



Frequently Asked Questions  
and Answers on  
Earned Paid Leave (LD 369)  
Maine Department of Labor - Bureau of Labor Standards

January 2021

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## Disclaimer

The Earned Paid Leave law establishes a minimum standard for paid time off in the State of Maine. Covered employers must meet this minimum standard, but the law does **not** require an employer to limit or reduce existing paid time off benefits. Many employers may already have a paid time off policy that meets or exceeds the minimum requirements of this law.

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The following information is general guidance based on hypothetical scenarios. It is not legal advice on any specific situation.

Individual cases must be analyzed and decided by the Bureau of Labor Standards (BLS).

## Introduction

These Frequently Asked Questions come from the listening sessions held in the Fall of 2019, public comments received on the proposed Rules, public webinar sessions in 2020, and conversations among Maine Department of Labor staff. The answers below are intended to clarify the Rules, the law, and the expectations for compliance.

## Questions and Answers, by Subject Area

### II. Definitions

#### II.B: “Base Rate of Pay”

- 1. Employer Question:** How do I calculate the rate I pay employees when they use accrued Earned Paid Leave?

**Answer:** The Earned Paid Leave law states that earned leave must be paid at least the same base rate of pay that the employee received immediately before taking earned leave and that employees must receive the same benefits as those provided under established policies of the employer pertaining to other types of paid leave.

The Rules define the base rate of pay as follows:

*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.*

The section of the Minimum Wage statute that defines the regular rate of pay applies to non-exempt employees only. Salaried exempt employees are paid a predetermined fixed amount so their base rate of pay is the hourly equivalent of their salary.

The base rate of pay for nonexempt employees is calculated by dividing the total straight-time earnings for the week, which includes any additional compensation included in the definition of the regular rate, by the total hours worked.

*26 MRS §664 (3) establishes that the regular hourly rate includes all earnings, bonuses, commissions, and other compensation that is paid or due based on actual work performed and does not include any sums excluded from the definition of “regular rate” under the Fair Labor Standards Act, 29 USC, section 207(e).*

NOTE: Half-time wages associated with overtime pay is excluded from the definition of “regular rate” and therefore not included in the base rate calculation.

Fair Labor Standards Act: <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FairLaborStandAct.pdf>

**2. Employer Question:** How do I determine the base rate of pay for a per diem employee like a substitute teacher?

**Answer:** The base rate of pay is determined by looking at the most recent week worked by a per diem employee. The total earnings from that week, divided by the total hours worked will equal the base rate of pay.

**3. Employee Question:** I have more than one rate of pay during the week. How do I know what my base rate of pay is?

**Answer:** The base rate of pay is calculated by dividing the total earnings for the week by the total hours worked.

For example: If you worked 15 hours at \$13.00 per hour and 25 hours at \$15.00 per hour the week before using your Earned Paid Leave, your base rate will be calculated as follows:

15 hours X \$13 = \$195

25 hours X \$15 = \$375

Total earnings = \$570

\$570 ÷ 40 hours = \$14.25 per hour base rate of pay.

**4. Employee Question:** I work in a restaurant and I have multiple rates of pay, all using the tip credit.

**Answer:** If all rates of pay are based on the tip credit then your base rate of pay is actually minimum wage.

*Example: Employee works in the following positions during the week.*

- Server at \$6.08 per hour plus tips
- Host at \$7.00 per hour plus tips
- Bartender at \$10.00 per hour plus tips

As long as your direct wages and tips received when combined at the end of the week total at least minimum wage, then your base rate of pay is minimum wage.

5. **Question:** How do I calculate the base rate when an employee receives a nondiscretionary bonus and/or commission?

**Answer:** Bonuses and Commissions are factored into the base rate for non-exempt employees only. However, only the amount associated with the week immediately prior to the employee using Earned Paid Leave will apply. For example, if the employee is paid on a weekly basis and the bonus or commission is also paid on a weekly basis, then the total amount of the bonus or commission will apply to that week. If the bonus or commission payment is deferred (i.e., paid on a monthly, quarterly, annual, or other specific timeframes) then the bonus or commission can be prorated to a weekly amount.

