

## 940 CMR: OFFICE OF THE ATTORNEY GENERAL

### CMR 33.00 EARNED SICK TIME

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

- (1) **Purpose.** To clarify practices and policies in the administration and enforcement of the Earned Sick Time Law, M.G.L. c. 149, § 148C.
- (2) **Scope.** 940 CMR 33.00 applies to all employers with employees eligible to accrue and use earned sick time and all employees of those employers in accordance with M.G.L. c. 149, § 148C.
- (3) **Interaction with State and Federal Leave Laws.** The time off provided by M.G.L. c. 149, § 148C, may run concurrently with time off provided by the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., the Massachusetts Parental Leave Act, M.G.L. c. 149, § 105D, the Massachusetts Domestic Violence Leave Act, M.G.L. c. 149, § 52E, the Small Necessities Leave Act, M.G.L. c. 149, § 52D, and other leave laws that may allow employees to make concurrent use of leave for the same purposes as M.G.L. c. 149, § 148C. Employees may choose to use, or employers may require employees to use, concurrent earned paid sick time, as provided under M.G.L. c. 149, § 148C, to receive pay when taking other statutorily-authorized leave that would otherwise be unpaid.

#### Section 33.02 Definitions

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

**Benefit Year.** “Benefit year” is used interchangeably with “calendar year” for purposes of 940 CMR 33.00.

**Break in Service.** A period of time extending from the date an employee last worked for an employer until the employee’s return to employment with that employer, whether the separation was voluntary or involuntary.

**Calendar Year.** Any consecutive 12-month period of time as determined by an employer. Most employers will find it helpful to use the year that they use for determining wages and benefits, including, for example: a year that runs from January 1 to December 31, the tax year, fiscal year, contract year, or year running from

an employee's anniversary date of employment. "Calendar year" is used interchangeably with "benefit year" for purposes of 940 CMR 33.00.

**Child.** A biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom an employee has assumed the responsibilities of parenthood.

**Child For Whom an Employee Has Assumed the Responsibilities of Parenthood.** A child of an employee standing in loco parentis, as defined by 29 U.S.C. § 2611(12) and 29 C.F.R. §§ 825.122(c) and 825.800.

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

**Date of Hire.** An employee's first date of actual work for an employer. "Date of hire" is used interchangeably with "first date of actual work" for purposes of 940 CMR 33.00.

**Earned Paid Sick Time.** Time off from work accrued by an employee and provided by an employer that can be used for the purposes described in 940 CMR 33.02: *Definitions* for Earned Sick Time compensated at the same hourly rate that the employee earns at the time the employee uses the paid sick time; provided, however, that the same hourly rate shall not be less than the effective minimum wage under M.G.L. c. 151, § 1 where applicable.

**Earned Sick Time.** Time off from work accrued by an employee during hours worked and provided by an employer to allow an employee to:

- (1) care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;
- (2) care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;
- (3) attend a routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse;
- (4) address the psychological, physical or legal effects of domestic violence; or
- (5) travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

**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, except:

- (1) an employee of the United States government;
- (2) an employee of a city or town is not considered an employee for purposes of this section until M.G.L. c. 149, § 148C, is accepted by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth;
- (3) an employee of a local public employer not covered by the term cities and towns, for example, school committees, including regional schools and educational collaboratives, shall be considered an employee

only if M.G.L. c. 149, § 148C, is accepted by vote or appropriation of the prudential bodies governing said entity;

- (4) a student attending a public or private institution of higher education located in the Commonwealth who is:
  - (a) participating in a federal work-study program or a substantially similar financial aid or scholarship program;
  - (b) providing support services to residents of a residence hall, dormitory, apartment building, or other similar residence operated by the institution at which they are matriculated in exchange for a waiver or reduction of room, board, tuition or other education-related expenses; or
  - (c) exempt from Federal Insurance Contributions Act (FICA) tax pursuant to 26 U.S.C. § 3121(b)(10);
- (5) a school-aged student under 20 U.S.C. § 1400 *et. seq.*, the Individuals with Disabilities Education Act (IDEA); and
- (6) an adult client who resides in a Massachusetts licensed program and performs work duties within the program setting as part of bona fide educational or vocational training.

