

# **Paid Sick Leave Becomes Law of the Land for All New Jersey Employers on October 29, 2018: Here Is How Employers Can Comply**

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Effective October 29, 2018, all New Jersey employers will be required to pay their employees paid sick leave, pursuant to the New Jersey Paid Sick Leave Act (the “Act”). The Act’s passage reflects a national trend, with New Jersey being the tenth state to mandate paid sick leave. While many businesses operating within (and outside) the Garden State already provide for paid sick leave, all New Jersey employers will have to comply with the specific rules set forth under the Act. As explained below, there are many pitfalls under the Act and employers must be aware of the rules involving accrual, rollover, and authorized use, among other nuances. Companies must review their policies to ensure that their current policies conform to the Act or, alternatively, they must adopt compliant policies before the law takes effect.

## **Scope of Employee Coverage**

The breadth of the law is sweeping. The Act applies to any person or entity that employs employees in New Jersey, whether full-time or part-time, with very limited exceptions. Employees must be compensated for paid sick leave at their regular rate of pay. There are only three categories of employees excluded from coverage: (1) employees performing services in the construction industry under contract pursuant to a collective bargaining agreement; (2) “per diem health care employee[s]”; and (3) public employees receiving paid sick leave pursuant to another New Jersey law, rule or regulation.

## **Authorized Uses for Paid Sick Leave**

The Act specifies five categories for which employees can request paid sick leave. These include the following:

1. Diagnosis, care, treatment of, or recovery from, a mental or physical illness, injury or other adverse health conditions, or for preventative medical care of the employee;
2. Caring for a family member during diagnosis, care, treatment of, or recovery from, a mental or physical illness, injury or other adverse health conditions, or for preventative medical care of the employee’s family member;
3. Absence(s) necessary due to the employee or employee’s family member being a victim of domestic or sexual violence, *if the earned sick leave is used for*.
  - o medical attention needed to recover from physical or psychological injury or disability caused by domestic or sexual violence;

- services from a designated domestic violence agency or other victim services organization;
  - psychological or other counseling;
  - relocation;
  - other legal services, including obtaining a restraining order or preparing for, or participating in, any civil or criminal legal proceeding related to the domestic violence or sexual violence;
4. Time needed after the closure of the employee's workplace or the school/place of care of the employee's child by order of a public official or other public health emergency, or if a public health authority issues a determination that the presence of the employee or their family member would jeopardize the health of others;
  5. Attending a school-related function of the employee's child requested or required by the school responsible for the child's education, or attending a meeting concerning the care provided to the child in connection with the child's health conditions or disability.

Employers may discipline employees who utilize leave under the Act for any purpose other than those enumerated above.

### **Mechanics of Calculating, Accruing, and Carrying Over Leave**

Employees may accrue up to 40 hours, or five days of paid sick leave per benefit year (i.e., the employer's 12 consecutive month period during which employees may accrue and use earned sick leave). Employers are not obligated to provide more than 40 hours of paid leave. Under the Act, paid sick leave may be calculated by one of two methods: the accrual method and the annual method. Under the accrual method, employees may accrue one hour of paid sick time for every 30 hours worked. Under the more straightforward annual method, employers may "front load" the total amount of paid sick leave at the beginning of the benefit year.

Existing employees who began accruing leave prior to the Act's October 29, 2018 effective date may immediately use earned sick leave (under the annual method) or as soon as sufficient hours are earned (under the accrual method). With respect to those employees hired after October 29, 2018, the Act requires a 120-day waiting period before such employees may use paid sick leave, irrespective of whether the employer uses the accrual or annual method.

Employers must allow employees to carry-over up to 40 hours of paid sick leave to the following benefit year, unless an employer offers and the employee chooses to accept payment for unused sick time in the final month of the benefit year. Once an employer makes such an offer, an employee must respond within ten (10) calendar days. Employees may accept a full payout or, alternatively, request a 50% payout of the accrued leave and carry-over the remainder. However, should the employee reject both options, any earned but unused paid sick leave up to 40 hours must be carried over to the following benefit year.