**Example 1:**

- Employee worked 40 hours at \$15 per hour = \$600
- Employee received a **weekly** bonus of \$100.
- Total earnings for the week are \$600 + \$100 = \$700
- $\$700 \div 40 \text{ hours} = \$17.50$  base rate.

**Example 2:**

- Employee worked 40 hours at \$15 per hour = \$600
- Employee received a **monthly** bonus of \$100. (in this example the bonus applies to a month with 30 days)
- $\$100 \div 30 \text{ days} = \$3.33$  per day x 7 days in the week = \$23.31 bonus applies to one week
- Total earnings for the week are \$600 + \$23.31 = \$623.31
- $\$623.31 \div 40 \text{ hours} = \$15.58$  base rate.

[II.E: "Covered Employee"](#)

6. **Question:** The Act Authorizing Earned Employee Leave ("Earned Paid Leave Law") references definitions in the Employment Security Act, which governs unemployment. Does that mean that if an employee is covered by unemployment, the employee is also covered by Earned Paid Leave?

**Answer:** As a general rule, yes. The exceptions to "employer" and "employment" in the Employment Security Act also apply to coverage for Earned Paid Leave. Therefore, if you list an employee on your quarterly report to the Bureau of Unemployment Compensation, that employee is covered by Earned Paid Leave. The only exception is seasonal employees. (See the next question on seasonal employees.)

As a general matter, if the employer reports more than 10 employees in its quarterly report to the Maine Department of Labor, Bureau of Unemployment Compensation, then those employees are covered by Earned Paid Leave.

7. **Employer Question:** Can you explain the exception for seasonal employees, including summer interns and international workers (J1, H-2B, etc.)?

**Answer:** The Earned Paid Leave Law expressly exempts seasonal employees as defined by the Employment Security Act.

The Unemployment Insurance Commission determines that certain industries are seasonal. A business that operates for fewer than 365 days a year does not necessarily make it seasonal for purposes of this law. Employers that have been determined seasonal by the Department will have two account numbers within the ReEmployME unemployment insurance system. One account number is for seasonal wages, and the other for non-seasonal.

If the employer is within any such industry **and** the employer has submitted the required report to the Bureau of Unemployment Compensation setting forth the seasonal period for the applicable year, then the employees working only within that seasonal period will be exempt from coverage for Earned Paid Leave.

A list of seasonal industries and their seasonal periods can be found at:

[https://www.maine.gov/labor/Templates/ui\\_forms\\_template.shtml?id=38865](https://www.maine.gov/labor/Templates/ui_forms_template.shtml?id=38865).

Earned Paid Leave coverage can be determined using the following:

1. Is the business an employer as defined under [26 M.R.S. § 1043, 9](#)?
  - a. If no – Earned Paid Leave will **not** apply
  - b. If yes go to question 2
2. Does the business employ more than 10 employees in Maine for more than 120 days (Total days, not consecutive days) in any calendar year?
  - a. If no – Earned Paid Leave will **not** apply
  - b. If yes go to question 3
3. Is the work provided by the worker considered employment as defined under [26 M.R.S. §1043, 11](#)?
  - a. If no – Earned Paid Leave will **not** apply
  - b. If yes go to question 4
4. Is the employment included in a seasonal industry as defined in [26 M.R.S. §1251](#)?
  - a. If no – Earned Paid Leave **will** apply
  - b. If yes – go to question 5
5. Did the employer (excluding a predefined seasonal business) submit the required report to the Bureau of Unemployment Compensation?
  - a. If no – Earned Paid Leave **will** apply
  - b. If yes – go to question 6
6. Is the work performed only within that seasonal period?
  - a. If no – Earned Paid Leave **will** apply
  - b. If yes – Earned Paid Leave will not apply

**8. Employee Question:** Am I eligible for this benefit?

**Answer:** If you work for an employer who has more than 10 employees in Maine and you are not under a collective bargaining agreement as of 1/1/2021, you may be eligible for this benefit.

