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California and Massachusetts Employers Feverishly Prepare for Paid Sick Leave

Employees in California and Massachusetts who do not currently receive paid sick leave will be eligible for a new benefit when statewide mandates take effect. Beginning July 1, California employers will be required to provide nearly all employees with three paid sick days per year. Massachusetts employers will have to provide employees with five days of sick leave per year, paid or unpaid depending on the employer's size. Employers should ensure that they are familiar with the new requirements and update their policies and procedures to ensure compliance with an ever-growing patchwork of federal, state and local leave laws.

In this article: [Background](#) | [California Sick Leave Law](#) | [Massachusetts Earned Sick Time Law](#) | [In Closing](#)

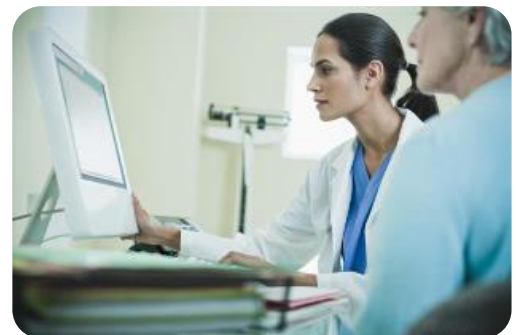
Background

When 2014 began, only one state — Connecticut — and six major cities had paid sick leave laws on the books. Since then, paid sick leave ordinances have gone into effect in major metropolitan areas such as New York City, Portland (OR), and Newark (NJ), as California lawmakers and Massachusetts voters approved statewide mandates.

On July 1, employers will have to begin providing paid sick leave to their employees in California and Massachusetts. The two states' laws share some common characteristics, but also have some notable differences that can complicate multi-state leave administration. Employers that already provide paid time off (PTO), vacation or other leave benefits may be able to use existing policies to meet their new compliance obligations, but only if they provide no less leave than the new laws and satisfy other requirements discussed below.

California Sick Leave Law

While the [Healthy Workplaces, Healthy Families Act of 2014](#) generally took effect on January 1, 2015, the right to accrue and use sick leave under that law takes effect July 1. When the accrual and usage provisions become operative, nearly all private- and public-sector employers will be required to provide paid sick time to employees who



work in-state at least 30 days within a year of beginning employment (including full-time, part-time, temporary and seasonal employees). The mandate will apply to California employers with at least one employee, including state and municipal governments. (See our [September 24, 2014 For Your Information.](#))

Key Provisions

Most employees who satisfy the minimum in-state work threshold (even if headquartered elsewhere) will be entitled to paid sick time under the new law. However, there is a carve-out for employees who are covered by a valid collective bargaining agreement (CBA) that provides for paid sick leave and satisfies certain other criteria (including final and binding arbitration of sick leave disputes, a regular hourly pay rate that exceeds the state minimum wage by at least 30%, and premium wage rates for overtime). In addition, limited industry-specific exemptions will be available for:

- Construction workers covered by a valid CBA that provides for regular hourly pay of at least 130% of the state minimum wage rate and satisfies certain other criteria
- In-home supportive service providers
- Airline employees who work as flight deck or cabin crew members, provided they receive an amount of PTO equal to or exceeding the new law's requirement

Accrual and Use. The law allows employers to provide paid sick time in two different ways, either by: (1) accruing one hour of paid sick leave per every 30 hours worked; or (2) granting a lump sum of 24 hours or three days of paid sick leave at the beginning of each year. Under the accrual method, employees will begin to accrue paid sick leave on July 1 or on the first date of employment (if later), and employers may cap an employee's total accrual at 48 hours or six days. For these purposes, the workweek for exempt employees is generally considered 40 hours. Whether leave is accrued or provided in a lump sum, employers may limit the amount an employee can take to 24 hours or three days in a year.

Employees may begin to use accrued sick time on their 90th day of employment — but no sooner than July 1 — for the following reasons:

- For the diagnosis, care, or treatment of their own or a family member's (includes parent, child, spouse, registered domestic partner, grandparent, grandchild or sibling) existing health condition or preventive care
- To address the effects of domestic violence, sexual assault or stalking on the employee

Employers may require employees to take at least two hours of leave for partial day absences. Other than that two hour minimum increment, the law allows the employee to determine how much paid leave time to take. Employees may request the time verbally or in writing, but are required to give reasonable advance notice when the need for leave is foreseeable and as much notice as practicable when unforeseeable.

