

Client Alert **Employment & Labor**

New Jersey Paid Sick Leave Implementation Date Is Quickly Approaching

As discussed in our [May 2018 Alert](#), Governor Murphy signed New Jersey's Sick Leave Law ("NJSLL") on May 2, 2018, replacing the patchwork of local laws throughout the state. In September, the New Jersey Department of Labor and Workforce Development issued proposed regulations, offering guidance on how employers can adopt compliant policies and practices. Although the proposed regulations are not yet finalized, the effective date of the NJSLL is October 29, 2018, providing employers with a limited window to review and bring their policies into compliance. Following is a summary of ten key questions and our current interpretation of the regulations in response:

1) What employees are entitled to accrue sick leave?

Any employee working within the State of New Jersey is entitled to paid sick leave, except for three categories: (i) any employee performing construction services under a collective bargaining agreement; (ii) any per diem health care employee (which meets a very specific definition which should be consulted by any employer seeking to take advantage of this exception); or (iii) any public employee that is provided sick leave through another law, rule, or regulation. Importantly, full-time and part-time employees are covered and there is no requirement that an individual be employed for a requisite period of time prior to accruing sick leave.

2) What employers are covered by the NJSLL?

All private employers operating within the state, regardless of size, are covered by the NJSLL.

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3) When does the NJSLL go into effect?

Employers must have policies in place that allow employees to begin accruing sick leave by October 29, 2018. However, while they must be able to accrue time on that date, the proposed regulations have created conflict regarding when employees may begin to use the sick leave they have accrued.

For individuals who are hired *after* October 29, 2018, the NJSLL and regulations are straight-forward. New employees begin accruing sick leave on the date they begin employment, and are entitled to use any accrued sick leave 120 days after that date.

For individuals who were hired *before* October 29, 2018, the guidance is contradictory. The NJSLL, as passed, states that existing employees can use their accrued sick leave 120 days after they begin employment. However, under the proposed regulations, employees would not be entitled to use their accrued sick leave before the later of (1) February 26, 2019 (which is 120 days from October 29, 2018), or (2) 120 days from the date they commence employment. This conflict has led to significant confusion amongst employers, who are left to wonder how they should approach the “gap” between October 29, 2018, and February 26, 2019. As such, the safest approach would be to allow existing employees to accrue sick leave, starting on October 29, 2018, and allow any employee who has been employed since June 30, 2018, to begin using accrued sick time immediately upon accrual.

4) How is sick leave accrued and used?

The NJSLL mandates that all covered employees earn one (1) hour of sick leave for every thirty (30) hours worked. