



The Massachusetts Earned Sick Time Law: What Every Employer Needs To Know

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The Massachusetts Earned Sick Time Law: The Basics

The Earned Sick Time Law was approved by Massachusetts voters pursuant to a ballot question posed in November 2014. Under the law, starting **July 1, 2015**, all Massachusetts employers must allow their employees to accrue and use sick leave.

ALL MASSACHUSETTS EMPLOYERS ARE SUBJECT TO THE EARNED SICK TIME LAW, BUT SIZE MATTERS.

The Earned Sick Time Law broadly defines the term “employer” to include “any individual, corporation, partnership or other private or public entity....who engages the services of any employee for wages, remuneration or other compensation.” All persons and entities that satisfy this definition must allow their employees to earn and use sick leave.

However, despite its broad application the law does not impose the same requirements on all employers. Employers that maintained **an average of 11 or more employees** on its payroll during the preceding benefit year must offer paid sick leave. Employers that maintained **an average of less than 11 employees** need only provide unpaid sick leave. Employers determine their average number of employees by dividing the total number of full-time, part-time, and temporary employees on their payroll during each pay period by the number of pay periods.¹

ALL EMPLOYEES WHO WORK PREDOMINANTLY IN MASSACHUSETTS ARE ELIGIBLE TO EARN SICK TIME.

The Earned Sick Time Law likewise broadly defines the term “employee” to include “any person who performs services for an employer for wage, remuneration, or other compensation.” This explicitly includes full-time, part-time, seasonal, and temporary employees.

However, only employees whose “primary place of work” is Massachusetts are eligible to earn sick time.² This does not require that employees spend more than 50% of their time working in Massachusetts, only that they perform more work in Massachusetts than in any other state.

EMPLOYEES MUST ACCRUE AT LEAST 1 HOUR OF SICK TIME FOR EVERY 30 HOURS WORKED.

Eligible employees must accrue sick time at a minimum rate of **1 hour of sick time for every 30 hours worked**,³ up to a cap of 40 hours per benefit year.⁴ Salaried employees must accrue sick time based on their “normal work week,” which is assumed to be 40 hours per week unless their job specifies a lower number. Employees paid on a piece work or fee-for-service basis must accrue sick time based on a reasonable measure of the time they work, including established practices or billing. Regardless of how the sick time hours are accrued, employers must permit all employees to rollover up to 40 unused hours of sick time to the following year.

All current employees must start accruing sick time on July 1, 2015. All subsequently-hired employees must start accruing sick time on their first day.

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1. Employees who are furnished and paid by a temporary staffing agency count as employees of both the staffing agency and the employer.
 2. This rule applies regardless of the location of the employer.
 3. This included overtime hours, but excluded hours paid to employees when they are not working such as hours paid under a vacation or other paid time off plan.
 4. However, employees who possess a bank of 40 hour of unused sick time may opt to delay further accrual until they draw down the bank below 40 hours.

THE EARNED SICK TIME LAW PERMITS EMPLOYEES TO USE THEIR SICK TIME FOR A VARIETY OF REASONS.

Under the law, employees are permitted to use earned sick for any of the following reasons:

1. Caring for their own physical or mental illness, injury, or medical condition;
2. Caring for a physical or mental illness, injury, or medical condition of their child, spouse, parent, or spouse's parent;
3. Attending their own routine medical appointment;
4. Attending a routine medical appointment for their child, spouse, parent, or spouse's parent;
5. Addressing the psychological, physical, or legal effects of domestic violence; or
6. Travel necessitated by any of the above.

Employees may only use sick time when they are scheduled to be at work. Employers are not required to pay employees for any non-work time they spend for any of the above-listed purposes.

EMPLOYERS MUST PAY EMPLOYEES USING SICK TIME THEIR NORMAL RATE ON THEIR NORMAL SCHEDULE.

