

SENATE No. 1004

The Commonwealth of Massachusetts

PRESENTED BY:

Michael J. Rodrigues

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to clarify the earned sick time ballot question.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Michael J. Rodrigues</i>	<i>First Bristol and Plymouth</i>
<i>Bruce E. Tarr</i>	<i>First Essex and Middlesex</i>
<i>Steven S. Howitt</i>	<i>4th Bristol</i>

SENATE No. 1004

By Mr. Rodrigues, a petition (accompanied by bill, Senate, No. 1004) of Michael J. Rodrigues, Bruce E. Tarr and Steven S. Howitt for legislation to clarify the earned sick time ballot question. Labor and Workforce Development.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act to clarify the earned sick time ballot question.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 149 of the General Laws, as recently amended by the voters under
2 the provisions of Article 48 of the Amendments to the Massachusetts Constitution, is hereby
3 amended after section 148B, by striking out sections 148C and 148D, inclusive, and inserting in
4 place thereof the following two new sections:-

5 Section 148C. (a) As used in this section and section 148D, the following words, unless
6 the context clearly requires otherwise, shall have the following meanings:-

7 “Child”, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a
8 person who has assumed the responsibilities of parenthood. A child shall be defined as no older
9 than 18 years.”

10 “Earned paid sick time”, the time off from work that is provided by an employer to an
11 employee as computed under subsection (d) that can be used for the purposes described in
12 subsection (d) and is compensated at the regular (“straight time”) hourly rate of pay, provided,

13 however, that this hourly rate shall not be less than the effective minimum wage under section 1
14 of chapter 151. For those employees who are exempt from overtime requirements under 29
15 U.S.C. section 213(a)(1) of the Fair Labor Standards Act, the rate of compensation shall be
16 determined by dividing by 40 the employee's regular weekly salary amount, unless the normal
17 work week is less than 40 hours, in which case the employee's weekly salary amount shall be
18 divided by the number of hours in the employee's normal work week. Paid sick time shall be
19 paid at the regular rate of pay regardless of when it is used, and not subject to overtime or time
20 and half rates. An employee may opt-into for additional hours of work at a rate of regular pay at
21 the employer's discretion. An employee who chooses to work additional hour or shifts during the
22 same or following pay period, in lieu of hours or shifts missed, shall not use accrued paid sick
23 leave.

24 "Earned sick time", the time off from work that is provided by an employer to an
25 employee, whether paid or unpaid, as computed under subsection (d) that can be used for the
26 purposes described in subsection (c).

27 "Employee", any person who performs services for an employer for wage, remuneration,
28 or other compensation, except that employees employed by cities and towns shall only be
29 considered Employees for purposes of this law if this law is accepted by vote or by appropriation
30 as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

31 "Employer", any individual, corporation, partnership or other private or public entity,
32 including any agent thereof, who engages the services of an employee for wages, remuneration
33 or other compensation, except the United States government shall not be considered an Employer
34 and cities and towns shall only be considered Employers for the purposes of this law if this law is

35 accepted by vote or by appropriation as provided in Article CXV of the Amendments to the
36 Constitution of the Commonwealth.

37 “Commission Based”, shall be defined by any employee, whose payment is based on
38 commission, and shall not be counted in the employers count for total number of employees and
39 is eligible for leave at the discretion of the employer and is eligible for leave at the discretion of
40 the employee.

41 “Seasonal Employee”, shall be defined as referenced in Section 1 and 24 of Chapter
42 151A, and not counted for the total number of employees,

43 “Break in Service”, An employer may establish a break in service policy that states that
44 any termination of an employee’s employment by an employer, whether voluntary or
45 involuntary, shall be construed as a break in service. Should an employee be rehired by the
46 employer following a break in service, the employee shall begin to accrue leave upon hire and
47 shall not be entitled to any unused hours of paid sick leave that had been accrued prior to the
48 service workers’ break in service. If an employee separates from an employer and is rehired by
49 the employer after one year from the date of separation, the sick days are deemed used.

50 “90 day period”, A day within the 90 day period is defined as one full workday as defined
51 by the employer or 8 hours.

