

Mandatory Paid Leave in Maine: Just Around the Corner

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Resources

- Statute (26 M.R.S. 637) – binding, as law.
- Maine Department of Labor (MDOL) Rules – force of law, if a reasonable interpretation of the statute.
- MDOL Question & Answer document – not law, but indicative of how MDOL will interpret the law and regulations.

26 M.R.S. 637

- What began as a paid sick leave statute is now a general paid time off law.
 - 1 hour accrued for every 40 worked.
 - Paid at “base rate.”
 - Can prevent use for first 120 days of employment.
 - Protected.
- Effective 1/1/21.
- Applies to employers with more than 10 employees in the usual and regular course of business for more than 120 days in any calendar year.

“More than 10 employees”

- All Maine workers (part-time, full-time, per diem, etc.) count.
- An employee who works in multiple states may still be a “Maine employee.”
 - Is service localized in any particular state?
 - Base of operations in Maine?
 - Service directed or controlled in Maine?

Covered Employees

- All employees are covered.
 - Part time
 - Hourly or salaried, exempt or non-exempt
 - Per diems
 - Temporary employees (but can prevent use for 120 days)
 - Seasonal employees, except:
- “Employment” does not include employment in a seasonal industry, during the season.

“Seasonal Industry”

- Industry determined to be seasonal by the Unemployment Insurance Commission, for employer who has submitted the required report to Bureau, setting forth seasonal period for the year.
- See MDOL Table of Seasonal Industries
 - Harvesting of certain agricultural products
 - Ski industry
 - Camping areas
 - Amusement parks, etc.
- Only work performed during the season is exempt.

Accrual - Rate

- 1 hour for every 40 worked, up to 40 hours.
 - Paid time off accrues on all hours worked, including overtime.
 - Whether to permit accrual in smaller increments (e.g. .25 hours of leave for 10 hours worked) is discretionary.
- Must begin on first day of employment, even if prevent use for 120 calendar days.

120 Days = Calendar Days

- Employee hired December 1, 2020, will begin to accrue January 1, 2021; and may use time starting March 31, 2021.
- Employee hired June 1, 2021, who leaves after 113 days will have leave available to use one week after re-hire, if re-hired within a one year period.
 - But employer can pay out upon termination to avoid this result.

Front Loading

- In lieu of accrual, employer may choose to provide employees with 40 hours of Maine Paid Leave at the beginning of the year.
 - May be January 1, anniversary date, fiscal year, etc.
- Depending on weekly hours, part time employees might be provided with fewer than 40.
 - If front loading, need to watch part time employees, who may work more than expected and therefore be entitled to more leave than anticipated.

Carry Over Year-to-Year

- If employer front loads hours at beginning of year, need not roll hours over into next year.
- If time is accrued, employer must permit rollover, but may limit hours accrued in the following year accordingly.
 - Example: Employee who rolls 10 hours from 2021 into 2022 need only accrue 30 hours in 2022.
 - Note this is different from an accrual cap.
 - Law concerned only with employee having 40 hours available to them in the year.

Negative Balances

- Need not permit use before time has accrued.
- If employer allows employees to “go negative,” or if employer front loads, and employee takes leave and then terminates before that leave would have been earned if accrued, employer may deduct from final paycheck.
- Policy should very clearly state this is employer’s practice.

Pay Out at Year End

- If employer front loads, it may choose to pay out unused leave at year end, or not.
 - Pay out may be a disincentive to use.
- If employer does not front load, it may give employees the election of cashing out or rolling time over; but cannot require cash out.
 - If employer limits accrual the following year by any hours carried over—it will be in every employee's interest to cash out.

Pay Out Upon Termination

- Like with vacation in Maine, whether leave must be paid out is determined by policy.
- If no paid leave policy, MDOL will look to terms of vacation policy.
- It is permissible to have one policy for vacation / PTO and a different policy for paid leave.
- If not paid out, balance is available to employee who returns within one year period.

