

EMPLOYMENT LAW ALERT: EARNED PAID LEAVE
December 9, 2020

Beginning January 1, 2021, most Maine employers must offer at least 40 hours of earned paid leave to their employees. Although this may sound straightforward for employers with PTO policies, employers should be careful to read the fine print – there are some tricky issues which require close attention.

The Basics

Maine Earned Paid Leave (EPL) applies to employers with more than 10 employees on staff in Maine for more than 120 days in a calendar year. Employers must provide 40 hours of paid time off *per year* to their employees, which may be front-loaded *or* accrue at one hour per 40 hours worked. Employers may impose a 120-day waiting period before newly hired employees can use EPL. Employees may use EPL for any reason and cannot be retaliated against for taking paid leave. MDOL states that an employee may not be disciplined for using EPL (and remember it can be used to cover tardies and absences with very minimal notice).

What if we already provide paid time off?

Don't assume that if you provide a generous leave policy that exceeds 40 hours of PTO, that you're automatically in compliance with the new law. Under MDOL regulations, employers with existing leave policies must nonetheless provide 40 hours of leave with the same "characteristics" as EPL. For example, employers must: 1) allow employees to use up to 40 hours of paid leave for any reason, 2) allow employees to take paid leave in the event of an emergency, illness, or sudden necessity with as much notice as feasible, and 3) calculate the rate for EPL at the same base rate of pay the employee earned in the week prior to taking leave.

Are *all* of our employees eligible?

Full-time, part-time, temporary and per diem employees are eligible for Earned Paid Leave benefits. Seasonal workers may be exempt from EPL if: 1) the employer's operations are defined as a seasonal industry under Maine law, 2) the employer filed the appropriate paperwork with the Bureau of Unemployment Compensation, and 3) the employee's work will be performed during the seasonal period. This exemption requires a fact-specific analysis, and if you need more guidance we can provide resources and information on seasonal industries.

Notice, reasons and written documentation

Employers may require employees to provide up to four weeks' written notice of their intent to use EPL. However, should a sudden necessity, emergency or illness arise, employers may only require as much notice as "feasible under the circumstances." In essence this means virtually no notice, provided the employee calls in as soon as possible. Although employers may ask for a

“general description” of the employee’s need for unplanned leave, they cannot require a medical note or other form of documentation unless the leave is for more than three consecutive days.

Undue hardship to employers

Employers may deny a planned leave request based on undue hardship (i.e., significant impact on operational needs or finances). A recommended practice would be to identify in writing blackout periods when employees cannot schedule planned EPL leave. However, employees may take unplanned leave for a sudden necessity, emergency or illness even when it presents an undue hardship to the employer. For example, retailers may implement policies prohibiting employees from taking EPL on Black Friday, but if an employee gets a flat tire that morning, they may still use EPL to cover their missed time.

Collective Bargaining Agreements Govern

Unionized employers should follow the collective bargaining agreements already in effect on January 1, 2021. When a collective bargaining agreement expires after Jan 1st, the employer must provide EPL.

Our Advice to Employers

This new law does not lend itself to a simple form policy (and none has been provided by MDOL). First of all, figure out how you want to integrate EPL into your current PTO policy. You’ll then need to address issues such as accrual, the tracking of EPL, rollover or payout on termination, and you must ensure that the EPL is paid out based on the statutory formula and not just your current PTO rate. Pay attention to the following:

1. Figure out if you will designate the first 40 hours of PTO taken as EPL.
2. Weigh the impact of the rate calculation on exempt and non-exempt employees (it’s the same formula)
3. Determine if you’ll treat unused EPL like vacation on termination.
4. Make sure at least 40 hours of EPL is available for any reason (often sick leave use is limited to illness)

We are working with many of our clients to bring them into timely compliance on Jan 1st. Let us know if we can help you.

For more information, please contact Peter Lowe at plowe@brannlaw.com.