

AICUM Fall Symposium 2015: Leave Me Alone! A Primer for Understanding and Navigating the Laws Related to Employee Leaves of Absence

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October 8, 2015

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Agenda

- Massachusetts Earned Sick Time Law
- Massachusetts Domestic Violence Leave Law
- Massachusetts Parental Leave Act
- Massachusetts Small Necessities Leave Act
- Family and Medical Leave Act ("FMLA")

Earned Sick Time Act

Basics by the numbers:

7/1/2015 = effective date

30 = hours of work to earn 1 hour of sick time ("ST")

40 = max. ST hours accruable in a calendar year

40 = max. ST hours usable in a calendar year

40 = max. ST hours that can be carried over*

40 = hours per week exempt employee is assumed to work for purpose of ST accrual, unless normal work week < 40 hours



Earned Sick Time Act

Basics by the numbers (continued):

- 11 or more = employees in workforce → paid ST
- 10 or less = employees in workforce → unpaid ST
- 90 = calendar days upon which new hire can use ST
- 24 = consecutive hours of ST used after which an employer may require certification (or 3 days)
- 0 = \$ owed to employee upon separation for unused earned ST



Earned Sick Time Act

Accrued sick time be used for:

1. Illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse.
2. Routine medical appointments of the employee or the employee's child, spouse, parent or parent of a spouse.
3. To address effects of domestic violence on the employee or the employee's dependent child.
4. Travel to and from appointments, pharmacies and other locations related to 1-3.



Earned Sick Time Act

Accrual and Use:

- Current employees – began accruing ST on 7/1/2015 and can use ST as it accrues.
- Future hires – began/begin accruing ST on first day of work and can use after 90 days.
- Accrue ST only on hours actually worked.
- **Adjunct faculty compensated on “per-course” basis deemed to work 3 hours for each “classroom hour” worked.**
 - Break in Service rules regarding use



Earned Sick Time Act

Employees Covered:

- Most FT, PT, seasonal, per diem, and temporary employees whose primary place of work is in MA.
- *Exemption for students attending a public or private institution of higher education in Massachusetts who are:*
 - a) participating in a federal work-study program or a substantially similar financial aid or scholarship program;
 - b) providing support services to residents of a residence hall, dormitory, apartment building, or other similar residence operated by the institution at which the student is matriculated in exchange for a waiver or reduction of room, board, tuition, or other education-related expenses; or
 - c) exempt from Federal Insurance Contributions Act (FICA) tax pursuant to 26 U.S.C. § 3121(b)(10).



Earned Sick Time Act

Carryover:

| Employer's Policy | Employer's Carryover Obligation |
|--|---|
| The employee is provided earned sick time via accrual. | The employee must be allowed to carry over at least 40 hours of unused earned sick time into the next year. |
| The employee is provided earned sick time in a lump sum allocation of at least 40 hours at the beginning of each <i>benefit year</i> . | The employer <i>is not</i> obligated to allow an employee to carry over unused earned sick time into the next year. |
| The employee is provided earned sick time in a lump sum allocation at the beginning of each <i>month</i> . | The employer <i>is</i> obligated to allow an employee to carry over at least 40 hours of unused earned sick time into the next year. |
| The employee is paid out for unused earned sick time at end of benefit year (which is not required but employers may elect to do so). | If the employer elects to pay out unused earned sick time to an employee, then the following rules apply: <ul style="list-style-type: none">• If paying out 16 hours or more: must provide 16 hours of unpaid sick time until the employee accrues new paid time, which must replace the unpaid time as it accrues.• If paying out less than 16 hours must provide an amount of unpaid sick time equivalent to the amount paid out until the employee accrues new paid time, which must replace the unpaid time as it accrues. |

Earned Sick Time Act

Common Questions/Concerns:

- Same Hourly Rate
- Break in Service
- Paid Time Off (“PTO”) and other leave policies
- No-fault attendance policies
- Application to union employees
- Notice requirements – employer and employee
 - Workplace Posting/Disclosure – available at <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-employee-notice.pdf>

Earned Sick Time Act

Common Questions/Concerns (continued):

- Misuse of sick time
- Verification of authorized use
- Medical certification and documentation of use
- Safe Harbor
- Interaction with Other Leave Laws
 - Use of earned ST may be counted toward concurrent leave under federal or state law, such as the FMLA.
- Enforcement – treble damages and attorney's fees



Domestic Violence Leave – Overview

- Effective August 8, 2014
- Employers with 50 or more employees
- Must provide up to 15 days paid or unpaid leave in a 12 month period to a “qualifying employee” to address domestic violence (“DV”)
 - Qualifying employee – paid employee who is a victim of domestic violence, sexual assault, stalking or kidnapping or who has a family member who is a victim.
- Employers may require employees to exhaust all available leave before using DV leave.

Domestic Violence Leave - Application

- Applies to victims and their family members; not perpetrators of DV.
- Family member is defined under the statute as:
 - A parent, step-parent, child, step-child, sibling, grandparent or grandchild;
 - A married spouse;
 - Persons in a substantive dating or engagement relationship and who reside together;
 - Persons having a child in common regardless of whether they have ever married or resided together; or
 - Persons in a guardianship relationship.

