

Law School for the CFO Employment Law 2015

Robert M. Hale

Partner, Goodwin Procter LLP

February 25, 2015

Employment Law 2015

- Massachusetts Earned Sick Time Act
- Unlimited Vacation Policies: Pros and Cons
- Accommodations for Disabilities: General Principles and Telecommuting
- Negotiating Severance Agreements: Ten Issues

Massachusetts Earned Sick Time Act: Coverage Basics

- When – July 1, 2015
- Covered Employers – 11 or more employees
- Eligible – 90 days after hire (but accrual begins on Day 1)

Massachusetts Earned Sick Time Act: How Much Time?

- Accrual Rate – One hour for every 30 worked; for exempt employees, assume 40 hours of work per week or normal workweek, if less
- Annual Caps – Earn and use up to 40 hours per calendar year
- Carryover Into New Year – Up to 40 hours; carryover does not affect cap on use

Massachusetts Earned Sick Time: Qualifying Purposes

- Employee's illness or injury, routine medical appointment, effects of domestic violence
- Immediate family members illness or injury or routine medical appointment (child, spouse, parent or parent-in-law)

Massachusetts Earned Sick Time: Documentation

- Minimum Absence for Documentation Requirement – 24 consecutive work hours
- Required Information – Confirmation of need; no employer right to receive explanation of nature of illness

Massachusetts Earned Sick Time: Notice and Information

- Employee – Good faith effort to provide advance notice if use is foreseeable
- Employer – Posting to be developed by Attorney General

Massachusetts Earned Sick Time: Interaction with Other Policies

- No need to provide additional accruals if existing policy provides paid time off with at least favorable terms for
 - › accrual
 - › qualifying purposes
 - › conditions for use (e.g., documentation, notice, eligibility)
- Vacation policies could satisfy the requirements, but verify eligibility, accrual rate, carryover rights, and notice requirements, among others

Unlimited Vacation Policies

Traditional Vacation Policies

- Tracking of time
- Liability for accrued time upon termination in some states, including Massachusetts
- More restrictive standards in California, including prohibition of “use it or lose it” rules

Unlimited Vacation Policies: How they Work

- No accrual of time
- Typically applicable to exempt employees only
- Employer retains oversight for reasonableness

Unlimited Vacation Policies: Advantages for Employers

- No tracking or payout
- Enhanced professionalism

Unlimited Vacation Policies: Traps for Employers

- Risk of abuse
- FMLA obligations: “Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.” 29 C.F.R. §825.207(a).
- Similar concerns apply to leaves to address disabilities under the ADA and state law
- Consider caps on frequency and time off per vacation to reduce FMLA and ADA issues

Unlimited Vacation Policies: Traps for Employers

- Inconsistent administration can create morale and/or discrimination issues
- Establishing standards can be a back door to an accrual system
- Aside from consistency, morale could be harmed by perceived pressure not to take vacation

Unlimited Vacation Policies: Transition Options

- Pay for accrued time upon adoption
- Establish transition period
- Pay for accrued time upon termination

Accommodations for Disabilities: General Principles

- ADA prohibits discrimination against a “qualified individual with a disability”
- A “qualified individual with a disability” is one who can perform a job’s essential functions with or without a “reasonable accommodation”
- Discrimination includes not making reasonable accommodations unless the employer can demonstrate undue hardship

Accommodations for Disabilities: General Principles

- *US Airways v. Barnett* (U.S. Supreme Court 2002):
 - › Accommodation must generally be “reasonable in the run of cases.”
 - › If not, the employee can show that it is reasonable on the particular facts
 - › If otherwise reasonable, the employer may show that a proposed accommodation is an undue hardship

Accommodation for Disabilities: Telecommuting

- *Vande Zande v. Wisconsin Dep't of Admin.* (7th Cir 1995) – Telecommuting is generally not a reasonable accommodation
- *Smith v. Bell Atlantic* (Mass. App. Ct. 2005) – Employee with data analysis and report preparation functions was not given sufficient home office support to telecommute

Accommodation for Disabilities: Telecommuting

- *EEOC v. Ford Motor Co.* (6th Cir 2014) – Steel buyer with responsibility to interact with others regularly may be entitled to telecommute four of five days as a reasonable accommodation
- Decision currently under review by full Sixth Circuit
- Case illustrates that accommodation issues are fact-specific

Negotiating Severance Agreements: Ten Issues

1. Age Discrimination Releases – Individual terminations and group reductions
2. Resignation or Involuntary Termination
3. Benefit Continuation – Permissible to continue group health plans but not other ERISA benefits
4. California Releases – Waiver of unknown claims must waive California statute
5. Mutual Releases – Consider risks of unknown claims; avoid waiver of loan agreements

Negotiating Severance Agreements: Ten Issues (continued)

6. Non-disparagement – Avoid complete reciprocity; EEOC position concerning non-disparagement clauses
7. Confidentiality of Agreement – Similar issues
8. Post Termination Assistance and Litigation Cooperation
9. Right to Terminate Payments for Violations
10. Attorneys' Fees for Violations