Employers must compensate employees who use earned sick time according to their normal rate as follows:

1. Traditional Hourly Employees – Employees who perform a single job for a single hourly rate must be compensated at that hourly rate.
2. Multi-Rate Hourly Employees – Employees who receive different pay rates for hourly work must be compensated either at the rate they would have been paid for the hours they were absent, or at a “blended” hourly rate that incorporates a weighted average of all hourly rates paid to them during the previous pay period, month, quarter, or other period of time the employer uses to establish “blended” rates.⁵
3. Salaried Employees – Salaried employees must be compensated at a rate representing their total earnings for the previous pay period divided by the total hours they worked (which is assumed to be 40 hours per week unless their normal work week is less).
4. Other Non-Hourly Employees – Employees compensated on a piece work or fee-for-service basis must be compensated at an hourly rate that represents a reasonable calculation of the wages they would have received for the piece work or service.
5. Commission Employees – Employees compensated on a straight commission or a wage-plus-commission basis must be compensated at their base hourly wage or at the minimum wage, whichever is greater.
6. Tipped Employees – Tipped employees must be compensated at the minimum wage.

Notwithstanding any of the above calculations, **the minimum hourly rate an employer may pay an employee for using sick time is minimum wage.** Employers are *not* required to compensate employees using sick time for commissions, bonuses, other incentive pay based on sales/production, overtime or holiday pay, or other premium rates.

Employers must pay all wages for the use of sick time on the same schedule as regular wages, and employers cannot delay payment even when employees fail to comply with a valid request that they certify their reasons for using sick time.

5. Whatever method the employer selects to determine the “blended” rate must be used consistently throughout the benefit year.

ALTHOUGH THE EARNED SICK TIME LAW GOES INTO EFFECT JULY 1, 2015, THERE IS A SAFE HARBOR FOR QUALIFYING EMPLOYERS UNTIL JANUARY 1, 2016.

To help employers comply with the law, the Attorney General has established a **safe harbor** for qualifying employers for the “transition year” ending December 31, 2015. To qualify for the safe harbor, an employer must have had a paid time off or paid sick leave policy in place on May 1, 2015, and:

1. The policy allows full-time employees to earn at least 30 hours of paid time off/sick leave in 2015;
2. Starting on July 1, 2015, the employer permits all employees not previously covered by the policy (including part-time, seasonal, temporary, and per diem employees) to earn paid time off/sick leave at the same accrual rate or receive a pro-rated lump sum allocation (if the policy so provides);
3. The employer provides its non-hourly and non-salaried employees with a lump sum allocation based on a reasonable approximation of their hours;
4. At least 30 hours of the paid time off/sick leave employees earn under the policy: is job protected and subject to the law’s anti-retaliation provision; is available to be used for all of the purposes allowed by the law; and, allows sick time that is not used by January 1, 2016, to be carried over (unless the policy obviates rollovers by providing lump sum allocations for unused time); and
5. The employer conforms its paid time off/sick leave policy to the Earned Sick Time Law on or before January 1, 2016.

How do employers violate the Earned Sick Time Law?

BY INTERFERING WITH, RESTRAINING, OR DENYING EMPLOYEES’ USE OF EARNED SICK TIME.

The Earned Sick Time Law prohibits employers from interfering with, restraining, or denying employees’ exercise of (or even attempt to exercise) earned sick time rights. This not only means employers cannot subject employees to discipline for using sick time, but also that employers cannot consider employees’ use of sick time as a negative factor in any performance evaluation, promotion decision, disciplinary action, or termination decision.

BY TAKING ADVERSE ACTION AGAINST EMPLOYEES FOR USING THEIR SICK TIME.

The Earned Sick Time Law also includes an **anti-retaliation provision** that prohibits employers from taking “adverse action” against employees for either opposing a practice they believe violates the law or the accompanying regulations, or for supporting another employee’s exercise of rights under the law (e.g., filing a lawsuit, providing information or testifying in connection with an inquiry related to earned sick time, etc.).

The Attorney General’s regulations provide a non-exhaustive list of employer actions that are considered “adverse” under the law, including:

1. Denying employees the right to use sick time;
2. Delaying payment of used sick time;
3. Terminating an employee;
4. Taking away an employee’s work hours;
5. Negatively altering the terms or conditions of employment;
6. Disciplining an employee under an attendance policy;

7. Giving employees undesirable assignments or schedules;
8. Giving an employee a false negative reference;
9. Making a false criminal report against an employee;
10. Reporting an employee to immigration; or
11. Threatening any of the foregoing.

What are the penalties for violating the Earned Sick Time Law?

The Earned Sick Time Law and regulations authorize a wide range of civil and even criminal penalties for violations. The type and severity of a penalty, though, will depend on the nature and severity of the violation, and who is bringing the enforcement action.

