

# Vermont Earned Sick Time Rules

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# Vermont Earned Sick Time Rules

## **Section 1. Authority.**

This rule is issued by authority of the Commissioner of Labor pursuant to 21 V.S.A. § 487 and Act 69 of the 2016 General Assembly (“Act”).

## **Section 2. Purpose and Scope.**

- (a) Purpose. To clarify practices and policies in the administration and enforcement of “An act relating to absence from work for health care and safety.” 21 V.S.A. §§ 481 - 486 (the Act).
- (b) Interaction with the Vermont Parental and Family Leave Act. Time accrued by an employee may be used at the same time as time off provided by the Vermont Parental and Family Leave Act. An employee may choose to use earned sick time as provided under the Act to receive pay when taking leave under the Vermont Parental and Family Leave Act that would otherwise be unpaid.

## **Section 3. Definitions.**

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

- (1) **“Annual period”** means any continuous 12-month period of time as determined by the first day of work. If an employee has been working before the implementation date of the Act, his or her annual period will start on January 1. An employer with an existing fixed paid leave year may use such fixed paid leave year as the annual period, provided that all earned sick time accrued pursuant to the act shall be carried over into the fixed paid leave year. The use of approved off-payroll time does not restart the annual period and accrual of earned sick time shall resume upon the employee’s return to work.

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- (2) **“Child”** means a minor or adult son or daughter by birth or adoption.
- (3) **“Commissioner”** means the Commissioner of Labor or his or her designee.
- (4) **“Discharge”** means a separation from employment initiated by the employer, including a temporary or seasonal layoff.
- (5) **“Domestic Violence”** has the same definition as in 15 V.S.A. § 1151.
- (6) **“Earned Sick Time”** means paid time off from work accrued by an employee and provided by an employer for the purposes permitted by the Act.
- (7) **“Employee”** means any person who, in consideration of direct or indirect gain or profit is employed by an employer for an average of not less than 18 hours per week. To calculate if an employee has worked an average of 18 hours per week an employer shall, on a yearly basis, divide the number of hours worked by the employee in the last completed calendar year by 52. If an individual has been employed for an average of not less than 18 hours per week in the prior calendar year, the individual’s accrual of sick time shall be deemed to have commenced on the first day of that year. The previous calendar year calculation shall not be applied to those individuals hired during that calendar year who are anticipated to work an average of more than 18 hours a week. The term “employee” shall not include:
  - (A) an employee of the federal government;
  - (B) an individual who is employed by an employer for 20 weeks or fewer in a 12-month period and in a job scheduled to last 20 weeks or fewer. If the job extends past 20 weeks, sick time accrual shall be deemed to have commenced on the first day of work. The one year waiting period on the use of earned sick time may still apply to the employee.

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(C) an individual that is employed by the State and is exempt or excluded from the State classified service pursuant to 3 V.S.A. § 311, but not an individual that is employed by the State in a temporary capacity pursuant to 3 V.S.A. § 331.

(D) an employee of a health care facility as defined in 18 V.S.A. § 9432(8) or a facility as defined in 33 V.S.A. § 7102(2) if the employee only works on a per diem or intermittent basis.

(i) "Health care facility" means all persons or institutions, including mobile facilities, whether public or private, proprietary or not for profit, which offer diagnosis, treatment, inpatient, or ambulatory care to two or more unrelated persons, and the buildings in which those services are offered. The term shall not apply to any institution operated by religious groups relying solely on spiritual means through prayer for healing, and shall include but is not limited to:

(aa) hospitals, including general hospitals, mental hospitals, chronic disease facilities, birthing centers, maternity hospitals, and psychiatric facilities including any hospital conducted, maintained, or operated by the state of Vermont, or its subdivisions, or a duly authorized agency thereof;

(bb) nursing homes, health maintenance organizations, home health agencies, outpatient diagnostic or therapy programs, kidney disease treatment centers, mental health agencies or centers, diagnostic imaging facilities, independent diagnostic laboratories, cardiac catheterization laboratories, radiation

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therapy facilities, or any inpatient or ambulatory surgical, diagnostic, or treatment center.