**9. Question:** Are part-time and per diem employees covered by Earned Paid Leave?

**Answer:** Yes, as long as they otherwise meet the definition of a covered employee.

**10. Employee Question:** My employer told me that I will not be entitled to Earned Paid Leave because I am an independent contractor, not an employee. I believe that I am misclassified and that I am an employee. What should I do?

**Answer:** Contact the Bureau of Unemployment Compensation at 207-621-5120. They will investigate whether, under 26 M.R.S. §1043(11)(E), you are exempted from the definition of employment. If you are not exempted, your employer will be responsible for paying unemployment taxes for the back quarters for which you were working in “employment.”

After BUC completes its investigation, it will report the results to the Bureau of Labor Standards (BLS). If the BUC finds that you are an employee and not an independent contractor, the BLS will inform your employer that you are entitled to Earned Paid Leave and that the employer is subject to penalties if it fails to comply. BUC also has the discretion to assess a penalty against the employer for misclassification pursuant to 26 M.R.S. § 591-A.

**11. Question:** Are students considered workers under this law and therefore entitled to the benefit?

**Answer:** If a worker is a covered employee for unemployment insurance purposes, that worker is covered by Earned Paid Leave. As a general matter, high school and college students are considered covered employees for unemployment purposes, and therefore, students are covered by Earned Paid Leave. The exceptions are students who are working in the following type of services (who are not covered by unemployment insurance and will not be eligible for Earned Paid Leave):

- Service performed by students participating in a cooperative program of education and occupational training or on-the-job training that is part of the school curriculum;
- Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law and service performed as an intern in the employ of a hospital by an individual who has completed a 4-year course in a medical school chartered or approved pursuant to state law;
- Service performed in the employ of a school, college, or university if that service is performed by a student who is enrolled and is regularly attending classes at such a school, college or university; or
- Service performed by a full-time student employed by certain seasonal youth camps.

**12. Question:** Are high school students who work a summer job covered by Earned Paid Leave?

**Answer:** Generally, yes. While these workers often do not earn enough money to be eligible for unemployment benefits, a worker is covered by Earned Paid Leave as long as the worker is a covered employee under Maine's unemployment law. High school and college students are covered employees under unemployment law, with limited exceptions, such as work-study students.

**13. Question:** Does this mean that part-time summer workers are covered by Earned Paid Leave?

**Answer:** Potentially, yes. Part-time and temporary workers are covered by Earned Paid Leave. Workers begin to accrue Earned Paid Leave at the start of employment and earn one hour of Earned Paid Leave for every 40 hours worked. However, an employer is not required to permit the use of leave before an employee has been employed by that employer for 120 days in any calendar year.

**14. Question:** Are state and local employees exempt from the law?

**Answer:** Not if otherwise eligible as explained above.

**15. Question:** Are school personnel, especially per diem, substitutes, adjuncts, adult ed instructors, and the like exempt from this law?

**Answer:** Not if otherwise eligible as explained above.

**16. Question:** Are non-citizens exempt from this law?

**Answer:** Not if otherwise eligible as explained above.

**17. Question:** Are government, municipal, and school entities exempt from these rules?

**Answer:** No. The Earned Paid Leave Law specifies that employment for purposes of Earned Paid Leave has the same meaning as employment in the Employment Security Act, 26 M.R.S. § 1043(11). The Department of Labor does not have the legal authority to exempt groups of workers or employers who are covered by the law. Only the legislature may make changes as to the coverage of the law.

**18. Question:** Are employees exempt from these rules when collective bargaining agreements are in effect that already address the paid time off issue.

**Answer:** Yes. Until the collective bargaining agreement term ends, the contract takes precedent. New contracts negotiated after 1/1/2021 must include Earned Paid Leave as a benefit going forward.

