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Client Alert

NEW MASSACHUSETTS EARNED SICK TIME LAW

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In November 2014, Massachusetts voters went to the polls and passed a law requiring all employers to allow employees to earn at least one (1) hour of sick time for every thirty (30) hours worked, up to forty (40) hours per year. For employers with 11 or more employees, the sick leave must be paid leave; for employers with fewer than 11 employees, the sick leave need not be paid. Employer size is determined by counting all employees, including those who work primarily at worksites outside the Commonwealth of Massachusetts.

In advance of the effective date of July 1, 2015, the Massachusetts Attorney General's Office published regulations offering guidance re compliance with the new law. Highlights from the regulations include the following:

Eligible Employees. An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in the Commonwealth of Massachusetts, regardless of the location of the employer. Importantly, an employee need not spend 50% or more time working in Massachusetts in order for Massachusetts to be the employee's primary place of work. For instance, if an employee divides her work time for a single employer among locations in three different states, but more of her time is spent in Massachusetts than in the other two locations, then Massachusetts is her primary place of work, and she is eligible to accrue and use earned sick time. Also, if an employee is eligible to accrue and use earned sick time, then all hours the employee works, regardless of where the hours are worked, must be included in calculating the earned sick time.

Covered Employers. The new law covers virtually all employers – individuals, corporations, partnerships, and other private and public entities – who engage the services of even a single paid employee. The law also covers "agents" of an employer, which should give managers, human resource directors, and supervisors pause as they consider that they, too, are at risk should the company be deemed noncompliant with the new law.

Accrual of Earned Sick Time. Earned sick time is accrued at the rate of one (1) hour for every thirty (30) hours worked, including overtime hours, up to a cap of forty (40) hours per benefit year. The term "benefit year" is used interchangeably with the term "calendar year," which, in turn, is defined in the regs as "any consecutive twelve (12) month period of time." The regs offer employers the following guidance re the benefit year:

> Most employers will find it helpful to use the year that they use for determining wages and benefits, including for example a year that runs from January 1 to December 31, the tax year, fiscal year, contract year, or year running from an employee's anniversary date of employment.

Employees accrue earned sick time only on hours worked, not on vacation time, paid time off ("PTO"), or time out of the workplace using earned sick time. Employees exempt from overtime under the Fair Labor Standards Act are assumed to work forty (40) hours for purposes of sick time accrual unless their jobs specify a lower number of hours per week (as detailed, presumably, in a job description, or as verified by payroll records). Employees paid on a piecework or similar basis accrue earned sick time based on a "reasonable measure" of the time worked, by reference to established practices or billing.

Once an employee has accrued forty (40) hours of sick time during the benefit year, the employee has "maxed out" and does not continue to accrue more sick hours. Also, once the employee has rung the proverbial bell of attaining forty (40) hours of unused sick time, the employer may delay further accrual until the employee discharges some of the earned sick time to below forty (40) hours.

Rollover and Tracking of Earned Time. At the end of a benefit year, an employee may rollover up to forty (40) hours of unused sick time to the next benefit year. This differs significantly from the common "use it or lose it" terms that many employers have imposed until now. Also, the employer may track the accrual in increments smaller than an hour (for example, a minute of time per 30 minutes worked, or two minutes of time per hour worked).

Use of Earned Sick Time. If an employee has earned forty (40) hours of sick time, then the employee has the right to discharge it in increments of no less than one (1) hour, unless the employer's payroll system uses smaller increments to account for absences. For employers that track time in hourly increments, an employee will have discharged a full hour of earned time even if the sick time only amounts to fifty (50) minutes, whereas the employee of an employer who tracks time in increments of fifteen (15) minutes gets the benefit of that system, so that an employee whose dentist appointment takes 90 minutes would require discharge of just an hour and a half of earned sick time, rather than two hours.