Domestic Violence Leave – Permitted Uses

DV Leave may be used to:

1. Seek or obtain medical attention, counseling, victim services or legal assistance;
2. Secure housing;
3. Obtain a protective order from a court;
4. Appear in court or before a grand jury;
5. Meet with a district attorney or other law enforcement official;
6. Attend child custody proceedings; or
7. Address other issues directly related to the abusive behavior against the employee or family member of the employee.



Domestic Violence Leave Act – Notification Requirements

- Employers must inform employees of rights and responsibilities under the law.
- Examples of notice may include:
 - Addendum to existing employee manuals.
 - Memos, letters or e-mails to employees.
 - Posting notice in a conspicuous place.
- Employees must provide appropriate advance notice as required by employer's leave policy.
 - Except in cases of imminent danger to health or safety to the employee – notification within 3 workdays that leave was or is being taken under the Law.



Domestic Violence Leave – Supporting Documentation

Types of documentation that an employee may provide to substantiate leave:

1. A protective order issued by a court.
2. A document under the letterhead of the court, provider or public agency which the employee attended for the purposes of acquiring assistance.
3. A police report or statement of a victim or witness provided to police documenting the abusive behavior.
4. Documentation that the perpetrator of the abusive behavior has: admitted to sufficient facts to support a finding of guilt; or has been convicted of, or has been adjudicated a juvenile delinquent by reason of, any offense constituting the abusive behavior.



Domestic Violence Leave – Supporting Documentation (cont.)

5. Medical documentation of treatment as a result of the abusive behavior.
6. A sworn statement provided by a counselor, social worker, health care worker, member of the clergy, shelter worker, legal advocate or other professional
7. A sworn statement from the employee attesting that the employee has been the victim of abusive behavior or is the family member of a victim of abusive behavior
 - Under pains and penalties of perjury; notary not required

**Employers cannot take negative action against the employee if any of the above documentation is provided within 30 days of the unauthorized absence.*



Domestic Violence Leave – Recordkeeping and Confidentiality

Maintain documents in employment record *only as long as needed to make a determination as to eligibility for the leave.*

All information related to the employee's leave must be kept confidential and may only be disclosed if:

1. Requested or consented to, in writing, by the employee;
2. Ordered to be released by a court;

Domestic Violence Leave – Recordkeeping and Confidentiality

3. Otherwise required by applicable federal or state law;
4. Required in the course of an investigation authorized by law enforcement; or
5. Necessary to protect the safety of anyone employed at the workplace.



Parental Leave Act

- Signed into law on January 7, 2015
- Massachusetts' Maternity Leave Act ("MMLA") extended to men:
 - 6 employees
 - 8 weeks of parental leave related to the birth, adoption, or placement for adoption of a child.
 - Leave may be paid or unpaid
 - Employees must provide 2 weeks notice of anticipated departure date and intention to return to work

Parental Leave Act (Continued)

- Two employees of the same employer are only entitled to 8 weeks of parental leave in total for the birth or adoption of the same child.
- Restoration rights same as MMLA.
- Does not change obligations under the FMLA
 - The leave period permitted under each law may, but will not necessarily, run concurrently.

Small Necessities Leave Act

- Enacted in 1998
- Eligible employees may take 24 hours unpaid leave in any 12 month period
 - 50 or more employees
 - Worked at least 12 months / 1250 hours in last 12 months
- The 24 hours of leave may be taken for the following purposes:
 1. to participate in school activities directly related to the educational advancement of a child of the employee, such as parent-teacher conferences or interviewing for a new school;
 2. to accompany the child of the employee to routine medical or dental appointments, such as check-ups or vaccinations;
 3. to accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care, such as interviewing at nursing or group homes.



Small Necessities Leave Act

- These 24 hours are in addition to the 12 weeks already allowed under the FMLA.
- Employer may require the employee to use any available paid vacation leave, personal leave or sick leave for any of the leave provided under SNLA.
- Employers may require that a request for leave be supported by a certification. See example from AG, available at <http://www.mass.gov/ago/docs/workplace/small-necessities-advisory.pdf>

FMLA Overview

- Enacted in 1993; regs last updated in 2013
- Current forms on DOL.gov – revised in May 2015 and good through 2018
- 12 weeks of leave for serious health condition of self or family; birth, adoption, placement; servicemember (active duty & caregiver (26 weeks))
- Can be taken in one block, several stretches, reduced schedule or on intermittent basis.
- Forseeable and unforeseeable
- Two theories of complaints:
 1. Interference/Entitlement
 2. Discrimination/Retaliation



FMLA Notice Obligations

- Employer must provide notice of rights and employees must comply with employer's notice requirements.
- Lupyan v. Corinthian Colleges, Inc. (3d Cir. 2014)
 - Instructor told to take personal leave without any discussion of FMLA leave or rights.
 - College tries to rely on the “mailbox rule” but the court rejects.
 - Need some sort of return receipt or proof of mailing!

Intermittent FMLA Leave

- Intermittent/reduced schedule leave may be taken:
 - For SHC of employee or family member.
 - to care for a newborn or newly placed adopted or foster care child *only with the employer's approval.*
- Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's HCP.
- Strategies for curbing abuse

QUESTIONS?

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