

November 7, 2014

## Massachusetts Voters Approve Paid Sick Leave Law

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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. Under the new law, which goes into effect on July 1, 2015, employers with 11 or more employees must provide employees with paid sick leave. Those employers under the threshold must provide unpaid sick leave. In enacting this law, Massachusetts joins California and Connecticut to become just the third state to require statewide paid sick leave.

### Who Is Covered By The Law?

The new law applies to all private sector employers in Massachusetts, but the requirements imposed by the law differ depending on the size of the company. All employers, regardless of their size, must provide sick leave to employees. Employers with 11 or more employees, however, must provide paid sick leave. Massachusetts joins California and Connecticut as the only states requiring paid sick leave. Employers with less than 11 employees must provide, at a minimum, unpaid sick leave.

When calculating the total number of employees for purposes of the new law, employers must count all full-time, part-time and temporary employees. The new law, however, is not completely clear regarding how to perform this calculation. First, the law does not indicate whether employees who work outside of Massachusetts are included as part of this calculation. Second, the law does not address when the calculation must be made, which is an issue of significant concern to companies with a seasonal or fluctuating workforce. Third, it is unclear whether the term "temporary employees," as used in the law, refers only to temporary employees on the company's payroll or whether it includes workers provided and paid by a temporary staffing company. It is possible that the Massachusetts Attorney General may issue regulations addressing these and other issues between now and July 1, 2015, the effective date of the law.

### How Will The New Law Work?

Beginning July 1, 2015, employers must provide all 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. For accrual purposes, exempt employees are assumed to work 40 hours per week unless their normal work week is less than 40 hours. Employees begin accruing sick leave on the later of July 1, 2015 or their date of hire. However, employees are not entitled to use the sick leave until 90 calendar days after they commence employment. Thereafter, employees may use the sick leave as it accrues.

Employees are only entitled to use 40 hours of sick leave per calendar year. However, employees are statutorily entitled to carry over up to 40 hours of unused sick time to the next calendar year. It will be important, therefore, for employers of all sizes to develop a method for tracking the accrual, use and carryover of sick leave time. Unlike unused vacation, employers are not required to pay out unused sick time upon the separation of employment.

The sick leave may be used to:

1. care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; or
2. care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; or
3. attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse; or
4. address the psychological, physical or legal effects of domestic violence.

Employers must grant sick time in hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

By mutual agreement of the employer and employee, an employee may avoid using accrued sick time by working an equivalent number of hours to cover the absence in the same or next pay period following the absence.

## What Obligations Does The Law Place On Employees?

When the sick leave use is foreseeable, employees must make a "good faith effort" to provide advance notice of the need to take leave. 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/her employer that an absence was covered by the sick leave law when the absence was not foreseeable. Employers should consult with experienced employment counsel to develop and implement specific notice requirements regarding earned sick time.

## Can Employers Require That Employees Provide A Doctor's Note?

An employer only may require that an employee provide a doctor's note, or some other form of certification from a health care provider, if the employee is absent for more than 24 consecutively scheduled work hours. In addition, employers may not require that the employee provide the certification prior to taking the leave. The law also provides that an employer may not require that the certification explain the nature of the illness or the details of the domestic violence. In other words, employers are limited to seeking medical notes that simply excuse the employee from work.

Employers are strictly prohibited from interfering with employees' rights to use sick leave, including, but not limited to, disciplining an employee for sick leave usage or considering use of sick leave as a negative factor in any employment decision. Employers are further prohibited from requiring an employee to make up hours missed because of a covered absence or requiring an employee to search for or find a replacement. The law also includes a broad anti-retaliation provision.

## Does The Law Impose A Posting Requirement?

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

## Does The Law Impose Any Recordkeeping Requirements?

Like all payroll-related records, employers will be required to maintain records related to sick leave for at least two years after each pay period. Such records shall be open to inspection by the Attorney General. Further, employers must allow employees to inspect their own records at reasonable times and places.

## How Does The New Law Affect Existing Leave Policies?

Employers with paid time off plans or policies equivalent to, or more generous than, the sick leave law are not required to provide additional paid sick time. However, employers must carefully review any such paid time off plan or policy to ensure it is usable for the same purposes and under the same conditions as the sick leave law. It is important to recognize that the manner in which sick leave accrues under the new law may differ from the manner in which it accrues under existing policies. For example, an employer currently may provide paid sick leave to its employees, but under the company's policy employees accrue sick leave at a rate of one hour per workweek, which the policy defines as being 40 hours. This policy would not comply with the new law because sick leave accrues at a slower rate than the accrual rate provided by the law.

The new law does not diminish an employer's obligation to comply with any contract, collective bargaining agreement or employee benefit program in effect on July 1, 2015 that provides greater earned sick time rights.

## What Are The Consequences If Employers Fail To Comply?

The new law provides the Attorney General with the power to bring both criminal and civil proceedings to enforce its requirements. In addition, employees, after first raising their claims with the Attorney General, can bring their own lawsuits to address alleged violations of the law. Employees who prevail in such lawsuits—including lawsuits under the law's anti-retaliation provisions—can recover compensatory damages, as well as mandatory awards of treble damages and attorneys' fees.

## What Should Employers Be Doing Now?

Although the law does not go into effect until July 1, 2015, employers should consider the steps they need to take to be in compliance with the new law. Among other things, employers should consider:

- Whether employees will be entitled to paid versus unpaid sick leave when the law takes effect, based on the 11 employee threshold.
- 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.
- Reviewing and revising, if necessary, attendance and anti-retaliation policies.
- Ensuring that they have appropriate systems in place to calculate, track, and detail accrued 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 any of these issues. Littler expects to conduct a webinar in December to address employers' concerns under the new law.

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