Comment. Many PTO policies require employees to use the time in half-day (four hour) increments. Employers with such policies will want to consider whether to extend a two-hour minimum to PTO as well as paid sick leave.

Covered Workplaces

Unlike the federal Family and Medical Leave Act and the California Family Rights Act (CFRA), California's new sick leave law will apply regardless of the number of employees the employer has in a particular location or workplace.

Applicable Pay Rate. Paid sick days are to be paid at the employee's regular hourly wage no later than in the next regular pay period following the sick leave. If the employee was a nonexempt salaried employee or was paid at different hourly pay rates, by commission or piece rate in the 90 days of employment before taking accrued leave, the applicable rate of pay is determined by dividing his or her total wages (excluding overtime premium pay) by the total hours worked in the pay periods of the prior 90 days.

Carryover. Employees will be entitled to carry over accrued but unused sick time to the following year, but the employer may still limit the amount of sick time that can be used to 24 hours or three days per year. If an employer opts to satisfy the law's minimum requirements by frontloading 24 hours or three paid sick days at the beginning of the year, it would avoid accruing additional time and would not need to allow employees to roll over unused sick leave to the following year.

In contrast to California's vacation or PTO payout rules, employers will not be required to cash out unused sick days at the time of termination. They would, however, have to reinstate previously accrued but unused paid sick days for rehires within one year after separation. Those employees would be able to use those days and begin to accrue additional paid sick days immediately upon rehire.

Notice and Recordkeeping. Employers are already required to provide new hires after January 1, 2015 at the time of hire with a written [notice](#) (required under Labor Code Section 2810.5) that includes paid sick leave information and notice of the amount of paid sick time accrued and available each time wages are paid — either on the employee's itemized wage statement or on a separate notice provided along with the employee's wage payment.

FAQs issued by the Division of Labor Standards Enforcement confirm that employers will also have to provide individual notices to "all employees hired prior to 2015." To inform employees of changes that relate to paid sick leave, employers may use the same notice used for new hires or other writing, generally no later than July 8, 2015. The FAQs confirm that notice must be given to existing employees even if an employer's existing policy already satisfies the new law's minimum requirements and was previously made available to employees.

Pending Legislation

A bill ([AB 304](#)) that would revise the new paid sick leave law to ease implementation and employers' compliance challenges is pending in the California legislature. Following passage by the Assembly on June 22, it was referred to the Senate Labor and Industrial Relations Committee. Labelled as an "urgency statute," the bill would become effective immediately if passed.

Comment. The FAQs state that employers are required to give "all" employees a new Wage Theft Prevention Act notice of any change to paid sick leave within seven days of the change even though Labor Code Section 2810.5 only applies to nonexempt employees.

In addition to the individual notice requirement, employers must also display the workplace [poster](#), issued by the labor commissioner, that informs employees of their sick leave rights. Finally, employers will be required to maintain for a three-year period records of the hours worked and the paid sick days accrued and used by each employee.

Non-Interference and Anti-Retaliation. Employers are prohibited from denying an eligible employee the right to use accrued sick days, or to discharge or threaten to discharge, demote, suspend or discriminate against an employee for using such time. The new law also prohibits requiring an employee, as a condition of taking sick time, to find a replacement to cover his or her absence.

Existing Policies. The law contains a carve-out for employees covered under a contract or benefit plan with more generous provisions than those in the law. Employers that have their own sick leave or PTO policies that provide as much paid time off usable for the same purposes and under the same conditions as the new law, are not required to provide additional paid sick time. However, employers with such policies would still have to comply with the law's other requirements as well as satisfying the revised Wage Theft Notice requirement.

Comment. Employers that have "unlimited" vacation or PTO policies do not have to provide additional PTO to satisfy the law's minimum requirements. However, they would still need to track paid sick time accrual and usage, and report the amount of available sick leave on employees' pay stubs or other payday documents. If they opt to frontload the paid sick time, they may avoid tracking accrual by hours of work but would still have to track and report sick leave use and availability.

