



## Earned Sick Time AIM Webinar FAQs

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## **Introduction**

The following FAQ responds to all of the questions generated in AIM's April 30, 2015 webinar on the new Earned Sick Time law. This webinar updated Massachusetts employers on the impact that the Attorney General's proposed regulations would have on their current time-off policies as well as on their efforts to comply with the new law. The questions have been grouped into categories. Within each category, similar questions are grouped together and, where appropriate, a single answer may respond to more than one question. At the beginning of each category is a brief summary of the questions raised and in most cases the relevant section of the law and the proposed regulations is quoted.

## **Eligible Employees**

The ballot question language broadly defines who is an employee.

any person who performs services for an employer for wage, remuneration, or other compensation... subsection (a)

The Attorney General's proposed regulations added to this basic definition.

**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.

The proposed regulations further state that any employee who primarily works in Massachusetts is eligible for Earned Sick Time.

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.

Webinar participants had several question on whether multistate, out-of-state, temporary, seasonal, commissioned and other employees are covered by the Earned Sick Time law.

### ***Multistate and Out of State Employees***

Many webinar participants had questions on eligibility for Earned Sick Time for employees who work outside of Massachusetts or in Massachusetts as well as other states.

Q: Are employees who work out of state for a Massachusetts based employer covered under the Earned Sick Time law?

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Webinar participants had the following questions:

- Does it matter what state the employee lives in if the employer is in MA?
- If a Massachusetts has employees working in another state, are they excluded? For instance, if we are located in Massachusetts but have employees working exclusively in New Hampshire, must we provide earned sick time?
- I have an employee in Maryland that is an hourly employee. She does not receive benefits. Do I have to offer her personal time?
- Do employees who work in other states are subject to this new law?
- Our company is based in MA, but we have some employees who live and work at our CT location. Do they qualify for MA earned sick pay?

*A: The law applies to any employee who primarily works in Massachusetts, regardless of where the employer is located. According to the proposed regulations, the primary state is the one that the employee works in more than any other state. If the out of state employee works primarily in a state other than Massachusetts, then the law does not apply to that employee.*

Q: If the employer is located outside of Massachusetts but has employees who work inside Massachusetts, does the Earned Sick Time law apply to all employees of the company, just those who work in Massachusetts or to none of the employees?

Webinar participants asked the following questions:

- We have employees based in Massachusetts, but their payroll is based out of state. The state where the employee is paid out of must accrue their sick time, correct?
- If you are an employer in another state with MA employees does the regulations only affect the MA employees or all the employees? If only MA employees, doesn't that fall under discrimination?
- What if the company is based out of Rhode Island but their employees perform work in the state of MA are they required to have paid sick time?

*A: The law applies to employees who work primarily in Massachusetts, regardless of where the employer is located. It is possible that an employer will have some employees who are subject to the Earned Sick Time law and others who are not.*

Q: How do you determine the amount of Earned Sick Time for employees who work in multiple states?

Webinar participants asked the following questions.

- If an employee is transferred from NH to Massachusetts, does their time worked in NH apply to their accrual or do they start accruing once they work in Massachusetts?
- All employees of Mass. employers have earned sick time, even ones working and or living out of state?

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- So what if a truck driver who works out of RI but drives all over New England, do we have to keep track of the actual hours he drives in Mass vs. the other states to see if he qualifies?

*A: If an employee primarily works in Massachusetts, then you count all hours worked, regardless of the state in which they were worked, towards the employee's annual accrual of Earned Sick Time.*

#### Part-Time, Temporary and Seasonal Employees

Many webinar participants had questions on whether employers must include part-time, temporary, seasonal and other categories of employees as eligible to accrue and use Earned Sick Time.

Q: How does this law affect part-time employees?

Webinar participants asked the following questions.

- If any employee works 5 hours a week (in-eligible for benefits) do they accrue sick time
- Please confirm this law applies to part-time employees.
- Are part-time employees who work less than 30 hours per week eligible for Earned Sick Time?
- What about part-time employees who's full-time job is a municipal employee - are you subject to them earning paid sick time from the part-time employer?

*A: Part-time employees accrue, use and carryover Earned Sick Time at the same rate and under the same conditions as full-time employees.*

Q: Are seasonal employees eligible to accrue and use Earned Sick Time?

Webinar participants asked the following questions about seasonal employees and their eligibility for Earned Sick Time.

Webinar participants asked the following questions.

- I am the HR Manager at a tourist attraction. We have many seasonal employees who only work 2 or 3 months. How would they benefit from sick time if there is a 90-day waiting period? Do we have to offer sick time for those employees who only work 2, 3 or 4 months in a calendar year?
- Are agricultural workers eligible for Earned Sick Time?

*A: Seasonal employees are not specifically referenced in the ballot question. However, the proposed regulations state that they are included.*

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.

Q: If we have non-direct temporary employees (using an agency for temp to hire), are they, too, considered our company employees for purpose of this law?

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Participant questions included the following:

- So is the temporary staffing service responsible for paying or the client company where the temp is assigned responsible for paying time?
- When you place a person from a temp agency and then hire permanent when does the accrual start?
- How about contract employees?
- I need clarification on Temporary employees which are brought in through a Temporary employment agency, will the temp agency be responsible for the sick time accrual or will our company be responsible for this sick time accrual?
- Does a person working through a staffing agency (working as a temporary employee for us) count? They are NOT on our payroll.
- So an AGENCY TEMP is responsible for tracking accruing and paying their temps for sick time, we would not be.
- With a temp-perm hire, is it legal to start the 90 day clock from their date of hire and not go retro and include their temporary hours into the calculation?
- Are temporary employees the employees of the staffing agencies or the host employer?
- Temporary employees are the W-2 employees of the staffing agency, right?
- Has there been any guidance on what staffing agencies will be doing (i.e. who will be tracking/paying the sick time -- the agency or the placement employer)?
- Are temporary employees hired through an agency considered employees?
- Are temp employees through an agency are covered by the agency?
- If you hire from temp agencies is the temp agency responsible for their sick time?
- Just to clarify, agency temps would be considered "employees" of the temp agency and so the agency would be responsible for tracking & paying accrued sick time, correct?

*A: They are employees of the staffing agency and would accrue Earned Sick Time through the staffing agency.*

#### Independent Contractors

Q: Are independent contractors entitled to sick time?

Webinar participants asked the following questions.

- How do you handle independent sales people who do not work for the company, but are paid a commission based on work submitted? They do not really have hours worked for the company.
- Can you reiterate about a 1099 contractor
- Are employees that have a contract (not union) affected by this law?
- What about independent contractors? Is a MA company obligated to provide them with paid sick?

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*A: The ballot question defines an employee as any person who performs services for an employer for wage, remuneration, or other compensation. This broad definition could be interpreted to include independent contractors. However, the proposed regulations specifically exclude independent contractors by reference to the section of the Massachusetts General Laws that defines independent contractors.*

### Other Types of Employees

Webinar participants had a variety of questions about miscellaneous categories of employees.

Q: Are employees who are on commission only, entitled to paid sick time?

Q: Are employees who work remotely from home eligible for Earned Sick Time?

Q: How about hair salon workers who have no set hours?

*A: Yes, all employees on your payroll are eligible. If they are exempt, then you would credit them with 40 hours worked per week unless there is another hours per week schedule that applies. If they are nonexempt, then they accrue Earned Sick Time based on hours worked and entered into your payroll.*

Q: Are owners and board members eligible?

*A: Neither the law nor the proposed regulations specifically mention the status or sole proprietors or other owners. Nor do they mention board members. However, it is likely that anyone compensated through your payroll is eligible. If they are exempt, then you would credit them with 40 hours worked per week unless there is another hours per week schedule that applies. AIM is seeking clarification of this issue.*

Q: What about state employee?

*A: State employees are eligible for Earned Sick Time.*

### **Employers**

The Earned Sick Time law defines employers as follows:

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.

Q. Does the Earned Sick Time law apply only to employers located in Massachusetts?

*A. The law applies to any employee who primarily works in Massachusetts, regardless of where the employer is located. According to the proposed regulations, the primary state is the one that the employee works in more than any other state. If an employer employs an employee who*

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*primarily works in Massachusetts, then the Earned Sick Time law applies to that employer, regardless of where that employer is located.*

Q. Must all employers with employees who primarily work in Massachusetts provide paid sick time?

A. Only employers with 11 or more employees have to provide paid Earned Sick Time. Employers with 10 or fewer employees must provide unpaid Earned Sick Time?

Q. How do you determine if an employer has 11 or more employees?

A. *The Earned Sick Time law states that the attorney general "may adopt rules and regulations necessary to ... the manner in which employer size shall be determined. The proposed regulations state that*

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.

Q. Are all employees including owners included when determining the number of employee? Webinar participants had the following questions.

- In a small business that hires college students, part time, on a need basis only, is there a threshold to be counted as an "employee" as they usually work for a minimum of 4 hours at time? If we count these kids, we will cross the threshold of 11 employees
- In a small business, are owners who work in the business classified as an "employee"?

A. *Neither the Earned Sick Time law nor the proposed regulations address whether owners are included in the number of employees for determining if Earned Sick Time must be paid. AIM is seeking clarification of this issue. The proposed regulations state that full time, part-time, seasonal, and temporary employees as well as interns are eligible for Earned Sick Time. It is reasonable to assume that they must be included when determining the number of employees.*

### **Calendar Year**

The Earned Sick Time law states that employees accrue and use Earned Sick Time during the course of a calendar year. The proposed regulations state that a calendar year can be

Any consecutive 12-month period of time as determined by an employer... 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.

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Webinar participants had the following questions on how calendar year

Q. Can different collective bargaining agreements have different calendar years even though the proposed regulations say “[e]mployers shall apply the choice of “calendar year” consistently and uniformly to all employees.”

A. *The proposed regulations state “employers shall apply the choice of “calendar year” consistently and uniformly to all employees”. This language would seem to indicate that an employer would have to have the same consecutive 12 month period for all employees. AIM is seeking modification of this language to enable employees to accommodate multiple collective bargaining agreements.*

Q. If a company chooses to do a payout of Earned Sick Time is it based on the calendar year of the employer’s fiscal year ... sorry, but still confused on that.

A. An employer can choose the calendar year that works best for the organization and its employees. That could be the January – December calendar year, the company’s fiscal year, each employee’s anniversary date or any other consecutive 12 month period. Whichever consecutive 12 month period is chosen, then should the employer decide to payout Earned Sick Time at the end of the calendar year then payment would be at the end of the 12<sup>th</sup> month of that consecutive 12 month period.

### **90 Day Vesting Period**

The Earned Sick Time law and the proposed regulations both state that an employee can be prevented from using any accrued Earned Sick Time for the first 90 calendar days of employment. As stated in the proposed regulations:

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.

Q. If an employee works less than 90 days can that employee use Earned Sick Time?  
Webinar participants had the following questions.

- If an Intern works less than 90 days, are they not eligible for Earned Sick Time?
- We hire interns that don't last 90 days, so they just never get to use it?

A. *That is correct, however, as is noted in the section on Breaks in Service, they would be entitled to that time if you were to rehire them within one year of the last day of employment.*

Q. Does the 90 day vesting period apply to all employees?  
Webinar participants had the following questions.

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- Is the 90-day period only applied to new hires or current employees? We accrue all 6 paid sick days at the beginning of the year. Active employees do not have to wait 90 days to use that time, correct?
- If we provide a lump sum of 40 hrs. of job protected earned sick time at the onset of employment and at start of each subsequent calendar year rather than tracking the accrual of earned sick time over time can we delay the use of that 40 hours by 90 days for new employees?
- When does sick time start accruing? At the point of hire or after the 90 day waiting period?
- If we choose to give employees 40 hours paid EST Jan 1 each year & 40 at date of hire are we still able to use the 90 day waiting period for the new hire?
- And the waiting period of 90 days is applicable to both exempt and nonexempt positions?

A. *The 90 day vesting period applies to all employees, new hires, current employees, exempt, nonexempt, etc. The 90 days are counted from the first day of employment and is based on calendar days, not work days. Current employees will have credit for their existing employment when the law goes into effect. Those with 90 days prior to the effective date will have already met the 90 day vesting period. It does not matter if the time is accrued or provided in a lump sum up front, the 90 day vesting period applies in both instances.*

Q. If an employer has an initial probationary period of 90 days, does the Earned Sick time 90 day period start at hire or at the conclusion of the 90 day probationary period?

A. *The 90 day vesting period starts on the first day of work even if there is an initial probationary period.*

Q. Can an employer have a shorter vesting period than 90 days? Can an employer allow employees to start using Earned Sick Time immediately or after 30 or 60 days?

A. *The 90 day vesting period starts on the first day of work even if there is an initial probationary period. Employers may offer a greater benefit than required under the law. Employers may allow new employees to use earned sick time prior to the 90 day vesting period under the law.*

### **Breaks in Service**

The Earned Sick Time ballot question did not address what happens to accrued sick time during breaks in service. The proposed regulations do address this issue. First, the proposed regulations define a break in service as follows:

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.

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The proposed regulations state that employees returning the work after a break of service of up to one year retain their prior accrued Earned Sick Time balances and their prior date of hire.

(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.

Q: Our seasonal employees are terminated each year and many of them are hired back in the following year. Are they allowed to carry over accrued sick time balance if rehired in April the following year?

Webinar participants had the following questions.