**19. Question:** Are non-citizens eligible for Earned Paid Leave?

**Answer:** The Earned Paid Leave Law specifies that employment for purposes of Earned Paid Leave has the same meaning as employment in the Employment Security Act, 26 M.R.S. § 1043(11). The Employment Security Act does not exclude non-citizens from coverage. However, H-2A workers are exempt under this statute.

For purposes of the Earned Paid Leave law, if the work performed by non-citizens is considered covered employment, according to the Employment Security Act, then non-citizens will be entitled to Earned Paid Leave. The Bureau of Labor Standards does not take into account a worker's immigration status when it comes to worker protections and rights under labor laws.

See USCIS's web site at <https://www.uscis.gov> for more information on work authorization.

**20. Question:** Are agricultural workers covered by this law and are there any limitations?

**Answer:** The Earned Paid Leave Law specifies that individuals covered by the Employment Security Act are eligible for Earned Paid Leave. Specifically, 26 M.R.S. § 1043(11)(A-2) sets forth the circumstances in which employers of agricultural laborers must pay unemployment taxes, including when the employer pays wages of more than \$20,000 for agricultural labor or when 10 or more individuals are employed in agricultural labor during 20 calendar weeks. The same coverage extends to agricultural workers under the Earned Paid Leave law. Please note that "agricultural labor," is defined by 26 M.R.S. § 1043(1).



**21. Question:** Are domestic workers in private homes and the like covered by this law?

**Answer:** The Earned Paid Leave Law specifies that individuals covered by the Employment Security Act are eligible for Earned Paid Leave. Specifically, 26 M.R.S. § 1043(11)(A-3) specifies that domestic service in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid wages of more than \$1,000 in a calendar year is employed covered by the Employment Security Act. Such domestic service is therefore also covered by the Earned Paid Leave Law.

#### II. F: “Covered Employer”

**22. Employee Question:** I work for an employer with multiple business locations. There are fewer than 10 employees in my location. Does the employer have to provide this benefit?

**Answer:** If the employer has more than 10 employees across every location in Maine, they are required to provide this benefit.

**23. Employer Question:** I am an employer and I employ more than 10 employees nation-wide, but fewer than 10 employees in Maine. Are any of those employees covered by the Earned Paid Leave Law?

**Answer:** Probably not, but you need to be aware of the nuances. If you have questions, contact the Bureau of Unemployment Compensation at 207-621-5120. If none of the employee’s service is performed in Maine but is deemed employment under the unemployment compensation law of another state, then that employee is not covered by Maine’s Earned Paid Leave Law.

For example, if 10 employees work exclusively in Maine and 10 employees work exclusively in New Hampshire and the 10 New Hampshire employees are covered by New Hampshire’s unemployment law, then the employer is not a covered employer under Maine’s Earned Paid Leave Law. In this situation, the employer is not required to provide their Maine employees with paid leave under the Earned Paid Leave Law.

If work is performed in multiple states, the analysis is more complicated. Employees are covered if they are within the definition of employment under Maine’s unemployment law which includes employment localized in Maine. 26 M.R.S. § 1043(11)(A).

An employee is covered under the following circumstances:

- The service is not localized in any state but some of the service is performed in Maine and the base of operations is in Maine;
- The service is not localized in any state but some of the service is performed in Maine, there is no base of operations, and the service is directed or controlled in Maine;
- The service is not localized in any state but some of the service is performed in Maine, there is no base of operations, and the place from which the service is directed or controlled is not in any state in which some part of the service is controlled, but the individual's residence is in Maine.

**24. Question:** These rules apply to employers that employ more than 10 employees. Does the count include part-time employees?

**Answer:** Yes. Rule section II.E. specifies that covered employees include those who work full-time, part-time, and per diem.

