

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **New Jersey finalizes paid sick leave rules**

The New Jersey Department of Labor and Workforce Development has released final rules governing the New Jersey Earned Sick Leave Law, which went into effect in 2018. New Jersey employers should review and, as needed, adjust their practices, policies, and handbooks to ensure compliance.

#### **Background**

New Jersey became the 10<sup>th</sup> state to mandate paid sick leave when it enacted the Earned Sick Leave Law (ESLL) in 2018. The law requires most New Jersey employers, regardless of size, to allow employees to earn up to 40 hours of paid sick leave annually that can be used for: their own or a covered family member's illness, injury, health condition, or preventative care; absences relating to domestic or sexual violence; public health closures of the workplace, school, or childcare facility; or attending school-related conferences or events concerning their children.

The ESLL gives employers the option to either provide one hour of paid sick leave for every 30 hours worked (up to a maximum of 40 hours per benefit year) or to frontload 40 hours of leave at the beginning of each benefit year. Alternatively, employers may rely on paid time off (PTO) or other policies to satisfy their obligations, provided they meet or exceed all requirements of the ESLL. (See our May 18, 2018 FYI.) Although the New Jersey Department of Labor and Workforce Development (NJDOL) had proposed implementing regulations, final sick leave rules were not in place when the ESLL took effect on October 29, 2018. (See our October 11, 2018 FYI.)

#### **Final earned sick leave rules**

On January 6, 2020, the NJDOL issued final regulations interpreting the ESLL, including a summary of public comments on the proposed rules and the department's responses. The final rules, which took effect immediately, largely adopt the proposed rules and mirror the agency's FAQs but also provide several notable changes and clarifications.

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## Setting a benefit year

In a significant shift, the final regulations do not require employers to establish a single benefit year (e.g., based on the calendar year) for all employees. While employers must still establish a benefit year for every employee, the NJDOL indicated that it will propose a new rule allowing employers to establish multiple benefit years (e.g., based on employee anniversary dates). However, the final rules still require employers to provide 30 days' written notice to the NJDOL before changing an established benefit year. Further, the rules allow the agency to impose a benefit year if it determines that the change is intended to prevent sick leave accrual or use.

## Using existing PTO policies

Employers may use existing PTO policies or PTO banks to satisfy ESLL requirements — but only if they conform to all ESLL requirements, “including the carry-over requirements, relative to all of the PTO.” In view of that, employers may want to consider whether a single PTO policy or a separate ESLL compliant policy for New Jersey earned sick leave best suits their needs.

While the federal Family and Medical Leave Act (FMLA) allows employers to require employees to exhaust paid sick leave before taking FMLA leave, the ESLL bars employers from requiring use of earned sick leave. Under the ESLL, employers may require reasonable documentation where the employee uses earned sick leave for three or more consecutive days or uses unscheduled leave during a blackout period. While employers may condition an employee's return to work on receiving medical clearance from a doctor, they may not require medical proof that leave was for a purpose permitted by the ESLL.

## Blackout dates

The final regulations recognize that employers may prohibit employees from using earned sick leave on certain dates — but only when the need to use leave is foreseeable and employees had reasonable notice of the blackout dates. Further, those dates are limited to verifiable high-volume periods or special events during which leave use would unduly disrupt operations.

## Uses

The NJDOL clarified that paid sick leave may be used for, among other things, a child's extracurricular activities (such as school sporting events, plays, recitals, parties, and other non-educational events), but only if the parent's attendance was “requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education.” The DOL also intimated that such leave would not be available for inclement weather unless it rose to the level of a natural disaster.

## Payouts

While an employer may offer to pay out — rather than carry over — unused accrued sick leave in the final month of a benefit year, neither the ESLL nor the final regulations address the payout's timing. However, the NJDOL made clear that a failure to pay earned sick leave is a failure to pay wages under the state's Wage Payment Law. That law, which requires payment at least twice a month on

regular paydays designated in advance, would apply to any ESLL payout at the end of the benefit year.

### Collective bargaining agreements (CBAs)

The NJDOL clarified that the ESLL would not apply to union members covered by a CBA at the time of the law's enactment until the CBA expires. Notably, renewing a CBA under its old terms would not extend the agreement's expiration date for these purposes. Rather, unions may waive members' earned sick leave rights or benefits entirely or agree to accept less favorable terms than the ESLL requires only during negotiation of a new CBA.

### Additional guidance expected

The NJDOL indicated it would adopt additional ESLL regulations to address other issues such as calculating the rate of pay, applicability to out-of-state employees, and prorating frontloaded leave.

### Rate of pay

The NJDOL confirmed that nondiscretionary bonuses should be included in calculating an employee's rate of pay, but provided no guidance on how to incorporate quarterly or annual bonuses that have not been earned or calculated at the time of leave into that rate.

While the New Jersey Wage and Hour Law expressly excludes gratuities from the definition of "wages," the final regulations view them as part of a tipped employee's ESLL rate of pay. The NJDOL confirmed that employers should use a seven-day look back to determine tipped employees' wages (including gratuities) if feasible. If not, the employer may apply an agreed-upon wage as the rate of pay, provided it is no less than the state minimum wage. However, the agency failed to explain when calculating the hourly rate of pay would not be feasible.

### Out-of-state employees

The NJDOL indicated that it will promulgate additional rules concerning the ESLL's coverage of out-of-state employees. The rules are expected to extend the rights and protections of the ESLL to employees who routinely perform some work in New Jersey and whose base of operations or the place from which their work is directed or controlled is in-state.

### Prorating frontloaded leave

The NJDOL also indicated that it will amend the regulations to address:

- Frontloading sick leave to part-time workers based on their anticipated hours
- Prorating frontloaded sick leave to workers who are hired during a benefit year

Expected amendments would allow employers to frontload the amount of sick leave that part-time employees and mid-year hires are expected to accrue during the upcoming or remaining benefit year.

However, employers would still have to track hours worked, ensure the statutory accrual rate is satisfied, and allow employees who exceed their anticipated hours to accrue additional leave up to the maximum of 40 hours for the benefit year.

## In closing

Final rules governing New Jersey's Earned Sick Leave Law are now in effect. New Jersey employers should review and, as needed, adjust their leave practices, policies, and handbooks to ensure compliance and continue to monitor the NJDOL website for further guidance.

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