**Employer.** Any individual, corporation, partnership or other private or public entity, including any agent thereof, who engages the services of an employee for wages, remuneration or other compensation, except:

- (1) the United States government shall not be considered an employer;
- (2) cities and towns shall be considered employers for the purposes of this law only if this law is accepted by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth;
- (3) local public employers not covered by the term cities and towns, for example, school committees, including regional schools and educational collaboratives, shall be considered employers for the purposes of M.G.L. c. 149, § 148C, only if the law is accepted by vote or appropriation of the prudential bodies governing said entity; and
- (4) notwithstanding M.G.L. c. 15D, § 17, M.G.L. c. 118E, §§ 70-75, or any other special or general law to the contrary, the PCA Quality Home Care Workforce Council shall be deemed the Employer of all Personal Care Attendants, as defined in M.G.L. c. 118E, § 70, for purposes of M.G.L. c. 149, § 148C(d)(4), the Department of Medical Assistance shall be deemed the Employer of said Personal Care Attendants for all other purposes under M.G.L. c. 149, § 148C, and the Department of Early Education and Care shall be deemed the Employer of all Family Child Care Providers, as defined in M.G.L. c. 15D, § 17(a), for purposes of M.G.L. c. 149, § 148C.

**Health Care Provider.**

- (1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or
- (2) 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. Health Care Provider includes:
  - a) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the Commonwealth or any other State and performing within the scope of their practice as defined under the General Laws or any other state law;
  - b) nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice in the Commonwealth or any other State and performing within the scope of their practice as defined under the General Laws or any other State law;
  - c) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;

- d) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
- e) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

**Regular Hourly Rate.** The amount that an employee is regularly paid for each hour of work.

**Same Hourly Rate.**

- (1) For employees compensated on an hourly basis, the same hourly rate means the employee's regular hourly rate.
- (2) For employees who receive different pay rates for hourly work from the same employer, the same hourly rate means either:
  - (a) the wages the employee would have been paid for the hours absent during use of earned sick time if the employee had worked; or
  - (b) the blended rate, determined by taking the weighted average of all regular rates of pay over the previous pay period, month, quarter or other established period of time the employer customarily uses to calculate blended rates for similar purposes.
 Whatever method the employer elects to determine the same hourly rate, (a) or (b) above, the employer must use a consistent method for each employee throughout a benefit year.
- (3) For employees paid a salary, the same hourly rate means the employee's total earnings in the previous pay period divided by the total hours worked during the previous pay period. For determining total hours worked during the previous pay period, employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1), the Fair Labor Standards Act, shall be assumed to work 40 hours in each week unless their normal work week is less than 40 hours, in which case earned sick time shall accrue and the same hourly rate shall be calculated based on the employee's normal work week. Regardless of the basis used, the same hourly rate shall not be less than the effective minimum wage under M.G.L. c. 151, § 1, where applicable.
- (4) For employees paid on a piece work or a fee-for-service basis, the same hourly rate means a reasonable calculation of the wages or fees the employee would have received for the piece work, service, or part thereof, if the employee had worked. Regardless of the basis used, the same hourly rate shall not be less than the effective minimum wage under M.G.L. c. 151, § 1, where applicable.
- (5) For employees paid on commission (whether base wage plus commission or commission only), the same hourly rate means the greater of the base wage or the effective minimum wage under M.G.L. c. 151, § 1, where applicable.
- (6) For tipped employees who ordinarily receive the service rate under M.G.L. c. 151, § 7 (\$3.00 plus tips as of January 1, 2015), the same hourly rate means the effective minimum wage under M.G.L. c. 151, § 1 (\$9.00 as of January 1, 2015).
- (7) 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), including contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance, and any other employee benefit plans;
  - (c) overtime, holiday pay, or other premium rates. However, where an employee's regular hourly rate is a "differential rate," meaning a different wage rate paid for the same work performed under differing conditions (e.g. a night shift), the "differential rate" is not a premium.

**Transition Year.** The benefit year that includes July 1, 2015.

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

#### **Employees Eligible to Accrue and Use Earned Sick Time:**

- (1) An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts regardless of the location of the employer. An employee need not spend 50% or more time working in Massachusetts for a single employer in order for Massachusetts to be the employee's primary place of work.