(ii) "Facility" means a residential care home, nursing home, assisted living residence, home for persons who are terminally ill, or therapeutic community residence licensed or required to be licensed pursuant to the provisions of Chapter 71 of Title 33.

(E) an employee of a school district, supervisory district, or supervisory union as defined in 16 V.S.A. § 11 that:

- (i) is employed pursuant to a school district or supervisory union policy on substitute educators as required by the Vermont Standards Board for Professional Educators Rule 5381; and
- (ii) is under no obligation to work a regular schedule; and
- (iii) is not under contract or written agreement to provide at least one period of long-term substitute coverage which is defined as 30 or more consecutive school days in the same assignment.
- (iv) "School district" means town school districts, union school districts, interstate school districts, city school districts, unified union districts, and incorporated school districts, each of which is governed by a publicly elected board.
- (v) "Supervisory district" means a supervisory union that consists of only one school district, which may be a unified union district.
- (vi) "Supervisory union" means an administrative, planning, and educational service unit created by the State Board of Education under 16 VSA § 261

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that consists of two or more school districts; if the context clearly allows, the term also means a supervisory district.

(F) an individual who is under 18 years of age.

(G) an individual that is either:

- (i) a sole proprietor or partner owner of an unincorporated business who is excluded from the definition of employee under 21 VSA § 601(14)(F); or
- (ii) an executive officer, manager, or member of a corporation or a limited liability company for whom the Commissioner has approved an exclusion from the provisions of chapter 9 of Title 21, pursuant to § 601(14)(H).

(H) an individual that:

- (i) works on a per diem or intermittent basis; and
- (ii) works only when he or she indicates that he or she is available to work; and
- (iii) is under no obligation to work for the employer offering the work; and
- (iv) has no expectation of continuing employment with the employer.

(8) **“Employer”** means any individual, organization, or governmental body, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air or express company doing business or operating within this state.

(9) **“Foster child”** mean a foster child, a stepchild, a legal ward, or a child for whom an employee has assumed the responsibilities of parenthood, and 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.

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- (10) **"Paid time off policy"** means any policy under which the employer provides paid time off from work to the employee that includes a combination of one or more of the following:
- (i) annual leave;
  - (ii) combined time off;
  - (iii) vacation leave;
  - (iv) personal leave;
  - (v) sick time; or
  - (vi) any similar type of leave.
- (11) **"Sexual Assault"** has the same definition as in 15 V.S.A. § 1151.
- (12) **"Small Employer"** means an employer who on January 1, 2017 has five or fewer employees who averaged 30 hours or more per week during the previous calendar year. Individuals working less than 30 hours per week shall not be counted when calculating the number of employees. A small employer is not subject to the requirements of the Act until January 1, 2018.
- (13) **"Stalking"** has the same definition as in 15 V.S.A. § 1151.

### **Section 4. Eligibility to Earn Sick Time.**

- (a) An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Vermont, regardless of the primary location of the employer.

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- (b) If an employee is eligible to accrue and use earned sick time, then all hours the employee works shall be applied toward accrual of earned sick time regardless of the location of the work.<sup>1</sup>
- (c) An eligible employee who is permanently transferred to another state but remains with the same employer will no longer accrue earned sick time but may use any sick time already accrued.

### **Section 5. Accrual of Earned Sick Time.**

- (a) Between January 1, 2017, and December 31, 2018, an employee shall accrue earned sick time on all hours worked at a rate of no less than one hour of earned sick time for every 52 hours worked, including overtime hours, of which a minimum of 24 hours shall be usable per annual period.
- (b) After December 31, 2018, an employee shall accrue earned sick time on all hours worked at a rate of no less than one hour of earned sick time for every 52 hours worked, including overtime hours, of which a minimum of 40 hours shall be usable per annual period.
- (c) An employer may allow the accrual of additional earned sick time in excess of the minimum amount.
- (d) An employer shall not be required to track accrual balances in increments of less than one hour.
- (e) An employee exempt from overtime requirements under The Fair Labor Standards Act (29 U.S.C. § 213(a)(1)) shall be assumed to work 40 hours in each work week for

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<sup>1</sup> For example, in a single year, an employee of a Vermont catering company works 550 hours in Vermont, 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.

