

**CODE OF MASSACHUSETTS REGULATIONS  
TITLE 940: OFFICE OF THE ATTORNEY GENERAL  
CHAPTER 33.00 EARNED SICK TIME**

**940 C.M.R. 33.00: Earned Sick Time**

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**Section 33.01 Purpose, Scope and Other General Provisions**

- (1) **Authority.** 940 C.M.R. 33.00 is promulgated in accordance with and under the authority of Massachusetts General Laws (M.G.L.) c. 149, § 148C.
- (2) **Purpose.** To clarify practices and policies in the administration and enforcement of the Earned Sick Time Law, M.G.L. c. 149, § 148C.
- (3) **Scope.** 940 C.M.R. 33.00 applies to all employers and employees in the Commonwealth in accordance with the statute.
- (4) **Benefits Maintained.** Nothing in these regulations shall affect any policy or practice of any employer that provides for greater, additional or more benefits or sick leave than those required hereunder or by M.G.L. c. 149, § 148C.
- (5) **Interaction with State and Federal Leave Laws.** The time off provided by M.G.L. c. 149, § 148C is in addition to time off provided by the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., the Massachusetts Parental Leave Act, M.G.L. c. 149, § 105D, the Massachusetts Domestic Violence Leave Act, M.G.L. c. 149, § 52E, and the Small Necessities Leave Act, M.G.L. c. 149, § 52D, and the like.

**Section 33.02 Definitions**

As used in 940 CMR 33.00, the following terms shall, unless the context clearly requires otherwise, have the following meanings:

**Break in service.** A period of time of up to one year extending from the date an employee last worked for the employer until the employee's return to employment, whether the separation was voluntary or involuntary.

**Calendar year.** Any consecutive 12-month period of time as determined by an employer. Most employers will find it helpful to use the “calendar year” that they use for calculating wages and benefits, including, for example: a year that runs from January 1 to December 31, tax year, fiscal year, contract year, or the year running from an employee’s anniversary date of employment. Employers shall apply the choice of “calendar year” consistently and uniformly to all employees and shall inform their employees by way of a written notice at the date of hire what constitutes “calendar year.” However, for the purposes of determining employer size, the term “calendar year” shall mean a year that runs from January 1 to December 31.

**Child.** A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person who has assumed the responsibilities of parenthood.

**Child of a person who has assumed the responsibilities of parenthood.** A child of a person standing in loco parentis, as defined by 29 U.S.C. § 2611(12) and 29 C.F.R. §§ 825.122(c), 825.800.

**Domestic violence.** Abuse committed against an employee or the employee’s dependent child by: (1) a current or former spouse of the employee; (2) a person with whom the employee shares a child in common; (3) a person who is cohabitating with or has cohabitated with the employee; (4) a person who is related to the employee by blood or marriage; or (5) a person with whom the employee has or had a dating or engagement relationship. This term shall be consistent with M.G.L. c. 151A, § 1(g)(1/2), including any amendments thereto.

**Date of hire.** An employee’s first date of actual work for an employer. “Date of hire” is used interchangeably with “commencement of employment” for purposes of these regulations.

**Earned sick time.** Time off from work accrued by an employee and provided by an employer to allow an employee to: (1) care for the employee’s child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; (2) care for the employee’s own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; (3) attend the employee’s routine medical appointment or a routine medical appointment for the employee’s child, spouse, parent, or parent of spouse; or (4) address the psychological, physical or legal effects of domestic violence as defined in subsection (g 1/2) of section 1 of chapter 151A. Earned sick time includes time necessary to travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

**Earned paid sick time.** Time off from work accrued by an employee and provided by an employer that can be used for the purposes described above for “earned sick time” and is compensated at the same hourly rate as the employee earns from the employee’s employment at the time the employee uses the paid sick time; provided, however, that this hourly rate shall not be less than the effective minimum wage under M.G.L. c. 151, § 1.

**Employee.** Any person who performs services for an employer for wage, remuneration, or other compensation, as further defined by M.G.L. c. 149, § 148B, including full time, part-time, seasonal, and temporary employees. The definition also includes interns who must be treated as employees under Massachusetts state law. An employee of a city or town is not considered an employee for purposes of this section until this law is accepted by vote or by appropriation of the city or town for which the employee works as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

**Employer.** Any individual, corporation, partnership or other private or public entity, including any agent thereof, who engages the services of an employee for wages, remuneration or other compensation, except the United States government shall not be considered an Employer and cities and towns shall only be considered Employers for the purposes of this law if this law is accepted by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

