Insight

IN-DEPTH DISCUSSION

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Massachusetts Attorney General Issues Final Sick Leave Regulations

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Effective July 1, 2015, all private-sector employers in Massachusetts must provide their employees with up to 40 hours of sick leave per calendar year.[1] Earlier this year, the Massachusetts Attorney General published proposed regulations concerning the implementation of the new law.[2] After receiving comments to those proposed regulations, the Attorney General recently issued final regulations that differ from the proposed regulations in a number of important respects.

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 sick leave, but it can be unpaid.

The final regulations contain a new formula for determining the size of an employer for purposes of the paid sick leave obligation. According to the final regulations, if an employer maintained an average of 11 or more employees on the payroll during the preceding calendar year, the sick leave must be paid. All full-time, part-time, seasonal and temporary employees must be counted, including employees who work outside of Massachusetts. In addition, temporary employees furnished to an employer by a staffing agency are counted as employees of both the employer and the staffing agency.

How do employers calculate the accrual of sick leave?

Beginning July 1, 2015, employers in Massachusetts must provide all employees, including full-time, part-time, seasonal, temporary and per diem employees, with a minimum of one hour of sick leave for every 30 hours worked, including overtime, up to a maximum of 40 hours per calendar

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

2 *See* Adam Forman, Christopher Kaczmarek, and Carie Torrence, *Proposed Regulations Shed Light on Unanswered Massachusetts Sick Leave Questions*, Littler Insight (May 12, 2015); Adam Forman, Christopher Kaczmarek, and Carie Torrence, *Massachusetts Attorney General Creates a "Safe Harbor" From the Requirements of the Massachusetts Sick Leave Law*, Littler ASAP (May 26, 2015); and Christopher Kaczmarek, Carie Torrence, and Kevin Burke, *Massachusetts Attorney General Issues Required Notice of Employee Rights and Clarifies the "Safe Harbor" Exemption*, Littler ASAP (June 11, 2015).

year. The final regulations state that employers may adopt policies providing that employees who have accrued a bank of 40 unused hours of sick leave do not accrue additional sick leave until the employee draws down that bank below 40 hours.

As an alternative to having a plan that provides for accrual of sick leave, the regulations expressly permit employers to grant employees the full 40 hours of sick leave at the beginning of each calendar year. Employers who elect to frontload the full allotment of sick leave are not required to permit employees to carry over any unused sick leave from the prior year. Another option authorized by the regulations is to provide monthly lump-sum allotments of sick leave to employees based on average hours worked. For example, a full-time employee would receive eight hours of sick leave per month for the first five months of each calendar year and a part-time employee who works 20 hours per week would receive four hours per month for the first nine months of the year.

The regulations also 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 explaining how the calendar year is defined 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.

How do employees use sick leave?

Unlike the proposed regulations, the Attorney General's final regulations state that the smallest amount of sick leave an employee may use is one hour. Thus, if an employee spends 45 minutes attending a doctor's appointment, she is deemed to have used an hour of sick leave. For uses beyond one hour, employees may use earned sick leave in the smaller of one-hour increments or the smallest increment used by the employer's payroll system to account for other absences.

In addition, the final regulations clarify that sick leave may run concurrently with leaves under the Family and Medical Leave Act and other similar laws, and that sick leave may be used for "travel to and from an appointment, pharmacy, or other location" related to the purpose for which the leave was taken.

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. The regulations, however, state that if an employee returns to work within four months of the last date of employment, any sick leave earned prior to the break in service must be available immediately. Employees with a break in service of between 4 to 12 months are entitled to use previously earned sick leave, but only if they had accrued and not used 10 or more hours of sick leave.

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

The regulations permit employers to pay out any accrued, 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. Thus, an employer that pays out 40 hours of sick leave to an employee must provide 16 hours of unpaid sick leave for the employee's use until the employee accrues new paid time. In the event an employee had less than 16 hours paid out, employers are required to provide an amount of unpaid sick leave equal to the hours paid out until the employee accrues new paid time to replace the unpaid sick leave.

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." As expected, the final regulations differ significantly from the proposed regulations, providing more guidance to employers regarding the "same hourly rate" calculation.

Under the regulations, if an employee is paid on an hourly basis and receives different pay rates for hourly work, then the employer has the option of paying either the wages the employee would have been paid for the hours missed or a "blended" rate, *i.e.*, the weighted average of all straight-time rates of pay during the prior pay period. Employers must choose which method they will use in advance and consistently use

that method for all employees throughout the designated calendar year. Differential rates paid for working under specific conditions, such as night shifts, are not considered premium rates and must be included in calculating what constitutes the same hourly rate.

Tipped employees who normally receive the service rate must be paid the minimum wage, which is currently $9.00 per hour. For employees paid on a piece-work or a fee-for-service basis, the same hourly rate means a reasonable calculation of the wages the employee would have earned had the employee worked.