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purposes of earned sick time accrual unless the job worked specifies a lower number of hours per week. In such cases, earned sick time shall accrue based on the specified number of hours worked per week.

- (f) Adjunct faculty compensated on a fee-for-service or “per-course” basis shall be deemed to work 3 hours for each “classroom hour” worked.
- (g) An employer shall be in compliance with this section if the employer provides the employee with at least the full amount of earned sick time required by subsections (a) and (b) of this section at the beginning of each annual period. If the employer provides an employee with the full amount of sick time at the beginning of each annual period, any unused earned sick time hours at the end of the annual period shall not carry over into the subsequent annual period.
- (h) Except as otherwise provided in subsection (g) of this section and section seven of these rules, earned sick time that remains unused at the end of an annual period shall be carried over to the next annual period and the employee shall continue to accrue earned sick time at the same rate established in the Act. However, nothing in this subsection shall be construed to permit an employee to use more earned sick time during an annual period than any limit on the use of earned sick time that is established by his or her employer pursuant to the Act.

### **Section 6. Use of Earned Sick Time.**

- (a) From January 1, 2017, to December 31, 2018, an employee has the right to use up to 24 hours of accrued earned sick time per annual period.

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- (b) Beginning January 1, 2019, an employee has the right to use up to 40 hours of accrued sick time per annual period.
- (c) An employee may use earned sick time for the following:
- (1) care for the employee's own physical or mental illness, injury, or medical condition that requires homecare, professional medical diagnosis or care, or preventative medical care, including diagnostic, preventive, routine, or therapeutic health treatment;
  - (2) care for the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild or foster child, 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;
  - (3) care for the employee's sick or injured parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment, or accompanying the employee's parent, grandparent, spouse, or parent-in-law to an appointment related to his or her long-term care. Routine healthcare treatment includes travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.
  - (4) arranging for social or legal services or obtaining medical care or counseling for the employee or for the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic

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violence, sexual assault, or stalking. "Domestic violence," "sexual assault," and "stalking" shall have the same meanings as in 15 V.S.A. § 1151.

- (5) care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild or foster child, because the school or business where that individual is normally located during the employee's workday is closed for public health or safety reasons. A "business" includes a care facility.
- (d) An employer is not required to pay earned sick time and the employee shall not be charged for the use of earned sick time if the employee is not scheduled to be at work during the period of use.
- (e) If an employee's absence is shorter than a normal workday, the employee shall use earned sick time in the smallest time increments that the employer's payroll system uses or that the employer's paid time off policy permits. Employers may limit the minimum use of earned sick time to one hour.
- (f) An employer shall post notice of the provisions of the Act in a form provided by the Commissioner, and in a place conspicuous to an employee at the employer's place of business. An employer shall also notify an employee of the provisions of the Act at the time the employee is hired.
- (g) An employer shall not require an employee to make up time off from work as a condition of using earned sick time. However, an employee and employer may by mutual agreement arrange for the employee to work additional hours during the same pay period to avoid the use of and payment for earned sick time.

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- (h) An employer shall not require an employee to find a replacement for the employee's absences for purposes authorized by the Act, including absences for professional diagnostic, preventive, routine, or therapeutic health care.
- (i) If an employee is absent from work for one of the reasons listed in subsection (c) of this section, the employee shall not be required to use earned sick time and the employer will not be required to pay for the time that the employee was absent if the employer and the employee mutually agree that either:
  - (1) the employee will work an equivalent number of hours as the number of hours for which the employee is absent during the same pay period; or
  - (2) the employee will trade hours with a second employee so that the second employee works during the hours for which the employee is absent and the employee works an equivalent number of hours in place of the second employee during the same pay period.
- (j) An employer may adopt a policy that requires an employee to use earned sick time for an absence from work for a reason listed in subsection (c) of this section.

### **Section 7. Payment of Earned Sick Time.**

- (a) Earned sick time shall be paid on the same schedule and in the same paycheck as regular wages are paid. An employer shall not delay compensating an employee for earned sick time.
- (b) An employer may pay an employee for any hours of unused earned sick time at the end of the annual period or when the employee leaves employment. If an employer chooses to pay unused sick time at the end of an annual period, then the sick time that is paid out shall not carry over into the subsequent annual period.

