

What NJ Employers Should Know About Paid Sick Time Bill

By **Michelle Silverman and Rudolph Burshnic** (April 19, 2018, 1:00 PM EDT)

The New Jersey Legislature passed a bill on April 12 requiring employers in the state to provide employees with paid sick time. Gov. Phil Murphy is expected to sign the legislation, which would go into effect 180 days from the date it is signed.

The law would permit covered employees to earn and use sick time (inaptly labeled “sick leave” in the law) for reasons including their own illness, to care for a family member with a medical condition, because of circumstances relating to domestic or sexual violence, during public health emergencies and for parent-teacher conferences, among other reasons. Employers would be required to provide covered employees with paid sick time at a rate of at least one hour for every 30 hours worked, up to 40 hours per year. Employees would also be permitted to carry over up to 40 hours of sick time a year, but employers would not be required to provide more than 40 hours of sick time in a given year.

The law would also preempt existing local paid sick time laws around the state.

Overview of the Proposed Law

Scope

The law would apply to all private and public employers with employees in New Jersey,[1] regardless of size, except certain public employers. It covers all employees except those in the construction industry working under a collective bargaining agreement, “per diem hospital health care” employees, and certain public employees.

Accrual

Covered employees would accrue sick time at a rate of at least one hour for every 30 hours worked, up to 40 hours per year. The law would permit employers to designate any 12-month period for their “benefit year,” but once established, employers would be required to notify the commissioner of the New Jersey Labor and Workforce Development, or NJDOL, of any change.

Not surprisingly, the new law would not allow employers who have existing sick time policies to take away sick time that has already accrued before the effective date. But employees who had not accrued



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sick time before the effective date would begin accruing sick time on the effective date and could use sick time starting after the 120th day of their first date of employment. New employees hired after the law's effective date could begin to accrue sick time on the first date of their employment and could begin using sick time after they have been employed for 120 days.

Employers with existing paid time off, vacation or personal day policies may use these existing policies to satisfy their obligations under the new sick time law. However, it is important to note that any PTO, vacation or personal time that is used to satisfy the obligations of the new law must be usable in the manner required by the law, as discussed below.

Carryover and Frontloading

The law would require that accrued but unused sick time be carried over from one year to the next. But, employers who give employees a full 40-hour bucket of paid sick time at the beginning of each year (a practice known as "frontloading") may obviate the need to carryover unused time from the year before. It remains to be seen whether the state will provide further guidance on this question.

The law also permits employers to offer employees the option of "selling back" any unused sick time at the end of the year, as opposed to carrying over the time into the next year.

The law does not require employers to "pay out" unused sick time at termination.

Permissible Use of Sick Time

The law would allow employees to use sick time for the following reasons:

- Diagnosis, care, treatment or recovery for an employee's own health conditions, including preventive care
- Diagnosis, care, treatment or recovery for a family member's health conditions, including preventive care
- Circumstances resulting from the employee's or family member's status as a victim of domestic or sexual violence, including related counseling and court proceedings
- Time the employee is unable to work because of the closure of an employee's workplace or of a child's school or place of care because of a public official's order relating to a public health emergency, or because of a public health authority's determination that the employee or the employee's family member's presence would jeopardize the health of others
- Time to attend a school-related event as requested or required by school staff, or to attend a meeting related to the care of a child's health condition or disability

The law defines "family member" to include any "individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship." [2]

Sick time must be paid "at the same rate of pay with the same benefits as the employee normally earns," except that the rate of pay cannot be lower than the minimum wage set forth in the New Jersey Wage and Hour Law.

Increments of Use

Many employers will be pleased to know that the law allows employers to choose the increment in which employees use sick time, so long as it is no larger than “the number of hours the employee was scheduled to work” during a given shift. As an example, employees who are scheduled to work a regular eight-hour work day may be required to use paid sick time in a full eight-hour block, so long as the employer has included this requirement in its sick time policy.