Rate at Which Paid Leave Must be Paid

- Although statute says “base rate,” MDOL regulations say “regular rate” in effect week before leave taken.
- According to Webster’s “base rate” means “exclusive of additional payments” such as bonuses and differentials.
- “Regular rate,” on the other hand, includes all compensation received for hours worked:
 - Shift differentials
 - Commissions
 - Work performed at a higher rate
 - Non-discretionary bonuses (even if paid later in the year)

“Regular Rate” – Exempt Employees

- Exempt employees presumed to work 40 hours unless time tracked or salary understood to be for different number of hours.
- MDOL has advised that later paid non-discretionary bonuses may lead to additional amounts owed to exempt employees for leave taken earlier in the year.

Regular Rate – Specific Employees

- Per diems: Look at the most recent week worked by the per diem employees.
- Work at more than one rate: Use blended rate.
- Tipped employees: Minimum wage (without taking tip credit).

Notice for Use of Paid Leave

- Employers may institute black out periods, during which planned leave may not be taken.
 - Can restrict during specific times of the year, month, or week
 - Should be in written policy
- May also require up to 4 weeks' advance notice of planned leave (but not more than 4 weeks).
- For leave required for emergency, illness, or other "sudden necessity," may require only reasonable notice.

Use of Leave

- Employers must allow employees to use paid leave in increments as small as an hour (but may permit smaller increments).
 - Unanswered Question: Can employer “black out” use of paid leave in smaller increments, mid-shift; or must they prove undue hardship?
- Employers cannot require the use of paid leave when the employer does not have work for the employee.
 - *E.g.*, shut downs, cancelled shift.

Employer Entitlement to Documentation / Explanation

- Employer may require employee to provide a “general reason” for the unplanned leave.
 - Examples offered by MDOL include “transportation issue” and “illness of a day-care provider”
- May not require a medical note or documentation unless the leave is for more than 3 consecutive days.

Bases to Deny Leave

- (1) Leave is planned and falls within blackout period.
- (2) Leave is planned and employee did not give requisite notice (up to 4 weeks).
- (3) Leave is planned and employer can prove that employee's absence would cause an undue hardship.


Penalties / Enforcement

- **No private right of action.**
- MDOL may assess penalty against “any employee, officer, agent or other person” who violates the law, not to exceed \$1,000 per violation.
- Each denial of paid leave is a violation.
- Recovered through civil action, and amounts recovered go to Treasurer of State, not affected employee.
- Statute provides for right of appeal, with consideration given to size of business, good faith, gravity of violation, etc.

Poster Requirement

- May be met by putting poster on business's intranet, if employees not working in physical location.
- If workers in physical location, must post in that location.


Regulation of Employment



MAINE
DEPARTMENT OF
LABOR
Bureau of Labor Standards

Labor Laws of the State of Maine provide protection for people who work in Maine. The Maine Department of Labor administers the laws, which all employers must follow. Department representatives inspect workplaces to ensure compliance. Citations and penalties may be issued to employers who do not comply.

This poster describes some important parts of the laws. A copy of the actual laws or formal interpretations may be obtained from the Department of Labor, Bureau of Labor Standards, by calling 207-623-7900. (The laws are also on the Bureau's web site.)



Maine Law (Title 26 M.R.S.A. § 42-B) requires every employer to place this poster in the workplace where workers can easily see it.

This poster is available online at no charge and may be copied: <https://www.maine.gov/labor/posters/>

