

MASSACHUSETTS ATTORNEY GENERAL OFFERS “SAFE HARBOR” TO EMPLOYERS ON EARNED SICK TIME, BUT CERTAIN CONDITIONS APPLY

Insights
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On May 18, 2015, with just over six weeks until the earned sick time law is set to go into effect on July 1, 2015, the Massachusetts Attorney General’s Office announced that it would be creating a “safe harbor” provision for employers with existing paid time off policies. Under the safe harbor provision, an employer with a paid time off policy in existence as of May 1, 2015 will be deemed to be in compliance through December 31, 2015, provided that the paid time off policy meets certain requirements. Employers taking advantage of this safe harbor provision must be in full compliance with the law and the final regulations on January 1, 2016.

While this safe harbor provision does give certain employers some breathing room to comply with the law and the not-yet-finalized regulations, it raises more questions than it answers. We believe the Attorney General will have to clarify her announcement in order to enable employers to take advantage of this safe harbor.

WHO QUALIFIES FOR THE SAFE HARBOR?

- In order to be eligible for the safe harbor provision, an employer must have a paid time off policy **in place as**

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of May 1, 2015 that provides at least some employees the right to use at least 30 hours of paid time off during the calendar year 2015. Employers who have such a policy will be in compliance with respect to those employees who are already eligible for paid time off under the existing policy. The Attorney General has not provided a clear definition for a “paid time off policy.” Although vacation pay is paid time off, the Attorney General may only be referring to policies that permit employees to utilize paid time off for sick leave purposes. We hope to receive clarification about this shortly.

- The announcement says that an employer with an existing paid time off policy as of May 1, 2015 can also be in compliance with respect to other employees not currently eligible for paid time off under its existing policy, provided the employer extends them the right to use at least 30 hours of paid time off in 2015 under the terms and conditions of the existing policy. The Attorney General’s meaning and intent here is very unclear. One interpretation of this language would mean that employers would have to grant part-time, temporary and/or seasonal employees **more** paid time off than they would accrue under the statute itself. Another interpretation may be that employers can offer the non-covered employees up to 30 hours in 2015 on a pro-rata basis, based on the number of hours they work. We will communicate any updates that provide additional clarity.
- The safe harbor provision further states that to be in compliance, all paid time off taken under the existing policy must be job protected and subject to the earned sick time law’s non-retaliation and non-interference provisions. However, in all other respects, the employer may continue to administer paid time off according to its existing policies and practices through December 31, 2015.

OUR PRELIMINARY SUGGESTIONS, SUBJECT TO FURTHER CLARIFICATION BY THE ATTORNEY GENERAL

- You must first determine if you are eligible for the safe harbor. If you have a policy permitting 30 hours of paid time off for certain employees in place as of May 1, 2015, you are eligible for those employees, **but not for any other employees.**
- You must then decide if you want to grant the 30 hour opportunity to remaining employees. Given the vagueness of the Attorney General's announcement, it may be wiser to follow the accrual rules under the new law for those employees.
- If you choose to take advantage of the safe harbor this year, you must still decide what your policy will be for next year.
- If you are not eligible to take advantage of the safe harbor this year, you must draft a policy that will be effective as of July 1, 2015.

We are carefully monitoring developments about the new sick leave law, and will keep you advised. Click [here](#) to learn about the [Fisher Phillips Massachusetts Earned Sick Time Compliance Program](#), which can help you navigate the challenges of the new law.