

# MASSACHUSETTS EMPLOYMENT LAW Earned Sick Time



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Massachusetts' Earned Sick Time Law (ESTL) became effective July 1, 2015, and generally covers all employers in Massachusetts. However, employers must comply with existing collective bargaining agreements or contracts that have more generous leave provisions.

The Massachusetts Attorney General issued [final regulations](#) to implement the ESTL, which clarify practices and policies in the administration and enforcement of the law.

## STATE RESOURCES

### Massachusetts Department of Labor Standards

<https://www.mass.gov/orgs/departments-of-labor-standards>

### FAQs

The Massachusetts Attorney General's office has published these [answers](#) to frequently asked questions regarding earned sick time.

### Poster

Employers can use this model [poster](#) to satisfy their posting requirements.

### Earned Sick Time

The Attorney General provides [ESTL information and resources](#) for employers.

## OVERVIEW OF EARNED SICK TIME

The major provisions of the ESTL include the following:

- Employers with **11 or more employees** must provide **paid** sick time to employees;
- Employers with **fewer than 11 employees** must provide **unpaid** sick time to employees;
- Virtually all employees working in Massachusetts are eligible to accrue sick time;
- Employees must accrue at least one hour of paid sick time for every 30 hours worked;
- Employees may be limited to accruing up to 40 hours of sick time per calendar year;
- Employers may choose any consecutive 12-month period for its calendar year;
- Employees must be permitted to **carry over** up to 40 hours of unused sick time into the next calendar year;
- Employees can use accrued sick time for themselves or their family members, for routine medical appointments, care or treatment of an existing mental illness or health condition or for specified purposes for employees who are victims of domestic violence, sexual assault or stalking;
- Employers may restrict the use of earned sick time for the first 90 days of employment; and
- Earned sick time may run concurrently with time off provided by the federal Family and Medical Leave Act (FMLA) and other leave laws that allow employees to concurrently use leave for the same purposes as the ESTL.

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### COVERED EMPLOYERS

In general, **all employers** in Massachusetts are required to comply with the ESTL. However, the paid leave requirement only applies to employers with 11 or more employees, as follows:

- Employers with **11 or more employees** must allow all employees to earn and use **paid sick time**.
- Employers with **fewer than 11 employees** must allow all employees to earn and use **unpaid sick time**.

### ELIGIBLE EMPLOYEES

All employees—including part-time, temporary and seasonal employees—working in Massachusetts are eligible to accrue earned sick time. Whether an employee’s accrued earned sick time is paid depends on the size of his or her employer.

Employers may restrict the use of earned sick time for the first 90 days of employment.

### ACCRUAL OF EARNED SICK TIME

The ESTL requires that employees earn a minimum of **one hour of sick time for every 30 hours worked**, up to a maximum of 40 hours per calendar year. An employer may choose any consecutive 12-month period for its “calendar year.”

Employees must be permitted to **carry over up to 40 hours** of earned but unused sick time into the next calendar year. However, the law does not require employers to allow employees to use more than 40 hours of earned sick time in a calendar year. Employers that provide a lump sum of at least 40 hours of sick leave or paid time off at the beginning of each year are not required to track accrual or allow rollover of sick time.

### REASONS FOR LEAVE

An employee may use earned and accrued sick time, whether paid or unpaid, to:

- Care for a physical or mental illness, injury or medical condition affecting the employee or his or her child, spouse, parent or parent-in-law;
- Attend routine medical appointments of the employee or his or her child, spouse, parent or parent-in-law; or
- Address the effects of domestic violence on the employee or his or her dependent child.

The smallest amount of sick time an employee may use is one hour. For uses beyond one hour, an employee may use earned sick time in hourly increments or in the smallest increment the employer’s payroll system uses to account for other absences. An employee may not use earned sick time as an excuse to be late for work without an authorized purpose under the ESTL.

### INTERACTION WITH STATE AND FEDERAL LEAVE LAWS

Earned sick time may run concurrently with time off provided by the federal Family and Medical Leave Act (FMLA) and other leave laws that allow employees to concurrently use leave for the same purposes as the ESTL.

An employer may require an employee, or the employee may choose, to use earned sick time to receive pay when taking other leave authorized by law that would otherwise be unpaid.



### PAYMENT OF EARNED SICK TIME

When used, earned paid sick time must be paid on the same schedule as regular wages are paid. Earned sick time is paid at the “same hourly rate,” as follows:

FOR EMPLOYEES PAID:	THE “SAME HOURLY RATE” IS:
On an hourly basis	The employee’s regular rate of pay
Different rates of pay for hourly work	<p>Either:</p> <ul style="list-style-type: none"> <li>The wages the employee would have been paid for the hours absent during use of earned sick time, if the employee had worked; or</li> <li>The blended rate, determined by taking the weighted average of all regular rates of pay over the previous pay period, month, quarter or other established period of time the employer customarily uses to calculate blended rates for similar purposes.</li> </ul> <p>Whichever method an employer uses to determine the same hourly rate must be used consistently for each employee throughout the year.</p>
On a piece-work or fee-for-service basis	A reasonable calculation of the wages or fees the employee would have received for the piece work or service, if the employee had worked (not less than the effective minimum wage)
On commission	The greater of the base wage or the effective minimum wage
On salary	The employee’s total earnings in the previous pay period divided by the total hours worked during the previous pay period. Unless the normal workweek is less than 40 hours, an employee who is exempt should be assumed to work 40 hours per week.
Tipped	The effective minimum wage

Employers may, but are not required to, pay out unused earned sick time upon separation from employment.