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- (c) An employee who voluntarily separates from employment without good cause attributable to the employer shall forfeit all accrued earned sick time and any accrued earned sick time shall not transfer if the employee is subsequently hired by another employer.
- (d) An employer is not allowed to interrupt insurance benefits for an employee during the use of earned sick time. Group insurance benefits shall continue during the period an employee uses earned sick time at the same level and conditions that coverage would be provided for normal work hours. The employer may require that the employee contribute to the cost of the benefits during the use of earned sick time at the existing rate of employee contribution.
- (e) If an employee is compensated on an hourly basis, the normal hourly rate means the amount that an employee is regularly paid for each hour of work.
- (f) If an employee receives different pay rates for hourly work from the same employer, the normal hourly rate means either:
  - (1) the wages the employee would have been paid for the hours absent during use of earned sick time if the employee had worked; or
  - (2) 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.
  - (3) Regardless of the method the employer elects to determine the normal hourly rate, the employer shall use a consistent method for all his or her employees throughout an annual period.

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- (g) If an employee is paid a salary, the normal 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, an employee who is exempt from overtime requirements under the Fair Labor Standards Act (29 U.S.C. § 213(a) (1)), shall be presumed to work 40 hours each week unless his or her normal work week is less than 40 hours, in which case the normal hourly rate shall be calculated based on the employee's normal work week. Regardless of the basis used, the normal hourly rate shall not be less than the effective minimum wage established by 21 V.S.A. § 384.
- (h) If an employee is paid on commission (whether base wage plus commission or commission only), the normal hourly rate means the greater of the base wage or the effective minimum wage established by 21 V.S.A. § 384.
- (i) For a tipped employee who ordinarily receives the tipped wage rate under 21 V.S.A. § 384, the normal hourly rate means the non-tipped minimum wage rate established by 21 V.S.A. § 384.
- (j) As used in this section, the normal hourly rate shall not include:
- (1) sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production;
  - (2) 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; and

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(3) 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.

### **Section 8. One Year Waiting Period.**

- (a) A newly hired employee. An employee begins accruing earned sick time on the first date of actual work. An employer may require a waiting period for a newly hired employee of up to one year. During this waiting period, an employee shall accrue earned sick time pursuant to the Act, but an employer may prohibit the use of earned sick time until after the employee has completed the waiting period.
- (b) An existing employee. An employer may require for an existing employee on January 1, 2017, a waiting period of up to one year. The waiting period shall begin on January 1, 2017, and shall end on or before December 31, 2017. During this waiting period, an employee shall accrue earned sick time but an employer may prohibit the use of earned sick time until after the employee has completed the waiting period.
- (c) A small employer. A small employer need not comply with the Act until January 1, 2018. The waiting period for small employers shall begin on January 1, 2018, and shall end on or before December 31, 2018. During this waiting period, an employee shall accrue earned sick time but an employer may prohibit the use of earned sick time until after the employee has completed the waiting period.
- (d) An employee who is discharged by his or her employer after he or she has completed a waiting period, and is subsequently rehired by the same employer within 12 months after the discharge from employment shall begin to accrue and may use earned sick time

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without a waiting period. However, the employee shall not be entitled to retain any earned sick time that accrued before the time of his or her discharge unless agreed to by the employer.

- (e) An employee who is discharged prior to completing his or her waiting period and is subsequently rehired by the same employer within 12 months after the discharge from employment, shall have the same time remaining in his or her waiting period as on the date of discharge.<sup>2</sup>
- (f) An employee that voluntarily separates from employment after he or she has completed a waiting period, and is subsequently rehired by the same employer within 12 months after the separation from employment shall not be entitled to use previously accrued sick time and may be required to begin a new waiting period unless waived by the employer.

### **Section 9. Notice of Use of Earned Sick Time.**

- (a) An employer may require an employee planning to use earned sick time to make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours, or to notify the employer as soon as practicable of the intent to take earned sick time and the expected duration of the employee's absence.
- (b) An employer may require an employee to provide reasonable notice before using earned sick time.
- (c) The notice required to be given 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.