<p>Time of Payment Employees must be paid in full at least every 16 days. Employees must be notified of any decrease in wages or salary at least one day prior to the change.</p> <p>Payment of Wages Employees who leave a job must be paid in full on the next payday or within two weeks, whichever is earlier. This may also include the payment of accrued vacation pay and/or Earned Paid Leave if established in company policy or in practice.</p> <p>Unfair Agreement Employers cannot require that an employee pay for losses such as broken merchandise, bad checks, or bills not paid by customers, nor for special uniforms and certain tools of the trade.</p> <p>Rest Breaks Most employees must be offered a 30-minute paid or unpaid rest break after 6 hours of work.</p> <p>Nursing mothers must be provided with unpaid break time or be permitted to use their paid break or meal time to express milk. The employer must make reasonable efforts to provide a clean room or location, other than a bathroom, where the milk can be expressed.</p> <p>Family Medical Leave An employee who has worked for the last 12 months at a workplace with 15 or more employees can have leave for up to 10 paid or unpaid weeks in 2 years for:</p> <ul style="list-style-type: none"> • Birth or adoption of a child or domestic partner's child; • Serious illness of the employee or immediate family member, including domestic partner; • Organ donation; • Death or serious health condition of the employee's spouse, domestic partner, parent or child if it occurs while the spouse, domestic partner, parent or child is on active duty; • Serious illness or death of a sibling who shares joint living and financial arrangements with the worker. <p><i>(Federal family medical leave is different, call 866-487-9243 for more information.)</i></p>	<p>Leave for Victims of Violence, Assault, Sexual Assault or Stalking Must be allowed upon request if an employee (or a child, parent or spouse of an employee) is a victim of violence, assault, sexual assault or stalking or any act that would support an order for protection under Title 19-A M.R.S.A., c. 101 and the employee needs the time to:</p> <ul style="list-style-type: none"> • Prepare for and attend court proceedings; or • Receive medical treatment; or • Obtain necessary services to remedy crisis. <p>Leave to Care for Family If the employer's policy provides for paid time off, the employee must be allowed to use up to 40 hours in a 12-month period to care for an immediate family member who is ill.</p> <p>Earned Paid Leave (Effective 01.01.2021) An employer that employs more than 10 employees in the usual and regular course of business for more than 120 days in any calendar year shall permit each employee to earn paid leave based on the employee's base pay. An employee is entitled to earn one hour of paid leave from a single employer for every 40 hours worked, up to 40 hours in one year of employment. Accrual of leave begins at the start of employment, but the employer is not required to permit use of the leave before the employee has been employed by that employer for 120 days during a one-year period.</p> <p>Earned Income Tax Credit Employees may be eligible for federal and state earned income tax credits. Employees may apply for the tax credits on the employee's income tax return.</p> <p>Note: Maine employers may also be covered under the Federal Fair Labor Standards Act. For more information, contact the U.S. Department of Labor and Hour Office at 866-487-9243.</p>
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For more information, contact:
Maine Department of Labor
Bureau of Labor Standards
45 State House Station
Augusta, Maine 04333-0045
located at: 45 Commerce Drive
Telephone: 207-623-7900 | TTY users call Maine Relay 711.
Web site: www.maine.gov/labor/bls
Email: bls.mdol@maine.gov

At-Will Employment - Under Maine law, an at-will employee may be terminated for any reason not specifically prohibited by law. In most instances, you are an at-will employee unless you are covered by a collective bargaining agreement or other contract that limits termination. If you have questions about at-will employment, contact your human resources department or the Bureau of Labor Standards.

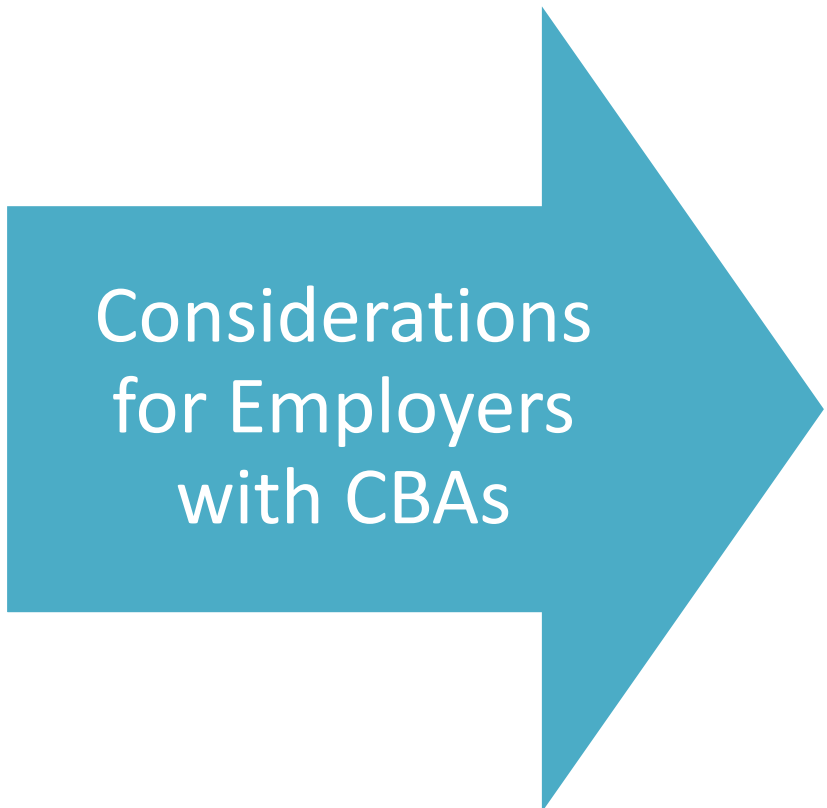
The Maine Department of Labor provides equal opportunity in employment and programs. Auxiliary aids and services are available to people with disabilities upon request.