#### II.G: “Emergency” and “Sudden Necessity”

**25. Question:** What constitutes an emergency or sudden necessity under the Earned Paid Leave law?

**Answer:** Anything within reason that is unforeseen and requires the employee to interrupt their work schedule.

#### II. K: Hours Worked—40-hour Presumption for Salaried Workers

**26. Question:** Why is there a presumption of 40 hours worked in a week for salaried workers?

**Answer:** In most cases, employers do not track the time of their salaried exempt workers. In such cases, this law needs an assumption for the benefit to be calculated. For more information on calculating the base rate of pay for salaried exempt employees, please see Question 29 under the subject “Accrual”.

#### II.N: “Year of Employment”

**27. Employer Question:** Does the year of employment and the defined year have to coincide with the calendar year?

**Answer:** No. It can be the same period for all employees or the anniversary date of each employee as long as the choice does not adversely impact the other requirements of the law.

### III. Accrual

#### III.A: Rate

**28. Question:** When does an employee start accruing Earned Paid Leave?

**Answer:** Accrual of Earned Paid Leave begins at the start of employment. The start of employment is defined in the Rules as the first day that an employee performed work for the employer. Please note that completion of new hire paperwork is considered time worked and should be paid as such. This time will count toward the accrual of Earned Paid Leave.

**29. Question:** How precisely does the 1 hour earned to 40 hours worked need to be calculated and how should businesses capture the number of hours worked if staff hours fluctuate week to week?

**Answer:** It should be as precise as hours tracked by the employer’s timekeeping system. It is a legal requirement to track the hours worked by non-exempt employees. It is not a requirement to track the hours of salaried “exempt” employees. Under the Earned Paid Leave Law, salaried “exempt” employees are presumed to work 40 hours per week unless their hours are recorded otherwise.

**30. Question:** Instead of calculating the hours earned by each employee for each week, can an employer provide the 40 hours of Earned Paid Leave at the beginning of the calendar year?

**Answer:** Yes. The annual maximum of 40 hours of Earned Paid Leave may be front-loaded at the beginning of the calendar year, or on the employee's anniversary date, as long as the employees receive no less Earned Paid Leave than if they had earned it week by week.

**31. Employer Question:** We have adjunct instructors which are part-time exempt employees. Can we use the IRS hours equivalence like we do for ACA as a basis for their hours worked?

**Answer:** If there is no actual record of hours worked and the employee does not dispute the standard, then the IRS standard would be acceptable.

**32. Question:** If an employee is using paid or unpaid leave, are they accruing hours of Earned Paid Leave?

**Answer:** An employee would not continue to accrue Earned Paid Leave while out on paid or unpaid leave. However, the days the employee is out on leave do count toward the threshold of 120 days of employment.

**33. Employer Question:** If an employee holds an hourly position, coaches, and is the advisor for a student club would they accrue Earned Paid Leave under each position?

**Answer:** Earned Paid Leave is accrued through hours worked for a single employer regardless of the number of positions held by the employee. If a covered employee holds multiple positions for one employer, that employee would accrue 1 hour of Earned Paid Leave for every 40 hours worked for that single employer.

### III.B: Waiting Period

**34. Question:** Is an employee required to work a minimum number of days or hours inside the 120 days from the "start of employment"?

**Answer:** No. The employer must allow the employee to use the leave after 120 calendar days of employment regardless of the number of days or hours actually worked during the period.

**35. Employee Question:** I have been working for my employer for a full year before January 1<sup>st</sup>, 2021. When can I start using my leave?

**Answer:** 120 days of employment may be considered to have occurred during the one-year period before the Earned Paid Leave law goes into effect. An employee who has been employed by their employer for at least 120 days before the law goes into effect on January 1, 2021, may use their leave as soon as it is earned.

**36. Employee Question:** I started working for my employer on November 1<sup>st</sup>, 2020. When can I start using my leave?