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<sup>2</sup> For example, if a person worked for eight months and was laid off and rehired two months later he or she will only have four months left until he or she has completed the waiting period.

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- (d) For multi-day absences, an employer may require notification of the expected duration of the leave from the employee or the employee's surrogate (e.g. spouse, adult family member or other responsible party), unless the circumstances make such notice impracticable.
- (e) An employer may require an employee to give notice in a manner the employee customarily uses to communicate with the employer for reporting absences or requesting leave.
- (f) An employee who is required to give notice shall specify that he or she is using earned sick time.
- (g) An employer may require an employee to provide reasonable proof that the employee's use of earned sick time is for one of the purposes allowed by the Act.

### **Section 10. Allowable Substitution of Employers' Paid Leave Policies.**

- (a) An employer may have their own sick time or paid leave policies, as long as all employees can use at least the same amount of leave, for the same purposes, under the same conditions, and with the same job protections provided in the Act.
- (b) An employer may have different paid leave policies for different groups of employees, as long as each policy meets the minimum requirements provided in the Act.
- (c) An employer that provides paid time off in amounts consistent with the Act that also may be used as earned sick time shall not be required to provide additional sick time to an employee.<sup>3</sup>

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<sup>3</sup> For 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 the Act. Does the store need to provide any separate sick time? No. The sporting goods store does not need to provide additional sick time, but the store would be well advised to notify the employees that if they use all of their hours for vacation, there will be no additional paid sick time available.

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- (d) Nothing in these rules shall be construed to diminish an employer's obligation to comply with any collective bargaining agreement or paid time off policy that provides greater earned sick time rights than the rights provided by the Act.
- (e) A collective bargaining agreement or paid time off policy may not diminish the rights provided by the Act.

### **Section 11. Retaliation Prohibited.**

- (a) An employer shall not discharge or in any other manner retaliate against an employee because:
  - (1) the employee lodged a complaint of a violation of the Act;
  - (2) the employee has cooperated with the Commissioner in an investigation of a violation of the Act; or
  - (3) the employer believes that the employee may lodge a complaint or cooperate in an investigation of a violation of the Act.
- (b) Notwithstanding subsection (a), an employer may discipline an employee for using his or her earned sick time for reasons not consistent with the Act.

### **Section 12. Recordkeeping and Disclosure.**

- (a) An employer shall keep true and accurate records of the accrual and use of earned sick time pursuant to 21 V.S.A. § 393.
- (b) An employer shall maintain such records for a period of three years and shall provide copies within 10 days upon demand by the Commissioner. An employee who requests his or her records shall be provided with a copy within 5 days and shall be allowed to inspect the original paper or electronic records at a reasonable time and place.

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### **Section 13. Violations of the Earned Sick Time Law.**

- (a) An employer who violates 21 V.S.A. § 482 or § 483 shall be fined not more than \$5,000.00 per violation.
- (b) An employee may file a complaint with the Commissioner in the manner prescribed by the Commissioner. The Commissioner shall investigate and enforce any violations in accordance with 21 V.S.A. § 342a.
- (c) In addition to recovery of earned sick time pay, the Commissioner may assess a civil penalty of not more than \$5,000.00 per violation.

### **Section 14. Severability of Provisions.**

If any provision of these rules or the application of such provision to any person or circumstances shall be held invalid, the remainder of these rules and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

### **Section 15. New Employers.**

- (a) Notwithstanding any provision of the Act to the contrary, new employers shall not be subject to the provisions of the Act for a period of one year after the employer hires its first employee.
- (b) For purposes of enforcement, an employer shall be presumed to be subject to the provisions of the Act unless the employer proves that a period of no more than one year elapsed between the date on which the employer hired its first employee and the date on which the employer is alleged to have violated the provisions of the Act.

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- (c) No employer shall transfer an employee to a second employer with whom there is, at the time of the transfer, substantially common ownership, management, or control for the purposes of either employer claiming an exemption pursuant to these rules.

### **Section 16. Effective Dates.**

These rules shall take effect on January 15, 2017.