Under the regulations, amounts paid as commissions, drawing accounts, bonuses, or other incentive pay or overtime, holiday pay, or other premium rates are not included in the paid sick leave calculation. Thus, commissioned employees must be paid for sick leave at the greater of their base rate (if applicable) or minimum wage.

For exempt employees, the rate is determined by dividing the total earnings from the prior pay period by 40 hours unless an employee's normal work week is less than 40 hours, in which case the calculation will be based on the employee's normal work week.

How do employees provide notice of the need for sick leave?

When the need for sick leave is pre-scheduled or foreseeable, the statute provides that employees must make a "good faith effort" to provide advance notice, but the statute 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 regulations, however, offer employers guidance regarding acceptable notice requirements.

First, the regulations clarify that reasonable notice may include compliance with an employer's existing absence notice system in effect for other absences, provided those notice requirements do not interfere with the purposes of the law. 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 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.

When can employers request documentation verifying the need for earned sick time?

Employers may require employees to submit written verification that they used sick time for allowable purposes after the employee has used any amount of sick time. However, the law restricts employers from requesting that an employee submit a doctor's note or other form of certification unless the employee is absent for more than 24 consecutively scheduled work hours or three consecutively scheduled work days. In circumstances where employers are allowed to request a doctor's note or other form of certification, 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. In addition, the regulations allow employers to require written documentation in other limited circumstances, including if an absence occurs within two weeks of an employee's final scheduled day of work before termination of employment, or after the employee has had four unforeseen and undocumented absences within a three-month period.

Employers cannot require that the employee's written verification or the doctor's note, if permitted, explains the nature of the illness. Rather, employers are limited to seeking employee verification or medical notes that simply state that the employee missed work for a purpose covered by the law.

How do employers address sick leave abuses?

Due to the restrictions on requiring sick leave documentation, employers may find it difficult to detect abuse of sick leave. The regulations, however, include some helpful language in this regard. For example, if an employee is exhibiting a clear pattern of using sick leave immediately

before a weekend, holiday or vacation, an employer is permitted to discipline the employee for misuse of sick time unless the employee provides verification that the time was taken for a protected purpose. Employers may only request a doctor's note or other form of certification if the suspected abuse amounts to four unforeseeable absences within a three-month period. Otherwise, the employee may provide a written statement under his or her signature.

The regulations also provide special rules for minors. Employers may require verification from a parent or guardian in the form of a written statement under the parent's signature if there is a reasonable suspicion that the employee is abusing sick leave time. In addition, employers may require documentation, including a doctor's note, after a minor has three unforeseen and undocumented absences in a three-month period.

Notably, the regulations allow employers to recoup paid sick time as an overpayment of wages if an employee fails to provide the required documentation.

How does the law affect bonuses or special premium pay conditioned on attendance?

Under the law, employers are strictly prohibited from interfering with an employee's right 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. Similarly, an employer 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 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 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. Similarly, policies that condition the receipt of holiday pay on an employee working the days immediately before and/or after a holiday are permissible.

How Does the New Law Affect Existing Leave Policies?

The law does not require employers with sick, vacation, personal or other paid time off policies that are equivalent to, or more generous than, the law to provide additional paid sick time. However, the law provided no guidance regarding the integration of the earned sick time requirements with existing sick, vacation or other paid time off policies.

The regulations, however, provide some guidance to employers wishing to substitute time off policies for earned sick time. To satisfy the law, an employer's time off policy must: accrue at a rate of no less than 1 hour for every 30 hours worked; be paid at the employee's same hourly rate; be accessible, at least, for the same purposes allowed by the law; be available under the same notice and documentation requirements; and, be subject to the same job protections.

If an employee uses all of the time off available for vacation or personal reasons and then has a need for sick leave later in the year, the employer is not required to provide additional time off—paid or unpaid—so long as the employer's policy put employees on notice that if they use all their hours for vacation or other purposes there will be no additional sick leave available.

What should employers be doing now?

Now that the final regulations have been issued, employers should consider:

- Reviewing or adopting a notification system that employees can 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 based on the 11-employee threshold as calculated by the final regulations.
- Determining what 12-month period to designate as the calendar year and including that designation in the sick leave, vacation and/or PTO policy.

- Reviewing and revising, if necessary, sick leave, vacation and/or PTO policies and procedures to ensure they meet the law's requirements, including carryover, cap and usage provisions, attendance and anti-retaliation provisions, and if a PTO or vacation policy will substitute for paid sick time, ensuring that the policy states that if employees exhaust their leave bank by taking vacation or other personal time off, no additional time will be granted for sick leave.
- Providing employees with a copy of the notice issued by the Attorney General and posting a copy of that notice in the workplace.
- Ensuring appropriate systems are 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.