**Answer:** An employer must permit the use of Earned Paid Leave after 120 days of employment. An employee who begins work on November 1<sup>st</sup>, 2020, would be eligible to use accrued leave after March 1<sup>st</sup>, 2021. An employer is not required to permit the use of Earned Paid Leave before this period has been served but may choose to do so.

### III.D: Carry-Over of Unused Leave

- 37. Question:** If an employee rolls over unused accrued Earned Paid Leave from the previous year, does the law require that 40 hours of Earned Paid Leave be available for employee use in addition to hours rolled over?

**Answer:** No. If the employee rolls over 40 hours of unused accrued Earned Paid Leave from one year to the next, the employee will not accrue any additional hours until the following year, but only if the employee rolls over less than 40 hours. If an employer provides additional leave, that is at their discretion.

*Example:* An employee rolls over 8 hours of unused accrued Earned Paid leave from the previous year. In the present year, the employee is only entitled to accrue up to 32 additional hours of Earned Paid Leave, regardless of how much leave the employee uses in the current year.

- 38. Question:** Is an employer that front-loads Earned Paid Leave obligated to roll-over unused leave?

**Answer:** An employer is not obligated to roll-over unused leave from one year to the next if they front-load 40 hours of Earned Paid Leave each year.

- 39. Question:** If an employer front-loads the 40 hours of Earned Paid Leave, and the employee takes the Earned Paid Leave, but the employment ends before the leave would have been earned, can the employer deduct the unearned leave from the last paycheck?

**Answer:** Yes, this is one of the few circumstances in which a deduction may be made from a paycheck. The terms of employment or the employer's established practice must include provisions for front-loaded leave if taken before it is earned. This leave may be pro-rated and deducted from a final paycheck.

### III.E: Payout of Unused Leave

- 40. Employee Question:** What happens if I leave work with an unused balance of Earned Paid Leave? Is my employer required to pay me for any leave that I did not use?

**Answer:** You may lose any accrued leave unless the employer has a policy that states the balance of unused Earned Paid Leave is paid when employment ends. If the employer does not have a policy for Earned Paid Leave, but has a policy regarding unused vacation time, then the policy on unused vacation time will apply to the unused Earned Paid Leave. In all cases, if the employer does not compensate you for the unused balance of Earned Paid Leave when employment ends, based on their policy and practice, then they will need to make the leave available to you if you return to work for that employer within a one-year period.

- 41. Question:** If an employee is terminated before 120 days of employment have elapsed, are they entitled to the Earned Paid Leave that they accrued?

**Answer:** A covered employee who has been separated from their employment is entitled to accrued Earned Paid Leave if their employer has a policy that states the balance of unused Earned Paid Leave is paid when employment ends. If a former covered employee is not compensated for their unused balance of Earned Paid Leave when

employment ends, based on the employer's policy and practice, then that leave must be made available to them if they return to work for that employer within one year.

- 42. Employer Question:** Can I offer my employees the ability to cash out their Earned Paid Leave during the year?

**Answer:** Whether an employer allows an employee to receive cash in lieu of actually taking time off is solely at the discretion of the employer. However, an employer cannot mandate that an employee take cash rather than using their accrued Earned Paid Leave.

## V: Notice of Use of Leave

### V.A: Reasonable Notice—Four Weeks' Notice Limit (Written notice, documentation)

- 43. Question:** Is an employee obligated to give a reason for unplanned leave?

**Answer:** An employer can require an employee to provide a general reason for an unplanned leave. However, an employer cannot require a medical note or other documentation unless the leave is for more than 3 consecutive days.

- 44. Question:** Is an employer obligated to provide Earned Paid Leave because an employee wants to take time off to care for a person who is not related to them?

**Answer:** Generally, yes. An employee is entitled to use Earned Paid Leave for any reason.

- 45. Question:** Can an employer require evidence of an "emergency, illness, or other sudden necessity?"

**Answer:** Generally, no. The employer may require a general description, i.e. illness of a child; illness of a day-care provider; transportation issue. Unless the leave is for more than 3 consecutive days, the employer cannot require a medical note or other documentation.

