

## Paid Sick Leave: New Jersey Continues the Trend

MAY 7, 2018

Paid sick leave is now the law in the Garden State. On May 2, 2018, New Jersey became the tenth state in the country to enact a statewide paid sick leave law. The law, which will take effect on October 29, 2018, requires that New Jersey employers provide covered employees up to 40 hours of paid sick leave per year. Because the law covers almost every employer, regardless of size, it is likely to impact most companies doing business in New Jersey.

### Coverage

The law defines employee as “an individual engaged in service to an employer in the business of the employer for compensation.” The law excludes from coverage employees performing services in the construction industry under a collective bargaining agreement, per diem hospital health care employees, and certain public employees.

“Employer” is defined as any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, or other entity employing employees in New Jersey—including temporary help agencies.

### Use of Leave

The law allows employees to accrue 40 hours of paid leave per year for the following reasons:

1. Diagnosis, treatment, care, or recovery related to an employee’s mental or physical illness, injury, or other adverse health condition; or for an employee’s preventative medical care.
2. To allow an employee to aid or care for a family member during diagnosis, care, or treatment of, or recovery from, the family member’s mental or physical illness, injury, or other adverse health condition; or during a family member’s preventative medical care.
3. Absences necessary because of circumstances resulting from the employee, or an employee’s family member, being a victim of domestic or sexual violence.

4. When the employee cannot work because the employee's workplace is closed, or the school or place of care of an employee's child is closed, by order of a public official due to an epidemic or other public health emergency; or because a public health authority has determined that the presence in the community of the employee, or an employee's family member in need of care by the employee, would jeopardize the health of others.
5. Attendance by an employee at his or her child's school-related conference, meeting, function, or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education; or attendance at a meeting regarding care provided to the child in connection with the child's health conditions or disability.

The employer cannot require that the employee find or search for a replacement worker for earned sick leave time used by the employee. However, with employer consent, an employee may voluntarily choose to work additional hours or shifts during the same or following pay period to make up for any hours or shifts missed. An employee may not be required to work any additional hours or shifts or to use accrued sick leave.

## Leave Related to Domestic or Sexual Violence

Similar to safe leave laws in other jurisdictions such as New York City, the New Jersey paid sick leave law allows an employee to use accrued leave for matters related to domestic or sexual violence. Specifically, the law allows an employee to use leave for the employee or a covered family member:

1. To seek or receive medical attention to recover from physical or psychological injury or disability caused by domestic or sexual violence;
2. To obtain services from a designated domestic violence agency or other victim services organization;
3. To get psychological or other counseling;
4. To relocate; or
5. To receive legal services, including to obtain a restraining order, or to prepare for or participate in any civil or criminal legal proceeding related to the domestic or sexual violence.

## Employee Notice to Employer

If the need to use sick leave is foreseeable, an employer may require at most seven days' advance notice. The employer may require that the notice include the expected duration of leave and that the employee make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations. If the employee's need is not foreseeable, an employer may require an employee to give notice as soon as practicable, provided that the employer has actually notified the employee of such a requirement.

Employers may prohibit employees from using foreseeable leave on certain dates and may require reasonable documentation if unforeseeable sick leave is used during such dates.

For leave of three or more consecutive days, the employer may require reasonable documentation that the leave is being taken for a covered purpose. For leave taken for the care of an employee's illness or preventative care, or for the illness or preventative care of a covered family member, documentation signed by a health care professional who is treating the employee or family member indicating the need for the leave, and if possible, the number of days of leave constitutes reasonable documentation.

For leave taken related to sexual and domestic violence, any of the following constitutes reasonable documentation:

1. Medical documentation;
2. Record or report from a law enforcement agency;
3. Court order;

4. Documentation that the domestic or sexual violence perpetrator has been convicted of a sexual or domestic violence offense;
5. Certification from a certified Domestic Violence Specialist or a representative of a designated domestic violence agency or other victim services organization; or
6. Other documentation or certification provided by a social worker, counselor, clergy member, shelter worker, health care professional, attorney, or other professional who has assisted the employee or covered family member in dealing with the domestic or sexual violence.

For leave taken based on an order of a public official or determination by a public health official, a copy of the order or determination constitutes reasonable documentation.

## Covered Family Member

The law broadly defines “family member” to be a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of an employee; a spouse, domestic partner, or civil union partner of a parent or grandparent of an employee; a sibling of a spouse, domestic partner, or civil union partner of an employee; or any other individual related by blood to an employee or whose close association with an employee is the equivalent of a family relationship.

“Parent” means a biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or of an employee’s spouse, domestic partner, or civil union partner; or a person who stood in loco parentis to an employee or an employee’s spouse, domestic partner, or civil union partner when the employee, spouse or partner was a minor child.

“Child” means a biological, adopted, or foster child, stepchild, or legal ward of an employee or of an employee’s domestic partner or civil union partner.