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

*Example:* A retail clerk relocates from New York to Massachusetts and takes a job at the employer's Boston store. Upon the first date of actual work at the Boston store, Massachusetts becomes the clerk's primary place of work.

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

*Example:* In a single year, an employee of a catering company works 550 hours in Massachusetts, 350 hours in New Hampshire and 200 hours in Maine. The caterer will accrue earned sick time on all 1,100 hours worked for the catering company.

- (3) Eligible employees permanently transferred to another state but remaining with the same employer will no longer accrue earned sick time but may use their accrued time.

#### **Accrual of Earned Sick Time:**

- (4) Employees accrue earned sick time on all hours worked at a rate of one hour of earned sick time for every 30 hours worked, including overtime hours, up to a cap of 40 hours per benefit year.
- (5) Employees accrue earned sick time only on hours worked, not on hours paid when not working. For example, employees do not accrue earned sick time during vacation, paid time off, or while using earned sick time.
- (6) Employees 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 jobs specify a lower number of hours per week, such as salaried part-time employees. In such cases, earned sick time shall accrue based on that specified number of hours per week.
- (7) Employees paid on a piece work or fee-for-service basis accrue earned sick time based on a reasonable measure of the time the employees work, including established practices or billing.
  - (a) Adjunct faculty compensated on a fee-for-service or "per-course" basis shall be deemed to work 3 hours for each "classroom hour" worked.

- (b) Family Child Care Providers, as defined by M.G.L. c. 15D, § 17, shall be deemed to work 6 hours for each “part day” worked and 10 hours for each “full day” worked.
- (8) Once employees have accrued 40 hours of earned sick time during the benefit year, they do not continue to accrue more hours of earned sick time regardless of the additional hours they work.
- (9) Once an employee possesses a bank of 40 hours of unused earned sick time, the employer may opt to delay further accrual until the employee draws down the bank of earned sick time to below 40 hours.
- (10) At the end of the benefit year, an employee may rollover up to 40 hours of unused earned sick time to the next benefit year.
- (11) Employers may track accrual at an accrual rate of one hour of earned sick time for 30 hours worked or any equivalent accrual rate with smaller increments of time (e.g. one minute of sick time per 30 minutes worked, two minutes of earned sick time per hour worked).

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

- (12) Employees have the right to use 40 hours of earned sick time per benefit year if the employee works sufficient hours to earn the time.
- (13) An employee may not use earned sick time if the employee is not scheduled to be at work during the period of use.
- (14) The smallest amount of sick time an employee can use is one hour. For uses beyond one hour, employees may use earned sick time in hourly increments or in the smallest increment the employer’s payroll system uses to account for absences or use of other time.

*Example:* Chris takes his daughter to a scheduled doctor’s appointment during his regularly scheduled work time, but the entire trip takes 50 minutes. Chris has used one hour of earned sick time.

*Example:* A furniture company uses a payroll system that tracks time in 15-minute increments. Anna, an employee, goes to a dentist appointment and returns after 90 minutes. Anna has used 90 minutes of earned sick time.

- (15) An employer may review with employees the allowable purposes for which earned sick time may be used under M.G.L. c. 149, § 148C.
- (16) Earned sick time may not be invoked as an excuse to be late for work without an authorized purpose under M.G.L. c. 149, § 148C.
- (17) An employee may not accept a specific shift assignment with the intention of calling out sick for all or part of that shift.
- (18) Where an employee’s use of earned sick time requires the employer to hire a replacement or call in another employee and the employer does so, the employer may require the employee to use an equal number of hours as the replacement or call-in employee works, up to a full shift of earned sick time. If

the employee lacks sufficient accrued earned sick time to cover such time away from work, the employer must provide sufficient job-protected unpaid leave to make up the difference in that shift.

*Example:* A food broker's fleet departs from the employer's principal place of business at 3:00 AM Monday through Friday to ensure timely delivery of perishable items to scheduled customers. The drivers' shifts vary slightly depending on the route, but average 8 hours with loading and unloading. The employee responsible for the upper Cape Cod deliveries arrives at the employer's principal place of business at 5:00 AM after spending the night in the ER with a sick child. The employer was notified by phone of the emergency, and called in an off-duty employee to cover the upper Cape Cod deliveries for the absent driver's shift. In this example, the employer may require the absent employee to use eight hours of earned sick time.