**Health care provider.** A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices or any other person determined by the U.S. Secretary of Labor to be capable of providing health care services under 29 U.S.C. § 2611. The term “health care provider” includes (1) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; (2) nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; (3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; (4) any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and (5) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

**Same hourly rate:**

- (1) For an employee compensated on an hourly basis, the same hourly rate means:
  - (a) base rate wages and
  - (b) any other benefits paid or accrued on an hourly basis if the individual works.
  - (c) For an employee who receives different pay rates for hourly work from the same employer, the base rate wages means the “blended” rate of the previous pay period. Where an employee works at two or more different types of work in a single pay period, for a single employer, for which different straight-time rates of pay (not less than minimum wage) have been established, the “blended rate” means the weighted average of all such rates during the previous pay period.
- (2) For an employee paid on a piece work basis, salary, fee or any basis other than an hourly rate, the same hourly rate means the employee’s total earnings in the previous pay period divided by the total hours worked during the previous pay period. Regardless of the basis used, an employee shall be paid not less than the effective minimum wage under M.G.L. c. 151, § 1.
- (3) For an employee paid on commission (whether base wage plus commission or commission only), the same hourly rate means the greater of the base wage or the effective minimum wage under M.G.L. c. 151, § 1.
- (4) The same hourly rate shall not include:
  - (a) sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production;
  - (b) sums excluded under 29 U.S.C. § 207(e); or
  - (c) overtime, holiday pay, or other premium rates.

**Section 33.03                      Accrual and Use of Earned Sick Time**

### **Employees eligible to accrue and use earned sick time:**

- (1) An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts. An employee need not spend more than 50% of working time in Massachusetts for it to be his or her primary place of work.

*Example:* A painter with a single employer works 40% of her hours in Massachusetts, 30% in New Hampshire and 30% in other states. Massachusetts is her primary place of work.

- (2) If an employee is eligible to accrue and use earned sick time then all hours the employee works regardless of location of the work must be applied toward accrual of earned sick time.

*Example:* In a single year, an employee of a catering company works 900 hours in Massachusetts and 150 hours in other states. The caterer will accrue earned sick time on all 1,050 hours worked for the catering company.

### **Rate of accrual:**

- (3) Employees accrue earned sick time through working at a rate of not less than one hour of earned sick time for every 30 hours of work, including overtime hours.
- (4) Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) shall be assumed to work 40 hours in each work week for purposes of earned sick time accrual unless their job specifies a lower number of hours per week, such as a salaried part-time employee. In such a case, earned sick time shall accrue based on that specified number of hours per week.

### **Payment of earned sick time:**

- (5) When used, earned paid sick time shall be paid on the same schedule as regular wages are paid. Employers may not delay compensating employees for earned paid sick time until they receive written verification or documentation of the use of earned sick time.
- (6) If an employee earns unpaid sick time, the employee may substitute the use other paid time off he or she has a right to use (e.g., accrued vacation or personal time) to get paid for any absences due to the use of sick time.

### **90-day vesting period:**

- (7) Employees begin accruing earned sick time on the first date of actual work and may begin to use any accrued earned sick time 90 calendar days after the first date of actual work, regardless of the number of days worked during the 90 calendar day period.
- (8) Employees who have been employed by their employer for at least 90 calendar days as of July 1, 2015, begin accruing earned sick time as July 1, 2015, and may use earned sick time, whether paid or unpaid, as it accrues.

- (9) Employees who have been employed by their employer for less than 90 calendar days as of July 1, 2015, begin accruing earned sick time on July 1, 2015, and may use earned sick time, paid or unpaid, when they have been employed for 90 days.
- (10) Employees who commence employment after July 1, 2015, begin to accrue earned sick time as of their first day of actual work, and may use accrued earned sick time, paid or unpaid, when they have been employed for 90 calendar days.

**Break in service:**

- (11) Upon a return to work, an employee shall maintain the right to use any accrued earned sick time after a break in service of up to one year from the last date of actual work.
- (12) If an employee returns to an employer after a break in service of up to one year from the last date the employee worked for the employer, the date of commencement of their employment shall be their first date of actual work prior to the break or breaks in service from the employer.

*Example:* An employee has accrued 20 hours of earned sick time and then goes on an unpaid sabbatical for 11 months. Upon the employee's return to employment, 11 months from the date of the employee last worked for the employer, the employee shall have the right to use the 20 hours of earned sick time accrued before the start of the sabbatical.

**Transition year (July 1, 2015 until beginning of next Calendar Year):**

- (13) Employees shall begin to accrue earned sick time beginning on July 1, 2015.