52 “Health care provider”, the meaning given this term by the Family and Medical Leave
53 Act of 1993, 29 U.S.C. sections 2601 to 2654, inclusive, as it may be amended and regulations
54 promulgated thereunder.

55 “Parent”, a biological, adoptive, foster or step-parent of an employee or of an employee’s
56 spouse; or other person who assumed the responsibilities of parenthood when the employee or
57 employee’s spouse was a child.

58 “Spouse”, the meaning given this term by the marriage laws of the commonwealth.

59 (b) All employees who work in the commonwealth who must be absent from work for the
60 reason set forth in subsection (c) shall be entitled to earn and use not less than the hours of
61 earned sick time provided in subsection (d).

62 (c) Earned sick time shall be provided by an employer for an employee to:

63 (1) care for the employee’s child, spouse, parent, or parent of a spouse, who is suffering
64 from a physical or mental illness, injury, or medical condition that requires home care,
65 professional medical diagnosis or care, or preventative medical care; or

66 (2) care for the employee’s own physical or mental illness, injury, or medical condition
67 that requires home care, professional medical diagnosis or care, or preventative medical care; or

68 (3) attend the employee’s routine medical appointment or a routine medical appointment
69 for the employee’s child, spouse, parent, or parent of spouse; or

70 (4) address the psychological, physical or legal effects of domestic violence as defined in
71 subsection (g 1/2) of section 1 of chapter 151A, except that the definition of employee in
72 subsection (a) will govern for purposes of this section.

73 (d) (1) An employer shall provide a minimum of one hour of earned sick time for every
74 thirty hours worked by an employee. Employees shall begin accruing earned sick time
75 commencing with the date of hire of the employee or the date this law becomes effective,

76 whichever is later, but employees shall not be entitled to use accrued earned sick time until the
77 90th calendar day following commencement of their employment. On and after this 90 day
78 period, employees may use earned sick time as it accrues.

79 (2) Nothing in this chapter shall be construed to discourage or prohibit an employer from
80 allowing the accrual of earned sick time at a faster rate, or the use of earned sick time at an
81 earlier date, than this section requires.

82 (3) Employees who are exempt from overtime requirements under 29 U.S.C. section
83 213(a)(1) of the Federal Fair Labor Standards Act shall be assumed to work 40 hours in each
84 work week for purposes of earned sick time accrual unless their normal work week is less than
85 40 hours, in which case earned sick time shall accrue based on that normal work week.

86 (4) All employees employed by an employer of eleven or more employees shall be
87 entitled to earn and use up to 40 hours of earned paid sick time from that employer as provided
88 in subsection (d) in a calendar year. In determining the number of employees who are employed
89 by an employer for compensation, all employees performing work for compensation on a full-
90 time, part-time or temporary basis shall be counted.

91 (5) Notwithstanding section 17 of chapter 15D, sections 70-75 of chapter 118E, or any
92 other special or general law to the contrary, the PCA Quality Home Care Workforce Council
93 shall be deemed the Employer of all Personal Care Attendants, as defined in section 70 of
94 chapter 118E, for purposes of subsection (d)(4) of this section, the Department of Medical
95 Assistance shall be deemed the Employer of said Personal Care Attendants for all other purposes
96 under this section, and the Department of Early Education and Care shall be deemed the

97 Employer of all Family Child Care Providers, as defined in section 17(a) of chapter 15D, for
98 purposes of this section.

99 (6) All employees not entitled to earned paid sick time from an employer pursuant to
100 subsection (d)(4)-(5) shall be entitled to earn and use up to 40 hours of earned unpaid sick time
101 from that employer as provided in subsection (d) in a calendar year.

102 (7) At the discretion of the employer, earned sick time shall be used in increments of 4 or
103 8 hours, or 50% or 100% of an employer's normal shift if above 8 hours. Provided further in the
104 aggregate an employee would only be compensated up to 40 hours. Employees may carry over
105 up to 40 hours of unused earned sick time to the next calendar year, but are not entitled to use
106 more than 40 hours in one calendar year. Employers shall not be required to pay out unused
107 earned sick time upon the separation of the employee from the employer.