*Example:* The employee, a maternity ward nurse, is scheduled to report for her 12-hour shift at 8:00 A.M. but calls her supervisor at 6:00 A.M. to report that she will not be available to work until 12:00 P.M. that day due to a sudden illness in the family. The supervisor is able to secure a replacement for the first four hours of the employee's shift and must allow the employee to report for duty at 12:00 P.M. In this example, the employer may not require the absent employee to use more than four hours of her earned sick time.

- (19) Where an employer does not hire a replacement or call in another employee but the employee's use of earned sick time results in the employee missing transportation to a work site, the employer may require the employee to use earned sick time only until the employee arrives at the work site.

*Example:* The employee, a landscaper, calls his supervisor before the start of his 6-hour shift at 8:00 A.M. to report that he has to take an ill parent to the hospital. The landscaper's crew leaves for a new job site and the employee is not replaced. The employee arrives at the job site by 9:00 A.M. after finding a ride on his own. The employee need only use one hour of earned sick time.

- (20) An employer shall not require an employee to make up time off from work as a condition of using earned sick time. An employee and employer may, however, by mutual agreement arrange for the employee to work additional hours during the same or next pay period to avoid the use of, and payment for earned sick time.
- (21) Employers and their fee-for-service employees may arrange to make up hours during the same pay period or any future pay period that is mutually agreeable.
- (22) Employers and employees, by mutual written agreement, may arrange for employees to use earned sick time before accruing it and for employers to count the use against future accrual.
- (23) If an employee is committing fraud or abuse by engaging in an activity that is not consistent with allowable purposes for earned sick time under M.G.L. c. 149, § 148C, an employer may discipline the employee for misuse of sick leave.
- (24) If an employee is exhibiting a clear pattern of taking leave on days just before or after a weekend, vacation, or holiday, an employer may discipline the employee for misuse of earned sick time, unless the employee provides verification of authorized use under M.G.L. c. 149, § 148C.

### **Payment of Earned Sick Time:**

- (25) Earned paid sick time is paid at the same hourly rate listed in 940 CMR 33.02: *Definitions Same Hourly Rate*.
- (26) When used, earned paid sick time must be paid on the same schedule as regular wages are paid. Employers may not delay compensating employees for earned paid sick time.
- (27) Employers shall have the option, but are not required, to pay out employees for up to 40 hours of unused earned sick time at the end of the benefit year or when the employee changes jobs within the employer's employment. Employers paying out 16 hours or more shall provide 16 hours of unpaid sick time until the employee accrues new paid time, which shall replace the unpaid time as it accrues. Employees paying out less than 16 hours shall provide an amount of unpaid sick time equivalent to the amount paid out until the employee accrues new paid time, which shall replace the unpaid time as it accrues.
- (28) Employers shall have the option, but are not required, to pay out unused earned sick time upon separation from employment.

#### **90-Day Vesting Period:**

- (29) Employees begin accruing earned sick time on the first date of actual work and may begin to use any accrued earned sick time 90 days following their first dates of actual work, regardless of the number of days worked during the 90-day period.
- (30) Employees who have been employed for at least 90 days as of July 1, 2015, meaning their first dates of actual work occurred on or before April 2, 2015, may use earned sick time, whether paid or unpaid, as it accrues.

*Example:* Jasper's first date of actual work as a salesperson at a shop is October 1, 2016. Jasper will be eligible to use any accrued earned sick time 90 days later, which is December 30, 2016.

#### **Break in Service:**

- (31) Following a break in service of up to four months, an employee shall maintain the right to use any unused earned sick time accrued before the break in service.
- (32) Following a break in service of between four and 12 months, an employee shall maintain the right to use earned sick time accrued before the break in service if the employee's unused bank of earned sick time equals or exceeds 10 hours.

*Example:* An employee has accrued 20 hours of earned sick time and then goes on an unpaid leave of absence for 11 months, starting June 1, 2016. Upon the employee's return to employment on May 1, 2017, eleven months from the date of the employee last worked for the employer, the employee shall have the right to use the 20 hours of earned sick time accrued before the leave of absence began.

- (33) Following a break in service of up to twelve months, employees maintain their vesting days from the employer and do not need to restart the 90-day vesting period.