- We have seasonal employees that work April to November. Do they carryover from one year to the next?
- We have an employee who works for us every summer. May-August. So we accrue his sick time this year. He works 90 days this summer, so next summer when he comes back he would have sick time to use?

*A: While the ballot question made no mention on how breaks in service are to be handled, the proposed regulations state that employees who are rehired within one year have the right to use any accrued and unused Earned Sick Time that existed at the time of their termination. Employers will need to keep records of accrued Earned Sick Time at the time of hire to ensure that it is credited to rehires with qualifying breaks in service.*

Q. When we rehire someone with a break in service of less than 12 months, do they have to wait for a new 90 day period before they can use accrued Earned Sick Time or do they get credit for the prior time worked?

Webinar participants had the following questions.

- Does the 90 days start over when a seasonal employee returns the next season?
- If we have a reoccurring summer temporary employee, how do we assess the 90 days rule? For example, an employee works 8 weeks each summer - does the 90 day waiting period restart each summer?
- When does the 90 day period start? Each time they are re-hired?

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- If someone works for company and accrues time but worked less than 90 days but then comes back in 6 months and works for 1 month and accrues more time, does the company have to add the total days worked in the first stint and the second stint to see if they total 90 days worked so they would be eligible to use the sick time OR do they have to work 90 days in one block of time each time they return to work to be eligible to use any accrued hours?
- A. *Employees who are rehired within one year of their prior date of termination retain their prior date of hire for purposes of Earned Sick Time. For example, an employee was hired on July 1, 2015 and worked through August 31, 2015. The employer rehires the employee on July 1, 2016. The employee's date of hire for purposes of the 90 day waiting period is July 1, 2015. Therefore, the employee starts on July 1, 2016 with more than 90 calendar days since the date of hire and can use any accrued Earned Sick Time immediately.*
- Q. If an employer pays out earned sick time at the time of termination of employment, can the employer avoid having to carryover accrued time from the prior period of employment for employees with qualifying breaks in service?
- Webinar participants had the following questions.
- If someone leaves the company and PTO is paid out at termination, are they entitled to 5 days protected sick when returning? Is just the protection available since the pay was paid out?
  - If all accrued sick time is paid out at termination, we do not need to credit any time when rehired, right?
  - When they come less than one year and they had their benefits paid out do they get it back even though we already paid them that unused time?
  - If we pay out the EST at termination and we rehire within a year, can we state in our policy that they don't get the unused EST back (because we already paid it out)?
  - Can an employer chose to pay out accrued sick pay at termination and avoid having to restore accruals for re-hires?
- A. *It is not certain whether an employer can payout Earned Sick Time at the time of an employee's termination of employment. Neither the law nor the proposed regulations address this issue. The proposed regulations do allow a payout of accrued but unused time at the end of the calendar year (see FAQ section on Payouts), however those payouts apply only to accrued and unused Earned Sick Time that exceeds 16 hours. It is not clear whether an employer faces the same limitations on payouts upon termination of employment, if such payouts can be done at all. AIM is seeking guidance on this issue from the Attorney General's office.*
- Q. If an employee signs a release of all claims at the time of termination will that allow an employer to not have to track accrued Earned Sick Time in case of rehire?
- A. *A release to claims to which an employee is legally entitled is not enforceable without adequate consideration. Even if adequate consideration is offered and accepted, it is*

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*uncertain that the Attorney General's office while enforcing the law would accept such a release.*

### **Accrual**

The Massachusetts Earned Sick Time ballot question states that employees accrue one hour of Earned Sick Time for every 30 hours worked.

An employer shall provide a minimum of one hour of earned sick time for every thirty hours worked by an employee. Employees shall begin accruing earned sick time commencing with the date of hire of the employee or the date this law becomes effective, whichever is later... subsection(d)(1)

While not specifically mentioned in the ballot question, the proposed regulations do clarify that "hours worked" includes overtime hours.

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.

### Rate of Accrual

Q. How should an employer calculate Earned Sick Time hours accrued when an employee works more than 30 hours in a week?

Webinar participants had the following questions

- If an employee is paid on a % basis, how to you determine the number of hours they earn?
- What if the exempt person works more than 8 hours a day? Do you count 8 or more for the accrual?
- I missed the first ten minutes--is it 1 hour or 30 worked or 40 worked? Thanks
- If an employee works multiple OT hours each week can the employer limit EST to 20 hours each 6 month period or 1/2 year?
- Accrual rate per week or if works 60 hours in one week, accrue 2 hours of EST?
- If an employee works 35 hours 1 week does the extra 5 hours carry over to the next payroll for accrual
- Someone works 46 hours in a week. They earn 1 hour, but does the other 16 hours go towards the next 30 hours?

A. *Earned Sick Time does not accrue on a week to week basis. It accrues on an hourly basis. There is no set weekly amount that accrues per employee. Instead, the actual hours worked by the employee, including overtime hours, is totaled and then divided by 30 to determine the amount of Earned Sick Time accrual for that week. For example, an employee who worked 40 hours in a week would accrue 1.33 hours of Earned Sick Time that week. An employee working 40 hours or regular time and 20 hours of overtime in the week would accrue 2 hours of Earned Sick Time.*

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### Overtime Hours

Participants had several questions on the inclusion of overtime hours when determining Earned Sick Time accruals.

Q: Are overtime hours to be considered in accruing sick time or is there a cap of 40 hours a week?

Webinar participants asked the following questions:

- If an employee works overtime do those hours count to the accruing sick time?
- Is there a cap to the number of Earned Sick Time hours that can be earned per week?
- So many EEs are paid for 35/week but often work more. Does the 35 apply toward calculations or the actual hours worked?
- The hours worked total is actual hours worked, correct? OT hours would be included correct?

A: *The ballot questions states that an employee earns 1 hour for every 30 hours worked. It does not mention straight time or overtime hours. The proposed regulations specifically state that overtime hours are to be counted when determining Earned Sick Time accruals.*

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.

*An employer would count all hours worked, including overtime hours, not the hours scheduled. Exempt employees weekly hours are considered to be 40 unless they work a different set schedule in which case that schedule is used to determine their accrual.*

### Hours Paid but not Worked

Participants had several questions on whether they should include nonworking hours such as holidays and vacations when determining the accrual of Earned Sick Time

Q: Do unworked hours count toward accrual?

Webinar participants asked the following questions:

- To confirm is vacation, holiday pay, sick, PTO, jury duty, bereavement, etc. contemplated as hours worked for the purposes of accrual
- Will an employee still accrue for paid holidays, sick, or vacation hours that are not worked?
- Do employees earn EST on vacation time?
- Do you accrue EST on paid holidays?
- Does EST accrue on vacation or holiday hours taken?

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- Could you please clarify EST accrual during sick time and PTO/vacation time? Does it accrue on both?
- Does the employee earn EST if they are on vacation?
- Does employee accrue EST while on vacation since that is paid on an hourly basis?
- Does sick time accrue while employee is on sick or vacation time?
- Is vacation, holiday time included in the 30 hours?
- Is vacation time counted as hours worked for the purpose of accruing the EST
- Does Vacation, Holiday pay count as hours worked
- Do hours worked for accrual of EST include paid holiday? Paid vacation? Time off using paid sick time?
- Are paid hours (holidays, vacation) counted towards the 30 hours accrual?
- Do hours work include paid vacation and holidays in determining earned sick time?
- Does "hours worked" = actual hours worked or hours paid? All of our employees are salaried at 70 hrs. but often work more or less.
- Are vacations counted for accrual purposes?

*A: The language specifically states hours worked. Paid hours for vacation, holiday, time on leave, and other hours that do not correspond to worked hours would not be counted towards the accrual of earned sick time. However, MA law prohibits the loss of benefits while on jury duty. It is possible that hours on jury duty will count towards the accrual of Earned Sick Time. AIM is seeking clarification on this issue.*

Q. Does time taken as Earned Sick Time count towards the accrual of Earned Sick Time?

Webinar participants had the following questions.

- Aren't the hours based on HOURS worked so why is it being accrued on sick pay hours?
- Does an employee accrue EST on EST hours taken?
- Every 30 hours you get 1 hour sick time, how can you earn sick time while out on sick time?
- How is an employee supposed to EARN sick time when they are out on sick time- the law states 1 hour earned for every hour WORKED- they are not working when they are out?
- Doesn't the law state hours worked?
- How can someone accrue sick time while using sick time when the calculation is based on "hours worked"?
- If they use 8 hours of sick time, that 8 hours is also counted into the 30 hour accumulating time?
- Does earned sick time used count as hours worked for purposes of calculating OT?

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- A. *The ballot questions states that an employee earns 1 hour for every 30 hours worked. However, when defining the rate of pay for Earned Sick Time, the proposed regulations state that*

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.

*Since Earned Sick Time is a benefit "paid or accrued on an hourly basis if the individual works" then it would seem that an employer must include time taken as Earned Sick Time when calculating the employee's accrual of Earned Sick Time. AIM is seeking further guidance on this from the Attorney General's office.*

#### Leaves of Absence

- Q. Does Earned Sick Time accrue while an employee is on an approved FMLA leave?

Webinar participants had the following questions.

- If an employee is out on FMLA do they still accrue EST?
- Would accrual be applied to time out for short term disability, long term disability or workers compensation time out?
- Do employees on paid leave (ex: paid parenting leave) accrue EST during that leave?
- Accrual is based on hours worked, not accruing if out on leave - i.e. w/c or disability?
- Do they EST accrue while employee is out on FMLA, Workers Comp, and Parental Leave?

- A. *FMLA does not require the accrual of time-off benefits if the employer's policy does not require it. Employers should review their policies to ensure that Earned Sick Time will not accrue during FMLA leaves. Time paid for workers' compensation, short term disability and long term disability would not be counted for the accrual of Earned Sick Time.*

#### Alternative Rates of Accrual

- Q. Can an employer use an alternative rate of accrual as long as it adds up to 40 hours of Earned Sick Time in a year?

Webinar participants had the following questions

- Can we give employees a day a month for the first five month since it is quicker than the plan?
- If your Sick time is accrued per pay period, but is truly "sick time" not PTO, and it is more generous than the law (40 hrs.) are we ok as is?

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- Our FT EEs earn 48 hrs. of PTO in a calendar yr. (4 hrs./ mo. on 1st of each mo) and they can use it before it accrues. However, it's not accrued at a faster rate than the MA sick pay law. Given this, would our policy be considered more generous or not?

A. *An alternative rate of accrual can be used, but it cannot be slower than the rate of 1 hour per every 30 hours worked. Providing one day per month for the first 5 months might not be faster than 1 hour for every 30 hours worked when an employee has overtime hours. Providing 4 hours per month for 12 months will result in more hours, but it is not allowed because it accrues at a rate slower than 1 hour for every 30 hours worked.*

Providing a Lump Sum of Time at Hire or the Start of the Year

Q. Can an employer place an annual cap on the amount of Earned Sick Time that can be accrued?

Webinar participants had the following questions.

- Can you confirm the time must be accrued? Can you not give the 40 hours at the beginning of the calendar year?
- Would we be compliant if we gave all employees 40 hours of earned sick time at the beginning of each calendar year and deduct from that as it is used throughout the year?
- If 40 hours paid in advance, can time off accrue into following year?
- If we provide lump sum payment to everyone at Jan 1, do we still need to track accrual time?
- If I allow each employee 40hours of sick time effective every Jan 1, or after 90 days for new hires, dos that meet the law?
- If you front load time under policy of PTO each year will you be able to bypass the over this hour increment tracking
- It doesn't seem practical for the average small employer (or even a larger one) to do accrual and provide lump sums at the beginning of the calendar period. It feels kind of covert- sneaky law
- Can we do annual grant on 1/1 vs. accrual?
- If you give more than the min required for sick (not PTO) on Jan 1st each year and don't accrue, is that ok?
- If we fund everything up front, then we are OK (we provided 2 weeks sick based on scheduled hours)
- If you give 8 days on Jan. 1 do you still have to track throughout the year?
- What if the employer gives the employee the 40 hours up front in January for a January to December if we give up front do we have to do any tracking?
- Record keeping: If we give 40 Hours PTO up front for sick time ....we do not have to track any accruals etc. correct?
- So are you saying that if we give 40 hours up front we do into have to track?

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- Are we covered if we decide to give all of our EEs 40 hrs. paid sick time up front instead of accruing, and instead of allowing a carryover?
- If the employer provides 48 hrs. to all employees at the start of the calendar year w/o any accrual would that be considered compliant?
- If Jan. 1 we give 80 hours of sick time for calendar year to all exempt and non-exempt employees, do we still need to track accrual?
- If we currently provide more than 40 hrs. of sick time to all regular employees and it is provided at the beginning of each FY with no limit to amount of hours allowed to carryover are we still required to go to an accrual system for them or just our interns/contract employees.
- If you front load all employees 40 hours of sick time in a calendar year then you will be compliant correct?
- If we have a nonexempt employee(s) who often work overtime and we give 48 hours of sick time on 1/1 of each year, do we have to calculate the employee's EST rate each pay period?
- Can I just make the 5 sick days available on 1/1 and not accrue, we don't know when or if they will be out sick.
- If an employer gives the employees 40 hours on July 1st to simplify things does the employee continue to accrue or is 40 hours the limit they can accrue?
- If we give 5 sick says to every employee on January 1st and do not hire any employees during the year, do we still have to track and calculate sick time accruals based on the 1 hour per 30 worked policy?
- Can we just give all employees 40 hours at the first of the year instead of doing the accrual process?
- If we give 80 hours of sick to nonexempt employees that they can begin to use immediately are we covered with the accrual rate?
- Is it still OK to give the full time employees their sick time of 40 hours up front come January 1, 2016 as we have done in the past, but have the part time employees accrue theirs and use it as they earn it.

