

MAINE STATE LEGISLATURE

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Report to Labor and Housing Committee

on Progress Made in the State to Comply with 26 MRS §637, Earned Paid Leave

On January 1, 2021, Maine's first-in-the-nation requirement for most employers to provide paid time off to their employees for any reason went into effect. This law was the result of tireless work by interested parties, the Department, and Governor Mills to reach a compromise on a previous earned sick leave proposal.

The resulting statute, signed by Governor Mills on May 28, 2019, and entitled "An Act Authorizing Earned Employee Leave," requires covered employers to allow workers to earn paid leave at the rate of one hour for every forty hours worked up to forty hours of leave per year, and to use that leave after 120 days of employment. Employees can use their paid leave in most cases entirely at their discretion after providing reasonable notice unless there is an emergency.

The Maine Department of Labor was charged with enforcing the new statute and was required to adopt rules for its implementation and to produce an annual report to the legislature on its progress. This is the first of those reports and will cover the Department's experience in implementing the law. The Department has also received specific questions about the Department's experience with specific issue areas.

Listening Sessions and Rulemaking Process

Beginning in the Fall of 2019 and continuing through the Summer of 2020, the Department worked diligently to develop the framework within which the statute would be implemented, conducting research and gathering information and advice from a wide variety of sources. Perhaps most significantly, the Department conducted a series of public listening sessions throughout the state. This was intended to reach as many communities and individuals around the state as possible. The Department was also aware that there are regional differences in the state that needed to be considered during the rulemaking process.

The first such session was held in Presque Isle on October 2, 2019. The 21 attendees were mostly local businesspeople invited by the Central Aroostook Chamber of Commerce. As with many of the sessions, the attendees were universally very appreciative of the effort made by the Department to reach out to interested individuals in all areas of the State.

Subsequent listening sessions occurred at these locations on the following dates:

- **Lewiston CareerCenter, October 28, 2019 at 5:30 PM**
- **Rockland CareerCenter, November 6, 2019 at 5:30 PM**
- **Springvale CareerCenter, November 14, 2019 at 5:30 PM**
- **Greater Portland CareerCenter, November 18, 2019 at 5:30 PM**
- **Machias CareerCenter, November 20, 2019 at 9:00 AM**
- **Bangor CareerCenter, November 20, 2019 at 5:30 PM**
- **Farmington Town Hall, December 2, 2019 at 5:30 PM**
- **Maine Department of Labor (Employer session), December 6, 2019 at 2:00 PM**
- **Maine Department of Labor (Worker Session), December 11, 2019 at 12:30 PM**

In all, ten sessions were held, attended by a total of more than 200 individuals. The participants were made up of employers from the region, school administrative staff, workers, and town officials. These sessions provided the backbone of the Department's implementation plan and showed us the specific issues that members of the public wanted the Department to clarify during the rulemaking process.

In mid-December of 2019, based on information gathered to that point and with the indispensable participation of Assistant Attorney General Nancy Macirowski, the Department assembled a team and began the arduous process of formulating rules. This was a process that required hours of meetings within the team to develop rules based on questions we heard and already established interpretations of certain Wage and Hour Laws. On March 25, 2020, as required by the Maine Administrative Procedures Act, the Earned Paid Leave Rule was posted by the Secretary of State for formal comment. Public comments were invited, both in writing until April 27, and at a public hearing—held virtually because of the pandemic—on April 15. The Department began receiving comments the very next day and continually until the close of the comment period, which for several reasons was eventually extended to May 27, 2020.

In all, 158 individuals submitted comments – 21 verbally at the hearing and the remainder in writing. The next step, beginning in early April, was to analyze and respond to those comments. Over the next few months, again with the invaluable assistance of AAG Macirowski, the Department's team carefully studied and categorized all the comments received, discussed them in detail, and decided how to respond by either amending the proposed rules or explaining why it did not. The Department eventually finalized its responses and submitted all required documents to the Secretary of State to formally adopt the final rule in August of 2020.

We have attached the comments and corresponding responses to this report as an appendix. The responses explain decisions made by the Department in the rulemaking process. Also included is a copy of FAQs that the Department wrote to provide clarity on how the rule and law are enforced by the Department.