Employee Notice

When the need for sick time is “foreseeable,” employers would be permitted to require employees to provide up to seven days’ advance notice of the intended use and the expected duration. Employees would be required to make a “reasonable effort” to schedule the time off so it does not “unduly disrupt” the employer’s operations.

Employers may also be pleased to hear that the law would allow employers to prohibit employees from using foreseeable sick time “on certain dates” and to require specified documentation if sick time that is not foreseeable is used during those dates.

For time that is not foreseeable, employers would be permitted to require notice “as soon as practicable,” if the employer has provided notice to the employee of this requirement.

For sick time lasting three or more consecutive days, employers would be permitted to require “reasonable documentation” showing that the time was taken for a permissible purpose, and the law sets forth what reasonable documentation is for the different types of sick time.

Record-Keeping

The new law requires employers to maintain five years of records documenting employees’ hours worked and sick time used. The NJDOL would be permitted to demand access to these records to monitor compliance. An employer’s failure to maintain adequate records or failure to provide the NJDOL access to these records would create a presumption that the employer failed to provide the sick time “absent clear and convincing evidence otherwise.” The employer would also be subject to the penalties in the New Jersey Wage and Hour Law relating to maintaining and disclosing records for violation of these record-keeping requirements.

Employer Notice Requirements

Employers would be required to provide employees and new hires with notice of their rights under the law through a form to be issued by the commissioner. The notice would also have to be posted at each of the employer’s workplaces.

Preemption of Local Laws

The law would preempt all existing and future county and municipal ordinances, resolutions, laws, rules or regulations regarding paid sick time. Currently, there are 13 New Jersey municipalities with paid sick time ordinances: Newark, Jersey City, East Orange, Paterson, Passaic, Trenton, Montclair, Irvington, Bloomfield, Elizabeth, New Brunswick, Plainfield and Morristown.

Anti-Retaliation Provisions

Like many other paid sick time laws, the law includes anti-retaliation provisions and establishes a rebuttable presumption of retaliation when an employer takes adverse action against an employee within 90 days of the employee engaging in certain enumerated protected activity relating to paid sick time.

Importantly, however, the law specifies that employers may discipline employees who misuse sick time for purposes other than those permitted by the law.

Other Notable Elements

- Employers would be prohibited from requiring an employee to work additional hours or shifts because the employee missed work using sick time, but employees could voluntarily choose to make up missed time
- An employer may not require employees to find a replacement for hours missed when using paid sick time
- Employees who are terminated would be entitled to have any forfeited sick time if they are rehired within six months of their termination
- Employers would be required to treat as confidential certain employee information submitted to support the use of sick time
- The law has special provisions for unionized workforces, and employers with those workforces should consult with counsel

Recommendations for Employers

Employers should consider the following steps:

- Review current sick time policies to ensure that they comply with the law's requirements. Employers with paid time off policies more generous than the requirements of the law (through PTO, vacation, unlimited sick time or another bona fide policy) may need to make policy changes to ensure that at least 40 hours of that time can be used in a manner consistent with the new law
- Review sick time policies to ensure that employees know they may be disciplined if they misused paid sick time
- Consider the possibility of frontloading sick time, but employers should consult counsel before doing so
- Train managers and human resources employees on the law and make sure that they are aware of its anti-retaliation provisions

- Ensure that time and payroll records are sufficiently detailed to reflect the amount of hours worked and sick time used by covered employees

After the law becomes effective, employers should look out for the NJDOL commissioner’s notice, which will need to be distributed to employees and new hires, as described above.

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[1] The proposed law defines “employer” as “any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the state, including a temporary help service firm. In the case of a temporary help service firm placing an employee with client firms, earned sick leave shall accrue on the basis of the total time worked on assignment with the temporary help service firm, not separately for each client firm to which the employee is assigned.”

[2] The law also sets forth specific definitions of “child,” “parent,” “sibling” and “spouse.”