*Example:* If an employer adopts a January 1 to December 31 method of tracking accrual and the employee has used 16 hours of paid sick time in 2015 before July 1, 2015, the employer must allow the employee to use up to 24 hours of earned paid sick time in the remainder of the year. Any unused, earned paid sick time accrued beyond 24 hours may be carried over into 2016.

- (14) An employer shall not be required to provide more than 40 hours of earned paid sick time during the transition year, and any paid leave given prior to July 1, 2015, will be credited.
- (15) If an employer must provide earned paid sick time, employees who took unpaid sick leave earlier in the calendar year shall still be entitled to accrue and use up to 40 hours of earned paid sick time.

**Increments of earned sick time use:**

- (16) Employees shall be entitled to use earned sick time in hourly increments or in the smallest increment the employer's payroll system uses to account for absences or use of other time.
- (17) Where an employee's absence from work at a designated time requires the employer to hire a replacement and the employer does so, the employer may require the employee to use up to a full shift of earned sick time.

*Example:* A food broker's fleet departs from the employer's principal place of business at 3:00 AM Monday through Friday to ensure timely delivery of perishable items to scheduled customers. The

drivers' shifts vary slightly depending on the route, but average 8 hours with loading and unloading. The employee responsible for the upper Cape Cod deliveries arrives at the employer's principal place of business at 5:00 AM after spending the night in the ER with a sick child. The employer was notified by phone of the emergency, and called in an off-duty employee to cover the upper Cape Cod deliveries for the absent driver's shift. In this example, the employer may require the absent employee to use an entire 8-hour shift to cover the sick time used for that day.

**Use of earned sick time before accrual permitted by mutual agreement:**

- (18) By mutual agreement with the employer in writing, employees may use earned sick time before accruing it.

**Alternatives to use of earned sick time:**

- (19) An employer and employee by mutual agreement may arrange for the employee to work additional hours during the same or next pay period to avoid the use and payment of earned sick time. *Any additional hours worked to avoid the use and payment of earned sick time are subject to state and federal wage and hour laws, including payment of overtime.*
- (20) An employer shall not require an employee who has used earned sick time to make up time off from work.
- (21) At the end of the calendar year, an employee may carry over up to 40 hours of unused earned sick time to the next calendar year.
- (22) An employer shall have the option but is not required to offer an employee a payout of up to 40 hours of unused earned sick time at the end of the employer's calendar year, provided the employer makes available to the employee at least 16 hours of sick time at the beginning of the new calendar year. Employers shall have the option but are not required to payout unused earned paid sick time upon separation from employment.
- (23) An employer is not permitted to payout sick time as it accrues during the employer's calendar year or otherwise cause a forfeiture of an employee's right to accrued sick time.

**Section 33.04            Employer Size**

- (1) An employer must provide earned paid sick time to eligible employees if:
  - (a) the employer maintained 11 or more employees on the payroll during 20 or more weeks (whether consecutive or not) over either the current or preceding calendar year; or
  - (b) the employer maintained 11 or more employees on the payroll during 16 consecutive weeks over the current or preceding calendar year.
- (2) All of an employer's employees, whether working in or outside Massachusetts, and regardless their eligibility to accrue and use earned sick time, shall be counted for the purpose of determining employer size.

- (3) All other employers not required to provide earned paid sick under the Earned Sick Time law and these regulations must provide eligible employees with the right to accrue and use up to 40 hours per calendar year of earned unpaid sick time.
- (4) Employees shall be provided notice 90 days in advance in writing if earned sick time that is paid based on an employer's size will be changing to unpaid sick time based on an employer's size.
- (5) When an employee has unused, earned paid sick time at the time that an employer converts from paid to unpaid sick time because of a reduction in size below 11 employees, the unused paid sick time shall remain paid sick time until exhausted, despite the fact that the employee will begin to accrue unpaid sick time.
- (6) When an employee has earned unpaid sick time, the sick time remains unpaid, notwithstanding a change in employer size, until the earned unpaid sick time is exhausted, despite the fact that the employee may begin to accrue earned paid sick time.
- (7) When an employee has both unused earned paid and unpaid sick time available for use, the employee has the option of using either or both to cover the use of earned sick time.