Outreach and Education

After adopting the final rule, the Department quickly engaged in a determined effort to ensure that workers, employers, the media, and the public would understand the law and the rules as well as possible by the time they went into effect on January 1, 2021. By the end of 2020, more than fifteen outreach and education sessions were conducted for a wide variety of interested groups and the public and attended by many hundreds of individuals. A PowerPoint presentation was prepared for those sessions and made available to the general public on the Department’s website. In addition, the Bureau responded to a continuous flow of inquiries from individual workers and employers as well as their organizational representatives.

The Department also provided various materials to help the regulated community understand the new law. A webpage was created exclusively for EPL, containing among other items a poster translated into eight languages other than English and a comprehensive Frequently Asked Questions (FAQs) document which is updated as new questions arise.

https://www.maine.gov/labor/labor_laws/earnedpaidleave/

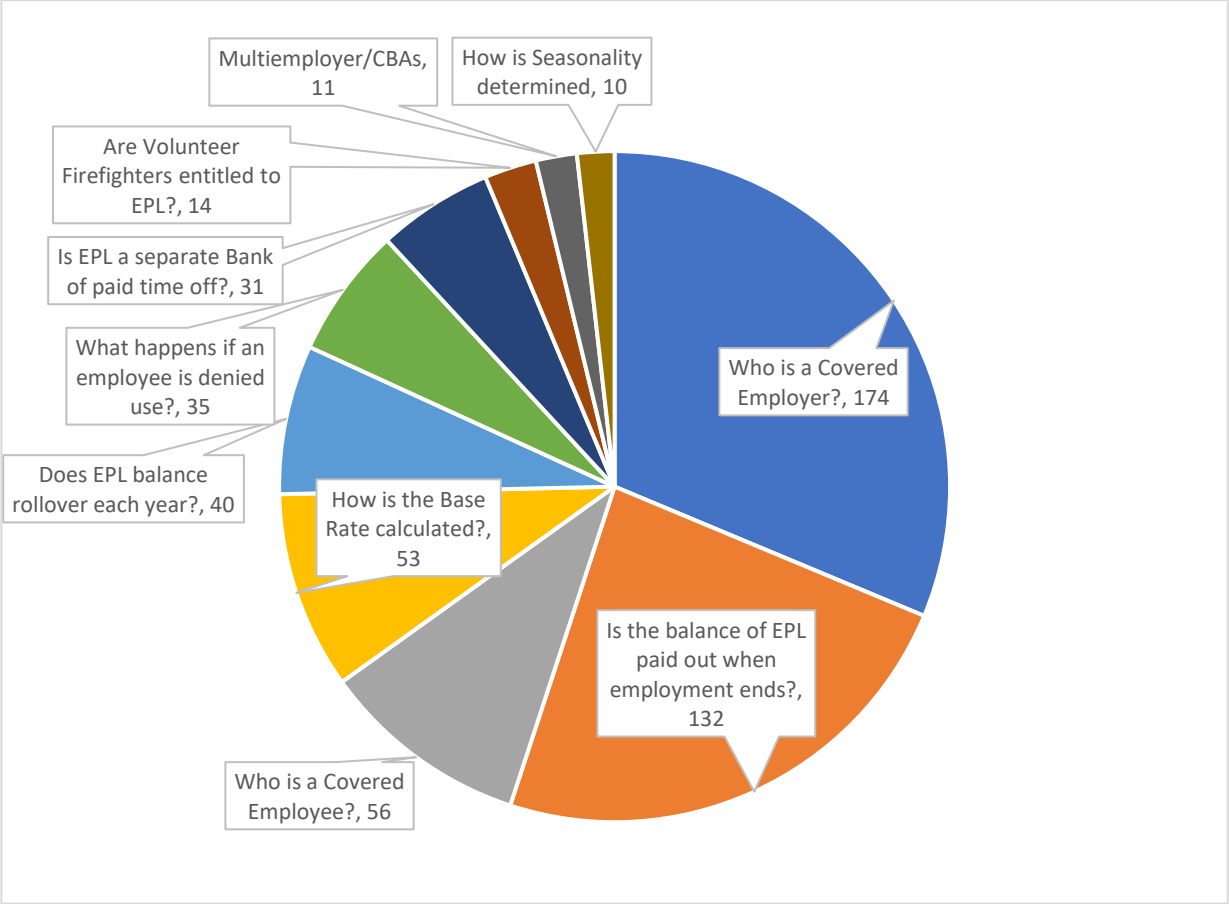
Compliance Assistance

Now that the law has gone into effect, the Department’s Bureau of Labor Standards continues to offer compliance assistance and advice regarding the statute. We have received 1,256 calls and emails on the subject during the first eleven months of 2021. The following table shows the specific subtopics about which the Bureau received ten or more inquiries.

| Issue | Count |
|--|-------|
| Who is a Covered Employer? | 174 |
| Is the balance of EPL paid out when employment ends? | 132 |
| Who is a Covered Employee? | 56 |
| How is the Base Rate calculated? | 53 |
| Does EPL balance rollover each year? | 40 |
| What happens if an employee is denied use? | 35 |
| Is EPL a separate Bank of paid time off? | 31 |
| Are Volunteer Firefighters entitled to EPL? | 14 |
| Multiemployer/Collective Bargaining Agreements | 11 |
| How is Seasonality determined? | 10 |

In addition, it is worth noting that the five inquiries we received regarding retaliation involved hypothetical situations rather than allegations of actual retaliation by an employer. There were also seven COVID-related inquiries. Seventy-five inquiries concerned a wide variety of other topics. The remaining inquiries were not categorized by specific topic in the reported information.

The following pie chart represents the percentages of those inquiries that could be categorized.



Enforcement

