

New Statewide Paid Sick Leave Law

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—Overview—

On May 2, 2018, Governor Phil Murphy signed a law which requires most private sector employers to provide at least 40 hours of paid sick leave in a 12-month period to every employee for their own diagnosis, treatment, or preventative care, or, for that of a family member. This Fast Facts helps employers understand the changes the law imposes as well as ensure their policies comply.

—Background—

Not including New Jersey's Paid Sick Leave Law, there are eight separate federal and state statutes that guarantee leave time or partial wage replacement for New Jersey workers. For instance, workers caring for a sick family member or recovering from childbirth can take leave under the federal Family and Medical Leave Act (FMLA). New Jersey law also provides additional leave rights, including the right to parental leave and domestic violence leave. Employees can likewise collect temporary disability benefits when they are unable to work due to their own disabling conditions (including pregnancy), as well as paid family leave benefits when caring for a family member.

That said, for many years employers had discretion in whether or not to establish paid time off (PTO) policies like those that provided paid sick days for short-term illnesses. Following a national movement, New Jersey municipalities in 2014 began imposing government mandates that all workers receive paid sick leave to deal with reasons not covered by other laws.

With the enactment of the Paid Sick Leave Law, New Jersey became the 10th state, including Washington, D.C., to impose a statewide paid sick leave requirement, establishing one statewide standard, and preempting any previously enacted municipal ordinances.

—General Compliance Information—

When does the law take effect?

The law takes effect October 29, 2018.

Are all employers required to provide paid sick leave? Is there a small business exemption?

Almost all employers are required to provide paid sick leave. There is no minimum number of employees an employer needs to have for the Paid Sick Leave Law to apply, i.e. there is no small business exemption.

Only three groups of employees are not covered by the law:

- (1) those in the construction industry that are under contract with a collective bargaining agreement;
- (2) per diem healthcare employees; and,
- (3) public employees who are provided with sick leave under another law, rule, or regulation.

Are all employees eligible for paid sick leave?

Part-time and temporary employees are covered by the law as are exempt and non-exempt employees.

For what reasons can paid sick leave be used?

Under the law, an employer must allow an employee to use paid sick leave for any of the following reasons:

- the diagnosis, care, treatment, or recovery from an employee's own mental or physical illness, injury or condition, or, for their preventative care;
- the diagnosis, care, treatment, or recovery from a family member's own mental or physical illness, injury or condition, or, for their preventative care;
- to deal with domestic violence or sexual assault experienced by an employee, or experienced by one of their family members;
- if an employee's place of business, or their child's school, or place of care has been closed by order of a public official for any health-related reason;
- if a public health official has determined that an employee or a member of their family could jeopardize the health of others; and,

- for an employee to attend a school-related conference, meeting, function or other event, or to attend a meeting to discuss the child's health conditions or disability.

Nothing prevents an employer from allowing employees to use paid sick leave for other reasons not specifically mentioned in the law, but, at a minimum, employers must allow use of the time for the reasons mentioned above.

What is the definition of a family member?

A family member includes a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of an employee, or a spouse, domestic partner, or civil union partner of a parent or grandparent of the employee, or a sibling of a spouse, domestic partner, or civil union partner of the employee, or any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship.

—Paid Sick Leave Accrual—

How is paid sick leave awarded?

Employees earn one hour of paid sick leave for every 30 hours worked starting on October 29, 2018 (the law's effective date), or the date the employee is hired, whichever is later. Employees can earn a maximum of 40 hours over a 12 month consecutive period established by the employer. That means employers can still award time at the beginning of the calendar year, or at the start of some other time period like a fiscal year. However, once the "benefit year" is established, it can't be changed without notifying the Commissioner of the NJDOLWD. To simplify bookkeeping, employers can choose to frontload paid sick leave at the beginning of their benefit year to cover the hours that their employees are projected to earn.

Nothing prevents an employer from offering a more generous policy which provides more than 40 hours.

When can an employee begin using paid sick leave?

Employers are permitted to make new employees wait up to 120 days before starting to use their time. Employers are not required to permit an employee to accrue or use in any benefit year, or carry forward from one benefit year to the next, more than 40 hours of paid sick leave.

Can employers choose the increments in which employees may use the time?

Yes. For instance, a company's PTO policy can still state that employees must use the sick time in four- or eight-hour increments. However, employers must make sure that employees aren't required to use more time than they're scheduled to work. So, in the above example, an employer can't require an employee to use eight hours if they are only scheduled to work four.

Does accrued paid sick leave time need to be paid out if an employee leaves a company, regardless of the reason?

No. The law doesn't require employers to pay out employees for unused sick time regardless of whether they leave the company voluntarily or are terminated.

How is sick leave pay calculated?

When time is taken as sick leave, it is paid at the same rate and with the same benefits that the employee normally earns.

—Impact on Existing PTO Policies—

Can employers still provide paid sick leave as part of a general PTO bank, or, do a certain number of days need to be specifically designated?

Employers can still provide a PTO bank which includes a combination of personal days, vacation days, and sick days, etc., as long as the time can be used for the same reasons and accrues at the same rate (or faster) than it does under the Paid Sick Leave Law.