### **Transition Year:**

- (34) Employees shall begin to accrue earned sick time beginning on July 1, 2015 and shall be eligible to use their earned sick time 90 days after their first date of actual work, should a qualifying need arise.
- (35) An employer shall not be required to provide more than 40 hours of earned paid sick time during the transition year, and any paid leave given in the benefit year prior to July 1, 2015, will be credited.

*Example:* An employee used 15 hours of paid leave time as of July 1, 2015. The employer must allow the employee to earn and use up to 25 hours of earned paid sick time in the remainder of the benefit year.

### **Transition Year: Safe Harbor for Employers with Existing Policies Providing Paid Time Off**

- (36) Employers with a policy in existence on May 1, 2015 that provides paid time off or paid sick leave, shall be deemed in compliance with the Earned Sick Time law until January 1, 2016 provided:
  - a) Full-time employees on the policy have the right to earn and use at least 30 hours of paid time off/paid sick leave between January 1, 2015 and December 31, 2015;
  - b) On and after July 1, 2015, all employees not previously covered by the policy, including part-time employees, seasonal employees, temporary employees, new employees, and per diem employees must either:
    - i) accrue paid time off at the same rate of accrual as covered full-time employees; or
    - ii) if the policy provides lump-sum allocations, receive a prorated lump-sum allocation based on the provision of lump sum paid time off/paid sick leave to covered full-time employees. Such lump-sum allocations may:
      - (1) where lump sums of paid time off are provided annually, be halved for employees who receive coverage as of July 1, 2015, and proportionately reduced for employees hired after July 1, 2015; and/or
      - (2) be proportionate for part-time employees;
- If an employee is compensated other than on an hourly or salaried basis, the employee must accrue or receive lump-sum allocations based on a reasonable approximation of hours worked; and
- c) 30 hours of paid time off/paid sick leave or such lesser amounts as are earned or used by employees under this section must be:
  - i) job-protected leave subject to the law's anti-retaliation provisions;
  - ii) available for the allowed purposes of the leave under M.G.L. c. 149, § 148C; and
  - iii) available to the employee after January 1, 2016 if unused during the Transition Year unless the policy provides lump sum allocations that make rollover unnecessary.
- (37) In all other respects, during this transition period, employers may continue to administer paid time off under policies in place as of May 1, 2015.
- (38) Employers with the option to utilize the safe harbor may also choose full compliance with M.G.L. c. 149, § 148C, and 940 CMR 33.00 beginning July 1, 2015 for some or all employees.
- (39) On or before January 1, 2016, all employers operating under this safe harbor provision must adjust their policies providing paid time off/paid sick leave to conform to M.G.L. c. 149, § 148C, and 940 CMR 33.00.

### **Section 33.04            Employer Size**

- (1) An employer must provide earned paid sick time to all eligible employees if the employer maintained an average of 11 or more employees on the payroll during the preceding benefit year.

Employers shall determine the average number of employees by counting the number of employees, including full time, part-time, seasonal, and temporary employees, on the payroll during each pay period and dividing by the number of pay periods. Employees furnished to an employer by a temporary staffing agency and paid by the staffing agency count as employees of both the staffing agency and the employer for the purpose of determining employer size.

- (2) If an employer uses multiple start dates for the benefit year, such as dates based on employees' anniversaries of hire, the employer should calculate employer size based on the previous January 1 to December 31 calendar year.
- (3) All of an employer's employees, including full-time, part-time, seasonal, and temporary employees, whether working in or outside Massachusetts and regardless of their eligibility to accrue and use earned sick time, shall be counted for the purpose of determining employer size.
- (4) All employers with fewer than 11 employees must provide employees with the right to accrue and use up to 40 hours of earned unpaid sick time per benefit year.
- (5) Employers shall notify all eligible employees at least 30 days in advance in writing if earned sick time will be changing from paid to unpaid or from unpaid to paid sick time based on a change in employer size.
- (6) Earned sick time is paid when used, if the employer provided paid time when the employee accrued the time. Earned sick time is unpaid when used, if the employer provided unpaid time when the employee accrued the time.
- (7) When an employee has both unused earned paid and unpaid sick time available for use, the employee has the option of using either or both to cover the use of earned sick time.