Despite the large number of inquiries (or perhaps because of their value in promoting compliance), no formal complaints were filed regarding Earned Paid Leave and no violations of the statute were cited during 2021. However, the Department of Labor remains committed to ensuring compliance with the Earned Paid Leave statute by means of routine business inspections, active investigations of perceived violations, and continued outreach and education efforts through workplace compliance workshops.

When someone calls the Wage & Hour Division to seek guidance on a particular law, the inspector asks pertinent questions and educates the caller on the nuances of that law. If there is a possibility that a violation occurred, the inspector will send the caller a complaint form through email or U.S. Postal Service and advise them to provide the specific details in writing so we can investigate the issue. To date, no one has submitted a complaint involving Earned Paid Leave.

Anyone suspecting a violation of the statute may contact the Bureau of Labor Standards Wage and Hour Division at 45 State House Station Augusta, Maine 04333-0045 or 207-623-7900 or bls.mdol@maine.gov. All information will be kept confidential if the complainant prefers.

Media

- **Portland Press Herald, January 17, 2021:** <https://www.pressherald.com/2021/01/17/maine-blazes-workplace-trail-with-earned-paid-leave-requirement-2/>
- **WGME, January 1, 2021:** <https://wgme.com/news/local/maine-increasing-minimum-wage-and-paid-time-off>
- **WMTW, December 30, 2020:** <https://www.wmtw.com/article/maine-increased-minimum-wage-new-earned-time-off-law-take-effect-jan-1/35099924>
- **Penobscot Bay Pilot, September 14, 2020:** <https://www.penbaypilot.com/article/maine-dept-labor-adopts-final-rules-earned-paid-leave-law/138550>
- **Bangor Daily News, October 3, 2019:**
<https://bangordailynews.com/2019/10/03/news/aroostook-employers-raise-concerns-about-how-new-earned-paid-leave-statute-will-affect-migrant-and-harvest-workers-2/>
- **SHRM, June 6, 2019:** <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/maine-mandates-paid-leave-for-any-reason.aspx>

12 DEPARTMENT OF LABOR

170 BUREAU OF LABOR STANDARDS

Chapter 18: RULES GOVERNING EARNED PAID LEAVE

Summary: The purpose of this chapter is to provide definitions and procedures for implementing earned paid leave for certain employees pursuant to 26 MRS §637.

Section I: Application

These rules apply to employers that employ more than 10 employees in the usual and regular course of business for more than 120 days in any calendar year, with certain exceptions. Covered employers shall permit each employee to accrue earned paid leave based on the employee's base rate of pay as defined in Section II.