Penalties and Enforcement. The new law will be enforced by the California labor commissioner. An employer that willfully violates the posting requirements will be subject to a civil penalty of not more than \$100 per offense. Employees will be entitled to three times the dollar amount equivalent of paid sick days withheld or \$250, whichever is greater, up to a maximum of \$4,000. For other violations, including failure to provide notice each time wages are paid, employers will face a maximum penalty of \$50 per day, up to a maximum of \$4,000. The law will also allow the labor commissioner to assess a fine of \$50 for each employee whose rights were violated for each day a violation occurs or continues.

Interaction with Other State and Local Laws. Because the new law will interact with a number of other state laws, employers will have to factor them into an overall compliance strategy. Among the Labor Code sections implicated are: 2810.5 (Wage Theft Prevention); 226 and 246(h) (Itemized Wage Statement Requirements); 230 and 230.1 (Domestic Violence, Sexual Assault and Stalking Leave); and 233 (Kin Care).

Comment. The California Paid Family Leave (PFL) program also provides benefits to employees who take time off to care for seriously ill grandparents, grandchildren, siblings, and parents-in-law. (See our [November 18, 2013 For Your Information](#).) However, family care leave under CFRA is available only for the employee's child, parent, spouse or registered domestic partner.

Amended CFRA Regulations

Along with California's new paid sick leave law, [amended CFRA regulations](#) that more closely parallel FMLA regulations will also take effect on July 1. Employers should make sure to update their leave policies and procedures to ensure compliance.

Because the new statewide sick leave law does not preempt or limit similar municipal-level laws, employers with employees performing work in cities such as San Francisco and Oakland that already have paid sick leave ordinances in effect will have to comply with both laws. In doing so, employers will have to provide whichever benefit is more generous or provision is more favorable to the employee. Paid sick time under the new California law may run concurrently with FMLA, CFRA and local ordinances. Whether it does will generally depend on the reason for the leave and the person for whom the leave is taken.

Massachusetts Earned Sick Time Law

Massachusetts voters approved the [Earned Sick Time Law](#) on November 4, 2014. When the new law takes effect on July 1, employees in Massachusetts will be able to earn and use sick time according to certain conditions.

Whether accrued time is paid or unpaid depends on the employer's size. (See our [November 13, 2014 For Your Information](#).)

Key Provisions

The law will require employers with 11 or more employees to provide up to 40 hours of paid sick leave annually, and smaller employers to provide the same amount of unpaid leave. Employees will be able to use up to 40 hours of sick time per year. Public employees of a city or town are covered by the new law only if it is made applicable by local or state legislative vote or by appropriation of funding to pay for the benefit.

Accrual and Use. Full-time, part-time, seasonal and temporary employees will earn one hour of sick time for every 30 hours worked. Accrual of those hours will begin on July 1, 2015 or on the date of hire, if later. Employees may begin to use accrued sick time on their 90th day of employment for any of the following reasons:

- To care for their own or their child's, spouse's, parent's, or parent-in-law's physical or mental illness, injury or medical condition
- To attend their own or their child's, spouse's, parent's, or parent-in-law's routine medical appointments
- To address the effects of domestic violence on the employee or the employee's dependent child

If the earned sick time is paid, it will be compensated at the employee's hourly rate when the sick time is used. An employee will not have to use earned sick time if he or she misses work for a qualifying reason and agrees with the employer to make up the time in the same or next pay period. However, employers may not require an employee to work additional hours to make up for missed time. When the need for leave is foreseeable, employees are to make a good faith effort to provide advance notice to their employers, but cannot be required to find a replacement employee.

Carryover. Employees will be allowed to carry over up to 40 hours of sick time to the next calendar year, but may not take more than 40 hours of sick time in any year. Employers will not be required to cash out an employee's accrued but unused sick time upon separation from employment.

Certification. Employers may require certification of the need for sick time if an employee uses that time for more than 24 consecutively scheduled work hours. Employers cannot delay the taking of leave or withhold payment for earned sick time because they have not received the certification.

Non-Interference and Anti-Retaliation. Employers are prohibited from interfering with or retaliating based on an employee's exercise of earned sick time rights, and from retaliating based on an employee's support of another employee's exercise of such rights.

Other Statewide Mandates

Unlike the Connecticut law, the Massachusetts mandate is not restricted by the employer's size or industry. It also provides a more generous employee benefit than the new California law (40 versus 24 hours of paid leave per year).