How does the law impact collective bargaining agreements (CBAs)?

Nothing in the law stops an employer from adopting a CBA to provide more favorable rights or benefits. To the extent that the CBA is less favorable, or has workers accrue time at a slower rate, it may need to be changed. If a CBA is already in place when the law takes effect, the law will not apply until the CBA expires.

How does the law impact call-out policies and discipline for absenteeism? Can employers still ask for advanced notice before sick leave is used?

Employers can't require their employees to find someone to cover their shifts while they are using paid sick leave. They can require up to seven calendar days' advanced notice, but only if an employee's need to use paid sick leave is "foreseeable." Otherwise, the employee only has to provide notice as soon as it's practicable, or reasonable, for them.

In addition, once an employee earns paid sick leave and uses it for a valid reason, it is illegal to retaliate against them. That means employers can't count paid sick leave as an absence toward an employee getting disciplined, demoted, suspended or terminated. Likewise, the law creates a rebuttable presumption that a negative employment action (like a demotion) is retaliation if it is taken or threatened within 90 days of the employee:

- filing a complaint with the NJDOLWD;
- informing "any person" about their rights under the law, or, about a possible violation;
- cooperating in an investigation or prosecution; or
- opposing any policy, practice, or act that they believe is illegal under the Paid Sick Leave Law.

At what point can an employer ask for a doctor's note as a condition of taking or returning from paid sick leave?

An employer can request documentation once an employee has taken three or more consecutive workdays as paid sick leave.

Can an employer establish black-out days where paid sick leave cannot be used such as in particularly busy times for the business?

Yes, but paid sick leave can only be denied on those days if the need for the leave is "foreseeable." If the need is not foreseeable and an employee is absent on one of those days, an employer can ask for reasonable documentation like a doctor's note.

—Notice & Recordkeeping Requirements—

What are employers required to tell their employees about the law?

Employers must:

- Post a notice (provided by the commissioner of the NJDOLWD) in a conspicuous place.
- Provide a copy of the notice to all employees:
 - o Within 30 days after it is issued by the NJDOLWD;
 - o At the time of an employee's hiring, if the employee is hired after the notice is issued; and

- o Any time an employee requests a copy of the notice.

Employers with bilingual workforces must post and provide the notification in English, Spanish, and any other language for which the NJDOLWD has made the notification available and which the employer reasonably believes is the first language of a significant number of the employer's workforce.

Does the law impose any additional record keeping requirements on employers?

Yes. The law requires employers to keep records documenting the hours worked and the paid sick time earned and used by each employee for at least five years. If an employee claims an employer did not provide the paid sick leave they were entitled to and the employer does not have the necessary records, it's assumed that employer did not provide the leave.

—Penalties for Not Complying with the Law—

What are the penalties for not following the law?

New Jersey's Paid Sick Leave Law imposes the same penalties as those imposed for other wage and hour violations. These are fines of \$250 for a first offense and \$500 for subsequent offenses. For "willful violations," or, when an employer is found to have intentionally disregarded the law or acted with indifference, penalties increase to between \$100 and \$1,000 and 10-90 days in prison. For further "willful" violations, employers can be fined between \$500 and \$1,000 and/or face between 10 and 100 days in prison.

These penalties are in addition to any remedies imposed by a judge if a private lawsuit is brought against an employer (which is explicitly allowed by New Jersey's Paid Sick Leave Law). If so, the law requires a judge to award a prevailing employee any actual damages they suffer as a result of their employer not following the law plus liquidated damages (or twice the amount of unpaid wages).

—Preemption of State Law—

Thirteen municipalities have their own ordinances which impose different provisions for businesses operating within their borders. Which standards should be followed?

New Jersey's Paid Sick Leave Law contains strong preemption language which bars New Jersey municipalities from adopting ordinances, rules, resolutions or regulations

regarding criminal histories in the employment process. That means that this new law is the standard and supersedes requirements imposed by cities like Newark and Jersey City.

—Recommended Next Steps for Employers—

Employers may wish to consider these best practices prior to the law becoming effective on October 29, 2018:

- Review current PTO policies, call-out and discipline procedures. Close attention should be paid to the law's specific requirements on accrual, carry over, and the definition of a family member for whom paid sick leave could be used. If a current PTO policy is in excess of the new requirements, it need not be changed;
- Train managers and supervisors about the law's anti-retaliation provisions. That is, employees can no longer be required to find their replacements and may only have to provide "reasonable" notice that they intend to use paid sick leave;
- Develop a system to comply with the recordkeeping provisions of the law and to keep track of how much paid sick leave is accrued by each employee; and,
- Monitor the NJDOLWD website (nj.gov/labor) to check for the poster that must be provided and posted informing workers of their rights under the Paid Sick Leave Law.

—For More Information—

If you need additional information, please contact NJBIA's Member Action Center at 1-800-499-4419, ext. 3 or member411@njbias.org.

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This information should not be construed as constituting specific legal advice. It is intended to provide general information about this subject and general compliance strategies. For specific legal advice, NJBIA strongly recommends members consult with their attorney.

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