



# Massachusetts Attorney General Publishes Final Earned Sick Time Regulations

Insights

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On June 19, 2015, the Massachusetts Attorney General published the final regulations concerning the new Earned Sick Time (“EST”) law that will go into effect on July 1, 2015. These final regulations differ somewhat from the draft regulations submitted in April and provide clarification and additional detail to aid with implementation.

## The Basics

Under the EST law, all employees in Massachusetts must be allowed to accrue and use up to 40 hours of EST in a calendar year, subject to certain conditions set forth in the law and the regulations. Under the previously announced “safe harbor” provision, companies that utilized a policy under which certain employees received at least 30 hours of paid time off as of May 1, 2015 will be deemed compliant relative to those employees and any other employees to whom the policy is extended on a proportional basis. Additionally, starting July 1, all use of time, whether under the law itself or under the safe harbor provision, must be job protected and is subject to the law’s anti-interference and anti-retaliation provisions. A summary of the law can be found [here](#).

## Key Changes And Distinctions Between The Draft And Final Regulations

### EST May Run Concurrently With FMLA

The final regulations state that EST may run concurrently with leave under the federal Family and Medical Leave Act and other state leave laws. The draft regulations had stated that EST must be “in addition to” FMLA and other state leaves.

### Additional “Travel Time” EST Use Added

The law provides four purposes for which sick time may be used: care for a physical or mental illness, injury or medical condition; caring for a close family member with such a condition; attending medical appointments; and addressing the effects of domestic violence. The final regulations add a fifth category: EST may be used for “travel to and from an appointment, a pharmacy, or other location related to the purpose for which time was taken.”

### “Same Hourly Rate” Defined

The law states that EST must be paid at “the same hourly rate” as the employee would earn for their work. Given the numerous ways employees can be compensated outside of an “hourly rate,” the final regulations set out more specifically how this “same hourly rate” should be calculated:

- hourly employees are paid their regular hourly rate; those who earn two or more rates are paid an average “blended rate” based on their previous pay period;
- salaried employees are paid a rate based on the total compensation divided by hours worked in the previous pay period. For exempt salaried employees working 40 hours or more per week, the employer can assume 40 hours rather than using actual hours worked. However, employers cannot make that assumption for exempt salaried employees regularly working less than 40 hours per week or salaried non-exempt employees;
- employees paid on a piece-work or fee-for-service basis must be paid “a reasonable calculation of the wages or fees the employee would have received” for the work if the employee had worked;
- commissioned employees, whether commission-only or base rate plus commission, must be paid the greater of their base wage or the minimum wage; and
- tipped employees must be paid the minimum wage.

### **Alternative Accrual Schedule**

The final regulations provide that employers who prefer not to track accrual of sick time over the course of the year may use a prescribed schedule for providing time off. The compliant alternate accrual schedule can be found at page 14 of the [final regulations](#).

### **Accrual Can Be Delayed**

The final regulations make clear that once an employee has accrued 40 hours of unused time, employers may delay further accrual until the employee uses some of the accrued time. For example, if an employee rolls over 40 hours of accrued but unused EST from one calendar year to the next, the employer can delay further accrual until the employee uses some of the accrued time.

### **Frontloading Avoids Roll-Over Time**

Under the EST law, employees must be permitted to roll over up to 40 hours of accrued but unused EST from one calendar year to the next, allowing an employee with a legitimate need for EST early in the calendar year to use previously accrued time. However, neither the law nor the draft regulations contemplated how this provision would apply to employers who chose to grant employees their 40 hours at the beginning of the calendar year. The final regulations add clarity—employers that “frontload” EST at the beginning of the year do not need to track accrual or allow any roll-over of that time.

### **Notice and Documentation**

The final regulations include several provisions concerning how employees may use EST and how it may be documented:

- EST cannot be invoked as an excuse to be late for work without an authorized purpose;
- an employee may not accept a specific shift assignment with the intention of calling out sick for all or part of the shift.

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- you can require written verification that an employee has used EST for allowable purposes after using any amount of sick time, but you can only demand medical documentation after 24 consecutive missed work hours;
- you can require the employee to provide a fitness-for-duty certification if doing so is consistent with industry practice or state and federal safety requirements, and reasonable safety concerns exist regarding the employee's ability to perform duties; and
- if an employee is exhibiting a "clear pattern" of taking leave on days just before or after a weekend, vacation, or holiday, you may discipline for misuse unless the employee provides personal verification of authorized use.

### **Payout Of EST**

Employers have the option of paying out up to 40 hours of accrued but unused EST to employees at the end of the calendar year. However, for employees who are paid out 16 hours of paid EST or more, you must provide 16 hours of unpaid EST until the employee accrues new paid time which will replace the unpaid time as it accrues. For employees who are paid out less than 16 hours of paid EST, you must provide an equivalent amount of unpaid EST which will be replaced as paid EST accrues.

### **Break In Service**

If an employee returns to employment following a break in service, whether voluntary or involuntary, the employee retains the right to use EST for up to 12 months without restarting the 90 day vesting period. Following a break in service of up to four months, employees may use any EST accrued before the break. Following a break in service of between 4 and 12 months, the employee may use any EST previously accrued if the employee had at least 10 hours of EST previously accrued.

### **Our Suggestions**

Employers who are eligible for the safe harbor must determine whether it is in their best interest to fully comply with the law on July 1, or to take advantage of the safe harbor through the end of 2015. Employers who have begun drafting new policies based on the EST law and draft regulations must review those policies to ensure that they are in full compliance with the final regulations.

Additionally, you should consider how to communicate these changes to your employees. All employers should display the [Attorney General's EST Notice](#) and distribute copies of this notice to their employees by July 1.

If you have any questions about these final regulations, please contact the Fisher Phillips attorneys in the Boston office at (617) 722-0044. Click [here](#) to learn more about the Fisher Phillips Massachusetts Earned Sick Time Compliance Program, which can help you navigate the challenges of the new law.

*This Legal Alert provides an overview of a specific new Massachusetts state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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