### V.C: Scheduling of Leave

- 46. Employer Question:** Does the employer always have to give me time off?

**Answer:** No. The employer can require up to 4 weeks' notice for use of leave other than an emergency, illness, or other sudden necessity and can restrict dates that such time off may be granted. For instance, they might restrict or not allow leave (other than leave for an emergency, illness, or other sudden necessity) during a holiday season, or other busy seasons or days. We recommend that employers create a written policy and clearly communicate restrictions to avoid any misunderstandings.

- 47. Employer Question:** I want to avoid multiple workers using leave at the same time. How can I best do that and stay within the law?

**Answer:** You may want to consider identifying times of the year, month, or week that leave may be restricted due to operational needs, other than leave for an emergency, illness, or sudden necessity. Employers must be able to prove undue hardship if they deny the use of leave for any reason. A written policy outlining dates that planned

employee leave is restricted due to operational needs is one of the best ways to ensure compliance with this piece of the Earned Paid Leave law.

- 48. Question:** What constitutes undue hardship for the purposes of restricting planned employee leave and how does a business prove undue hardship?

**Answer:** Undue hardship is defined in the Rules as: 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. This language is a summation of an already existing definition of “undue hardship” currently used in our Rules Governing Employment Leave for Victims of Violence.

The law permits employers to require 4 weeks of notice for planned employee absence, as well as restrict planned leave for specific times of the year where employee absence would cause undue hardship to their business.

A written policy outlining when planned leave is restricted for use, as well as how much notice employees are required to give is the best method to ensure that a business is in compliance with this part of the Earned Paid Leave law.

- 49. Question:** Can an employer require the use of Earned Paid Leave or other types of PTO when an employee is out?

**Answer:** If an employee has accrued Earned Paid Leave, an employer may require that leave be used if the employee takes a planned absence, or if the employee is out due to an emergency, illness, or sudden necessity.

#### V.D: One-Hour Increment

- 50. Employee Question:** I was 15 minutes late for my shift (I needed only a half-hour for an appointment), and the employer refused to let me use less than one hour of Earned Paid Leave. Is this permitted?

**Answer:** The employer can require the use of Earned Paid Leave in one-hour increments. An employer may choose to allow the use of Earned Paid Leave in smaller increments. Please note that an employer cannot require the use of Earned Paid Leave in larger increments.

- 51. Question:** Does Earned Paid Leave accrue in increments smaller than one hour? For example, does an employee earn .25 hours of leave after working for 10 hours?

**Answer:** The minimum standard set by this law is that a covered employee must earn 1 hour of Earned Paid Leave for every 40 hours worked, accruing up to 40 hours of Earned Paid Leave per year. It is at the discretion of the employer if they will permit the accrual and use of leave in smaller increments.

## Other Issues Raised

### Pre-Existing Leave Policies

- 52. Question:** My business currently provides sick and vacation days. If those total 5 days or more, am I in compliance with the law?

**Answer:** For an existing policy to be in compliance with the Earned Paid Leave law, the existing policy must allow an employee to use up to 40 hours of paid leave per year for any reason. A leave policy must have the following characteristics to be in compliance:

- Up to 40 hours of paid leave are available for use per year;
- Leave may be taken for any reason;

*(Example: An existing leave policy that only provides 20 hours of sick time and 20 hours of vacation time per year does not meet the requirements of the Earned Paid Leave law because the employee must be allowed to use up to 40 hours of accrued Earned Paid Leave for either sick or vacation, or a combination thereof.)*

- No more than 4 weeks of notice are required for a planned employee absence; The employee may take the leave, with only the amount of notice feasible under the circumstances, in the event of an emergency, illness, or sudden necessity;

*(Example: Employee is allowed to take the leave when a daycare provider is ill, and the employee notifies the employer when the employee first learns of the babysitter's unavailability, such leave will count toward the 40 hours required).*

- Leave can be used for emergency, illness, or sudden necessity even when a policy restricts scheduling leave during certain times to prevent undue hardship to the business.