*A: An employer can provide Earned Sick Time in a lump sum at the beginning of the year. The proposed regulations state that employers may provide more generous accruals of Earned Sick Time and cites the following as an example:*

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;

*As long as the amount provided is at least 40 hours, then a lump sum amount on the first day of employment or the start of the year is compliant with the law.*

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### Annual Cap on Total Hours Accrued

Q. Can an employer place an annual cap on the amount of Earned Sick Time that can be accrued?

Webinar participants had the following questions.

- If we have 35 hour work week and we allow 35 hours of sick time for our exempt employees can we also cap the non-exempt employees at 35 hours as well?
- Just a clarification, the accrual stops at 40 hrs.
- Do hours continue to accrue even though max hours to be used a year are 40?
- Please clarify, if you have a regular salary employee 40 hours per week if you do the 1 hour for every 30 hours worked that would be 69.333 hours do they accrual this or do we stop the accrual at 40?
- Do you continue to accrue this after employee hit 40 hours of earned sick time
- When does the accrual stop for PT employees? Is it 40 hours or up to the average hours worked per week?
- We have 37.5 work week and now we have policy to accrue 37.5 hours sick time per year. Should we increase to 40 hours?
- I believe Tom just mentioned a "40 hr. cap". Can you confirm that we can limit the accrual to 40 hours each year (i.e. we do not have to allow employees to accrue indefinitely each year)?
- I understand that they can only USE 40 hrs., but can they accrue more than 40 new hours in a single calendar year? Thanks!
- Can an employee earn more than 40 hrs. sick pay if they work sufficient hours? Or is 40 the max they can accrue?

A. *All employees must accrue at a minimum rate of 1 hour of Earned Sick Time for every 30 hours worked. An employer can put an annual cap on the accrual, but the annual cap may not be less than 40 hours.*

### Different Accrual Rates for Different Classes of Employees

Q. Can an employer give some employees a faster rate or higher amount of accrual than to others? Can an employer give full time employees a higher annual accrual than is provided to part time, seasonal or other employees? For example, can an employer provide 48 hours of Earned Sick Time to full time employees and 40 hours of Earned sick time to part time, temporary and seasonal employees?

Webinar participants asked the following questions

- Can you have a more robust policy for full time employees, and a separate policy for part-time employees?
- Can you give full time employees an upfront amount of sick time and part timers accrue on the hourly accrual? We currently give our full time people 52 hours per year.
- Can you accrue different for PT, Seasonal, other?

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- FT at a grant in excess of 1:30 but PT and Interns using the 1:30
- We currently provide more than 40 hours to regular staff. We will now have to provide 40 hours to per diem and fee for service staff. Can these groups of employees be treated differently with the per diem employees earning less than the regular employees?
- Can you have different accrual policies for full-time and part-time employees? Can you give full-time employees 6 days per year but have part-time employees accrue at the rate of 1 hour per 30 hours worked?
- We have full and part time staff who are benefited and accrue PTO. We also have per diem staff who currently do not accrue paid time off. Can we keep our current PTO benefit for the FT and PT staff and then create a separate EST accrual for the per diem staff?
- We have an existing benefit that is more generous than this 40 hrs... only FTE's are eligible for benefits at this time. So the question is---- Can we maintain the current benefit for FTE's and offer the PTE's the 40 hrs. as outlined in the proposed regulations?
- If an Intern works less than 90 days, are they not eligible for Earned Sick Time?
- If an employee works 20 hrs. per week they will have a maximum 20 hours per year requirement? Or is it 40 hours no matter if they are FT or PT? (i.e. - if they carry over time at end of year 1 - they could have 40 accrued by year 2)
- What about part-time employees who's full-time job is a municipal employee - are you subject to them earning paid sick time from the part-time employer?
- How does a part time employee accrue sick time? Is it based on the average hours they work each week?
- Can we have a more generous policy for year round employees' vs. seasonal employees?
- How does this calculation for part-time employees effect full time employees?

*A: Assuming all accrual rates meet the 1 hour per 30 hours worked accrual schedule and all employees have the ability to accrue up to 40 hours of Earned Sick Time in a calendar year, then both would be allowed under the current language since all employees would meet the minimum rate of accrual and accrual hours of the Earned Sick Time law. However, AIM advises waiting until the Attorney General's office issues any guidance or regulations to ensure that there are no prohibitions against making distinctions between full-time and part-time employees. AIM is seeking guidance on this issue.*

#### Prorated Accruals

Q. If an employee starts in the middle of the year, can we prorate the accrual?

Webinar participants had the following questions.

- If someone is hired 3 months into the year can we continue to prorate his or her sick time based on his or her hire date?

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- If we grant 40 hours up front at beginning of year, sounds like need to grant 40 hours immediately to new hires. Is there any way to pro-rate a new hire?
- If someone is hired mid-year, with the policy of 40 hours at hire, are the 40 hours pro-rated?
- If we do the lump sum method, can we prorate the lump sum amount for midyear hires? (i.e. someone hired in July only gets 20 hrs.)?

A. *You cannot prorate the rate of accrual based on an employee's date of hire. All employees, regardless of the date of hire, must be able to accrue at the rate of 1 hour for every 30 hours worked and must be able to accrue up to 40 hours per calendar year. For example, an employer's calendar year is from January 1 through December 31. An employee starts on March 1 and works 40 hours per week. The employee accrues at 1 hour for every 30 hours worked and will accrue 40 hours of Earned Sick Time before the end of the calendar year. Example, an employer's calendar year is from January 1 through December 31. An employee starts on January 1 and works 30 hours per week. The employee accrues at 1 hour for every 30 hours worked and will accrue 40 hours of Earned Sick Time before the end of the calendar year.*

Q. If an employee is scheduled to work part-time, can we prorate the accrual?  
Employers had several questions about prorating Earned Sick Time accruals.

- If an employee works 20 hrs. per week. They will have a maximum 20 hours per year requirement? Or is it 40 hours no matter if they are FT or PT? (i.e. - if they carry over time at end of year 1 - they could have 40 accrued by year 2)
- How does a part time employee accrue sick time? Is it based on the average hours they work each week?
- How does this calculation for part-time employees affect full time employees?

A. *You cannot prorate the rate of accrual based on an employee's scheduled hours. All employees, regardless of their scheduled hours, must be able to accrue at the rate of 1 hour for every 30 hours worked and must be able to accrue up to 40 hours per calendar year. For example, an employer's calendar year is from January 1 through December 31. An employee starts on January 1 and works 30 hours per week. The employee accrues at 1 hour for every 30 hours worked and will accrue 40 hours of Earned Sick Time before the end of the calendar year.*

#### Exempt Employees

The Earned Sick Time law and the proposed regulations state that exempt employees are credited with 40 hours per week for accrual purposes unless they work fewer hours. The proposed regulations state:

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

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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. Employees who are scheduled to work more than 40 hours would also accrue at their scheduled hours.

Webinar participants had the following questions.

Q. For EXEMPT employee can it be based on a lower number? Example: I have a manager that just cut down to 3 days from 5 - so I am basing her salary now on 30hrs

A. *You would credit this manager with 30 hours per week, not 40. As a result, the manager would accrue 1 hour of Earned Sick Time per week.*

Q. If you have an exempt employee who takes 8 hours of vacation in a 40 hour week does that mean that week is considered 32 hrs. worked for EST purposes?

A. *That is correct. Accrual is based on hours worked. Employers will want to make sure that their payroll accruals are set up to account for hours worked by exempt employees.*

Q. To clarify, exempt employees earn 1 hour for their regular work week rather than 1 hour for working 30 hours?

A. *No, they earn 1 hour per 30 hours worked. If an exempt employee's regular work week is 40 hours then that employee would accrue 1.33 hours of Earned Sick Time per week.*

### **Use of Earned Sick Time**

The ballot question identifies 4 reasons why Earned Sick Time could be used:

- To care for a medical condition of the employee
- To care for a medical condition of the employee's spouse, child, parent or parent-in-law
- To attend routine medical appointments for the employee of the employee's spouse, child, parent or parent-in-law
- To attend to the effects of domestic violence.

The specific language reads:

Earned sick time shall be provided by an employer for 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; or
- (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; or
- (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

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- (4) address the psychological, physical or legal effects of domestic violence as defined in subsection (g 1/2) of section 1 of chapter 151A, except that the definition of employee in subsection (a) will govern for purposes of this section. Subsection (c)

#### Allowed Uses of Earned Sick Time

Q. Can Earned Sick Time be used when an employee is out sick without being under a doctor's care? Does this law apply to an employee who just calls in sick with the flu?

A. *Yes, the use of Earned Sick Time does not require that the employee or a family member of the employee actually receive medical care from a doctor.*

Q. Can Earned Sick Time be used for reasons not listed in the law such as care for relatives not listed in the law or for nonrelatives?

Webinar participants had the following questions.

- Can EST be used for siblings' illnesses/appointments?
- Can EST be used to take care of children who are not sick, but whose caregiver called out sick? If the caregiver is not a parent of the employee
- Does it cover if it's a person (relative or no-relative) who resides in the employee's home?
- Can employer's ALLOW employees to use EST for other reasons than the law provides?

A. *The Earned Sick Time law states the reasons why employers must allow an employee to use accrued Earned Sick Time. An employer may allow an employee to use Earned Sick Time for additional reasons. These reasons could include caring for siblings or other reasons. The employer may not, however, set different notice or documentation requirements for weather related absences if the same bank of time is used for this reason as is used for the reasons specified in the Earned Sick time law.*

Q. Can Earned Sick Time be used for weather related absences?

Webinar participants had the following questions

- So...is an employer no longer allowed to pay a 'sick day' for a storm day?
- Are they saying that paid sick leave cannot be used for snow days????
- Can employees use Earned Sick Time if the company closes/cancels shifts due to inclement weather and/or emergency situations?
- Can employees use Earned Sick Time if they don't come to work due to weather related issues?

A. *An employer may allow an employee to use Earned Sick Time for additional reasons. This could include time off for weather related reasons. The employer may not, however, set different notice or documentation requirements for weather related absences if the same bank of time is used for this reason as is used for the reasons specified in the Earned Sick time law.*

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Opting for Unpaid Time

Q. Can an employee choose to take an absence as unpaid even if there is available accrued time and the reason they missed work falls into one of the categories stated in the Earned Sick Time law?

Webinar participants had the following questions.

- Is it the employee's choice as to whether or not they use the earned sick time for an absence?
- Can an employee call in sick but state they do not want to use their sick time?
- How does this affect the attendance if employees are out sick and do not want to use sick pay.
- If any employee does not want to use sick pay when out he can carry over 40 hrs. of unused sick pay?
- We require employees to use their sick pay if they have any when they callout sick. They do not have an option of staying out with no pay for the day. Can we still do this?
- We require our employees to use sick pay if available. Can we still do this?
- If employee chooses not to use EST, would the absence then be subject to discipline under the employer's attendance policy?
- Can the employee decide when to use this earned time - example: Joe has a doctor's appointment on Thursday & needs 3 hours off- he chooses no paid time- yet he now has those 3 hours for later or should you pay as soon as they make request for this type of time of the job
- What if an employee calls in sick for two days and then fills out timecard and doesn't want to use their paid time off and wants to get paid for just the 24 hours as he wants to save his paid time off for summer vacation? If this is fine with the employer then can this happen or does the employer have to pay them to comply with this EST law?
- For companies with paid EST, can the employee call out sick but request not to use paid EST (or other paid time)?
- So we could have a policy that if people decline to use their sick time for which they are qualified to use- we can call it an unexcused absence and apply attendance policy?
- If an employee decides not to use paid sick time (and uses unpaid sick time) is it still coming out of the same 40 hour bucket?

A. *The Earned Sick Time law and the proposed regulations state that an employee does not have to reference the Earned Sick Time law when taking time off. However, the proposed regulations also state that an employer can require that an employee complete a verification form identifying whether the time that was taken fell into one of the reasons for Earned Sick Time. Should an employee identify that the time off was for an approved reason then the employer could require that time be applied to accrued Earned Sick Time.*

*It is clear that an employer cannot unilaterally designate the time-off as unpaid time if the employee has accrued time available. It would also seem that an employer could allow an*

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*employee to take unpaid time with the mutual agreement of the employer and the employee. However, it is uncertain whether an employee could unilaterally choose to take the time as unpaid when there is accrued time available. AIM is seeking clarification on this question.*

Q. Can an employee make up time missed instead of taking Earned Sick Time?

Webinar participants had the following questions.

- In healthcare if an employee calls out on weekend shift we require makeup the next weekend - will that still be allowed?
- Our policy for hourly staff is that they can only make up time in the same work week, not pay period. Wouldn't allowing non-exempt staff to make up time the following week violate the FLSA laws?
- When discussing the option to "make up time" either in the current or the next pay period, you IMPLIED by saying, "if paid bi-weekly" that you may only make up time if within a bi-weekly pay period is this true? More importantly you said to "beware of the OT issue" I assume this means that if the time is made up and results in OT, then the OT MUST be paid and this is not an even trade. Is this true?

A. *An employee can make up time within the same pay period instead of using Earned Sick Time only by mutual agreement of the employer and the employee. An employer could not require that the employee work the hours without the agreement of the employee. An employer policy requiring that any employee calling in sick one weekend to work the next weekend would not meet the "mutual agreement" requirement. Nonexempt employees paid biweekly who make up the missed time in the next week of the pay period might incur overtime in the second week even though their total hours over the two week pay period total 80 hours.*

#### Early Use of Earned Sick Time

Q. Is the use of Earned Sick Time limited to accrued hours or can employees use Earned Sick Time before it has been accrued?

Webinar participants asked the following questions.

- Can employees use earned sick time before accruing it?
- Are employers only responsible to pay accrued sick time and are not forced to loan sick time?

A. *Earned Sick Time can be used before it has been accrued, but only by a mutual agreement in writing between the employer and the employee.*

Q. If an employee who has used Earned Sick Time before it has accrued terminates employment with a negative balance, can the employer deduct the balance from the final paycheck?

Webinar participants had the following questions.

- If we allow employees to take time off before accrued, can we recover this cost from final paycheck if employee quits before accruing the time?

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- If employee allowed to use sick leave before it is earned but then terminates, can company deduct pay for those hours from final check?
- A. *An employer can deduct negative Earned Sick Time balance from a final paycheck provided the employee signed an acknowledgement prior to taking the unaccrued time and the final paycheck does not reduce the employee's net pay to a rate below the minimum wage.*

### Exempt Employees

Q. How do you account for Earned Sick Time taken by employees who are exempt under the Fair Labor Standards Act?

Webinar participants had the following questions.

- I'm sorry if I missed this...does this apply to exempt employees? So even though they are salaried, they would need to take an hour of sick time if they come in 1 hour late due to an appointment?
  - So for exempt employees, we are still tracking sick time in hours? This doesn't run afoul of FLSA?
  - Regarding exempt employees, what do we do with this tracking if they get paid anyway?
  - What about for exempt employees whose time we do not track?
  - If exempt employee takes unearned sick time and we do not advance pay for that time, am I supposed to dock their pay for the missed hours? This contradicts wage and hour laws re pay treatment of exempt employees for partial days worked.
  - I thought if an exempt works any part on work week they must be paid for entire week.
  - But, they aren't paid hourly. Time off for doctor appointments isn't punished by less wages
  - Are we required to set up an accrual of sick time hours for salaried employees as well as the hourly employees?
  - Do we need to track salaried positions EST?
  - How do you suggest recording the time that Executives take for sick time?
  - How does it apply to salaried employees?
- A. *An employer's time off policy can allow the deduction of time off from a salaried employee's hours according to the policy. As for payroll procedures, employers should follow the same procedures they use for vacation time taken by exempt employees.*

Q. Are policies that provide unlimited time off to exempt employees compliant with the Earned Sick Time law?

Webinar participants asked the following questions

- We have liberal policies for exempt employees and no limit on 'sick' time. Is this a problem?
  - If we currently give exempt employees unlimited sick but don't track it, is that acceptable?
- A. *These policies meet the accrual requirements of the Earned Sick Time law. However, they must also allow the employee to use the time for the same reasons and in the same manner*

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as listed in the Earned Sick Time law. Also, they must have the same notice and documentation requirements.

Minimum Increments of Time in which Earned Sick Time May Be Taken

The ballot Earned Sick Time law and the proposed regulations state that Earned Sick Time may be used in the lesser of increments of 1 hour or the smallest increment that the employer's payroll system uses to track absence.

Earned sick time shall be used in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

Q. Does "account for absences or use of other time" include the minimum increment of time an employer uses for tardiness? Our smallest pay increment is 6 minutes, can an employee use 6 minutes a day every day to cover their tardiness until their accrual is used? If so, when does tardiness become something we can act on?

A. *It is not clear whether this phrase includes tardiness or instead attempts to identify the usual unit of time that an employer uses to account for traditional absences from work due to illness, Small Necessities Leave Act or other absences. Given the earned Sick Time law's limits on what employers can require for notice and documentation as well as the limits on employer discipline for use of Earned Sick Time, should Earned Sick Time be allowed to be used in this fashion employers would be limited in their ability to enforce timely attendance. The employer can require the employee to complete a form to verify that the reason for the tardiness meets the allowable uses for Earned Sick Time. This would be difficult to enforce if the employer decides to treat all time-off as Earned Sick Time. AIM is seeking clarification from the Attorney General's office on this question.*

Q. What if someone comes in an hour or so late and we had to put someone to work who would otherwise be off work? Would we be able to charge that late individual a full day?

A. *The proposed regulations state that*

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.

*The proposed regulations include an example in which a delivery driver needs to be dispatched at a particular time. The sensitivity of the employee's start time is a determining factor to being able to charge a full day of Earned Sick Time when employing a replacement.*

Q: We pay to the minute but we record everything as the quarter of the hour - does that mean we need to change to the minute on sick time?? That is a nightmare tracking.

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*A: If your payroll system tracks time to the minute for absence or any other purpose, then you must allow employees to take time in as small as 1 minute increments. AIM is seeking clarification on this issue from the Attorney General's office.*

**Q.** How do we use less than full day increments for exempt employees?

Webinar participants asked the following questions.

- Are employers **REQUIRED** to use sick for partial sick days for salaried employees?
- Why do we need to track partial time off for, say coming in late due to a doctor's appointment, for exempt employees if they are going to be performing work during that day?
- For exempt can you just allow them to use PTO only if out 1/2 or full day not by hours
- Will you be addressing timekeeping and utilization for exempt associates?

*A. An employer time off policy can allow the deduction of time off from a salaried employee's hours according to the policy. As for payroll procedures, employers should follow the same procedures they use for vacation time taken by exempt employees.*

#### Employer Limits on the Use of Earned Sick Time

**Q:** Can't an employer limit the hours used to 40 within a year?

*A: Yes, the law does not require an employer to allow the use of more than 40 hours of earned sick time in a calendar year. Even if an employee carried over 40 hours from the prior calendar year and accrued an additional 40 hours in the current calendar year, an employer can limit the total time used to 40 hours.*

**Q.** If an employee takes their 40 hours can you not pay them for sick time above the 40 hours?

*A. That is correct, an employer is not required to provide more than 40 hours of Earned Sick Time pay in a calendar year.*

**Q.** No matter what size an employee sick bank is now they can only take 40 hours annually for sick time, correct?

*A. The Earned Sick Time law requires that employers allow employees to accrue up to 40 hours of Earned Sick Time per calendar year. However, the law also allows employers to have more generous policies. If you have an existing balance of accrued time, the employer could decide to allow employees to draw upon that balance into the future.*

**Q:** Can I require an employee to apply sick time to a "waiting period" for short term disability? Currently there is a 40-hour waiting period before Short term disability benefits begin. Will this law affect the STD waiting period requirement?

*A: An employer could have a policy that requires employees to apply time off to applicable time off benefits. However, if the reason for the absence does not fit into one of the four reasons*

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*for using Earned Sick Time, then the employer could not require the employee to use accrued Earned Sick Time.*

Q. Our current policy does not allow an employee to use paid time off to be paid for missing a scheduled overtime shift. Will we have to pay Earned Sick Time when an employee calls in sick for an overtime shift?

A. *Neither the Earned Sick Time law nor the proposed regulations address this question. AIM is seeking guidance from the attorney General's office on this question. If it is required, the employee would be paid at their regular base rate of pay, not the overtime rate.*

Q. Can an employer choose to be assign employee absences to Earned Sick Time?

A. *The proposed regulations also state that an employer can require that an employee complete a verification form identifying whether the time that was taken fell into one of the reasons for Earned Sick Time. Should an employee identify that the time off was for an approved reason then the employer could require that time be applied to accrued Earned Sick Time.*

#### *Use of Earned Sick Time on Days Before or After Paid Holidays*

Q. Can an employer restrict certain times that this sick time cannot be used such as the day before or after a paid holiday?

The following question was asked by a webinar participant.

- Can an employer deny the use of sick time during Company shutdowns or the day before or after a Company paid holiday?
- If an employee uses a sick day before or after a holiday do they still get paid for the holiday?
- Our policy states sick time cannot be used 8 hours before a holiday or 8 hours after a holiday if they want to be paid for the holiday would this no longer be allowed with the new laws?
- If our holiday policy requires the EE to work the day before and after, can we still deny the holiday pay?
- Can you clarify, if the policy says that you are not being paid for the holiday if you are out the day before or after a holiday, do we need to pay for the holiday based on this new law.
- to complete that question if the employee calls out sick the day before a holiday can I refuse to pay that person the holiday
- If the employee does not work the day before a holiday and we pay them ESL -- can we still NOT pay them the holiday?
- I am wondering if we can still withhold the holiday pay. Our policy does not pay holiday if someone is out unscheduled the day before/after.
- Can we not pay for the holiday if they used sick day before or after? We would pay the sick pay day but not the holiday?
- If someone takes a sick day before or right after holiday do you have to pay the holiday?

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- If the employer's current policy states that holiday pay is forfeited if an employee calls out on the scheduled day before or after the holiday, does this still apply if the employee uses Earned Sick Time for the call-out?

A. *While neither the Earned sick Time law nor the proposed regulations directly address this question, they do state that an employee is entitled to take Earned Sick Time without notice for unforeseeable events and with a maximum seven day notice for foreseeable events. The proposed regulations state that an employer can only deny or delay an employee request to use Earned Sick Time when an employee has not complied with documentation requirements for a previous Earned Sick Time absence. It would seem that an employer could no longer deny holiday pay if a sick day is taken on the day before or after the holiday.*

### **Rate of Pay**

The ballot question states that Earned Sick Time is to be paid at the rate the employee would have been paid if he/she had worked.

“Earned paid sick time” ... 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 section 1 of chapter 151. Subsection (a)

The proposed regulations further clarified rate of pay as the employee’s base rate of pay.

- (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.

The proposed regulations also exclude certain types of compensation from pay for Earned Sick Time

- (2) 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

Employers had several questions on whether overtime and shift differential premiums should be included in the rate of pay for Earned Sick Time

### *Overtime and Shift Pay*

Q: Does the exclusion of “other premium rate” mean that shift differential is excluded from the same hourly rate?

Webinar participants had the following questions.

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- We have a second shift differential (5%) paid on all hours they worked. OT hours are included in the "total" hours, but paid at the "base" rate (times 1.5). Would EST be paid including the differential for these people?
- So do shift differentials have to be paid or just base rate?
- How does the law work when a shift differential comes into play? For example, hourly rate is \$10 but they receive \$2.00 more when they work a different shift.
- Yes, but is shift pay excluded? Seems to be under Premiums paid for "off work" hours, yes?
- Question regarding shift pay differentials. Under draft regulations definition Same Hourly Rate 1c and 4c. Does 4c exclusion of premium rates therefore exclude shift pay differentials?

*A: Neither the Earned Sick Time law nor the proposed regulations address shift differentials. However, the proposed regulations state that "premium rates" are not included in the calculation of pay for Earned Sick Time. Shift differentials are usually referred to as premium rates. AIM is seeking clarification from the Attorney General's office on this interpretation. At this time, it is not possible to state with certainty whether shift differential will or will not be considered when calculating Earned Sick Time.*

Q: If an employee uses Earned Sick Time for a Saturday or Sunday shift for which overtime is paid is Earned Sick Time calculated on the base rate or the overtime rate?

*A: As mentioned above, the proposed regulations exclude overtime pay from the same hourly rate to be paid when an employee uses Earned Sick Time.*

Q: Does an employer include paid hours for Earned Sick Time when determining the hours worked in the week when calculating overtime?

Webinar participants had the following questions

- Our current paid sick time does NOT count towards OT. Does EST count towards OT?
- Ex: 40 hour week- sick 1 day so only worked 32 hours so not eligible for OT if work additional hours
- We currently do not count sick time hours worked towards OT. Do sick time hours taken need to be counted toward OT calculation?
- Does EST time used in a pay used during a pay period count towards OT?
- If an employee wants to take EST, but they have already hit 40 hours, does the EST calculate towards OT? Additionally, can you prohibit employees from using EST if they already have 40 hours for the week?
- Sick time counts as time worked for OT?

*A: Laws affected overtime are based on hours worked. Some employers choose to count other paid hours such as vacation time, holidays, etc. towards overtime. However, that is not required. Earned Sick Time is not hours worked. An employer is not required to count Earned Sick Time hours towards overtime.*

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### Commissioned Employees

Q: What is the Rate of Pay for an employee earning commissions?

Webinar participants asked the following questions?

- If the employee is commission only, it is paid at minimum wage? Referring to Mortgage Originators.
- How do you manage commissioned employees whose rate of pay is variable?
- We have team members that are 100% commissioned but received a draw in advance of commissions. What rate would we pay sick since they have no base? Are we required to use their draw as a base?

A: *The proposed regulations exempt commissions from the rate of pay for Earned Sick Time. However, the rate of pay cannot be less than the applicable minimum wage. So, if the employee is commission only, then the rate of pay for each hour of Earned Sick Time taken would be the minimum wage.*

### Commissioned Employees with Multiple Rates of Pay

Q: What is the Rate of Pay for employees with multiple rates of pay such as piece work employees or employees who perform work on prevailing wage contracts?

