



# Frequently Asked Questions and Answers on Earned Paid Leave (LD 369)

Maine Department of Labor Bureau of Labor Standards

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## Introduction

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

*Disclaimer: 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).*

## Questions and Answers, by Subject Area

### II. Definitions

#### II.B: "Base Rate of Pay"

**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

$\$570 \div 40 \text{ hours} = \$14.25 \text{ per hour base rate of pay.}$

*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.*

*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).*

**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 \$6.00 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.

## II.E: “Covered Employee”

**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.

**Question:** Can you explain the exception for seasonal employees?

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

The Unemployment Insurance Commission has made determinations that certain industries are 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 paid leave.

**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.

## II. F: “Covered Employer”

**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.

**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.

**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 (and you should check with the Bureau of Unemployment Compensation if you have questions). 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.

**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 fulltime, part-time, and per diem.

**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:** Call the Bureau of Unemployment Compensation (BUC). 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.

**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 is 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.

**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.

**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.

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

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

**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.

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

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

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

**Answer:** No. The Earned Paid Leave Law specifies that employment for purposes of unpaid 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.

**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.

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

**Answer:** The Earned Paid Leave Law specifies that employment for purposes of unpaid 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. Non-citizens who are legally authorized to work in the United States are covered by the Employment Security Act, and therefore, are also covered by the Earned Paid Leave Law. See 26 M.R.S. § 1192(11).

Please see U.S. Citizenship and Immigration Services' web page for more information on work authorization.

**Question:** Are agricultural workers included 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).

**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.G: “Emergency” and “Sudden Necessity”

**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

**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.

## II.N: “Year of Employment”

**Employer Question:** Does the year of employment and 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

**Question:** How precisely does the 1 hour earned to 40 hours worked need to be calculated?

**Answer:** It should be as precise as hours tracked by the employer’s timekeeping system.

### III.B: Waiting Period

**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.

**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.

**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 use of Earned Paid Leave before this period has been served but may choose to do so.

### III.D: Carry-Over

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

**Answer:** If the employer intends to deduct leave that is used but was not yet earned from the last paycheck in the event of a separation of employment, then the employer must keep track of the leave that is earned and rolled over.

**Question:** If some earned leave is rolled over from a previous year, and the employee takes some of that leave, at what point does the employee reach the cap of 40 hours a year?

**Answer:** If an employee rolls over 8 hours of unused leave from the previous year, then the employee will earn only 32 hours of earned leave in the present year, regardless of how much leave the employee uses in the current year and when it is used.

### III.E: Payout of Unused Leave

**Employee Question:** What happens if I leave work with an unused balance of Earned Paid Leave?

**Answer:** You may lose it unless the employer has a policy on unpaid vacation time. If so, the same policy for vacation time will apply to any balance of Earned Paid Leave. In all cases, if the employer does not compensate you for the unused balance of Earned Paid Leave, they will need to make the leave available to you if you return to work within a year.

## IV: Greater Benefits and Exception

**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.

**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.

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

**Answer:** The business must provide 40 hours of Earned Paid Leave. That leave must have the following characteristics:

- The leave may be taken for any reason. (For example, leave that may only be taken when the employee or a family member is ill does not count toward the 40 hours required).
- If an employer allows vacation time, with notice of up to four weeks, that leave will count toward the required leave, as long as the leave also has the following characteristics:
  - 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. (For example, if the 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 will count toward the 40 hours required even when the employer places restrictions on scheduling leave to prevent undue hardship to the business (for example, a retailer not allowing vacation time to be taken on Black Friday).
- If the employer provides more than 40 hours of leave to full-time employees, it only needs to meet the characteristics of the Earned Paid Leave for 40 hours of leave. For 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).

## V: Notice of Use of Leave

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

**Question:** Is an employee obligated to give a reason for the unpaid leave?

**Answer:** Generally, no. However, the employee must comply with the employer’s reasonable notice requirements, which may not exceed 4 weeks’ notice.

**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 unpaid leave for any reason.

**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

**Employee 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 would recommend that employers clearly communicate restrictions to avoid any misunderstandings.

**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.

### V.D: One-Hour Increment

**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.

**Answer:** The employer can require the use of Earned Paid Leave in one-hour increments.



## Other Issues Raised

### Retaliation Concern

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

**Answer:** 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)

**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 of 9/2020.