Section II: Definitions

As set forth in 26 MRS §637 or in this chapter, the following terms have the following meanings.

- A. "120 days" for purposes of 26 MRS §637(2) and (3) means 120 *calendar* days (not business days).
- B. "Base rate of pay." The base rate of pay for purposes of earned paid leave required by this statute is identical to the regular rate of pay defined in section 26 MRS §664(3). The base rate will be calculated by reference to the week immediately prior to the leave taken.
- C. "Bureau" means the Bureau of Labor Standards, within the Department of Labor.
- D. "Calendar year" means January 1 through December 31 of any year.
- E. "Covered Employee." A covered employee is a person engaged in employment as defined in the *Employment Security Act*, 26 MRS §1043(11) for an employer as defined by 26 MRS §1043(9), except as otherwise set forth herein or in the Act Authorizing Earned Employee Leave. A covered employee may include a person who is employed full-time, part-time or per diem.
- F. "Covered Employer." A covered employer is an employer as defined by 26 MRS §1043(9) who employs more than 10 covered employees in the usual and regular course of business for more than 120 days in any calendar year.
- G. "Emergency" and "sudden necessity," which terms may be used interchangeably herein, mean a situation in which the need for leave is not reasonably foreseeable.
- H. "Employer" has the same meaning as in 26 MRS §1043(9).
- I. "Employment" has the same meaning as in 26 MRS §1043(11), but does not include employment in a seasonal industry as defined in 26 MRS §1251.

- J. "Employment in a seasonal industry" means employment in an industry determined by the Unemployment Insurance Commission to be seasonal pursuant to 26 MRS §1251 and employment for an employer who has submitted the required report to the Bureau of Unemployment Compensation setting forth the seasonal period for the applicable year.
- K. "Hours Worked." For purposes of 26 MRS §637(3), for covered employees defined as exempt by federal regulations (29 CFR §541), in the absence of any other record, the presumption is that hours worked by such employees are 40 hours per week.
- L. "One-year period" means any period of 365 (366 in a leap year) consecutive days.
- M. "Start of Employment" means the first day the employee performed work for the employer.
- N. "Year of employment" means a period of 365 (366 in a leap year) consecutive days beginning with the employee's *start of employment*, or any subsequent period of 365 (366 in a leap year) consecutive days beginning on one of the following:
 - i. the anniversary date of the employee's start of employment; or
 - ii. such date as the employer may assign, provided that no loss of earned paid leave results for any employee not using the date identified in i. above.

Section III: Accrual

- A. An employee is entitled to earn one hour of earned paid leave from a single employer for every 40 hours worked, up to 40 hours in one year of employment.
- B. Accrual of earned paid 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.
- C. No more than forty hours of earned paid leave is required to be available for use by a covered employee during any one year period as established by section II. L. herein.
- D. Covered Employees with accrued and unused hours of earned paid leave from the previous year of employment will have those hours available for use by the employee in the current year of employment, up to a maximum of forty hours. Hours are only required to continue to accrue up to forty hours in the current year of employment.

- A. Whenever the terms of employment or the employer's established practice includes provisions to pay the balance of unused earned paid leave at the time of separation, earned paid leave on cessation of employment has the same status as wages earned in accordance with 26 MRS §626.
- B. An employee who returns to work within a one-year period of the last date of previous employment with the same employer is entitled to any unused balance of earned paid leave that was not paid out at the time of separation of employment.
- C. For the sole purpose of determining the accrual of earned paid leave for construction workers, the term "employer" includes all covered employers bound by a collective bargaining agreement negotiated by a multiemployer bargaining unit.

Section IV: Greater Benefits and Exception

- A. Nothing in this chapter may be construed to affect an employer's obligation to comply with any collective bargaining agreement or employee benefit plan that provides greater earned paid leave rights to employees than the rights provided by 26 MRS §637.
- B. 26 MRS §637 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.

