written comments may be submitted to the Attorney General through June 10th. After this public comment period, the Attorney General’s Office will adopt final regulations. It is possible that the final regulations will differ from the proposed regulations discussed above.

In the interim, employers should consider the steps they need to take to comply with the new law. Among other things, employers should consider:

- Reviewing or adopting a notification system that employees will use to communicate absences, including absences triggered by the need to use sick leave.
- Determining whether employees will be entitled to paid versus unpaid sick leave when the law takes effect, based on the 11-employee threshold as interpreted by the proposed regulations.
- Reviewing and revising, if necessary, paid sick leave and/or PTO policies and procedures to ensure they meet the law's requirements, including a review of carryover, cap and usage provisions, as well as policies governing attendance and anti-retaliation.
- Reviewing and revising, if necessary, any bonus programs that are tied to attendance.
- Ensuring that they have appropriate systems in place to calculate and track earned and used sick time.
- Training supervisory and managerial employees, and HR and payroll personnel, on the new law's requirements.

Employers should consult with experienced employment counsel when addressing these issues. Littler Mendelson is holding a free Breakfast Briefing on June 5, 2015 in Burlington, Massachusetts to discuss the new sick leave law, as well as other new federal and state employment laws.<sup>2</sup>

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<sup>2</sup> For more information on this event, click [here](#).