

New Jersey Proposes Paid Sick Leave Rules

The New Jersey Department of Labor and Workforce Development has released proposed rules to implement the New Jersey Paid Sick Leave Act. The rules, which will not be finalized before the Act goes into effect on October 29, provide certain clarifications but also leave some open questions. New Jersey employers should review and, as needed, adjust their practices, policies, and handbooks to ensure compliance with the state's new mandate.

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Background

Earlier this year, Gov. Phil Murphy signed the New Jersey Paid Sick Leave Act ([A. 1827](#)) into law, making New Jersey the 10th state to mandate paid sick leave. When the Act takes effect on October 29, it will preempt the paid sick leave ordinances of 13 municipalities — Bloomfield, East Orange, Elizabeth, Irvington, Jersey City, Montclair, Morristown, New Brunswick, Newark, Passaic, Paterson, Plainfield, and Trenton — and all current or future county and municipal regulation of earned sick leave in the state.

The new law will require most New Jersey employers, regardless of size, to allow employees to earn and use up to 40 hours of paid sick leave (PSL) for qualifying reasons annually. Leave may be used for the employee's own or a covered family member's illness, injury, or adverse health condition (including preventive care) and for certain absences resulting from the employee's or his/her covered family member's status as a victim of domestic or sexual violence. Employees may also use leave to deal with workplace, school, or childcare facility closures due to a public health concern or to attend school-related conferences, meetings, or events concerning their children. Employers will have the option to provide one hour of PSL for every 30 hours worked or frontload 40 hours of PSL at the beginning of each benefit year. Alternatively, employers may rely on existing paid time off (PTO) or other policies to satisfy the new mandate, if they meet or exceed all requirements of the Act. (See our [May 18, 2018 For Your Information.](#))

Proposed Rules

On September 13, the New Jersey Department of Labor and Workforce Development (NJDOL) released [proposed Earned Sick Leave Rules](#). A public hearing on the new rules is scheduled for November 13, and public comments may be submitted until December 14, 2018. Thus, rulemaking will not be concluded, and final rules will not be in place when the Act takes effect on October 29, 2018.

The proposed rules, which are subject to change following public hearing and comment, clarify some aspects of the Act, but leave a number of questions unanswered. Highlights of the proposed rules follow.

Benefit Eligibility

The proposed rules make several clarifications with respect to determining an individual's eligibility for PSL benefits, the treatment of PSL benefits for other employee benefits purposes, and the applicable benefit year.

Independent Contractor Status

With limited exception, regular, temporary, and seasonal New Jersey employees — both part-time and full-time — will be entitled to PSL when the Act takes effect. Because independent contractors are not covered under the Act, eligibility for the new benefit hinges on proper worker classification. The proposed rules provide that the determination of employment status for these purposes will be based on the “ABC” test identified in the state's Unemployment Compensation Law.

Counting PSL as Hours Worked

The proposed rules make clear that for purposes of employee benefits the use of PSL “shall be as if the employee worked those hours.”

Changing the Benefit Year

Both the Act and the proposed rules define “benefit year” as any period of twelve consecutive months established by the employer. The proposed rules clarify that the employer must establish a single benefit year for all employees.

To change an established benefit year, the proposed rules would require the employer to provide written notice to the NJDOL at least 30 calendar days prior to a change. Among other things, the notice would have to include the effective date and the reason for the change, a list of current employees with their contact information, and each employee's PSL accrual, use, payment, payout, and carryover history for the prior two benefit years.

The “ABC” Test

Section 19(i)(6)(A), (B) and (C) of the New Jersey Unemployment Compensation Law contains a three-part test (the so-called “ABC” test) that the NJDOL applies in determining an individual's employment status and eligibility for state unemployment benefits. Regardless of whether individuals who provide remunerated services are treated as independent contractors for compensation purposes, they will be considered covered employees unless they satisfy all three parts of the test as set forth below.