108 (8) For an employer to provide earned paid sick time, an employer must have 11 or more
109 employees for 20 weeks per year. For purposes of determining the total employee count, the
110 following positions are exempt for the purposes of counting and are eligible for leave at the
111 discretion of the employer including the chief executive officer, the chief operating officer, the
112 chief financial officer or treasurer, any family member, any independent contractors, any
113 freelancers, any interns, any temporary worker working less than 20 weeks in a given year, any
114 employees not residing in the Commonwealth, any employees working less than 20 weeks a year
115 in the Commonwealth, any employees engaged in workshare, and any employee with a 5%.

116 (9) Any overtime shall not be counted in the accrual. An employee may not accrue or use
117 more than 40 hours of paid or earned sick time in a calendar or fiscal year as determined by the
118 employer, unless the employer chooses to offer greater leave benefits.

119 (10) At the discretion of the employer, an employee may be required to use their sick
120 leave or be paid for the leave prior to the end of any calendar year or benefit year.

121 (11) An employer is not required to provide compensation to an employee for accrued,
122 unused paid sick days upon termination, resignation, retirement, or other separation from
123 employment.

124 (e) If an employee is absent from work for any reason listed in subsection (c) and, by
125 mutual consent of the employer and the employee an equivalent number of additional hours or
126 shifts during the same or the next pay period as the hours or shifts not worked due to reasons
127 listed in subsection (c), an employee shall not be required to use accrued earned sick time for the
128 employee's absence during that time period and the employer shall not be required to pay for the
129 time the employee was so absent. An employer shall not require such employee to work
130 additional hours to make up for the hours during which the employee was so absent or require
131 that the employee search for or find a replacement employee to cover the hours during which the
132 employee is utilizing earned sick time.

133 (f) Subject to the provisions of subsection (n), an employer may require certification
134 when an earned sick time period covers more than 12 consecutively scheduled work hours. An
135 employer may require an employee to submit documentation from a certificated medical
136 professional for any absence within 24 hours of returning to work. An employer may maintain
137 records of employees that do not provide the certification or refuses to provide certification. An
138 employer has an affirmative defense for terminating an employee that does not provide
139 certification. An employer is held harmless from treble damages, unemployment insurance
140 claims and punitive damages for terminating an employee that has a documented pattern, over

141 any four month period, of non-compliance with certification requirements. Any reasonable
142 documentation signed by a health care provider indicating the need for earned sick time taken
143 shall be deemed acceptable certification for absences under subsection (c)(1), (2) and (3).
144 Documentation deemed acceptable under subsection (g 1/2) of section 1 of chapter 151A shall be
145 deemed acceptable documentation for absences under subsection (c)(4). An employer may not
146 require that the documentation explain the nature of the illness or the details of the domestic
147 violence. The employer shall not delay the taking of earned sick time or delay pay for the period
148 in which earned sick time was taken for employees entitled to pay under subsection (d), on the
149 basis that the employer has not yet received the certification. Nothing in this section shall be
150 construed to require an employee to provide as certification any information from a health care
151 provider that would be in violation of section 1177 of the Social Security Act, 42 U.S.C. 1320d-
152 6, or the regulations promulgated under section 264(c) of the Health Insurance Portability and
153 Accountability Act of 1996, 42 U.S.C. 1320d-2 note.

154 (1) An employer may withhold holiday pay if an employee is scheduled to work on a
155 holiday or receiving holiday wages and calls out sick on the day of the holiday, the day prior to a
156 holiday or the day immediately following a holiday. An employer may establish a policy that
157 prohibits holiday pay unless the employee provides documentation by a certified medical
158 professional within 24 hours of returning to work. The employer may document employee calls
159 out during holidays and may be subject to disciplinary action or termination.