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

- (1) Employees must notify their employers before they use earned sick time, except in an emergency.
  - a) Earned sick time cannot be used as an excuse to be late for work without an authorized purpose under M.G.L. c. 149, § 148C.
  - b) For foreseeable or pre-scheduled use of earned sick time, the employer may have a written policy requiring up to seven days' notice, except where the employee learns of the need to use earned sick time within a shorter period.
  - c) Notice required for unforeseeable absences is what is reasonable under the circumstances, recognizing that there are certain situations such as accidents or sudden illness for which advance notice might be infeasible.
  - d) For multi-day absences, an employer may require notification of the expected duration of the leave or, if unknown, then on a daily basis from the employee or the employee's surrogate (e.g. spouse, adult family member or other responsible party), unless the circumstances make such notice unreasonable.

- (2) An employer may require employees to use reasonable notification systems the employer creates, provided that the employees shall be allowed to communicate with the employer in a manner the employee customarily uses to communicate with the employer for absences or requesting leave.
- (3) An employee may provide notice without explicitly referencing the of M.G.L. c. 149, § 148C, or using the term “earned sick time” so long as the employer is on notice that the employee intends to use accrued time for a proper purpose.
- (4) Employers may seek verification of authorized use from a parent or guardian if they have reasonable suspicion that an employee, age 17 or under, is misusing earned sick time, unless verification would create a health and safety risk or hardship to the employee.

### **Section 33.06                      Documentation of Use of Earned Sick Time**

- (1) An employer may require written documentation for an employee’s use of earned sick time that:
  - a) exceeds 24 consecutively scheduled work hours;
  - b) exceeds 3 consecutive days on which the employee was scheduled to work;
  - c) occurs within 2 weeks prior to an employee’s final scheduled day of work before termination of employment, except in the case of temporary employees (i.e. “temp workers”);
  - d) occurs after 4 unforeseeable and undocumented absences within a 3-month period; or
  - e) for employees aged 17 and under, occurs after 3 unforeseeable and undocumented absences within a 3-month period.
- (2) Written documentation that may be required includes:
  - a) Written documentation signed by a health care provider indicating the need for the earned sick time taken; or
  - b) With regard to indicating the need of leave related to domestic violence, any of the following:
    - i) a restraining order or other documentation of equitable relief issued by a court of competent jurisdiction;
    - ii) a police record documenting the abuse;
    - iii) documentation that the perpetrator of the abuse has been convicted of one or more of the offenses enumerated in M.G.L. c. 265 where the victim was a family or household member;
    - iv) medical documentation of the abuse;
    - v) a statement provided by a counselor, social worker, health worker, member of the clergy, shelter worker, legal advocate or other professional who has assisted the employee in addressing the effects of the abuse on the employee or the employee’s family; or
    - vi) a signed written statement from the employee attesting to the abuse.
- (3) The employer may never require, as a condition of granting, using, or verifying earned sick time, that an employee provide documentation to explain the nature of the illness or the details of the domestic violence.
- (4) All evidence of domestic violence experienced by an employee, including the employee’s statement and corroborating evidence, shall not be disclosed by the employer unless written consent for disclosure is given by the employee at the time the evidence is provided.
- (5) Where documentation is required, employees who do not have health care coverage through a private insurer, the Massachusetts Healthcare Connector and related insurers, or an employer that provides

health insurance to employees 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 documentation by a health care provider. Employers may use the Attorney General's model form as a guide for their own policies and may include a check-off listing of the statutory reasons for permissible use of earned sick time on such form. Employers using their own verification form shall not require any additional information than what is required by M.G.L. c. 149, § 148C.