Allowable Purposes and Protections for the Employer. The new law does include some provisions protective of every employer's need to efficiently manage its business operations. For instance, an employer is free to review with employees the allowable purposes for which the earned sick time may be used under existing law. Those purposes include caring for a physical or mental illness affecting the employee or the employee's child, spouse, parent, or parent-in-law; attending routine medical appointments for the employee and those same family members; and addressing the effects of domestic violence on the employee or the employee's child. Also, the employer does not have to offer an employee separate leaves under the various leave laws. Time off required by the new law may run concurrently with time off provided under other leave laws, including the Family Medical Leave Act, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, and the Small Necessities Leave Act.

Also, the new law specifically states that employees must notify their employers before discharging earned sick leave, except in emergency situations. Written documentation verifying authorized use of earned sick time, either from a health care provider or, if related to domestic abuse, from other sources, including the police, a court, a counselor, or an attorney, may be required, depending upon the duration of the earned time discharged and other factors. (For

instance, use of earned time within 2 weeks before an employee's last scheduled day of work entitles the employer to require written documentation verifying the legitimacy of the leave.)

Earned sick time also may not be invoked as an excuse to be late for work without an authorized purpose, and an employee may not accept a specific shift assignment "with the intention of calling out sick for all or part of that shift." Proof of the employee's intent, of course, may well prove challenging. Finally, if an employee's use of earned sick time requires the employer to hire a replacement or call in another employee, then the employer may require the absent employee to use an equal number of hours as the replacement employee works, up to a full shift of earned sick time.

Fraud and Abuse. As is the case with other types of leave, including FMLA leave, if an employer determines that an employee is committing fraud or abuse by taking time off and engaging in activities that are not consistent with the purpose of the time off, then an employer is entitled to discipline an employee. Also, if the employer notes an employee's "clear pattern" of taking leave on days just before or after a weekend, vacation, or holiday, the employer may impose discipline unless the employee verifies the leave was legitimate.

Payment of Earned Sick Time. Earned paid sick time is paid at the employee's regular hourly rate. The regulations offer specific guidance regarding how to calculate earned time in special circumstances, such as for employees who have different rates of pay for the same employer, salaried employees, employees paid commissions, and tipped employees. Earned sick leave that is discharged must be paid on the same schedule as regular wages. Employers also have the option of paying out employees for up to forty (40) hours of unused earned sick time at the end of the benefit year, but employers who opt to do this must then provide at least sixteen (16) hours of unpaid sick time until the employee accrues new paid time, which shall replace the unpaid time as it accrues.

Employers are not required to pay out unused earned sick time upon separation from employment. This distinguishes accrued paid sick time from vacation time, which under Massachusetts law, must be paid out upon termination of employment.

90-Day Vesting Period and Breaks in Service. Employees begin accruing earned sick time on the first day of actual work, but they may not discharge any of the accrued leave until they have been employed for 90 days. In some circumstances, employees who leave their employment and later return to work retain their earned sick time and also do not need to repeat the 90-day vesting period.

Transition Year and Safe Harbor Provisions. This new law has an effective date of July 1, 2015, and employers must begin tracking accrued time as of that date. However, the benefit year that includes July 1, 2015, has been deemed a "transition year." In the transition year, an employer is not required to provide more than forty (40) hours of earned paid sick time, and any paid leave given in the benefit year prior to July 1 will be credited. (Example: An employee used 15 hours of paid leave time as of July 1, 2015. The employer must allow the employee to earn and use up to 25 hours of earned paid sick time in the remainder of the benefit year.)

Employers with PTO policies in existence on May 1, 2015, are deemed compliant with the new law until January 1, 2016, provided certain conditions are met. Those conditions include the following:

1. Full-time employees have the right to earn and use at least 30 hours of paid time off between January 1, 2015, and December 31, 2015.

2. On and after July 1, 2015, all employees not previously covered by the PTO policy, including part-time, seasonal, temporary, and other employees, must either accrue paid time off at the same rate of accrual as employees already covered by the policy, or, if the policy provides lump sum allocations, receive a prorated lump sum allocation based on the allocation for already-covered employees.