Webinar participants asked the following questions;

- We have flat rate employees, so for vacation I take the previous year earnings divided by number weeks. Can I use this formula for the Earned Sick Time?
- We do blended rates. What is this going to do to that calculation?

A: *The proposed regulations address this situation:*

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.

*The employer will have to look back to the immediate prior pay period and determine what the employee’s rate of pay will be for Earned Sick Time taken in the current pay period. The calculation is based on the weighted average crediting both the rate of pay and the hours paid at that rate.*

### Contributions to Other Benefits

Q: Is an employer required to make contributions to 401k plans, pension plans, medical and other benefits for time taken as Earned Sick Time?

Webinar participants had the following questions.

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- Are Health and Welfare Benefits (employer fringe contributions) excluded from Same Rate of Pay as is 401(k) and retirement?
- Does the hourly rate of pay include union fringe benefits or just the wage?
- How does the same rate of pay work with union employees? Will we still have to pay into their union benefit package as well?
- Can employer 401(k) contributions be withheld when employee uses EST? (earned sick time only)

*A: The proposed regulations state that for employees compensated on an hourly basis, the same hourly rate includes*

a) base rate wages and (b) any other benefits paid or accrued on an hourly basis if the individual works.

*If a benefit is "paid or accrued on an hourly basis if the individual works" then the employer makes the contribution for each hour taken as Earned Sick Time.*

### Unpaid Earned Sick Time

Q: What is unpaid Earned Sick Time?

*A: Unpaid Earned Sick Time is the Earned Sick Time accrued by employees of employers with 10 or fewer employees. The time accrues at the same rate as paid Earned Sick Time and is used in the same manner and subject to the same regulations as paid Earned Sick Time.*

### **Payout of Earned Sick Time and Attendance Rewards Programs**

Although not mentioned in the Earned Sick Time law, the proposed regulations provide an opportunity for employers to payout accrued but unused Earned Sick Time at the end of a calendar year.

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.

Q. What is a payout?

Webinar participants had the following questions.

- CASH OUT?????????
- Please confirm the cash out.
- Payout means "give them a check"?

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- What does cash out mean? Do we have to actually pay the employee for time not used?
- I do not understand the concept of "Cashing out" and "Carrying over" the accrued time.

A. *A payout or cash out of Earned Sick Time occurs when the accrued time is turned into the monetary equivalent (hours multiplied by the employee's hourly rate of pay) and is paid to the employee through the employer's payroll. As a result, the employee's Earned Sick Time accrual is depleted by the number of hours converted to money.*

Q. Is the payout of Earned Sick time at the end of the calendar year required or optional?

Webinar participants had the following questions.

- Payout at the end of the calendar year is optional?
- Are companies of 50+ required to pay out accrued Earned Sick Time?
- Is there any situation when sick pay is cashed out?
- Do you have to pay out?
- Do you have to payout sick time?
- The question is CAN we still pay it?
- Is the payout voluntary by employer
- Payout isn't required, it's optional?
- We can cash out sick time that isn't used as long as it is more than 16hours?
- Are Employers required to CASH OUT any time??
- Why wouldn't someone want to be paid for their accrued sick time?

A. *The proposed regulations state that the employer has the option to payout accrued Earned Sick Time at the end of the calendar year. There is no requirement that employers payout accrued Earned Sick Time at the end of the calendar year.*

Q: Are employers required to payout accrued Earned Sick Time at the time of termination of an employee's employment?

Webinar participants had the following questions

- With summer interns if they accrue day one, but not eligible for 90 days and they do not work for more than 90 days in summer and you have combined into PTO do you have to pay out what is accrued?
- If we decide to give a lump sum of 40 hours of EST on January 1, are we required to pay out balance if employee terminates during the year?
- Vacation time must be paid when an employee leaves the company, as I understand it, it is OPTIONAL for us to payout sick time, correct?
- If you terminate someone wouldn't you have to pay them for the unused time since it was earned by them?
- Are employers required to pay out unused accrued EST at termination?
- So to confirm, going forward accrued sick time will have to be paid out at time of termination just as accrued vacation time is now?

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- Does an employer have to payout EST upon termination?
- If an employee terminates, are we required to pay sick time?
- Is unused earned sick time cashed out at termination and if so, how can the prior accruals be restored?
- In regards to Payout of EST, is Termination and Resignation considered the same thing?
- Due to the nature of our business we have a lot of turnover. Some employees only work a couple of days or weeks. We will still track hours but do we have to pay them out when the employee leaves?
- What if they resign? Can we pay them out for all their sick time when they leave?
- Would an employer be required to payout EST when employment terminates? (like you do w/vacation time)
- So, we don't pay out accrued sick time upon separation?
- What happens at the time of termination? Does the employer pay out all accrued sick time?

*A: The proposed regulations state “employers shall have the option but are not required to payout unused earned paid sick time upon separation from employment.”*

*Note: Many employers have expressed that they are considering combining Earned Sick Time into their overall PTO policy. These employers should review their policies and the nature of this time-off to determine if the combining their PTO policy and Earned Sick Time requires them to payout accrued time at the time of the employee’s termination of employment.*

Q: If an employer has a policy that pays out accrued Earned Sick Time at the end of the calendar year, can an employer choose not to accept the payout and carry over the hours into the next calendar year instead?

Webinar participants asked the following questions

- Does an employee have the option to get paid out unpaid sick time not used for the calendar year?
- It is our policy to pay out unused sick time. Employees do not have a choice whether we want them to or not. Can we keep this policy?

*A: The proposed regulations state that the employer shall have the option. It would seem that an employer’s policy could require that employees accept the payout. It is not clear whether employers could have a policy which provides employees with the choice of receiving a payout or carrying the time over to the next calendar year.*

Q: Can an employer payout accrued time at the end of the calendar year to some employees but not to others?

Webinar participants asked the following questions.

- Can we pay out some groups of employees, but not pay out other?

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- Can we choose certain classifications of employees to pay out? We are interested in paying out our non-exempt employees.
- We currently payout unused sick time now - but only for Non-Exempt. Can we continue with separate payout policies for Non - Exempt vs. Exempt?

*A: Neither the Earned Sick Time law nor the proposed regulations address this question. The proposed regulations state that an employer shall have the option "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." It is not certain that the choice to state "an employee" as opposed to "all employees" was intended to provide this flexibility to employers. AIM is seeking clarification of this issue.*

Q: Is an employer required to withhold up to 16 hours from the end of the year payout if the employer provides 40 hours or more hours of Earned Sick Time to all employees on the first day of the calendar year?

Webinar participants had the following questions

- If we give employees 6 sick days at the beginning of the year (they don't have to accrue them), can we cash them out in full at the end of the year?
- What if we front load...can we payout all 40 or do we still have to allow 16 to carry over?
- Can you cash out the entire bank of time if you front load the time for the employee?
- Do you have to allow cash out of more than 16 hours if your sick policy provides 90 hours up front every FY?

*A: While the intent of withholding 16 hours from the payout is to ensure that employees have time available in the new year to address matters before sufficient new Earned Sick Time has accrued, a concern that is addressed by the granting of 40 or more hours at the start of the calendar year, the proposed regulations do not list any exceptions to the requirement to carryover 16 hours of accrued and unused Earned Sick Time to the next calendar year.*

Q: Is an employer required to payout more than 40 hours of accrued Earned Sick Time?

Webinar participants had the following questions.

- In year two if we allow people to carry 40hrs are we required to pay out on the end of the year more than 40hrs if they have remaining?
- If they carry over 40 hours the employer can only pay them for 40 hours even after accrual of another 40 hours throughout the year, is that true?
- Do we have to pay out at end of calendar year? If we don't, does the employee keep the accrued time but can only use 40 next year?

*A: The proposed regulations state an employer has the option "to offer an employee a payout of up to 40 hours of unused earned sick time." It would seem 40 hours is the maximum number of hours that can be paid to an employee at the end of the calendar year. If the employee carried over 40 from the prior calendar year and accrued an additional 40 current calendar year, then the most the employer could pay out 40 hours and the employee could carryover*

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*the other 40 into the next calendar year. If the employer does not offer a payout, then the employee would carryover 40 hours and forfeit the other 40 hours.*

Q: Can an employer payout Earned Sick Time at a rate different from the employee's hourly rate of pay?

Webinar participants had the following questions.

- If you pay someone out does it have to be at his or her hourly rate?
- Cash out for unused - must be at 100% or can policy be a predetermined percentage, e.g. 50%?

A: *The proposed regulations do not address the rate of pay for a payout of accrued Earned Sick Time. Absent any language, it is likely that the same rules on rate of pay apply to a payout of earned Sick Time as apply to the use of Earned Sick Time.*

Q: Can an employer payout Earned Sick Time during the course of the calendar year?

A: *The proposed regulations state "an employer is not permitted to payout sick time as it accrues during the employer's calendar year."*

#### **Attendance Awards**

Q: Can an employer provide rewards for meeting certain attendance goals?

A: *The proposed regulations state that employers may provide rewards for attendance provided employees who use Earned Sick Time are not subject to adverse actions.*

*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.*

#### **Carry Over**

The ballot question and the proposed regulations both state

*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.*

Q: Can an employee carryover more than 40 hours?

Webinar participants had the following questions.

- In our previous policy we capped our sick time at 40 days per year, can we cap how many sick days/hours employees keep on the books? Because 40 hours can rollover

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each year, if someone doesn't take sick time for 3 years, can they keep all 15 days on the books (we offer 5 per year)? Does it keep accumulating?

- Regarding carryovers, is 80 hours the max? Do employees stop accruing once employees hit the 80?
- Do I understand that you cannot carry over more than 40 hours?
- Employee can carry over up to 80 hours but it also said we can limit that to 40 - what is the actual requirement under the law. Somewhat confusing. Thanks
- Hi. If an employee rolls over 20 hours into the next year are you required to let them take that 20 hours on top of the 40 hours that they have in that year?

*A: The ballot question language states that an employee may be allowed to carry over up to 40 hours into the next calendar year. This appears to set the maximum carryover required by the law. Another section of the ballot question states that employers may allow employees to accrue and use Earned Sick Time in a more generous manner*

Nothing in this chapter shall be construed to discourage or prohibit an employer from allowing the accrual of earned sick time at a faster rate, or the use of earned sick time at an earlier date, than this section requires. Sec. 1(d)(2)

*However, this section of the ballot question does not mention carryover. Another section states that an employer may provide more generous sick pay policies*

Nothing in this section shall be construed to discourage employers from adopting or retaining earned sick time policies more generous than policies that comply with the requirements of this section... Sec. 1(j)

*Under this section, it appears that an employer could allow an employee to carryover more than 40 hours into the following calendar year. However, if that employer is also limiting the amount of Earned Sick Time an employee can use in a calendar year to 40 hours, then there would be no reason to allow more than 40 hours of carryover. It would only make sense to allow more than 40 hours of carryover if you are also going to be more generous in the amount of time that can be used and increased the annual use to more than 40 hours.*

Q: Does an employer have to allow for the carryover of Earned Sick Time if it provides 40 or more hours of Earned Sick time on the first day of the new calendar year?

Webinar participants had the following questions.

- If the employer provides 48 hours of sick time at the beginning of each calendar year...does unused sick time have to be carried over?
- If you do a full grant you don't need to carry?
- If you award 40 hours of sick at the start of each year do you still have to allow for 16 hours of carry over?
- Must we still allow carry over if we provide a more generous policy for use on January 1st? We would pay out on 12/31.

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- Specific to this topic right now, do you have to carry anything over if you always provide them 40 hours of sick on January 1st?
- If an employer offers more than the 40 hours for earned sick time per calendar year (56) and every employee receives a bank of 56 hours every January 1, do they still have to allow a carry over? If so, can the employer limit the amount of sick time an employee can take during the calendar year?

*A: While the intent of carrying over Earned Sick Time is to ensure that employees have time available in the new calendar year to address matters before sufficient new Earned Sick Time has accrued, a concern that is addressed by the granting of 40 or more hours at the start of the calendar year, the proposed regulations do not list any exceptions to the requirement to carryover accrued and unused Earned Sick Time to the next calendar year*

**Q:** If an employee carries over 40 hours into the new calendar year and accrues another 40 hours in the new calendar year what happens to the extra hours if the employer allows employees to use up to 40 hours of Earned Sick Time per year?

Webinar participants had the following questions.

- If you can stop accruing at 40 hours, and an employee does not use any, and the employer must allow a carryover of up to 40 hours, and the employer only has to pay up to 40 hours - does that mean the employer would not have to accrue any new sick time for that employee in the new year?
- The law states there is a carryover provision of 40 hours, yet you cannot use more than 40 hours in a year. What is the purpose of the carry over if you are not going to pay for unused time?
- Do carryover sick hours used in the new calendar year count toward the employee's eligible 40 hours for the current year?
- If they carry over 40 hours and end up with 80 hours at end of year will they lose the 40 hours if we do not pay out?

*A: Regardless of the number of hours carried over from the prior year, an employee still has the ability to accrue up to 40 hours in the current calendar year. An employer can limit the amount of Earned Sick Time used in a calendar year to 40 hours. Any hours above 40 are either paid out, carried over or forfeited.*

**Q:** Can Earned Sick Time be converted into a sick pay bank?

Webinar participants had the following question

- Instead of carrying over to the next year or cashing out unused sick time, are we allowed to bank unused sick time for LOA purposes during, say, the elimination period or personal portion of a LOA?