CIVIL FINES

For a first violation of the Earned Sick Time Law, an employer may be fined a maximum of \$15,000, unless the violation was unintentional in which case the maximum fine is \$7,500. The maximum fine for a repeat violator is \$25,000 for each repeat violation.

The Attorney General has discretion to determine the amount of any civil fine, and in doing so it must take into account the following factors:

1. Any previous violations of the Earned Sick Time Law or of Minimum Wage Laws (Mass. Gen. Laws Ch. 151) by the employer;
2. The employer's intent to violate the Earned Sick Time Law or Ch. 151;
3. The number of employees affected by the violation(s);
4. The monetary extent of the violation(s); and
5. The total amount of the payroll involved.

WRITTEN WARNINGS/CIVIL CITATIONS

The Attorney General may also issue a separate written warning or civil citation to a violating employer for every violation. In each warning/citation the Attorney General may require the employer to do any or all of the following:

1. Rectify the violation;
2. Pay restitution to the aggrieved party; and/or
3. Pay a specified civil penalty within 21 days.

Employers have the right to **appeal** civil citations for violations of the Earned Sick Time Law. To do so, employers should immediately retain counsel because notices of appeal are due within 10 days of the date of the citation. Employers who appeal are guaranteed a hearing at which they must demonstrate that the citation was erroneously issued. Employers that lose this administrative appeal may then further appeal the citation in Superior Court.

CRIMINAL PROSECUTIONS

The Attorney General also has the option of applying for a **criminal complaint** or seeking an **indictment** against an employer for violating the Earned Sick Time Law, particularly where the employer fails to comply with a civil citation, or fails to pay a civil penalty/restitution order on time.

In addition to potentially facing a criminal complaint or indictment, employers who fail to pay civil penalties/restitution orders on time shall also automatically become subject to a lien on its real estate or personal property in the total amount owed plus interest.

PRIVATE CIVIL LAWSUITS

Employees may also file civil lawsuits against their employers for violating the Earned Sick Time Law. In doing so, employees may request damages for lost wages and benefits, as well as injunctive relief (e.g., reinstatement). Whenever an employee's lawsuit prevails, the employer will be required to pay **triple damages** and the employee's litigation costs and reasonable attorneys' fees.

Are there any ways employers can control their employees' use of sick time?

Yes. Although the purpose of the Earned Sick Time Law is to provide enhanced benefits to Massachusetts employees, both the statute and the Attorney General's regulations provide certain tools to employers to help them orderly and efficiently maintain operations while complying with the law.

ENFORCE THE 90 DAY WAITING PERIOD BEFORE EMPLOYEES CAN USE EARNED SICK TIME.

Regardless of how many hours of sick time employees accrue, employers can prevent them from using sick time until after the 90th day following the commencement of their employment. However, employers must permit employees to begin using sick time starting after their 90th day irrespective of the number of days they actually worked in that 90-day period.

REQUIRE EMPLOYEES TO USE SICK TIME IN AT LEAST HOURLY INCREMENTS, OR PERHAPS FOR AN ENTIRE SHIFT.

Pursuant to the Attorney General's regulations, the smallest increment of sick time employees may use is 1 hour. An employer may require its employees to use their sick time in full hourly increments unless its payroll system uses a smaller increment to account for other absences or time off.

In addition, if an employee's absence due to the use of sick time requires an employer to hire a replacement or call in another employee as a replacement, the employer may require the employee to use the number of sick time hours the replacement or call-in employee worked, up to a full shift.⁶

REQUIRE EMPLOYEES TO CERTIFY THEIR REASONS FOR USING SICK TIME.

Employers may require employees who have used any amount of sick time to **personally verify**, in writing, that they used it for an allowable purpose. Moreover, employers may require employees to submit **written documentation** signed by a healthcare provider indicating the need for the sick time if:

1. The sick time exceeds 24 consecutively scheduled work hours;
2. The sick time exceeds 3 consecutive days on which the employee was scheduled to work;
3. The sick time is used within 2 weeks of an employee's final scheduled day of employment

6. If the employee lacks sufficient accrued sick time to cover the time away from work, the employer must provide sufficient job-protected unpaid leave to make up the difference.