3. The current PTO policy must provide for 30 hours of paid time off that is (a) job-protected, (b) available for the allowed purposes under existing law, and (c) available to the employee after January 1, 2016, if unused during the transition year. If an employer meets the safe harbor conditions, then it may continue to administer its pre-July 1, 2015 PTO policy during the transition year. However, this "safe harbor" expires on January 1, 2016.

Substitution of Employers' Paid Leave Policies and Relief from Tracking Obligations. Employers may have sick leave or PTO policies that exceed the requirements of the new law. Similarly, they may have different sick or PTO policies for different groups of employees, so long as all meet or exceed the requirements of the new law. Also, employers who provide vacation or PTO that can also be used as sick time need not provide separate, additional sick leave to meet the requirements of the new law.

Employers who provide unlimited sick leave or a lump sum of 40 hours' leave at the beginning of the benefit year are relieved of the tracking of accrual and rollover obligations. Tracking obligations can also be met by use of schedules set forth in the regulations that designate the number of hours that will be deemed earned for employees on the basis of average hours worked per week.

Retaliation. The new law makes it unlawful for an employer to deny or interfere with an employee's exercise of the new sick leave rights granted. An employer must not retaliate in any way because the employee opposes practices which the employee reasonably believes to be in violation of the new law, or because the employee supports a co-worker's exercise of rights under the new law. Prohibited adverse action is not limited to termination of employment but also includes other adverse job action, including denying use of, or payment for, earned sick time, taking away work hours, or otherwise negatively altering the terms or conditions of employment. The employer is also specifically prohibited from reporting an employee to immigration authorities in retaliation for the employee's exercising rights granted by the new law.

Recording-Keeping and Notice Requirements. Under the Fair Labor Standards Act and other labor and employment laws, employers are already required to keep true and accurate records of hours worked. The new law requires that employers also keep track of the accrual and use of

earned sick time. Leave records must be maintained for a period of three (3) years and must be provided to the Attorney General's office upon demand, and to any employee who requests such records. Employers are required to post a notice of the new law in a conspicuous place in the workplace and to provide a hard or electronic copy of the notice to all eligible employees, either separately or as part of an employee handbook.

Violations of the Earned Sick Time Law. Employers that violate the new law face both criminal and civil penalties. Willful violations are punishable by $25,000, up to one (1) year of imprisonment, or both for a first offense. Repeat willful violations may warrant a fine of $50,000 and imprisonment of up to two (2) years or both. Employees also have a private right of action to sue for violation of the new law. Remedies available in a civil action include treble damages, court costs, and attorneys' fees. As noted earlier, an employer's "agents" must also comply with the new law, which means that all of the available penalties and monetary consequences could conceivably be imposed on an employer's managers and supervisors.

Word to the Wise. Employers with employees who work primarily in Massachusetts and who are covered by the new law should immediately take the following steps:

1. Determine if their current PTO policy exceeds the new requirements or, if not, complies with the safe harbor provisions of the new statute for the current transition year;

2. Make any necessary changes in current sick leave policy to become compliant with the new law for all eligible employees as of January 1, 2016;

3. Give notice as required under the new statute of the company's sick leave; and

4. Devise and implement a comprehensive system for tracking accrual and discharge of earned sick time in compliance with the terms of the new law.

While compliance with the new statute may be challenging and transition issues difficult, experience in other jurisdictions indicates that businesses may well ultimately determine that the new sick leave law does not necessarily hurt the bottom line. State-mandated earned leave does not necessarily mean reduced profits; does not appear to lead to wide-spread abuse; does not ultimately result in reduced wages and benefits for employees; and does not necessarily hurt consumers by causing price increases. In fact, there is evidence suggesting that mandating earned sick leave does not have a significant effect on businesses, workers and consumers. Non-compliance with the new Massachusetts law, however, with its hefty penalties and monetary consequences, including treble damages and attorney's fees, can potentially have a devastating effect on a business and its managerial personnel. Businesses would be wise to review their policies, make any changes required to conform them to the new law, and make certain to administer their policies properly so as not to face daunting consequences.