## Accrual, Use, and Carry Over of Leave

Employers must allow an employee to accrue at least 1 hour per 30 hours worked but may cap the number of accrued hours at 40 hours per year. Accrual must begin on the law’s effective date for any employee who began employment before October 29, 2018. If employment commences after the effective date, sick leave begins to accrue upon the date employment commences. Instead of the hourly accrual, employers may also satisfy their requirements under the law by providing 40 hours of paid sick leave at the beginning of each benefit year.

An employee is eligible to use earned sick leave beginning on the 120th calendar day after the employee commences employment and thereafter may use sick leave time as soon as it is accrued. An employer may choose the increments in which employees use earned sick leave, so long as the increments are not greater than the number of hours of an employee’s shift.

Employees are entitled to carry over to a new benefit year any earned sick leave that was unused and unpaid during the prior year. In the final month of a benefit year, an employer whose employees earn one hour of paid leave time for every 30 hours worked may offer to pay an employee for any unused earned sick leave. An employee can choose to accept the offer and to be paid for all unused sick leave or for a percentage of such leave time. In that scenario, the employee must be paid for such time based on the employee’s rate of pay at the time of the payment and will not carry over such paid sick leave to the new year.

Employers who provide employees with 40 hours of sick leave at the beginning of a benefit year have the option of paying an employee for the full amount of unused accrued sick leave in the final month of the benefit year or letting such time carry over into the new year. However, an employer choosing to pay an employee for the full amount of unused and accrued paid sick leave time must provide the employee with 40 hours of paid sick leave time at the beginning of the new benefit year.

An employer is not required to allow an employee to accrue, use, or carry over from one year to the next more than 40 hours of earned sick leave

Employers may use existing paid time off, vacation, personal days, or similar policies to satisfy the law's requirements only if employees can use the leave for the reasons specified in the law and so long as the accrual rate is equal to or greater than that required by the paid sick leave law.

## Rate of Pay for Sick Leave

The employer must pay sick leave at the same rate and with the same benefits as the employee normally earns.

## Restoration of Sick Time upon Reinstatement

If an employee separates employment but is reinstated to his or her employment within six months of separation, then any sick time that was accrued and unused before separation also must be reinstated.

## Confidentiality

Information concerning an employee's health or the health of a covered family member, or any information concerning the domestic or sexual violence affecting an employee or a covered family member must be treated as confidential and cannot be disclosed except to the affected employee or with the written permission of the affected employee.

## No Retaliation

The new law prohibits "retaliatory personnel actions" against an employee for requesting or using sick leave either under the law or under the employer's own sick leave policy. Further, an employer cannot retaliate against an employee for filing a complaint with the commissioner alleging a violation of the law or for informing any other person of his or her rights under the law.

A "retaliatory personnel action" is defined to include denial of any right guaranteed under the law, and any threat, discharge (including a constructive discharge), suspension, demotion, unfavorable reassignment, refusal to promote, imposition of disciplinary action, sanction, reduction of work hours, a report or a threat to report the actual or suspected immigrant status of an employee or an employee's family, or any other adverse action against an employee.

The law also establishes a rebuttable presumption of retaliation whenever an employer takes a retaliatory personnel action against an employee within 90 days of when the employee:

1. Files a complaint with the Department of Labor and Workforce Development ("Department") or a court alleging a violation of any provision of the paid sick leave law;
2. Informs any person about the employer's alleged violation of the paid sick leave law;
3. Cooperates with the Department or other persons in the investigation or prosecution of any alleged violation of the paid sick leave law;
4. Opposes any practice, policy, or act that violates the paid sick leave law; or
5. Informs anyone of his or her rights under the paid sick leave law.

Anyone who mistakenly but in good faith alleges a violation is still protected from employer retaliation.

# Record Keeping

Under the law, employers must retain for a five-year period records documenting hours worked and earned sick leave taken by employees. Upon demand, employers must allow the Department access to those records.

# Employer Posting and Notice Requirements

Employers must provide notification, in a form to be issued by the Commissioner of the Department, to employees of their rights under the new law. Such notice shall include the amount of earned sick leave to which the employee is entitled and the terms of its use; and the remedies provided by the law if an employer fails to provide required benefits or retaliates against employees exercising their rights under the law. An employer must use the notification provided by the Department in the language that is the first language of a majority of the workforce.

The notification must be conspicuously posted in a place or places accessible to all employees in each of the employer's workplaces. Further, employers must also provide each employee with a written copy of the notification: not later than 30 days after the form of the notification is issued by the Commissioner; at the time the employee is hired, if the employee is hired after the issuance by the Commissioner; and at any time first requested by the employee.

# Violations

Any violation of the new paid sick leave law is considered a violation of the New Jersey State Wage and Hour Law and will be redressed as provided under that statute.

# Preemption

The law preempts any current earned sick leave law that has been adopted by a New Jersey county or municipality, and also prevents any future earned sick leave law from being adopted after the effective date.

# What Employers Should Do Now

Employers employing individuals working in New Jersey should consult with counsel to analyze current sick or paid leave policies to ensure they are in compliance with the new law. Employers should post the New Jersey Department of Labor and Workforce Development notice when the form of such notice is issued by the Department and provide the notice to all covered employees. Finally, employers should make preparations to maintain for a five-year period records of hours worked and accrued leave used.

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