- (except for temporary employees); or
4. The sick time is used after 4 unforeseeable and undocumented absences within any 3 month period (or 3 unforeseeable and undocumented absences for an employee aged 17 or under).

If the sick time is being used to address the psychological, physical, or legal effects of domestic violence, employers must accept any of the following as sufficient documentation (all of which the employer must keep strictly confidential):

1. A restraining order or other court-issued document;
2. A police record documenting the abuse;
3. Documentation that the perpetrator of the abuse has been convicted of a crime where the victim was a family or household member;
4. Medical documentation of the abuse;
5. A statement from a professional who helped the employee address the abuse (e.g., a counselor, social worker, health worker, member of the clergy, etc.); or
6. A signed written statement from the employee attesting to the abuse.

Employees must submit such documentation within 7 days after taking the sick leave unless good cause warrants additional time. If an employee fails to provide documentation without justification, the employer may, after providing notice to the employee, recoup any sum paid for the sick time by deducting it from future pay as an overpayment. Employers may not take any other adverse action.

Under no circumstances are employers ever permitted to request or require that a certification or verification address the nature of an employee's illness or the details concerning domestic violence.

DISCIPLINE EMPLOYEES FOR MISUSING EARNED SICK TIME.

The Attorney General's regulations authorize employers to discipline employees who defraud or abuse the earned sick time system, in particular by:

1. Using sick time for a purpose that is not allowed by the law; or
2. Exhibiting a clear pattern of using sick time on days just before or after a weekend, vacation, or holiday (unless they provide verification that the sick time was used for a proper purpose).

REQUIRE EMPLOYEES TO PROVIDE REASONABLE NOTICE WHEN USING SICK TIME.

The Attorney General's regulations permit employers to impose a wide range of specific notice requirements on employees using sick time:

1. Advance Notice – All employees using sick time must provide advance notice to their employers, except in an emergency.
2. Unforeseeable Use – Employees who use sick time for unforeseeable circumstances still must notify their employers in a manner that is reasonable under the circumstances.
3. Pre-Scheduled Appointments – Employers may implement written policies requiring employees using sick time for pre-scheduled appointments or other foreseeable reasons to provide up to 7 days' notice, unless the employee learns of the need to use sick time within a shorter period.
4. Daily Notification – Employers may require employees who use sick time for multi-day absences to provide advance notice of the expected duration of the leave or, if unknown, to require daily notification from the employee or a surrogate, unless circumstances make such notice infeasible.

INSTITUTE AN ALTERNATIVE PAID TIME OFF PROGRAM.

An employer's own paid time off policy (e.g., paid vacation) may be substituted for earned sick time so long as at least 40 hours under the policy comply with the provisions of the Earned Sick Time Law including:

1. Permitting employees to accrue at least 1 hour of paid time off for every 30 hours worked;
2. Paying employees for their time off at their same hourly rate;
3. Permitting employees to use their paid time off for the same purposes as the Earned Sick Time Law;
4. Making paid time off available under the same conditions of notice and documentation; and
5. Affording employees who use their paid time off the same job protections as the Earned Sick Time Law.

Employers should note, however, that certain paid time off programs may create additional liabilities upon an employee's separation from employment. For example, employers may be required to pay an employee for unused earned vacation time, whereas there is no such requirement for unused earned sick time.

INSTITUTE POLICIES REWARDING EMPLOYEES FOR WORK ATTENDANCE.

The Attorney General's regulations explicitly permit employers to institute policies that provide tangible rewards to employees for good or perfect attendance, or that provide holiday pay incentives (i.e., extra compensation for employees who come into work the days immediately before and after a holiday). An employee's inability to earn rewards under these programs due to the use of sick time will not constitute "adverse action" or violate the law.

SIMPLY DESIGNATING EMPLOYEES AS INDEPENDENT CONTRACTORS WILL NOT AFFECT THEIR SICK TIME RIGHTS.

Regardless of how employers designate employees, only individuals who meet all of the following criteria are exempt from the Earned Sick Time Law's definition of "employee":

1. The individual is free from the employer's control and direction in performing services;
2. The services performed are outside the employer's usual course of business; and
3. The individual is customarily engaged in an independently established trade, occupation, or profession of the same nature as that involved in the services performed.