### NOTICE AND CERTIFICATION REQUIREMENTS

Except in the case of an emergency, an employee must notify his or her employer prior to use of earned sick time. For pre-scheduled use of earned sick time, an employer may maintain a policy that requires up to seven days’ notice, unless the employee learns of the need to use sick time within a shorter period.

For multiple-day absences, an employer may require notification of the expected duration of the leave. If the duration is unknown, the employer may require notification on a daily basis from the employee or the employee’s surrogate (for example, spouse, adult family member or other responsible party), unless notice is unreasonable due to the circumstances.

In addition, employers may require medical documentation or certification for the need to use earned sick time if:

- The employee is absent for more than 24 consecutive work hours;
- The employee is absent for three consecutive workdays;

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- The use of sick time occurs within two weeks prior to an employee's final scheduled day of work before termination of employment (except temporary workers);
- The employee has four unforeseeable and undocumented absences within a three-month period; or
- The employee is age 17 or under and has three unforeseeable and undocumented absences within a three-month period.

However, an employer may not delay or deny sick time if certification is not received. Also, an employer may never require that the documentation from an employee explain the nature of the illness or the details of the domestic violence.

An employer may recoup the sum paid for sick time from the employee's future pay if the employee fails, without good cause, to submit required documentation within seven days after taking earned sick time. However, employees must be notified in advance of this practice.

Employers may also require employees who **use any amount** of earned sick time to self-verify, in writing, that they have used earned sick time for allowable purposes. Employers may use the Attorney General's [model form](#) as a guide for their own policies and may include a check-off list of the permissible reasons for use of earned sick time on the form. Fitness-for-duty or work release documentation may be requested for absences where certification is customarily required and consistent with industry practice.

### EMPLOYEE PROTECTIONS

An employer may not interfere with an employee's right to use earned sick time and may not retaliate against any employee who requests to use earned sick time.

An employee cannot be required to make up time off from work as a condition of using earned sick time. However, by mutual agreement, an employee may work additional hours during the same or next pay period to avoid use of earned sick time.

#### **BREAKS IN SERVICE**

An employee with a break in service of **up to four months** maintains the right to use any earned but unused sick time he or she accrued before the break in service.

Following a break in service of **between four and 12 months**, an employee maintains the right to use earned but unused sick time before the break in service only if the employee's unused bank of sick time equals or exceeds 10 hours. An employee with a break in service of **up to 12 months** maintains their vesting days from the employer and does not need to restart the 90-day vesting period.

### EMPLOYER PROTECTIONS

Employers may review the permitted uses of earned sick time with employees, and may require employees to self-certify that the reason for any sick time used was for one or more of these purposes. Employees are prohibited from accepting a shift assignment with the intention of calling in sick for all or part of that shift.

Also, if an employer must hire a replacement or call in another employee due to an employee's use of sick time, the employer may require the employee to use an equal number of hours as the replacement or call-in employee works, up

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to a full shift, of earned sick time. If an employee does not have enough sick time accrued to cover the hours worked by a replacement employee, the employer must provide unpaid, job-protected leave to make up the difference.

If an employee engages in activity that is not consistent with the permitted uses of sick time, an employer may discipline the employee for misuse of sick time. In addition, if an employee has a pattern of taking sick time on days before or after a weekend, vacation or holiday, an employer may discipline the employee for misuse of sick time (unless the employee provides verification that use of sick time was legitimate).

An employer that provides 40 or more hours of paid time off or vacation to employees that may also be used as earned sick time is not required to provide additional sick leave to employees who use all their time for other purposes (for example, vacation or personal time) and need sick leave later in the year. However, an employer's policy must be clear that no additional sick leave will be provided in these circumstances.

### **ALLOWABLE SUBSTITUTION OF EMPLOYER PAID LEAVE POLICIES**

Employers may maintain their own sick leave or paid time off policies, and may have different paid leave policies for different groups of employees. However, all employees must be able to use at least the same amount of time, for the same purposes, under the same conditions and with the same job protections as provided by the ESTL.

Employers who prefer not to track the accrual of earned sick time may use the following schedule for providing lump sums of sick leave or paid time off to their employees.

<b>FOR EMPLOYEES WORKING AN AVERAGE OF:</b>	<b>EMPLOYER PROVIDES:</b>
37.5-40 hours per week	8 hours per month for 5 months
30 hours per week	5 hours per month for 8 months
24 hours per week	4 hours per month for 10 months
20 hours per week	4 hours per month for 9 months
16 hours per week	3 hours per month for 10 months
10 hours per week	2 hours per month for 10 months
5 hours per week	1 hour per month for 10 months

An employer who uses this schedule will be considered to be in compliance even if an employee's hours vary from week to week. An employee who accrues earned sick time on this schedule has the right to roll over up to 40 hours of his or her sick leave into the next year. However, accrual may be delayed while an employee maintains an unused bank of 40 hours.

### **POSTER REQUIREMENT**

Massachusetts employers must post a [notice](#) in a conspicuous place informing employees of the right to earned sick time.

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### SAMPLE POLICY

The Massachusetts Attorney General's Office provides a [Sample Massachusetts Earned Sick Time Policy](#) that employers may customize for their organizations.

### MORE INFORMATION

More information on the Massachusetts ESTL is available on the Massachusetts Attorney General's [website](#).

### ***SPECIAL NOTE:***

The United States District Court for the District of Massachusetts granted summary judgement to employers and operators of rail transportation systems and intermodal terminals who brought action against the Massachusetts Attorney General. The Court [held](#) that the Railroad Unemployment Insurance Act (RUIA) preempted parts of the ESTL as applied to interstate rail carriers. The Court remanded the case for further consideration of whether other parts of the Massachusetts law that are not within the preemptive reach of the RUIA, and are not otherwise preempted by another federal law, might still be applied to interstate rail carriers.