*A: The annual accrual of up to 40 hours and the carryover of up to 40 hours appear to be limited to solely being used for Earned Sick Time or a payout. Neither the Earned Sick Time law nor the proposed regulations address hours that exceed amounts that can be used, paid out or*

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*carried over and would otherwise be forfeited. There is no direction on whether these hours can be converted into a sick bank.*

Q: We do not currently allow employees to carry over time. We start fresh each year. Do we have to allow a 40 hour carryover or can we just pay out at the end of the year?

A: *The ballot question language states that an employee may carryover up to 40 hours of accrued time. While it might be possible that an employer could provide an employee the option of carryover or an end of the year payout (see the section on payouts), an employer would not be able to deny an employee the opportunity to carryover up to 40 hours.*

### **Employee Notice**

The Earned Sick Time law states

When the use of earned sick time is foreseeable, the 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.

The proposed regulations expand on the notice requirements for the use of Earned Sick Time in several ways.

- An employee does not have to explicitly reference “Earned Sick Time” when either providing “reasonable notice or reporting of an absence for earned sick time”
- Employers may require employees to make a “good faith effort” to provide advance notice to all situations, not just those that are foreseeable.
- Reasonable notice includes “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.”
- Employers must either have an existing policy on notice procedures or establish one, preferably in writing.
- “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.”

The proposed regulations further define the acceptable notice procedures for the use of earned sick time that is foreseeable and unforeseeable as well multi-day absences.

- Employers can require up to seven days advance notice for foreseeable use of earned sick time provided there is a written policy on notification procedures.
- Employers may require employees to provide notice for each a day of a multi-day absence.
- If the use of earned sick time is unforeseeable, then the “employee must report this need to the employer as soon as is practicable” and follow the employer’s notification procedures.

Finally, the proposed regulations state that notice may be provided by the employee or the employee’s “surrogate”. A spouse, adult family member or other responsible party are mentioned as possible surrogates. The proposed regulations do not require that the employee provide notice unless incapacitated.

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### *Employer Policies*

Q. How do employer policies affect the notice requirements?

Webinar participants had the following questions.

- I have supervisors that will not accept call outs because of staffing issues as we own nursing homes and staffing is critical for our business. Do you think we should change that practice?
- For staffing services if a temp calls the client company versus the staffing service does that count?

A. *Employers should develop written policies that clearly state the accepted methods of providing advance notice and reporting an absence. These policies should be clearly communicated to supervisors, employees and employees employed through a temporary agency.*

### *Foreseeable and Good Faith Effort*

Q. How do employers determine what is foreseeable and unforeseeable and whether the employer acted in good faith?

Webinar participants had the following questions.

- How do employers determine what is foreseeable and unforeseeable? That could be a difference of opinion between employer and employee?
- How much time is "good faith effort", one hour, 5 minutes?
- What if they call hours later to say they wanted to use sick time but it doesn't comply with our policy...can we discipline them (i.e. warning) for attendance?

A. *The proposed regulations do not specify what a foreseeable use of earned sick time is. They do make a distinction between advance notice and reporting of absence. The proposed regulations do not specify what a good faith effort is. It would appear that there needs to be a review of the circumstances and how well in advance the employee knew of the need.*

### *No Call No Show Policies*

Q. Can an employer maintain a no call no show policy?

Webinar participants had the following questions

- So, if someone doesn't show up for work one day and doesn't call, can we term him or her as a NCNS?
- What if you have no call, no show for multiple days? Is there an assumed employer requirement to pay earned sick time?
- How about a no call no show? Can employee ask for sick pay?

A. *The proposed regulations do not address no call no show policies. They do state that an employer wishing to enforce its notice requirements for the unforeseeable use of earned sick time must have a written policy. If an employer has a written policy that includes disciplinary action for no call no shows, it would still have to comply with both the requirement to pay earned sick time that is available and to review whether the employee made a good faith effort to provide either advance notice or the reporting of an absence.*

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### *Tardiness and Early Departures*

Q. How does the Earned Sick Time law impact our attendance policies on tardiness and leaving work early without authorization?

Webinar participants had the following questions

- If an employee decides to leave early for the day must they state it's because they are sick in order to get paid sick time when leaving or can they decide the next morning
- As the law stands right now, is there anything that I can do to prevent an employee from coming in 15 minutes late every day for 160 days, by claiming it as sick time?
- Can employees use sick time for coming in late 10 minutes twice a week almost all year due to sickness

A. An employer will have to review the circumstances and determine if the employee has made a good faith effort to provide advance notice or to report an absence. The employer can maintain written policies on the proper ways to provide notice and address the employee for failing to follow those procedures.

### **Documentation**

The Earned Sick Time law places limitations placed on an employer's ability to request documentation for the use of Earned Sick Time.

An employer may require certification when an earned sick time period covers more than 24 consecutively scheduled work hours.

The type of documentation that may be required is defined as

Any reasonable documentation signed by a health care provider indicating the need for earned sick time taken shall be deemed acceptable.

The proposed regulations further define a health care provider as

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

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.

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The proposed regulations also reference a form to be developed by the Attorney General's office that employers may use including a "check-off listing of the statutory reasons for permissible use of earned sick time."

The proposed regulations also state that employers may not disclose information on domestic abuse without the consent of the employee nor may the employer "require any documentation to explain the nature of the illness or the details of the domestic violence."

Employees may submit documentation for the use of earned sick time that exceeds 24 consecutive work hours 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.

Employees must submit the documentation within 30 days of taking the earned sick time. Should an employee without reasonable justification fail to follow an employer's documentation procedures, then an employer may either delay or deny future use of earned sick time.

#### *More than 24 Consecutive Hours of Work*

Q: Does the more than 24 consecutively scheduled work hours apply to the employee's schedule or the scheduled hours for all employees?

Webinar participants had the following questions

- Is a Doctor's note needed if an employee is out of work for 3 consecutive days?
- In other words, 3 work days or 1 24 hour day?
- Is it 24 hours or 3 8 hour workdays before we can require documentation?
- Please clarify the 24 hours. Is this saying if you are out for 3 8 hour workdays then the employer can require documentation? That's confusing.....
- Can you request medical documentation for less than a 24 hour absence if you suspect fraud of earned sick leave use (out one day - don't believe the employee is using for sick leave)
- 24 consecutive hours doesn't mean 1 day - it means 8 hrs. 8hrs, 8hrs, 8hrs, right?
- Does "24 consecutive work hours" include weekends? So if someone is out Thursday, Friday and Monday, does that qualify? (Otherwise for practical purposes it's a week)
- So a full time employee works 24 hours faster than a part time employee. Documentation requirements may be different for each employee.
- Does 24 consecutive work hours equals to 3 days working 8 hours shift?
- What if the employers 3 consecutive work hours = 21, can that be the criteria for requesting medical documentation. It is essentially 3 work days but it isn't based on an 8 hour day but a 7 hour day?

A. *Twenty-four consecutive hours is determined by the employee's schedule, not the company's operating schedule. Nor can you assume that 24 hours equals 3 shifts. You look at the time worked by the employee.*

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*Employer recourse for employee failure to provide documentation*

Q: What can an employer do if the employee fails to provide documentation?

Webinar participants had the following questions

- What if an employee provides documentation AFTER the 30 days and when they want to take more paid sick time?
- If employee fails to comply with documentation requirements, ER may delay or deny future use of accrued EST. But for how long? Forever?? Can AIM help us propose an alternative approach to this during the public comment period?
- EE takes EST for sick child doctor's appointment, but does not follow through by supplying a doctor's note; do we deduct that time from next pay period?

*A: The proposed regulations appear to indicate that an employer may not delay or deny subsequent requests for earned sick time if documentation for prior use has not been received during the first 30 days after the date of use. However, once past the 30 days, the employer would only be able to delay or deny the future use of earned sick time until the documentation is received. Once received, the employer would not be able to delay or deny a subsequent use. The employer cannot refuse or delay payment for time taken.*

*Employer allocation of time taken to Earned Sick Time*

Q: Can an employer charge time taken to earned sick time without an employer specifically stating that was the reason for the absence?

Webinar participants had the following questions

- To circumvent the employee notification requirement, can we just write our policy to state, "if you mark your time off as sick time, we will assume you have taken sick time for the reasons outlined in the MA Sick Time Law"? That puts the burden on the employee.
- Can the employer assign sick time, if employee is late and out of other time?
- Does employee who calls in sick have to tell employer "I want to use paid sick time" or does employer just process as paid sick time.
- Do employees have to request to use sick time or do employers have to apply it?

*A: While the proposed regulations state that an employee does not have to reference earned sick time to use the time, they do not provide clarity on whether an employer can assume that time taken is earned sick time unless otherwise stated. The proposed regulations do state that the Attorney General's office is developing a form with a check-off of the various reasons why earned sick time may be used. An employer may want to use such a form to document how time-off is to be applied.*

*Verification that time was taken for an Earned Sick Time allowable purpose*

Q: Can an employer require that employees certify that time taken was for one of the approved earned sick time reasons even if the time taken was 24 consecutive work hours or less?

Webinar participants had the following questions

- Can employer require that an employee confirm in writing that the sick time is being taken for one of the allowable reasons?

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- So would we just change our SICK SLIP to a VERIFICATION FORM?
- If you are unable to ask what they are using the time for how would you find if someone was "engaging in activities not consistent with allowable purposes for earned sick time"?
- I see the reasons sick time may be used for, however, since employers can't ask for documentation for the use of sick time less than 24 hours, in essence it can be used for any purpose - correct?
- As an Employer are we able to ask for specific documentation from the employee for the minimum amount of time off; i.e.: doctor's notes or proof from spouse or family members doctors that the employee was actually using their EST for the specific reason the law was written rather than take a day off to go to the beach?
- Can you use a Paid Sick Time Request Form -same as a vacation request form to verify time taken was used as sick time
- We have a "request for time off" document that employees currently fill out for vacation or any time off requests...

A. *It does appear that an employer could use a form to verify how time-off should be charged. The form would not be able to require the signature of a health care provider and would simply list the approved uses for earned time-off and ask the employee to certify that the time taken was for one of the reasons listed.*

#### *Impact on Documentation for FMLA, Return to Work and Other Compliance Programs*

Q: How do the limitations on an employer's ability to ask for documentation affect the employer's administration of FMLA, SNLA, return to work programs and other compliance programs?

Webinar participants asked the following questions

- Can you require a medical provider's note stating employee is fit for duty if less than 24 hours?
- The law says we can't ask for the nature of the illness but what if details of the condition is required for FMLA, MMLA or STD?
- Currently, if we are aware that an employee is out sick for 1-3 days and they were hospitalized we require a return to work note. Can we still do this with the new documentation rules?

A. *The proposed regulations are not clear on how the limitations they place on employer requests for medical documentation will impact an employer's ability to manage these compliance to these laws and policies. It would seem that while an employer could not require documentation for the purposes of the Earned Sick Time law unless the employee's absence exceeds 24 consecutive work hours, an employer could still require the required documentation to fairly and efficiently administer compliance to these law, programs, and to ensure safety when returning to work. AIM is seeking clarification from the Attorney General's office.*

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*Employer policies requiring medical documentation for unplanned absences the day before or after a holiday.*

Q: Can a company require that an employee taking an unplanned absence the day before or the day after a paid holiday provide medical documentation or forfeit the holiday pay?

Webinar participants asked the following questions

- Can you still have a policy of needing to work the scheduled day before & day after a holiday in order to receive Holiday premium
- The question remains can you NOT pay holiday with or without a note
- I didn't hear that they answered the question about taking the sick time before a holiday requirement
- Can you still have the policy of no pay if you call out day before or after holiday?
- What was the answer to whether we cannot allow use of sick time before or after a holiday in order to get paid for the holiday
- Will we still be able to require employees to work the day before and day after a holiday?

A: *Under the proposed regulations an employer would not be able to require a doctor's note for an absence that does not exceed 24 consecutive work hours. Policies that require a note to receive holiday pay would not be compliant.*

Q: We have a shutdown at end of year. We require a note from any employee that calls out sick during shut down. Can we still implement that rule?

A: *Under the proposed regulations an employer would not be able to require a doctor's note for an absence that does not exceed 24 consecutive work hours. Policies that require a note to receive holiday pay would not be compliant.*

Q. Is email considered proper documentation?

A. *The proposed regulations state that documentation may be provided by "any customarily used method for the employer and employee to communicate." E-mail is listed as one of the possible ways to provide documentation, but it would depend on how the employer and the employee customarily communicate and which methods are allowed under the employer's policy.*

## **Discipline**

The Earned Sick Time law states that it shall be unlawful for any employer to include the

using and 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 this section.

The Earned Sick Time law also states that an employer may not take adverse action against an employee for using earned sick time, opposing employer actions which the employee believes

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to be in violation of the Earned Sick Time law, or for supporting another employee's use of earned sick time.

The proposed regulations cite the following as examples of adverse actions that an employer may not take against an employee for any of the above reasons

- 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.

The proposed regulations state limited actions that an employer may take in specified situations:

- Delaying or denying the future use of accrued earned sick time when an employee fails to comply with an employer's reasonable documentation requirements
- Disciplining an employee for "committing fraud or abuse by engaging in activity that is not consistent allowable purposes for leave"
- Disciplining an employee for "exhibiting a clear pattern of taking leave on days when the employee is scheduled to perform duties perceived as undesirable"

Q. Can an employer take disciplinary action against an employee if the employer knows the employee is using earned sick time for a reason other than one of the allowable purposes for earned sick time?