## **Required Notice**

Employers may require up to seven (7) calendar days' advance notice if the need for leave is foreseeable. If it is unforeseeable, the Act requires that employees provide notice as soon as practicable.

Where sick leave continues for three or more consecutive days, employers may require employees to provide reasonable documents that their leave time is for a purpose recognized under the Act. The nature of the documentation varies based on the category of leave one is taking under the Act. For example, if the leave is on account of an illness of an employee or an employee's family member, documentation signed by a health care professional who is treating the employee or the family member of the employee indicating the need for the leave and, if possible, number of days of leave, shall be considered reasonable documentation.

## **Recordkeeping Rules and Mandatory Poster**

The Act also mandates rather burdensome recordkeeping requirements. Employers are required to retain records of hours worked and sick leave taken for all employees going back a period of five years. The New Jersey Department of Labor and Workforce Development (NJDOL) will be authorized to review those records to monitor compliance.

The NJDOL Commissioner is developing a notice that employers must post in the workplace, advising employees of their rights under the Act. Employers will be required to provide this notice within 30 days of its issuance by the Commissioner. Employers must also provide employees a copy upon hiring and at their request.

## **Robust Anti-Retaliation Provisions**

The anti-retaliation provision of the Act is uniquely dangerous to employers, which employees can pursue in a private right of actions against employers. There is a *rebuttable presumption* of retaliatory action whenever an employer takes an adverse action against an employee within 90 days of the employee:

1. filing a complaint with the NJDOL;
2. informing any person of an employer's violation of the law or the employee's rights under the Act;
3. cooperating with the NJDOL's or other person's investigation of a possible violation of the Act; or
4. opposing any policy, practice or act that is prohibited by the Act.

Unlike other anti-retaliation and anti-discrimination laws, under the Act, the burden is flipped to the employer. Therefore, employers must tread carefully before taking any adverse action against an employee who engages in protected activity under the Act.

## **Potential Employer Pitfalls**

Employers in New Jersey are accustomed to navigating complex and labor and employment laws. However, with each new legislation, there are pitfalls, which, if not paid attention to, may disrupt business operations and produce unnecessary risk. Here are some examples under the Act:

- New Jersey employers may be covered under the Act even if their employees work outside of New Jersey;
- New Jersey employers may not have to be physically located within the State to be subject to the provisions of the Act so long as they direct their employees to work in the jurisdiction;
- Employers who already have “catch-all” PTO policies must make sure that they are separately tracking paid sick leave;
- The “Act” defines a “Family Member” broadly to include, among other categories, a domestic or civil union partner or any individual related by blood to the employee whose close association is the equivalent of a family relationship;
- Employers may be required to permit employees to use sick time accrued under the Act for scheduled shifts outside of New Jersey;
- If an employee is transferred to a separate division, entity or location of an employer, the employee will be entitled to all paid sick time accrued at the prior division, entity or location;
- If an employee is terminated, laid off, furloughed, or otherwise separated from employment and rehired within 6 months, any accrued sick time must be reinstated and they must immediately start accruing sick time; and
- The Act does not require that accrued paid sick time be paid out upon termination, unless otherwise provided by company policy.

The NJDOL is currently developing regulations, which will hopefully fill the gaps and resolve any open questions concerning the Act and its implementation, including some of those listed above. Employers should keep an eye out for those regulations, which are expected to be issued this fall.

For more information about this article or if you have any questions or concerns, please contact [Kenneth A. Rosenberg](#), at 973-994-7510 or [krosenberg@foxrothschild.com](mailto:krosenberg@foxrothschild.com) or [Asad Rizvi](#) at 973.994.7817 or [arizvi@foxrothschild.com](mailto:arizvi@foxrothschild.com) or any member of Fox Rothschild’s [Labor & Employment Department](#).