On June 22, Oregon Governor Kate Brown signed Senate Bill [454](#) into law, making Oregon the fourth state to mandate paid sick leave. Beginning January 1, 2016, most employers with 10 or more employees in the state will be required to provide up to 40 hours of paid sick time annually, while smaller employers will have to provide the same amount of unpaid sick time.

Existing Policies. The law contains a carve-out for employees covered under a contract or benefit plan with more generous provisions than those in the law. Employers that have their own policies providing as much PTO, usable for the same purposes and under the same conditions as the law, are not be required to provide additional paid sick time.

Enforcement. The attorney general for the commonwealth will enforce the law, using the same enforcement procedures applicable to other state wage laws. Employees can also file suits in court to enforce their earned sick time rights.

Final Regulations

On April 24, the attorney general [proposed](#) regulations that provided a number of important clarifications on the application and enforcement of the earned sick time law. After public hearings and comment, the attorney general published [final regulations](#) on June 19 that include additional clarifications and material differences from the proposed regulations. Key provisions on the accrual, use and payment of earned sick time, employer size, notice requirements, medical documentation, and compliance of existing employer policies are highlighted below.

Interaction with State and Federal Leave Laws. In a significant shift from the proposed regulations, the final regulations state that the time off provided under the new law may run concurrently with — rather than in addition to — time off provided by the FMLA, the Massachusetts Parental Leave Act, the Massachusetts Domestic Violence Leave Act, the Small Necessities Leave Act, and other leave laws that may allow employees to concurrently use leave for the same purposes. Employees may choose, or employers may require employees, to use earned paid sick time when taking other statutorily authorized leave that would otherwise be unpaid.



Calendar and Benefit Years. The final regulations clarify that the employer may use any consecutive 12-month period as the “calendar year,” and “benefit year” is used interchangeably with calendar year for purposes of this law.

Covered Employers and Covered Employees. Under the final regulations, an employer must provide paid sick time if it maintained an average of 11 or more employees on payroll during the preceding benefit year, while smaller employers would be required to provide unpaid sick time. Employer size would be calculated based on the prior January 1–December 31 calendar year for employers that use multiple start dates for the benefit year (such as employee anniversary dates). All of an employer’s employees (full-time, part-time, seasonal and temporary) — including those working or living outside Massachusetts — would be counted to determine employer size. For this purpose, workers who are furnished through and paid by a temporary staffing agency would be counted as employees both of the staffing agency and the employer for which they are providing services.

The regulations clarify that the new law covers full time, part-time, seasonal, and temporary employees whose primary place of work is in Massachusetts, regardless of the employer’s location. They also confirm that an employee need not spend 50% or more of working time in the commonwealth for it to be the primary place of work.

Accrual and Other Alternatives. Eligible employees will begin to accrue earned sick time on July 1, 2015, based on all hours that an employee works — even if in another state. The regulations clarify that hours paid when not working (such as vacation, PTO or while using earned sick time) would not count toward the accrual. Employees who are exempt from federal overtime requirements will be assumed to work 40 hours per week unless their jobs specify a lower rate, which would then apply. Special rules would apply to employees paid on a piece work or fee-for-service basis, such as certain adjunct faculty and family child care providers.

Employers would be permitted to track accruals at a rate of one hour of sick time earned for every 30 hours worked or at an equivalent rate with smaller increments (such as one minute of sick time per 30 minutes worked or two minutes of sick time per hour worked). Regardless of hours worked, employees would not continue to accrue earned sick time once they have accrued 40 hours during the benefit year. In addition, once an employee banks 40 hours of unused sick time, the employer may delay further accrual until the employee draws down the bank to below 40 hours.

The regulations provide other compliance options for employers, including frontloading the full 40 hours of sick leave. Employers that opt to grant employees such leave at the beginning of each year will not be required to allow carryover of unused time into the following year. Alternatively, the regulations would allow an employer to provide monthly lump-sum allotments.

Use and Payment. Eligible employees who began employment on or before April 2, 2015 would be able to use earned sick time — whether paid or unpaid — as it accrues. Employees who began employment after that date would be able to use any accrued earned sick time once they have been employed for 90 days — regardless of the number of days actually worked during that period. Any employee would be able to use 40 hours of earned sick time per benefit year as long as he or she works sufficient hours to earn it.