Webinar participants had the following questions

- What if you have proof (Facebook posts and pictures) a person took a vacation (to Disney World) but said it was earned sick time?
- Employees could lie and say they had a doctor's appointment but really didn't and we no recourse?

A. *The proposed regulations state that an employer may take disciplinary action against an employee who uses earned sick time in a fraudulent manner. However, an employer's policy would have to specifically state the reasons why the accrued time may be taken and the employer should have proof of the fraud, which may be difficult due to the limits place on an employer's ability to ask for documentation for absences that do not exceed 24 consecutive work hours. Employers who combine sick time, personal time and vacation time in one bucket might have difficulty demonstrating fraud.*

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Q. Can an employer discipline an employee who consistently uses earned sick time on certain days or for frequent tardiness?

Webinar participants asked the following questions

- Is the pattern only "when duties are perceived as undesirable?" What about if the employee takes every Monday - every Friday - every day after holiday
- Can we discipline an employee for no call no show?

A. *The proposed regulations only cite one type of pattern absence for which an employer may discipline the employee - the avoidance of duties perceived as undesirable. It is not clear from the language whether this was cited as an example or as the only type of pattern absence for which discipline can be administered. AIM is seeking clarification on this question. A single no call no show would not rise to the level of a pattern.*

Q. Can an employer consider attendance when making employee decisions?

Webinar participants had the following questions

- Can you be penalized or receive a black mark for using sick time?
- Can we continue to use attendance, including the use of accrued earned sick time, as a factor in our performance evaluations and salary reviews?

A. *An employer could consider attendance when making employment decisions affecting the employee only insofar as the use of time-off exceeded that allowed by the earned sick time law. For example, if an employee accrued 40 hours of earned sick time but then used 56 hours of time off, the employer could consider the 16 hours over the 40 hours allowed by the Earned Sick Time law when making employment decisions.*

Q. If an employee shows up late, finds that there had been a replacement called in for them, and they don't have enough EST for the entire day....can you discipline them?

A. *An employer could discipline an employee to the extent that the employee using time that exceeds the hours allowed under the Earned Sick Time law. If the employer is able to charge the employee the full day for an absence and the employee does not have a full day of accrued time to apply against it, then the employer could discipline the employee.*

### **Recordkeeping**

The Earned Sick Time law authorized the Attorney General to "prescribe by regulation the employer's obligation to make, keep, and preserve records" of earned sick time. The proposed regulations state that employers "shall keep a true and accurate record of the accrual and use of earned sick time" and that the records must be maintained for 3 years. The records must be available to employees to inspect them and made available upon demand to the Attorney General's office.

### *Reporting on Pay Stubs*

Q. Do employers have to report earned sick time on employee pay stubs?

Webinar participants asked the following question

- Is the accrual and balances required to be on paystubs?

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- Do pay stubs have to present earned and/or unused earned sick time?
- Does the accrued time need to be posted on employee pay stubs? Or do employers need to have the accruals posted somewhere for each employee to see?
- Is it the employer's responsibility to report eligible accrued earned sick time to its employees, similar to giving accrual of deductions/contributions in payroll?
- Do the accruals have to show on the paycheck?

A. *Neither the Earned Sick Time law nor the proposed regulations require reporting of earned sick time accruals or usage on the employee's pay stub. While an employer may choose to do so, nothing in the law or the proposed regulations would require it.*

#### *Administrative Concerns*

Q. How can employers administer the multiple time-off policies and laws that they have to track?

Webinar participants asked the following questions

- How do we keep track of 200 employees earned sick time?
- How is an employer supposed to keep track of sick accrual for every circumstance - if they are out on vacation or holiday - it is NOT included in accrual? How do you keep track of that?
- Tracking sick time in payroll (do we need a new payroll item called "sick time")?

A. *Employers will have to develop a process for verifying the time taken is earned sick time and that it is charged against accrued balances. Compliance with the notice, documentation and recordkeeping requirements of the law will require the devotion of administrative time to properly comply. Employers should consult with their timekeeping and payroll providers to identify ways to collect and track this data.*

#### **Employer Notice to Employees**

The Earned Sick Time law states that the Attorney General's office is to develop a notice of the law and that employers are to

Post this notice in a conspicuous location accessible to employees in every establishment where employees with rights under this section work.

The proposed regulations further require employers to "inform their employees at the onset of employment what constitutes a "calendar year"."

Q. In what ways is an employer required to notify employees of the Earned Sick Time law?

Webinar participants had the following questions

- We are required to put this benefit in offer letters? It's not sufficient to refer to time off policies as a benefit covered later in the handbook?
- Do employers need to post a notice of this new law and share it with all employees?
- Is having a poster and adding to employee handbook considered compliant notification under the law?

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- Does the handbook acknowledgement form cover this?
- A. *Employers are not required to include information on the Earned Sick Time law in offer letters or even in employee handbooks. All that is required is the posting of the Attorney General's yet to be released notice and informing employees at the time of hire of the calendar year the employer uses for earned sick time purposes. Many employers may choose to use the handbook for this purpose.*

### **Impact on Current Paid Time Off, Sick Pay and Vacation Policies**

Many Massachusetts employers already have some type of paid time off policy that provides 40 hours or more of paid time off per year. These employers have asked if they can maintain their current policies. The ballot question does address this question.

Employers required to provide earned paid sick time who provide their employees paid time off under a paid time off, vacation or other paid leave policy who make available an amount of paid time off sufficient to meet the accrual requirements of this section that may be used for the same purposes and under the same conditions as earned paid sick time under this section are not required by this section to provide additional earned paid sick time. Sec. 1(k)

These employers are not required to provide additional time provided the time that they provide meets the accrual requirements and may be used for the same purposes as stated in the ballot question language (See FAQ section on Use). Employers should be cautious in taking this approach, however. Calling all paid time off Earned Sick Time would extend the benefit to part-time, seasonal and temporary employees and would allow employees to use all of their time with the same notice and documentation requirements of Earned Sick Time. These requirements may be too burdensome for many employers. These employers will face the decision of either adding additional time or carving out 40 hours of their current time off benefits to be used as Earned Sick Time.

Q: Our current time-off policy does not accrue in the same manner as the Earned Sick Time law requires. Do we have to change our policy to accrue 1 hour for every 30 hours worked?

Webinar participants asked the following questions.

- We provide 64 hours lump at hire and then every hire date anniversary. Must we change to accrual system?
- We award 40 hours of sick time on 1/1. Are we covered and don't need to use an accrual system and also we do not need to carry over into the next calendar year as the state cap is 40 hours in any given year anyway.
- Our company gives 54 hours per year of sick time, are we allowed to provide those total hours on the first pay period of the new calendar year?
- WHAT DO WE DO WITH OUR CURRENT POLICY OF 64 HOURS UP FRONT DAY 1?????

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- We have one group of employees who only work 38.75 hours a week. We have an ET program. If these employees only work straight time for a year, they only earn 38.75 hours/week. They only earn 1 week for years 1 and 2. Do we modify the accrual rates for year 1 and 2??

A. *Both the Earned Sick Time law and the proposed regulations allow an employer to substitute its time-off accrual policy for the 1 hour per 30 hours worked 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

*If the employer's current accrual policy meets one of the above criteria, then it may be used instead of the rate of 1 hour for every 30 hours worked.*

Q: Can we maintain our current attendance policy that provides rewards for perfect attendance and points that count towards possible disciplinary action for time taken?

Webinar participants had the following questions

- Does the new EST law affect our attendance policy? Is EST an excused absence?
- If this time is used and we have a company attendance point policy, can an employee receive points for using this time?
- Is offering a personal (bonus) day a quarter for perfect attendance (did not use any sick time during the quarter) an adverse action. It is a reward we give for not using sick time. If you use sick time you do not earn the day that quarter.
- We have an attendance control program that issues a "point" for each unapproved (sick - not covered by FMLA) absence. Employees could be terminated if they earned 6 points in a rolling 12 month period. How would EST affect this point system?
- You say you can have a good attendance award, but cannot punish those who use time. That still means we can give \$100 for example to someone who uses no sick time, and not give that to someone who does? Not earning the perfect attendance would not be considered punitive, correct?

A. *The Earned Sick Time law and the proposed regulations state that an employer may not consider "the taking of earned sick time under this section as a negative factor in any employment action". Attendance systems that apply points to the use of earned sick time and that accrue towards potential disciplinary action would not comply with the Earned Sick*

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*Time law. The proposed regulations do allow employers to rewards employees for good attendance.*

Q. Our current PTO or vacation policy provides more than 40 hours of time-off per year. Can I combine earned sick time into this policy?

Webinar participants asked the following questions

- If I have a PTO policy that is more than 40hrs, say 4 weeks of time-off, does the Earned Sick Time rights spread to all that time if I don't have a separate "bucket" of Earned Sick Time?
- We have 40 hours of PTO. Can they use all 40 hours for vacation or do we need to account all 40 hours for sick leave?
- Is PTO considered a solution to this? For example if a company currently manages separate vacation/sick buckets, could they switch to a PTO system of a combination of 4 weeks of time-off and be in compliance because it's at least 40 hours?
- So if a PTO provides for a greater accrual rate and at least 40 hours/year, it's ok to keep the PTO policy?
- If you combine your current Vacation policy with sick and call it PTO time, can you require employee to use time for any absence?
- We currently offer our employees 1 week of accrued paid time off. They are able to use this for medical or personal reasons, including needing a day off. When we transition to this earned sick leave, it will replace out current paid time off policy. Does this mean employees are prohibited from using their earned sick time for personal needs (aka a day off)?
- Currently, I have 3 weeks of vacation time - 120 hours. I also have 16 hours medical absence time (sick) and 8 hours of personal time. How does that change?
- If your PTO policy is combined for all PTO but still more generous, will we need to separate out "sick time"?
- In our current PTO policy for non-exempt employees, they use the time for sick, vacation and personal things like going to their child's school etc. We do not specify how much time they have for sick time but it is way more than the amount required (40 hours) if they need it. Can we keep our policy as it is or should we going forward in our policy specify that 40 hours of the PTO is for sick?
- Our PTO is more generous after a full year full time employment...does that exempt us?

A. *The proposed regulations allow employers to substitute their current vacation, PTO, personal time or other time-off policy for earned sick time provided the time-off*

- 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;

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- d. come with the same notice requirements to employees; and
- e. be afforded the same job protections.

*The employer would have to allow employees to use the accrued time off under the same conditions as provided by Earned Sick Time. The limitations on advance notice might dissuade many employers from choosing to combine all of the time-off into one bucket.*

Q: Our current policy allows employees to take time-off to attend to the medical type of emergencies that are mentioned in the Earned Sick Time law as well as for personal reasons such as snow days and school events. Can we allow employees to use the time for personal reasons or do we have to separate out personal time from earned sick time?

Webinar participants had the following questions

- Currently we have 40hr to be use for personal or sick time. Is that OK?
- Should we delete personal time from our policy?
- We have personal /sick pay 40 hrs paid. If an employee requests a personal day does that 8 hr. count towards sick pay? How can we differentiate?
- We currently have a Personal Day policy that employees are eligible to use for sick time, do we need to change the terminology?
- Do these rules impact a company if they have Sick time rolled into the same 'bucket' as Personal time?
- We do not have a sick time policy but we offer 6 personal days. Can we change them to sick days?
- We currently allow people to use their sick time as personal time if scheduled in advance. Should we drop calling it personal time and go back to calling it sick time?
- We currently have a personal time policy. Would we need to change the name of our policy to earned sick time?
- If we currently have a policy that covers the regulations, but we call it "Paid Absence". Must we change it to Earned Sick Time?
- We give 40 hours paid sick time at the start of the year, but require they use it for all unplanned absences. Will we have to also give them more paid time this year if they used the time for snow storms or other reasons other than sick?
- We allow our employees to use personal time (sick time) to handle any business that cannot be handled outside of the business hours. Also includes time for a death. Do I have to separate that type of time out of the sick time?
- If we use PTO and a staff member uses this time for vacation and uses all they had and then calls out can the call out be counted against policy?
- If an employee requests 8 hours personal day can the monies come out of their sick pay?
- If we offer vacation to part-time employees for at least 2 weeks of their scheduled time, do we also have to give them sick time?

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A. *As stated in the prior answer, an employer can substitute an existing time-off policy for earned sick time provided the policy meets the requirements listed above. The employer would not have to separate personal time from sick time provided the employee has the right to use all of the 40 hours for the reasons listed in the Earned Sick Time law. It is the employee's choice to draw from the accrued time for reasons other than those listed in the Earned Sick Time law. The employee should be aware that all of the provisions of Earned Sick Time, including the notice provisions, must apply to all of the time in the bucket.*

Q: We currently keep sick time separate from vacation time. Should we keep them separate?

Webinar participants had the following questions

- We currently have 2 "banks" of earned time: Vacation and Sick/Personal. Since the definition of Sick Time is so specific, should that second bucket of time be strictly sick time (and not personal)?
- If my PTO policy is generous and covers this much time off, do I need to differentiate hours into the Earned Sick Time, and still need to pay out anything over and above 16 hours at plan year end?
- If I have a current PTO policy in place that covers sick time and vacation in a total of 40 hours, do I have to have a separate policy that covers just sick time
- A new employee will accrue 120 hours in their first year of employment, which is more generous than the pending EST law. We lump everything under PTO. Do we need to separate the hours into PTO and Sick, or are we ok with this procedure?