### **Section 33.05            Notice of Use of Earned Sick Time**

#### **Employee requirement of good faith effort in providing notice:**

- (1) When using earned sick time, an employee shall make a good faith effort to provide notice of this need to the employer in advance of the use of the earned sick time.
- (2) Reasonable notice may include compliance with an employer's reasonable notification system that the employee customarily uses to communicate with the employer for absences or requesting leave, provided that such requirements do not interfere with the purposes of the leave.
- (3) If an employer does not have an existing policy or procedure for providing such notice, the employer shall establish such a policy or procedure, preferably in writing. The policy or procedure should enable the employee to effectively provide reasonable notice in a way that can be documented.
- (4) Employers may require employees to submit written verification that they have used earned sick time for allowable purposes after using any amount of sick leave. In no event, however, may an employer request additional medical or other documentation from an employee substantiating the need to use earned sick time until the employee uses more than 24 consecutive hours of earned sick time.
- (5) If an employee is committing fraud or abuse by engaging in an activity that is not consistent with allowable purposes for leave (e.g. being sick, caring for an ill family member) or by exhibiting a clear pattern of taking leave on days when the employee is scheduled to perform duties perceived as undesirable, an employer may discipline the employee for misuse of sick leave.

#### **Reference to the earned sick time law is unnecessary to take leave:**

- (6) An employee may provide reasonable notice or reporting of an absence for earned sick time, whether foreseen or unforeseen, without explicitly referencing the law or using the terms "earned sick time."

- (7) An employer may review with the employee the purposes for which earned sick time may be used under the earned sick time law, provided that such review does not violate the privacy and confidentiality provisions of the earned sick time law or federal, or state medical privacy laws.

**Employee notification of foreseeable or multi-day use of earned sick time:**

- (8) The employer may require up to seven days advance notice if the reason for earned sick time is for a pre-scheduled or foreseeable absence. Employers that require notice of the foreseeable use of earned sick time shall maintain a written policy that contains procedures for the employee to provide notice.
- (9) If an employee anticipates a multi-day absence from work, an employer may require notification on a daily basis from the employee or the employee's surrogate (e.g. spouse, adult family member or other responsible party), unless the circumstances make such notification infeasible.

**Employee reporting the use of earned sick time that is not foreseeable:**

- (10) If an employee's need for the use of earned sick time is unforeseeable, the employee must report this need to the employer as soon as is practicable and must comply with an employer's notification system that the employee customarily uses to communicate with the employer for unforeseeable absences, provided that such requirements do not interfere with the purposes for which the earned sick time is needed.
- (11) An employee shall comply with an employer's notification system policy or call-in procedures for the use of unforeseeable earned sick time, recognizing that there are certain situations such as accidents or sudden illnesses for which such requirements might be unreasonable or infeasible.
- (12) If an employee is unable to provide notice personally, notice may be provided by the employee's surrogate (e.g. spouse, adult family member or other responsible party).

**Section 33.06                      Documentation of use of earned sick time**

- (1) When an employee's use of earned sick time results in an absence of more than 24 consecutive work hours, an employer may require written certification by a health care provider as defined by 940 C.M.R. 33.02, to the employer, that the use of earned sick time was for an authorized purpose.
- (2) Employees who do not have a health care provider may provide a signed written statement evidencing the need for the use of the earned sick time, without being required to explain the nature of the illness, in lieu of certification by a health care provider. Employers may use the Attorney General's model form as a guide for their own policies and may include a check-off listing of the statutory reasons for permissible use of earned sick time in such form.
- (3) Employees who have been absent for more than 24 consecutive work hours for reasons related to domestic violence, as defined in 940 C.M.R. 33.02 above, may provide any of the following certification, if documentation is required by the employer:
- a) a restraining order or other documentation of equitable relief issued by a court of competent jurisdiction;
  - b) a police record documenting the abuse;

- c) documentation that the perpetrator of the abuse has been convicted of 1 or more of the offenses enumerated in chapter 265 where the victim was a family or household member;
  - d) medical documentation of the abuse;
  - e) a statement provided by a counselor, social worker, health worker, member of the clergy, shelter worker, legal advocate or other professional who has assisted the individual in addressing the effects of the abuse on the individual or the individual's family; or
  - f) a signed written statement from the individual attesting to the abuse.
- (4) All evidence of domestic violence experienced by an individual, including the individual's statement and corroborating evidence, shall not be disclosed by the employer unless consent for disclosure is given by the individual.
- (5) The employer may never require any documentation to explain the nature of the illness or the details of the domestic violence.
- (6) Certification and other documentation may be submitted to an employer in hand or by any customarily used method for the employee and employer to communicate, including e-mail, mail, text message, or facsimile.
- (7) Employees must submit such certification or documentation within 30 days of taking earned sick time for which such certification or documentation is required.
- (8) If an employee fails to comply with the reasonable documentation requirements of the employer as described in the section on documentation above (940 C.M.R. 33.07) and there is no reasonable justification for the failure to comply, the employer may delay or deny the future use of accrued earned sick time by the employee until the documentation is provided.

