

Massachusetts Establishes COVID-19 Emergency Paid Sick Leave

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On May 28, 2021, Governor Baker signed legislation implementing COVID-19 emergency paid sick leave (“EPSL”) for Massachusetts employees. Employers are required to provide up to 40 hours of EPSL to employees when they are unable to work for certain qualifying reasons related to the COVID-19 pandemic. Employees may use EPSL beginning June 7, 2021 through September 30, 2021, or until the state’s EPSL fund is exhausted, whichever first occurs.

Who Must Comply?

All Massachusetts employers (private and public) are subject to EPSL. A state fund will be created to reimburse employers for EPSL benefits paid to employees.

QUALIFYING REASONS FOR LEAVE

Employers are mandated to provide EPSL to an employee for the following reasons related to the COVID-19 pandemic:

1. An employee’s need to:

- self-isolate and care for oneself because of the employee’s COVID-19 diagnosis;

- seek or obtain medical diagnosis, care or treatment for COVID-19 symptoms; or
 - obtain immunization related to COVID-19 or the employee is recovering from an injury, disability, illness or condition related to such immunization;
2. An employee’s need to care for a family member who:
- is self-isolating due to a COVID-19 diagnosis; or
 - needs medical diagnosis, care or treatment for COVID-19 symptoms;
3. A quarantine order, or other determination by a local, state or federal public official, a health authority having jurisdiction, the employee’s employer or a health care provider that the employee’s presence on the job or in the community would jeopardize the health of others because of the employee’s exposure to COVID-19 or exhibiting of symptoms, regardless of whether the employee has been diagnosed with COVID-19;

4. An employee's need to care for a family member due to a quarantine order, or other determination by a local, state or federal public official, a health authority having jurisdiction, the family member's employer or a health care provider that the family member's presence on the job or in the community would jeopardize the health of others because of the family member's exposure to COVID-19, regardless of whether the family member has been diagnosed with COVID-19; or
5. An employee's inability to telework because the employee has been diagnosed with COVID-19 and the symptoms inhibit the ability of the employee to telework.

Who Must Comply?

An employer must provide the following amount of leave for an employee who takes EPSL as follows:

- 40 hours for an employee who works 40 hours or more per week;
- The number of hours an employee works per week on average over a 14-day period of a regular schedule when the employee works less than a 40-hour workweek but maintains a regular schedule with consistent hours per week, or
- for an employee whose schedule and weekly hours worked vary from week to week, the employee will be provided EPSL that:
 - is equal to the average number of hours that the employee was scheduled to work per week over the 6-month period immediately preceding the date on which the employee takes the EPSL, including hours for which the employee took leave of any type; or
 - if the employee did not work over a 6-month period, is equal to the reasonable expectation of the employee at the time of hiring of the average number of hours per week that the employee would normally be scheduled to work.

An employee may use EPSL on an intermittent basis and in hourly increments.

Limits on Benefits Available

Employees are eligible for up to \$850 per week of EPSL. The benefit amount provided by an employer may be reduced by the amount of wages or wage replacement that an employee receives for that period under any government program or law (i.e., unemployment benefits).

EPSL may be reduced if the aggregate amount an employee would receive would exceed the employee's average weekly wage.

Employer Reimbursement

An employer who pays an employee EPSL will be reimbursed by the state within 30 business days after submitting an application (the form is not yet available) to the state. However, any qualified sick leave wages paid by an employer that are eligible for the tax credit for paid sick and paid family and medical leave under the Families First Coronavirus Response Act, or subsequent extensions, including the Consolidated Appropriations Act, 2021 and the American Rescue Plan Act of 2021, will not be eligible for reimbursement from the EPSL fund.

Benefits and Other Protections Available

EPSL is in addition to all job protected time off, paid and unpaid, that the employer is required provide to employees:

- under Massachusetts Earned Sick Time;
- under any existing policy or program of the employer;
- pursuant to a collective bargaining agreement; or
- under federal law, to the extent permitted by that federal law.

However, any employer with a separate COVID-19 sick leave policy who makes available an amount of COVID-19 sick leave sufficient to meet the requirements of EPSL, that may be used for the same purposes and under the same conditions as EPSL, is not required to provide additional COVID-19 emergency paid sick leave under EPSL.

While employees are receiving EPSL, employers must maintain all employment benefits provided or made available to an employee by the employer including, but not limited to,

health insurance, group life insurance, disability insurance, sick leave, annual or vacation leave, educational benefits and pensions.

An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the EPSL, unless federal law requires otherwise.

It is unlawful for any employer to interfere with, restrain or deny an employee's ability to take EPSL.

■ Notices

Employees

An employee must provide notice to the employer of the need for EPSL as soon as practicable or foreseeable. After the first workday an employee receives EPSL, an employer may require the employee to follow reasonable notice procedures in order to continue receiving EPSL. An employer may not require, as a condition of an employee's taking EPSL, that the employee search for or find a replacement worker to cover the hours during which the employee is using EPSL.

Employers

The state will be providing model notices in English and other languages for employers to use. Employers must post this notice in a conspicuous location accessible to employees in every establishment where employees work and must provide a copy to their employees. However, in cases where the employer does not maintain a physical workplace, or an employee teleworks or performs work through a web-based platform, notification must be sent via electronic communication or a conspicuous posting in the web-based platform.

■ Health Information Protected

Health information related to EPSL possessed by an employer regarding an employee or employee's family member must:

- be maintained on a separate form and in a separate file from other personnel information;
- be treated as confidential medical records;

- not be disclosed except to the affected employee or with the express permission of the affected employee; and
- be kept confidential in accordance with any other state or federal law.

■ Employer Action

As the state releases the various notice and reimbursement forms, employers should work with their employment counsel and leave absence management vendors to ensure compliance. Employers should be aware that the EPSL law also allows for the state to promulgate regulations necessary for its implementation. We will continue to monitor any developments related to EPSL.