*(Example: a retailer may not allow vacation time to be taken on Black Friday, but an employee may take Earned Paid Leave during that time to care for a sick family member.)*

#### **+40 Hours of Leave Provided**

- If an employer provides more than 40 hours of leave to full-time employees, only 40 hours of leave needs to meet the characteristics of the Earned Paid Leave law.

*(Example: The employer may allow 40 hours of leave for any reason but allow additional time that may only be used with advance notice (i.e. vacation time.)*

- The first 40 hours of leave available each year must be paid at the employee's base rate of pay as defined in the Rules.

**53. Employer Question:** Can I establish an Earned Paid Leave policy that is separate from our sick leave or vacation policies?

**Answer:** Yes. Employers can have separate policies for the different types of leave they offer. The Earned Paid Leave policy should explain what the notice requirements will be for employees intending to use their accrued Earned Paid Leave as well as what will happen to any unused balance when employment ends.

If an employer does not have a policy for Earned Paid Leave but has a policy regarding unused vacation time, then the policy on unused vacation time will apply to the unused Earned Paid Leave. In all cases, if the unused balance of Earned Paid Leave is not paid out when employment ends, based on the employer's policy and practice, then

the employer will need to make the unused/unpaid balance of leave available to the employee if the employee returns to work with that employer within a one-year period.

**54. Question:** If an existing leave policy has a provision for disciplining unscheduled absences, would that policy need to be reframed?

**Answer:** Employees cannot be disciplined for using Earned Paid Leave in accordance with the Earned Paid Leave law. Existing leave policies should include, at a minimum, notification requirements that meet the following criteria:

- No more than 4 weeks advanced notice for the planned use of leave; and
- Notification as soon as practicable if the use of leave is for an emergency, illness, or sudden necessity.

The policy should also indicate the type of disciplinary action that may result if the employee does not follow the established policy.

A policy must account for Earned Paid Leave that is used for an emergency, illness, or sudden necessity. By nature, emergency, illness, or sudden necessity are unscheduled. An employee who uses Earned Paid Leave for one of these reasons must report it to their employer as soon as practicable.

### EPL and Federal Leave Laws

**55. Question:** How does Earned Paid Leave intersect with the federal Family Medical Leave Act or Maine’s family sick leave laws? Can an employee use their accrued Earned Paid Leave in addition to the twelve weeks of unpaid, job-protected leave that the FMLA provides?

**Answer:** The Maine Department of Labor cannot give guidance on federal laws. We can only advise if a certain action will violate Maine law. In this case, an employer will not violate the Earned Paid Leave law if they require an employee to use their accrued Earned Paid Leave if that employee is going to be out of work in accordance with Maine’s Family Medical Leave or Maine’s Family Sick Leave statutes.

Interpretations of federal statutes should be directed to the USDOL Wage & Hour Division at 1-866-487-9243.

### Retaliation Concern

**56. Employee Question:** Can an employer discipline me for using Earned Paid Leave?

**Answer:** Generally, no. However, they can do so if you exceed the amount of leave you have available, or otherwise do not comply with the employer’s notice requirements.

### Notices/Posters (26 MRS section 42-B)

**57. Employer Question:** How is the poster requirement of the Earned Paid Leave law met?



**Answer:** The requirement is met by downloading and posting the Bureau of Labor Standard’s “Regulation of Employment” poster with a revision date no older than 10/2020.

If all employees are working remotely, a business can meet this requirement by making this poster available for all employees to view on the business’s intranet. However, if any employee is working in a physical location, this and all other required posters must also be physically displayed where employees can see it.

Please note that this poster is also available in Arabic, French, Haitian Creole, Khmer, Kinyarwanda, Portuguese, Somali, and Spanish. The posters displayed at the worksite should be in the primary language(s) of your employees.