rev. 10/20

Breakout Sessions



Paid Leave Policy
Options and
Considerations



Considerations
for Employers
with CBAs



Paid Leave Policy Options and Considerations

Katy Rand

Policy Options

- Create separate paid leave policy, either adding time or reducing another paid time off bucket.
- Revise existing paid time off policy to make it comply in all respects with Maine Paid Leave law.
- Revise existing paid time off policy to create different rules applicable to 40 hours of the existing benefit.

Considerations

- Do you already offer some form of protection for a limited number of unplanned absences (e.g., sick time, Act to Care for Maine Families)?
- If so, may be simplest to transform this bucket of time to Maine Paid Leave, making it available for planned or unplanned use.
- Policy can specify not payable upon termination, even if PTO / Vacation is.

Considerations cont.

- If you do not already protect unplanned absences (not covered by FMLA), will need to either:
 - Create a new, separate, Maine Paid Leave policy, perhaps shifting hours from an existing PTO / Vacation policy (and providing Maine Paid Leave is not payable upon termination);
or
 - Make your existing PTO / Vacation policy comply with the Maine Paid Leave statute.

Bringing All PTO / Vacation Into Compliance: An Unattractive Option

Regular Rate

Protected from discipline (even if unplanned)

No documentation required

Must be granted unless inadequate notice / black out period, or employer can prove undue hardship

Can be used in one hour increments

All paid out upon termination, or none paid out upon termination

Treating First 40 Hours of PTO / Vacation Used as Maine Paid Leave

Pros

Employee will inevitably exhaust, so no need to consider rollover if choose not to frontload

First 40 hours of time off excused; thereafter must be scheduled and employer has greater ability to deny

Eliminates need for employee to do anything to designate

Employee who calls in sick early in the year will be protected, while employee who calls out later in the year (after having taken a vacation) will receive an attendance point

May be administratively harder to ensure compliance with the statute

Cons

Allowing Employee to Designate

Pros

Employees can save for sudden necessity

Designation will trigger different treatment (e.g. rate) and so may be administratively easier to track

Employees will be incentivized to save these days for when sick; if they don't get sick, they will use them in the 3rd and 4th quarters (e.g. mental health days)

To avoid this result, consider paying out unused days at year end

Cons

Miscellaneous Considerations

- May still permit employees to request vacation at the beginning of the year, and grant those requests based on seniority.
 - Employee who later requests vacation with shorter notice risks the leave being denied due to undue hardship.
- Consider documenting minimum staffing requirements in different departments / areas, to bolster undue hardship argument.



Considerations for Employers with CBAs

Charlie Einsiedler and Dan Strader

Paid Leave under CBA

- Paid leave statute “does not apply to an employee covered by a collective bargaining agreement during the period between January 1, 2021 and the expiration of the agreement.”

When Does CBA Expire?

- What if CBA automatically renews for one year upon expiration of the initial term?
- What if parties negotiate a new CBA prior to the expiration?
- What if CBA would expire but the parties negotiate a temporary extension?
- What if parties allow CBA to expire but have not yet negotiated a replacement?

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Presenters

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