The smallest increment of sick time an employee may use is one hour, unless the absence is longer. For absences of more than one hour, employees may use earned time in the smallest increment the employer's payroll system allows for absences. While an employer cannot condition an employee's use of earned sick time on making up the time off, an employee and employer may mutually agree that the employee will work additional hours during the same or next pay period to avoid the use of (and payment for) earned sick time. If, however, an employer has to hire a replacement or call in another employee to cover the employee's absence, the employer may require the employee to use an equal amount of earned sick time (up to a full shift). If the employee doesn't have enough accrued time to cover, the employer must provide job-protected unpaid leave to make up the difference.

Earned paid sick time must be paid at the same regular hourly rate and on the same schedule as the employee's regular wages. While not required, an employer has the option to pay out employees for up to 40 hours of unused earned sick time at the end of the benefit year or when the employee changes jobs within the employer's organization. However, employers that pay out 16 or more hours are required to provide 16 hours of unpaid sick leave until the employee accrues new paid time, which will replace the unpaid time as it accrues. Employers that pay out less than 16 hours are required to provide an equivalent amount of unpaid sick time until the employee accrues new paid time, which will replace the unpaid time as it accrues.

Notice Requirements. Employers are required to conspicuously post the [Notice of Employee Rights](#) prepared by the attorney general in each location where eligible employees work. In addition, employers must either: (1) provide



a hard copy or an electronic copy of the notice to all eligible employees, or (2) include the employer's earned sick time policy or an allowable substitute leave policy (such as a PTO policy) in an employee manual or handbook.

Employers may have a policy generally requiring employees to provide up to seven days' notice for foreseeable or pre-scheduled sick leave. Reasonable notice is required for unforeseeable leave. The regulations clarify that for absences of more than one day, the employer may require notice of the expected duration or, if unknown, may require daily updates.

Medical Documentation. Employers may request a doctor's note or other certification only when the employee is absent for more than 24 consecutively scheduled work hours or three consecutively scheduled work days. In such circumstances, employees may provide a written statement signed by the employee documenting their need for leave if they do not have a healthcare provider. The regulations also permit employers to require written documentation if the absence occurs within two weeks of the employee's last day of employment or if the employee has had four undocumented and unforeseen absences over a three-month period.

Transition Year Relief and Safe Harbor

The regulations provide limited relief for employers during the transition year — the benefit year that includes July 1, 2015. Notably, employers would not be required to provide more than 40 hours of earned paid sick time during the transition year, and they would be credited for any paid leave given in the benefit year prior to July 1, 2015.

On May 18, Massachusetts Attorney General Maura Healey announced a transition year safe harbor that would allow qualifying employers an additional six months — or until January 1, 2016 — to comply with the new law. On June 10, the attorney general expanded and clarified the [safe harbor](#) requirements. To take advantage of the safe harbor, an employer must have had an existing PTO or paid sick leave policy on May 1, 2015 that gave full-time employees the right to earn and use at least 30 hours of PTO/paid sick leave during the 2015 calendar year and must extend the policy to all employees (including part-time employees, new employees, and per diem employees) on and after July 1, 2015.

For purposes of the safe harbor, employers would have to accrue PTO for employees not previously covered at the same rate as covered full-time employees or provide a pro-rated lump-sum allocation if covered full-time employees receive a lump-sum allocation. Thirty hours of PTO/sick leave or lesser amounts earned by employees must be job-protected, subject to the non-retaliation provision of the new law, and available for the same purposes it allows. In addition, any of those amounts that are unused during the transition year must be available to the employee after January 1, 2016. In all other respects, during this transition period, the employer may continue to administer PTO policies in place as of May 1, 2015. Employers with the option to use the safe harbor may also choose full compliance with the new law and regulations beginning July 1, 2015 for some or all employees. All employers operating under this safe harbor provision must adjust their policies providing PTO/paid sick leave to conform to the earned sick time law on or before January 1, 2016.

In Closing

The trend toward requiring private employers to provide paid sick leave has been growing at the local level, and appears to be gaining momentum. While it has not enjoyed universal support at state or federal levels, that may be changing. As lawmakers continue to debate the issue, employers are left to determine whether their current policies will satisfy the latest requirements and how to cope with expected administrative headaches as new laws spring up. In the absence of controlling federal law, employers will have to continue integrating their leave and attendance policies with other federal, state and local leave laws to ensure compliance at all levels.

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