- (6) Documentation may be submitted to an employer in hand or by any reasonable method, including e-mail.
- (7) Employees must submit such documentation within 7 days after the taking of earned sick time for which such documentation is required, unless, for good cause shown, an employee requires more time to provide such documentation.
- (8) If an employee fails to comply without reasonable justification with the documentation requirements of the employer as described in 940 CMR 33.06, the employer may recoup the sum paid for earned sick time from future pay, as an overpayment. Employees must be put on notice of this practice.
- (9) If the employee fails to provide documentation for unpaid earned sick time, the employer may deny the future use of an equivalent number of hours of accrued earned sick time until documentation is provided, but may not otherwise take adverse action.
- (10) Employers may require employees to personally verify in writing that they have used earned sick time for allowable purposes after using any amount of sick leave, provided that the employee shall not be required to explain the nature of the illness or the details of the domestic violence. Employers may use the Attorney General's model form as a guide for their own policies and may include a check-off listing of the statutory reasons for permissible use of earned sick time on such form. Employers using their own verification form shall not require any additional information than what is required by M.G.L. c. 149, § 148C.
- (11) Public employers performing essential public health and safety functions may require employees making any use of earned sick time during severe weather events or other emergencies to provide written documentation from a medical provider substantiating its use and to follow additional notification procedures set forth by the employer. If an employee fails without cause to follow policies in such circumstances, an employer may discipline an employee for misuse of sick leave.
- (12) Health care providers may require employees making any use of earned sick time during local, state or federally declared emergencies to provide written documentation from a medical provider substantiating its use and to follow additional notification procedures set forth by the employer. If an employee fails without cause to follow policies in such circumstances, an employer may discipline an employee for misuse of sick leave.
- (13) An employer may require an employee to provide a fitness-for-duty certification, a work release, or other documentation from a medical provider before an employee returns to work after an absence during which earned sick time was used if such certification is customarily required and consistent with industry practice or state and federal safety requirements and reasonable safety concerns exist regarding the employee's ability to perform duties. "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the employee or others.

### Section 33.07 Allowable Substitution of Employers' Paid Leave Policies

- (1) Employers may have their own sick leave or paid time off policies, so long as all employees can use at least the same amount of time, for the same purposes, under the same conditions, and with the same job protections provided in M.G.L. c. 149, § 148C.
- (2) Employers may have different paid leave policies for different groups of employees, so long as all employees can use at least the same amount of time, for the same purposes, under the same conditions, and with the same job protections provided in M.G.L. c. 149, § 148C.

*Example:* An employer may provide all employees working more than 20 hours per week with 80 hours of paid time off per benefit year while per diem workers receive earned sick time at the rate of accrual of one hour for every 30 hours worked.

- (3) An employer's own paid time off, vacation, sick leave, or other policy may be substituted for earned sick time so long as 40 hours of time off provided under the policy, or such lesser amount as each employee might earn if the employer were not using the substitute policy, complies with all the provisions of M.G.L. c. 149, § 148C, and 940 CMR 33.00, including:
  - a) accrual at the rate of no less than one hour for every 30 hours of work;
  - b) pay at the employee's same hourly rate;
  - c) access for all uses authorized under M.G.L. c. 149, § 148C;
  - d) availability under the same conditions of notice and documentation; and
  - e) extension of the same job protections.
- (4) Employers that provide employees with a lump sum of 40 hours or more of sick leave or paid time off at the beginning of each benefit year do not need to track accrual or allow any rollover, provided that such leave is otherwise consistent with M.G.L. c. 149, § 148C.
- (5) Employers that provide 40 or more hours of paid time off or vacation to employees that also may be used as earned sick time, consistent with M.G.L. c. 149, § 148C, shall not be required to provide additional sick leave to employees who use all their time for other purposes (i.e., vacation or personal time) and have need of sick leave later in the year, provided that the employers' leave policies make clear that additional time will not be provided.

*Example:* A sporting goods store provides its employees with 40 hours of paid vacation time that can also be used as earned sick time, consistent with M.G.L. c. 149, § 148C. Does the store need to provide any separate sick leave? No. A sporting goods store does not need to provide additional sick leave, but the store must put employees on notice that if they use all of their hours for vacation, there will be no additional sick leave available.

- (6) Employers that have an unlimited sick leave policy shall not be required to track accrual of sick leave or allow any rollover, provided that such leave is otherwise consistent with M.G.L. c. 149, § 148C.
- (7) Employers that wish to maintain separate use policies for paid time off in excess of 40 hours may do so, provided that they allow employees to designate which time is taken as earned sick time.

- (8) Employers that prefer not to track accrual of sick time over the course of the benefit year may also use the following schedules for providing lump sums of sick leave or paid time off to their employees.

Employers using these schedules will be in compliance even if an employee's hours vary from week to week. Employers may accelerate the accrual or increase hours if they choose. Employees accruing earned sick time on these schedules will have the right to rollover their sick leave up to 40 hours and accrual may be delayed while an employee maintains an unused bank of 40 hours.