**Section 33.07 Allowable Substitution of Employers' Paid Leave Plans**

- (1) Employers may deviate from the accrual rate of earned sick time so long as their sick leave (or other paid leave) policies are more generous than what is required under the M.G.L. c. 149, § 148C.
- (2) An employer's sick leave policy is more generous, for example, if it:
- a) provides more job protected sick time than the 40 hours of earned sick time required under the statute;
  - b) provides an accrual of job protected sick time at a faster rate than that required under the statute and provides at least 40 hours of earned sick time each calendar year;
  - c) provides a lump sum of 40 hours of job protected earned sick time at the outset of employment and at the start of each subsequent calendar year rather than tracking the accrual of earned sick time over time;
  - d) provides employees with at least 40 hours of job protected paid time off that may be used without restriction and accrues as least as fast as the one hour per 30 hours worked rate;
  - e) permits employees to use job protected sick time before it has been accrued and provides at least 40 hours of earned sick time each calendar year; or
- (3) In order for paid time off, vacation or other policies (PTO) to be substituted for the time off from work provided under the statute, the following requirements must be met. The time off provided by the PTO must:

- a) accrue at a rate of no less than one hour of PTO for every 30 hours of work;
  - b) be paid at the employee's same hourly rate, as defined in 940 CMR 33.02 above;
  - c) be accessible on the same basis, meaning time may be taken for the authorized uses under the statute;
  - d) come with the same notice requirements to employees; and
  - e) be afforded the same job protections.
- (4) Attendance policies that reward employees for good attendance are permissible so long as employees who exercise their rights under the Earned Sick Time law and these regulations are not subject to any adverse actions. An employee's inability to earn a reward for good attendance based on his or use of earned sick time does not constitute an adverse action or interference with an employee's rights under this section.

**Section 33.08                    Prohibition on Retaliation and Non-Interference**

- (1) It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this section, including, but not limited to, by using the taking of earned sick time under this section as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an employee to discipline for the use of earned sick time under these regulations.
- (2) It shall be unlawful for any employer to take any adverse action against an employee because the employee opposes practices which the employee believes to be in violation of this section, or because the employee supports the exercise of rights of another employee under this section. Exercising rights under this section shall include but not be limited to filing an action, or instituting or causing to be instituted any proceeding, under or related to this section; providing or intending to provide any information in connection with any inquiry or proceeding relating to any right provided under this section; or testifying or intending to testify in any inquiry or proceeding relating to any right provided under these regulations.
- (3) Examples of adverse actions include but are not limited to:
- a) denying use or delaying payment of earned sick time;
  - b) terminating an employee;
  - c) taking away work hours;
  - d) giving the employee undesirable assignments or schedule changes;
  - e) giving false negative references for future employment;
  - f) making false criminal reports to authorities about the employee;
  - g) reporting an employee to immigration authorities; or
  - h) threatening an employee with any of the above listed adverse actions.

**Section 33.09                    Recordkeeping and Disclosure**

- (1) Employers shall keep a true and accurate record of the accrual and use of earned sick time, consistent with the employee recordkeeping requirements in M.G.L. c. 151, § 15.
- (2) Employers must maintain such records for a period of three years and provide a copy of the records upon demand by the Attorney General or designee. An employer shall allow an employee at reasonable times and places to inspect the records kept under this section and pertaining to that employee.

- (3) Employers shall inform their employees by way of a written notice at the onset of employment what constitutes “calendar year.” Any change by an employer in the designation of what a calendar year means for purposes of accrual and use shall be prospective and shall not cause a loss or forfeiture of any employee’s accrued earned sick time.
- (4) Employers shall post a notice of the Earned Sick Time law and these regulations, prepared by the Attorney General, in a conspicuous location accessible to employees in every establishment where employees with rights under this law and these regulations work, and shall provide a copy to their employees.

**Section 33.10                    Violations of the Earned Sick Time Law**

Violation of any provision of the Earned Sick Time Law, M.G.L. c. 149, § 148C, or these regulations, 940 C.M.R. 33.00 shall be subject to paragraphs (1), (2), (4), (6) and (7) of subsection (b) of M.G.L c. 149, §27C(b) and to §150.

**Section 33.11                    Severability**

If any provision of 940 C.M.R. 33.00 or the application of any provision of a regulation to any person or circumstance is finally held invalid by a court of competent jurisdiction, the validity of the remainder of 940 CMR 33.00 and the applicability of such provision to other persons or circumstances shall not be affected.