A. *You do not need to separate out earned sick time from other types of time-off if you are comfortable with applying all of the accrual, use, carryover, payout, notice and other provisions of the Earned Sick Time law and the proposed regulations to all of this time. Many employers will want to maintain separate banks of time for recordkeeping purposes and to require longer advance notice for planned time-off. Also, there is no requirement to pay out earned sick time, either at the end of the calendar or at the termination of the employee's employment.*

Q: Our policy requires that any absence be charged against available accrued time-off. Will we be able to continue this policy?

Webinar participants had the following questions

- Our company handbook states that employees cannot take time off without pay if accrued time is available - so this law now puts this policy in question?
- Can employers have a policy in place that requires any time-off - employees must use paid time that they have available?
- Are we required to substitute other time for sick time?
- We automatically give employees sick pay when they call in sick. They do not have a choice and must use it if it is available. Can we continue this policy?

A. *Neither the Earned Sick Time law nor the proposed regulations directly address this question. However, both state specific reasons for the use of Earned Sick Time. An*

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*employer with a policy that provides up to 40 hours per year to be used solely for the purposes of earned sick time would probably not be able to automatically charge time-off against that accrued time without the confirmation of the employee. It is not certain whether an employer that provides time-off that meets or exceeds the accrual requirements of the Earned Sick Time law but can be used for purposes beyond those listed in the law would be able to automatically apply time-off against the accrued time. AIM is seeking clarification from the Attorney General's office on this question.*

Q: We currently take personal time remaining at the end of the year and put it into a short term disability bank. Can we still do this? We pay out 1/3 of the time when an employee leaves.

A: *The Earned Sick Time law requires employers to carryover up to 40 hours of accrued but unused time from one calendar year to the next. The proposed regulations allow employers to cash out accrued but unused earned sick time in excess of 16 hours at the end of the calendar. Neither the law nor the proposed regulations address how employers may treat accrued and unused time that exceeds 40 hours.*

Q: Our PTO Policy has a 6 month waiting period with no accrual. With this sick time policy – do we have to eliminate the waiting period to let them accrue ASAP? Even though they have to wait 90 days to use the time?

A: *You would have to allow employees to start accruing from day one as is required under the law. Also, you would have to reduce your waiting period to no longer than 90 calendar days.*

Q: Our current policy treats carryover differently from the Earned Sick Time law, but our employees have at least 40 hours of time per year. Do we have to change this to comply with the new law?

Webinar participants asked the following questions

- If managers have an automatic 80 hours sick time. Exempt employee. Use it or lose it with another annual 80 hours upon 01/01. New policy?
- We have employees who have accumulated sick time up to 225 hours, could they carry over this sick time for the future and use it if they need more than 40 hours?

A: *Employers can have policies that are more generous than what is required under the law. While the employer in the first question provides more than 80 hours or time-off in a year, the employer does not meet the carryover requirements. The law states that employees must be able to carryover up to 40 hours and the proposed regulations would modify this requirement by allowing employers to pay out accrued and unused hours in excess of 16 at the end to the calendar year. The employer in the second question would be able to allow employees to carryover up to 225 hours as that is more generous than what the law requires.*

Q: Can an employer provide one bank of accrued time that exceeds 40 hours but limit 40 of those hours to the requirements of Earned Sick Time?

Webinar participants asked the following question

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- If employer provides 12 days of sick leave a year, do the regulations and all requirements only apply to the first 40 hours - i.e. can we require medical documentation for the times used after 40 hours as sick leave if we suspect abuse?
- If we offer more than 40hrs of sick time, can I tell EEs who used say 40hrs of sick time but have 40hrs remaining, that they do not have any MA Sick Leave for the remainder of the year?

A. *The proposed regulations allow employers to substitute their existing policies for earned sick time provided all the time meets the requirements of the law. They also allow employers to provide more generous policies. However, they do not address whether an employer can apply the requirements of earned sick time to some hours but not others. It would appear that this would not be possible, but AIM is seeking clarification from the Attorney General's office.*

Q: We require all people calling out to make an effort to replace themselves without overtime. This means they have to call at least 3 people - will this be allowed or not under the new EST regulations?

A: *The Earned Sick Time law states*

An employer shall not require such employee to work additional hours to make up for the hours during which the employee was so absent or require that the employee search for or find a replacement employee to cover the hours during which the employee is utilizing earned sick time

*You would not be able to continue your policy requiring employees to make an effort to find a replacement.*

### **Transition Year**

The Earned Sick Time law and the proposed regulations state that employees begin to accrue time effective July 1, 2015. The proposed regulations state that an employer shall not be required to provide more than 40 hours of paid earned sick time during the time period of July 1, 2015 through the start of the employer's next calendar year. The time period from July 1, 2015 through the start of the next calendar year is called the Transition Year. Any paid leave provided from January 1, 2015 through June 30, 2015 may be applied against the up to 40 hours required for the Transition Year. However, unpaid leave provided between January 1, 2015 and June 30, 2015 may not be applied against the up to 40 hours required during the Transition Year

On May 18, 2015, the Attorney General's Office issued a notice entitled Transition Year: Safe Harbor for Employers with Existing Paid Time Off Policies. This safe harbor relief states that employers are in compliance with the Earned Sick Time law from July 1, 2015 through December 31, 2015 if the employer meets the following requirements:

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- The employer has a paid time off policy in existence as of May 1, 2015
- The policy provides to employees the right to use at least 30 hours of paid time off during the calendar year 2015
- The leave is job protected leave subject to the law's non-retaliation and non-interference provisions

Employers who meet the above requirements will be considered compliant with the Earned Sick Time law with respect to those employees covered under the policy. The employer will also be considered compliant with regards to any other employees to whom the employer extends the use of at least 30 hours of paid time off under the same conditions.

Q: If an employee has already accrued 40 hours of time-off prior to July 1, 2015 do they continue to accrue from July 1 through December 31, 2015?

Webinar participants had the following questions

- I have a PTO policy where an employee earns 80 hours per year which can be used for any purpose at any time during the calendar year even if not yet earned. If an employee has already used the entire 80 hours as of July 1 do I have to let him accrue more time beginning July 1?
- If an employee has 40 hours of vacation time at this point and 16 hours of earned sick time, can we allow him to use another 24 hours of vacation time as sick time, and be in compliance?
- Can you clarify for companies who had lump sum sick time given (which exceeds the law's requirement) on 1/1/2015? Are we required to start new accruals on 7/1 and if so are we required to rollover 16 hours if the employee used 40 hours or more in 2015? We will be converting to accrual in 2016.
- How does it work effective July 1st if an employer advances the time up front and their calendar year is Jan.-Dec.?

A. *The law states that all employees begin accruing time on July 1, 2015. However, if an employer takes advantage of the transition year safe harbor then the employer would continue on its current policy through the end of 2015 and start accruing according to a rate that is at least as generous as the accrual requirements of the Earned Sick Time law – 1 hour for every 30 hours worked. If the employer does not opt for the safe harbor, then it does not matter how much time was accrued or used prior to July 1, 2015. The employees would start accruing according to a rate that is at least as generous as the accrual requirements of the Earned Sick Time law on July 1, 2015. However, the employer can limit the total hours used in 2015 to 40, including paid time-off used prior to July 1, 2015.*

Q: If an employee has already used 40 hours of time-off prior to July 1, 2015 does an employer have to allow them to use additional time from July 1 through December 31, 2015?

Webinar participants had the following questions

- Does the time used before July 1 need to be specifically sick time? Or can it be any use?

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- I'm still unclear what happens on 7/1/15 if our employees have already used their 40 hours that were awarded on 1/1/15? Are they eligible for additional time or only to accrue additional time that will carry into 2016?
  - If the company has a present sick time policy and the employee has used up all 40 hours, what happens July 1st? Do they start accruing and can they use it?
- A. *The law states that all employees begin accruing time on July 1, 2015. However, if an employer takes advantage of the transition year safe harbor then the employer would continue on its current policy through the end of 2015 and start accruing according to a rate that is at least as generous as the accrual requirements of the Earned Sick Time law – 1 hour for every 30 hours worked. If the employer does not opt for the safe harbor, then it does not matter how much time was accrued or used prior to July 1, 2015. The employees would start accruing according to a rate that is at least as generous as the accrual requirements of the Earned Sick Time law on July 1, 2015. However, the employer can limit the total hours used in 2015 to 40, including paid time-off used prior to July 1, 2015.*

Q: How does the accrual work effective July 1, 2015? Do all employees start accruing at 1 hour per 30 hours worked or just new employees?

Webinar participants asked the following questions

- Employees who have worked for years, do they have 40 hours automatically accrued on July 1?
  - How does it work effective July 1st if an employer advances the time up front and their calendar year is Jan.-Dec.?
  - If we hire an employee on June 30th, are they automatically eligible for the 40 hours? Also, if we have employees that have not met their eligibility period of 90 days before 07/01 are they automatically eligible for the 40 hour?
- A. *All employees would begin to accrue at least 1 hour per 30 hours worked effective July 1, 2015 unless the employer has opted for the transition safe harbor.*

Q. *Do all employees have to wait 90 days from July 1, 2015 to use earned sick time or is credit given for past service?*

A. *Credit is given for past service. So, an employee who has already has been employed for 90 or more calendar days on July 1, 2015 can use time as soon as it accrues.*

Q. *Can we use our current policy for our full-time employees through the rest of 2015 and start complying with the Earned Sick Time law on July 1, 2015 for those employees who are not covered by our current policy?*

A. *If your current policy was in place on or before May 1, 2015 and it provides those covered by the policy with at least 30 hours of paid time-off and the time off is protected leave subject to the law's non-retaliation and non-interference provisions of the Earned Sick Time law, then you are in compliance for those employees. The safe harbor states you will also be in compliance for employees not covered by your policy if you extend 30 hours of paid time-off*

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*to them and the time-off is protected leave subject to the law's non-retaliation and non-interference provisions of the Earned Sick Time law. Should you not extend 30 hours of protected leave to those not covered by your policy, and then presumably you would have to comply with the Earned Sick Time law effective July 1, 2015 for those employees. However, it is not certain that you could maintain a current policy for some employees and not for others. AIM is seeking clarification on this point.*

- Q. If an employee has accrued and unused time prior to July 1, 2015, can we delete the balance on June 30 and start anew on July 1?*
- A. Employers will want to determine how to structure their compliant earned sick time policies, determine their calendar year and decide what to do with existing balances. An employer could decide to start a new policy effective July 1, 2015 with no credit for existing balances. Before deciding to delete the current balances, check to see if you have paid out these balances in the past or if your policy requires you to pay them out. Also, communication with your employees would be essential for a smooth transition. Depending on how your current policy is structured and what the allowable uses for time-off are, some employees may have already scheduled time-off that could be impacted.*

### **Impact on existing Collective Bargaining Agreements**

The Earned Sick Time law states

Nothing in this section shall be construed to diminish or impair the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan in effect on the effective date of this section that provides to employees greater earned sick time rights than the rights established under this section.

This language seems to indicate that employers must follow the Earned Sick Time law when the benefits provided in the law exceed those provided in the collective bargaining agreement and follow the collective bargaining agreement when it provides benefits that exceed those provided in the law.

The proposed regulations do not address the impact of the new law on existing collective bargaining agreements.

Q: How does the Earned Sick Time law affect existing collective bargaining agreements?

Webinar participants had the following questions

- If we have a contract does this have to be enacted in July or at CBA renewal?
- Does a union contract supersede these changes and usages of Earned Sick Time?

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- The collective bargaining agreement provides LESS than the new law. Does the agreement override the law?
  - We have language in union contract that allows us to ask for medical documentation for one day of absence if abuse is suspected. Does this change what has been agreed to in collective bargaining
  - Small company, 11 employees. 9 are non-union, 2 are union. Are the union employees covered under a collective bargaining agreement (only 2) eligible?
- A. *Employers will not be able to wait until contract renewal to start complying with the Earned Sick Time law. Instead, they will need to look at the provisions of the Earned Sick Time law and the provisions of the collective bargaining agreement to determine which one provides the more generous provision to the employee. In each case, the more generous provision would control.*
- Q: Many of our employees in the collective bargaining agreement work for us and for other employers. How do we determine how much earned sick time these employees have?
- Webinar participants had the following questions
- If you have union employees and they work for three companies in a year, potentially they could have two or three days of earned sick time at each company they work for during a year. How do they not get over 40 hours in a year?
  - How does this work with union employees who may only work 8 weeks on a project, then get laid off. While laid off from us, they may work somewhere else, we do not know that. But then that person could come back to work for us again in 6 weeks and work for us again for 12 weeks - how do we calculate time? Could someone end up with more than 40 hours by working at multiple companies?
- A. *Each employer would need to track the time that the employee works for them to determine how much earned sick time is available to that employee. It might be possible for the employee to earn more than 40 total hours in the year, but no single employer would be required to provide more than the employee accrued while working for them and each employer can limit the total hours used in a calendar year to 40.*

### **Support Questions**

Q: Will Certificates of Attendance be issued for this webinar?

A: *The webinar was approved for 1 general recertification credit through HRCI. Participants interested in obtaining the coding information for this credit should contact Carrie Stowe at [cstowe@aimnet.org](mailto:cstowe@aimnet.org).*

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