For employees working an average of:

- a) 37.5 – 40 hours per week, provide 8 hours per month for 5 months.
- b) 30 hours per week, provide 5 hours per month for 8 months.
- c) 24 hours per week, provide 4 hours per month for 10 months.
- d) 20 hours per week, provide 4 hours per month for 9 months.
- e) 16 hours per week, provide 3 hour per month for 10 months.
- f) 10 hours per week, provide 2 hours per month for 10 months.
- g) 5 hours per week, provide 1 hour per month for 10 months.

### **Section 33.08 Prohibition on Retaliation and Non-interference**

- (1) It is unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this section, including, but not limited to, using the taking of earned sick time under M.G.L. c. 149, § 148C, 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 M.G.L. c. 149, § 148C.
- (2) It is unlawful for any employer to take any adverse action against an employee because the employee opposes practices which the employee reasonably believes to be in violation of M.G.L. c. 149, § 148C, or 940 CMR 33.08, or because the employee supports the exercise of rights of another employee under M.G.L. c. 149, § 148C. Exercising rights under M.G.L. c. 149, § 148C, shall include but not be limited to filing an action, or instituting or causing to be instituted any proceeding, under or related to M.G.L. c. 149, § 148C; providing or intending to provide any information in connection with any inquiry or proceeding relating to any right provided under M.G.L. c. 149, § 148C; or testifying or intending to testify in any inquiry or proceeding relating to any right provided under M.G.L. c. 149, § 148C, or 940 CMR 33.00.
- (3) Examples of adverse actions include but are not limited to:
  - a) denying use or delaying payment of earned sick time;
  - b) terminating an employee;
  - c) taking away work hours;
  - d) negatively altering the terms or conditions of employment;
  - e) disciplining an employee under the employer's attendance policy;
  - f) giving an employee undesirable assignments or schedule changes;
  - g) giving false negative references for future employment;
  - h) making false criminal reports to authorities about the employee;
  - i) reporting an employee to immigration authorities; or
  - j) threatening an employee with any of the adverse actions listed in 940 CMR 33.08.

- (4) Attendance policies that reward employees for good attendance and holiday pay incentives that provide extra compensation for coming to work on the days immediately before and after a holiday are permissible so long as employees are not subject to any adverse actions for exercising their rights under M.G.L. c. 149, § 148C, and 940 CMR 33.00. An employee's inability to earn a reward for good attendance or to receive a holiday pay incentive based on an employee's absence occasioning use of earned sick time shall not constitute an adverse action or interference with an employee's rights under 940 CMR 33.08.

### **Section 33.09 Recordkeeping and Disclosure**

- (1) Employers shall keep true and accurate records of the accrual and use of earned sick time, consistent with the recordkeeping requirements of M.G.L. c. 151, § 15. However, if an employer provides time off to employees under a paid time off, vacation or other policy that complies with M.G.L. c. 149, § 148C, the employer is not required to track and keep a separate record on accrual and use of earned sick time, except employers must keep records of the time designated as earned sick time where the employer chooses to maintain separate policies under 940 CMR 33.07(7).
- (2) Employers shall maintain such records for a period of three years and must provide copies upon demand by the Attorney General or a designee from the Attorney General's Office. An employee who requests such records pertaining to the employee shall be provided with a copy within ten business days, and, if the employee so requests, shall be allowed to inspect the original paper or electronic records at a reasonable time and place.
- (3) Employers shall post a notice of the M.G.L. c. 149, § 148C, prepared by the Attorney General, in a conspicuous place accessible to employees in every location where eligible employees work.
- (4) Employers shall provide a hard copy or electronic copy of this notice to all eligible employees, or include the employer's policy on earned sick time or the employer's allowable substitute paid leave policy in any employee manual or handbook.

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

Violation of any provision of M.G.L. c. 149, § 148C, or 940 CMR 33.00 shall be subject to M.G.L. c. 149, § 27C(b) (1), (2), (4), (6) and (7) and to § 150.

### **Section 33.11 Severability**

If any provision of 940 CMR 33.00 or the application of any provision of a regulation to any person or circumstance is finally held invalid by a court of competent jurisdiction, the validity of the remainder of 940 CMR 33.00 shall not be affected.

REGULATORY AUTHORITY  
940 CMR 33.00: M.G.L. c. 149, § 148C