EMPLOYERS LIKEWISE CANNOT REQUIRE EMPLOYEES USING SICK TIME TO MAKE UP THE HOURS THEY MISSED OR TO FIND SOMEONE TO "COVER" THEIR SHIFT.

The Earned Sick Time Law prohibits employers from requiring employees who have used sick time to make up that time by working additional hours. The employer and employee may, however, mutually agree to arrange for the employee to work additional hours during the same or next pay period to avoid using sick time. The law also prohibits employers from conditioning employees' use of their earned sick time on finding someone to "cover" their hours or shift.

What else must employers do to comply with the Earned Sick Time Law?

EMPLOYERS MUST PROVIDE THEIR EMPLOYEES WITH NOTICE OF THE EARNED SICK TIME LAW.

Employers must immediately post the **notice** of the Earned Sick Time Law prepared by the Attorney General in a conspicuous location that is accessible to its employees in all of its locations. Employers must also provide a hard or electronic copy of the notice to its employees.⁷ The Attorney General has prepared the notice in English and other languages, and employers should post/provide the notice in all languages that are applicable to its employees at any given location.

EMPLOYERS MUST COMPLY WITH THE EARNED SICK TIME LAW'S RECORDKEEPING REQUIREMENTS.

Employers must maintain true and accurate **records** of its employees' accrual and use of sick time. These records must include, at a minimum:

1. The name, address, and occupation of each employee;
2. The amount paid to each employee during each pay period; and
3. The number of hours each employee worked each day and each week.

Employers who wish to avoid tracking their employees' accrual of sick time can do so by:

1. Providing a lump sum of 40 or more sick hours or paid time off;
2. Providing an unlimited sick leave policy; or
3. Providing employees a lump sum of sick leave or paid time off according to their average hours worked per week as set forth in the Attorney General's regulations.

Employers must maintain these records at their place of business for a minimum of 3 years, and must provide copies to the Attorney General upon request. Employers must also provide employees with a copy of the records pertaining to them within 10 business days of the request, and also permit inspection of the original paper or electronic records at a reasonable time and place.

EMPLOYERS SHOULD ALSO REVIEW THEIR EXISTING POLICIES AND ESTABLISH NEW ONES.

Prior to the Earned Sick Time Law going into effect, employers should contact their legal counsel to **review their existing policies** for compliance with the law, and to **establish new policies** that are either required or may help efficiently control and process employees' use of sick time. These may include:

1. Absence Notice Policy – Employers should consider establishing a written policy to provide employees a uniform method for communicating absences, including those due to their use of sick leave.
2. Foreseeable Absence Policy – Any employers that intend to require employees to provide 7 days' notice in advance of foreseeable sick leave (as permitted by the Attorney General's regulations) must establish a written policy on how employees should provide that notice.
3. Sick Time Documentation Policy – Employers should consider implementing a policy requiring employees to uniformly document and verify their use of sick time. This may include requiring employees to fill out a form or checklist in which they choose the permitted statutory reason for their use of sick time.⁸
4. Attendance Reward Policy – Employers may wish to consider implementing a policy that

7. Including a copy of the employer's policy on earned sick time (or its allowable substitute policy) in an employee manual or handbook will satisfy this requirement.

8. The Attorney General has developed a model form that employers may use as a guide.

rewards employees for good or perfect attendance, or for coming into work the days before and after holidays. This is explicitly permitted by the Attorney General's regulations.

5. Open Door Policy – Employers should also consider implementing an open door policy that encourages employees to raise any sick-time related questions or concerns with management before making a report to the Attorney General or taking other legal action.

EMPLOYERS SHOULD CONSULT WITH LEGAL COUNSEL TO DISCUSS THEIR SPECIFIC NEEDS RELATED TO THE EARNED SICK TIME LAW.

Although all employers must be in compliance with the Earned Sick Time Law by July 1, 2015, it is crucial for employers to consult with legal counsel **before implementing any changes to their existing policies**. The Earned Sick Time Law and the Attorney General's regulations were drafted to apply to a wide range of employers across all industries. Accordingly, they contain many nuances and the various provisions may affect different employers in different ways. The only way employers can be sure of their compliance with the law and regulations is to consult legal counsel about their own specific needs before they implement any changes to their existing policies, even changes that the employer believes are required by the Earned Sick Time Law.



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