160 (g) When the use of earned sick time is foreseeable, the employee shall provide notice of
161 this need to the employer in advance of the use any earned sick time in the manner designated by
162 the employer. When the use of earned sick time is unforeseeable, the employee shall provide
163 notice of this need to he employer as soon as possible before or after the scheduled start of a

164 work in the manner designated by the employer. Any unforeseen circumstances should be
165 reported during the same day or within 24 hours. Employers are permitted to ask any employee,
166 when they are taking leave. A foreseeable event shall be considered 3 workdays in advance of
167 taking time off. Employers are permitted to create a uniform call-in procedure for use of sick
168 time. Employee violation of said call in or reporting procedure are subject to disciplinary action
169 and termination.

170 (h) It shall be unlawful for any employer to interfere with, restrain, or deny the exercise
171 of, or the attempt to exercise, any right provided under or in connection with this section,
172 including, but not limited to, by using the taking of earned sick time under this section as a
173 negative factor in any employment action such as evaluation, promotion, disciplinary action or
174 termination, or otherwise subjecting an employee to discipline for the use of earned sick time
175 under this section.

176 (i) It shall be unlawful for any employer to take any adverse action against an employee
177 because the employee opposes practices which the employee believes to be in violation of this
178 section, or because the employee supports the exercise of rights of another employee under this
179 section. Exercising rights under this section shall include but not be limited to filing an action, or
180 instituting or causing to be instituted any proceeding, under or related to this section; providing
181 or intending to provide any information in connection with any inquiry or proceeding relating to
182 any right provided under this section; or testifying or intending to testify in any inquiry or
183 proceeding relating to any right provided under this section.

184 (1) An employer may retain any attendance incentive policy, including those in collective
185 bargaining agreements. The employer shall not be subject to treble, punitive, or liquidated

186 damages. When an employer determines a regular attendance problem is occurring, the
187 employer may require the employee to provide an explanation for the absences or require a
188 notice by a medical practitioner relative to the employee's absences. An employer may
189 document, and take disciplinary actions that may lead to termination.

190 (j) Nothing in this section shall be construed to discourage employers from adopting or
191 retaining earned sick time policies more generous than policies that comply with the
192 requirements of this section and nothing in this section shall be construed to diminish or impair
193 the obligation of an employer to comply with any contract, collective bargaining agreement, or
194 any employment benefit program or plan in effect on the effective date of this section that
195 provides to employees greater earned sick time rights than the rights established under this
196 section.

197 (k) Employers required to provide earned paid sick time who provides their employees
198 paid time off under a paid time off, vacation or other paid leave policy or under a collective
199 bargaining agreement who provide, advance or makes available an amount of earned or paid as
200 defined in shall retain the accrual and conditions for which an employee may use the leave.

201 (l) The attorney general shall enforce this section, and may obtain injunctive or
202 declaratory relief for this purpose. Violation of this section shall be subject to paragraphs (1), (2),
203 (4), (6) and (7) of subsection (b) of section 27C and to section 150.

204 (m) The attorney general shall prescribe by regulation the employer's obligation to make,
205 keep, and preserve records pertaining to this section consistent with the requirements of section
206 15 of chapter 151.

207 (n) The attorney general may adopt rules and regulations necessary to carry out the
208 purpose and provisions of this section, including the manner in which an employee who does not
209 have a health care provider shall provide certification, and the manner in which employer size
210 shall be determined for purposes of subsection (d)(4).

211 (o) Notice of this section shall be prepared by the attorney general, in English and in
212 other languages required under clause (iii) of subsection (d) of section 62A of chapter 151A.
213 Employers shall post this notice in a conspicuous location accessible to employees in every
214 establishment where employees with rights under this section work, and shall provide a copy to
215 their employees. This notice shall include the following information:

216 (1) information describing the rights to earned sick time under this section;

217 (2) information about notices, documentation and any other requirements placed on
218 employees in order to exercise their rights to earned sick time;

219 (3) information that describes the protections that an employee has in exercising rights
220 under this section;

221 (4) the name, address, phone number, and website of the attorney general's office where
222 questions about the rights and responsibilities under this section can be answered; and

223 (5) information about filing an action under this section.