Section V: Notice and Use of Leave

- A. Reasonable Notice. Absent an emergency, illness or other sudden necessity for taking earned paid leave, the employer may have a written policy requiring up to 4 weeks' notice to the employer of the employee's intent to use earned leave.
- B. Notice required for an emergency, illness or other sudden necessity must be reasonable under the circumstances, recognizing that advance notice may not be feasible. In such circumstances, a covered employee shall make a good faith effort to provide as much notice as is feasible under the circumstances to the employer of the employee's intent to use earned paid leave.
- C. Scheduling of Leave. The Employer may place reasonable limits on the scheduling of earned paid leave for reasons other than emergency, illness or other sudden necessity, to prevent undue hardship on the employer as reasonably determined by the employer. Undue hardship means a significant impact on the operation of the business or significant expenses, considering the financial resources of the employer, the size of the workforce, and the nature of the industry.
- D. Employees may use earned paid leave in increments of at least one hour, unless the employer chooses to allow smaller increments.
- E. The employer cannot require the employee to use accrued earned paid leave when the employer causes the employee to be unable to perform their job, such as by closing the business or cancelling a shift.

- F. An employer shall not deny an employee the right to use paid leave available for use by that employee in accordance with the conditions of this section.

Section VI: Penalties

- A. Penalties for violations of this section are the same as those provided in section 26 MRS §53. Each denial of paid leave for each affected covered employee in violation of 26 MRS §637 and this Rule is a separate violation.

STATUTORY AUTHORITY:

26 MRS §42 and §637

EFFECTIVE DATE:

January 1, 2021- filing 2020-203



FOR IMMEDIATE RELEASE: March 25, 2020

Media Contact: Jessica Picard, Maine Department of Labor, Jessica.I.picard@maine.gov or 207-621-5099

Dept. of Labor Posts Rules, to Hold Public Hearing on Earned Paid Leave

The Maine Department of Labor (MDOL) has published rules for the required rulemaking process for Public Law 2019 Ch. 156, “An Act Authorizing Earned Employee Leave.” Governor Mills signed this bill into law last year, which will go into effect January 1, 2021.

On Wednesday, March 25, the proposed rules will be published, and the public comment period will open for the Earned Paid Leave Rules. The public comment period will remain open until April 27.

The draft rules will be published at <https://www.maine.gov/labor/proposedrulemaking/>. The website will have an option to submit comments electronically through a submission box. Public comments may be sent online, by email to bls.mdol@maine.gov (please note that it is about Earned Paid Leave rules in the subject), or through written correspondence to Maine Department of Labor, 54 State House Station, Augusta, ME 04330-0054. All submissions require a full name as well as a place of residence.

The Maine Department of Labor is also announcing a public hearing on the proposed rules:

April 15, 2020, 5-7 p.m.

During the public hearing, anyone interested in speaking will have up to three minutes to share their thoughts on the proposed draft rules. In consideration of recent health concerns, the public hearing will be remote-access only, rather than an in-person meeting. Details on how to participate will be available on the Department’s website: <https://www.maine.gov/labor/proposedrulemaking/>.

The bill required the Maine Department of Labor to write rules to ensure the legislation can be implemented and enforced appropriately. The posting of the draft rules is part of MDOL’s rulemaking process. Once the public comment period ends, MDOL will review and respond to all public comments that were submitted. After the public comment period ends, MDOL will have 120 days to adopt the rules or release a revised set of rules based on public comments.

The legislation guarantees earned time off for employees who work for a business with 11 or more employees. Small businesses with 10 or fewer employees and seasonal employers who regularly operate less than 26 weeks in a calendar year are exempt. The law requires that an employee earn one hour of paid leave from a single employer for every 40 hours worked, up to 40 hours in one year of employment. This leave can be used for any purpose by the worker, however they are required to give their employer as reasonable notice as is possible.

The rules written will provide guidance to employers as well as workers who benefit from the earned paid time off. The Maine Department of Labor will also provide new posters to employers outlining guidance for the rule on its website.

If you would like to be updated during the process, please email bls.mdol@maine.gov and ask to be placed on the “Earned Paid Time Off rules mailing list.”

The effective date of this law is January 1, 2021.

A link to the chaptered law (Public Law 2019 Ch. 156) may be found at the link below:

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0110&item=4&snum=129>

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