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Covered Family Member

The Act defines a covered family member as the “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.” The proposed rules clarify that for these purposes a “close association” means a significant personal bond that is, or is like, a family relationship, regardless of biological or legal relationship.

Comment. Other paid sick leave laws and ordinances, such as those in Arizona, Chicago, Los Angeles, and New York City, include a similar category of covered family member.

Exempt Employees

Unlike other states, the New Jersey law covers exempt employees but fails to explain how to account for them. The rules do not require employers to maintain records documenting the hours worked by exempt employees. Solely for purposes of calculating leave accruals, an employer has the option to either record hours actually worked or presume that the exempt employee works 40 hours in a workweek.

Use and Carryover

Under the Act, a new hire is eligible to use PSL starting 120 calendar days after commencement of employment if the employer uses the accrual method. The law is silent as to a waiting period if the employer uses the advancing method — or frontloads — the full amount of PSL at the beginning of each benefit year. The rules clarify that the same 120-calendar-day restriction applies regardless of whether the employer accrues or frontloads leave.

The act provides that “earned sick leave shall begin to accrue on the effective date of this Act for any employee who is hired and commences employment before the effective date of this Act and the employee shall be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commences employment.” This language implies that employees who were hired prior to July 1, 2018 would be able to use PSL as soon as it accrues, and employees who were hired thereafter would be able to offset some portion of the 120-day waiting period by their employment prior to October 29. The NJDOL’s [notice](#) of employee rights that employers must post and distribute to their New Jersey employees states: “You can begin using earned sick leave accrued under this law 120 days after you begin employment.”

However, the proposed rules provide that “an employee shall not be eligible to use earned sick leave until February 26, 2019 (the 120th calendar day after October 29, 2018), or the 120th calendar day after the employee commences employment, whichever is later.” The rules recognize only two exceptions. First, they qualify the waiting period saying, “Where the employee has accrued earned sick leave prior to October 29, 2018, he or she shall be eligible to use that earned sick leave prior to February 26, 2019.” Presumably, this language is intended to ensure that PSL accrued under any of the state’s municipal ordinances or other employer policies can be used prior

States of Paid Sick Leave

The following states have paid sick leave laws currently in effect:

- (1) Connecticut; (2) California;
- (3) Massachusetts; (4) Oregon;
- (5) Vermont; (6) Arizona;
- (7) Washington; (8) Maryland; and
- (9) Rhode Island.

Last month, Michigan became the first state in the Midwest to adopt a statewide paid sick leave law. While the Michigan Earned Sick Time Act — a citizen petition-initiated measure **approved** by the state legislature — is likely to be amended before it goes into effect in April 2019, Michigan employers should prepare for some form of mandate next year.

to February 26, 2019. Second, the rules make clear that employers have the option to allow employees to use earned leave during the waiting period.

Comment. In its final rules or other administrative guidance, the NJDOL should reconcile the seemingly contradictory language in its employee rights notice and proposed rules on when existing employees first become eligible to use earned sick leave.

Blackout Periods

The Act permits employers to prohibit employees from using PSL on certain dates. Under the proposed rules, those dates would be limited to “verifiable high-volume periods or special events, during which permitting the use of foreseeable earned sick leave would unduly disrupt the operations of the employer.” An employee could not be prevented from using PSL for an unforeseeable purpose during a blackout period. However, where the employee’s need for leave is not foreseeable and he or she seeks to use leave during a blackout period, or where the employee uses PSL for three or more consecutive days, the proposed rules would allow the employer to require reasonable documentation that leave is being taken for a permissible purpose under the Act.

Under the proposed rules, an employer must inform employees in advance of the requirement to provide reasonable notice of the need for unforeseeable PSL if an employer wishes to require such notice. Absent advance notice, an employee must be permitted to take the unforeseeable leave “without having provided the employer with any prior notice, practicable, or otherwise.”

Working Additional Hours in Lieu of Using PSL

Where an employee would be eligible to use PSL, the proposed rules confirm that, with the employer’s consent, the employee could choose to work additional hours to compensate for the time missed in lieu of using sick leave. However, the employer could not require the employee to work additional hours.

Carryover

The proposed rules confirm that frontloading PSL each year does not permit employers to apply a “use it or lose it” strategy and clarify carryover limits. Employers that frontload must either (1) provide employees with a payout for the full amount of unused PSL at year end, or (2) permit employees to carry over up to 40 hours of accrued, unused time.

Rehire and Reinstatement

Employees who are reinstated or rehired in New Jersey by the same employer within six months of their termination, layoff, furlough, or other separation from employment shall receive any unused earned sick leave accrued by or advanced to them prior to the separation immediately upon rehire or reinstatement.

PSL Pay Rates

The new law requires employers to compensate PSL at the same rate of pay with the same benefits the employee normally earns but provides no guidance on the proper calculation for non-hourly employees. The regulations clarify how to determine proper compensation in the following scenarios:

- The employer need not pay an employee at an overtime rate for leave used for hours that would otherwise have been paid at a premium rate.

- When an employee works at two or more different rates, is paid on a piece-rate basis, the pay fluctuates, or the compensation includes the value of gratuities, food, or lodging, the employer must divide the total earnings (excluding overtime earnings) over the last seven workdays for which leave was not taken by the total hours worked over those workdays.
- When it is not feasible to determine the exact hourly wage for an employee whose pay includes the value of gratuities, food, or lodging, the employer may base PSL on an agreed hourly wage that must be at least the state minimum wage (currently, \$8.60).
- When an employee is compensated on a base wage plus commission or commission only basis, the employer must pay the higher of the hourly base wage rate or the state minimum wage.

Notice and Posting Requirements

The Act requires employers to conspicuously post a notice of employee rights in each of their workplaces. The Act also requires employers to provide each employee with a written copy of the notice of employee rights within 30 days after the notice has been issued, at the time of hire, and on request.

On October 3, the NJDOL released the [notice](#) in English and 12 other languages, including Spanish, Chinese, and Arabic, on its website. The notice must be posted and distributed in any language that is the first language of a majority of the employer's workers. The proposed rules confirm that employers may satisfy both the posting and distribution requirements electronically. The notice may be posted on an internet or intranet site for exclusive use by its employees and to which all employees have access. Employers may provide the required individual notice by email.

Recordkeeping

The Act requires employers to maintain records of employee hours worked and PSL used for a 5-year period. The proposed rules extend the recordkeeping obligation to PSL accrued, advanced, used, paid, paid out, and carried over. They also clarify that the hours worked recordkeeping obligation does *not* apply to employees who are exempt under the federal Fair Labor Standards Act or state wage and hour law if the employer frontloads the full amount of paid sick leave or assumes 40-hour workweeks for accrual purposes.

Importantly, the proposed rules provide that records required under the Act must be maintained in New Jersey — either at the place of employment or in a central office — and must be available for inspection by the NJDOL.

Penalties

An employer that knowingly and willfully violates the Act would be subject to a fine of not less than \$100 and no more than \$1,000 and/or not less than ten days and no more than 90 days of imprisonment for the first offense. The minimum fine for a second or subsequent offense would be not less than \$500, nor more than \$1,000 and/or not less than 10 days and no more 100 days of imprisonment. Each week in any day of which an employee was not given the prescribed amount of PSL and each employee affected would constitute a separate offense.

In addition, the NJDOL would be able to assess administrative penalties in the amount of \$250 for the first violation and between \$250 and \$500 for a second. However, employers would be entitled to a hearing on such administrative penalties.

The NJDOL would be authorized to supervise the payments of amounts due to employees under the Act, for which employers would be required to pay an administrative fee calculated as a percentage of the gross amounts due.

In Closing

The New Jersey Paid Sick Leave Act goes into effect on October 29. The NJDOL's proposed rules, which clarify some issues, will remain open for public comment until December 14 with final rulemaking to follow. New Jersey employers should review and, as needed, adjust their practices, policies, and handbooks to ensure compliance with the new statewide mandate.

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