224 (p) Notwithstanding any special or general law to the contrary, earned sick time shall not
225 be subject to treble damages. An employer shall not be assessed any penalty or liquidated
226 damages under this provision due to an isolated, or unintentional payroll error, or written notice

227 error that is a clerical, or an inadvertent mistake regarding the accrual, or available use of paid
228 sick leave.

229 (q) The Office of the Attorney General, members of the great and general court and the
230 Executive Office of Labor and Workforce Development shall engage in outreach efforts
231 coordinated by the Office of the Attorney General to communicate to businesses and individuals
232 via website, RSS feeds, blogs, newsletters, all and other forms of communication regarding the
233 earned sick time law, the rules and responsibilities for employers and employees. In particular
234 the Office of the Attorney General must include utilize all print and media network news outlets
235 throughout the Commonwealth regarding the law, and risks and responsibilities, and
236 requirements for employers and employees.

237 (r) There shall be a fiscal impact statement made by the state Office of the Attorney
238 General regarding the costs associated with analyzing, promulgating, and educating
239 Massachusetts businesses and individuals regarding the new law. The cost associated with this
240 should also itemize the cost associated for businesses to analyze, operationalize and possible risk
241 cost associated with legal cost associated with non-compliance.

242 (s) There shall be a an bi-annual report by the Office of the Attorney General in
243 coordination with the State Auditor and the State Inspector General shall publish a report on the
244 costs and resources dedicated to educating the public in addition to the costs and resources
245 dedicated to the enforcement of said law. The annual report shall also take into effect the
246 amount of cost and resources granted by any other state offices or constitutional offices. The
247 report shall itemize the number of cases that included earned sick time disputes, the nature of the
248 case and cost associated with any settlement and in separate calculation a cost associated with

249 final court verdicts. The annual report shall also item by case and in the aggregate the total
250 number costs for treble damages.

251 (t) The office of administration and finance shall compile an annual statewide collective
252 bargaining agreement list that shall itemize the bargaining units total number of members,
253 bargaining agreement total cost for the agreement, and shall also itemize for each collective
254 bargaining agreement the total cost associated with healthcare insurance and associated
255 healthcare cost in addition to an itemized accounting of the collective bargaining units cost
256 associated with earned sick time. The report shall be due each year on January 1. The first
257 report will be due by July 29, 2015.

258 (u) Notwithstanding any special law to the contrary, the Secretary of Labor and
259 Workforce development shall send out an annual survey asking Massachusetts employers if the
260 Massachusetts paid sick leave law has changed their staffing levels, if they have chosen to move
261 staff and or their operations out of the state. The secretary shall post the report on his website and
262 report the finding to the Ways and Means.

263 (p) Notwithstanding any special or general law to the contrary, earned sick time shall not
264 be subject to treble damages. An employer shall not be assessed any penalty or liquidated
265 damages under this provision due to an isolated, or unintentional payroll error, or written notice
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299 Massachusetts paid sick leave law has changed their staffing levels, if they have chosen to move
300 staff and or their operations out of the state. The secretary shall post the report on his website and
301 report the finding to the Ways and Means.

302 Section 148D. The executive office of health and human services, in consultation with
303 the attorney general, shall develop and implement a multilingual outreach program to inform
304 employees, parents, and persons who are under the care of a health care provider about the
305 availability of earned sick time under this section. This program shall include the distribution of
306 notices and other written materials in English and in other languages to all child care and elder
307 care providers, domestic violence shelters, schools, hospitals, community health centers, and
308 other health care providers.

309 SECTION 2. Section 150 of chapter 149 is hereby amended by inserting after the word
310 “148B”, the following word:- , 148C.

311 SECTION 3. If any provision of this act or application thereof to any person or
312 circumstance is judged invalid, the invalidity shall not affect other provisions or applications of
313 the act which can be given effect without the invalid provision or application, and to this end the
314 provisions of this act are declared severable.

315 SECTION 4. This act shall take effect on January 1, 2016, provided that in the case of
316 employees covered by a collective bargaining agreement in effect on January 1, 2015, this Act
317 shall apply on the date of the termination of such agreement. At the discretion of the employer,
318 an employee may only use or be compensated for a total of 40 earned sick time hours during the
319 transition year.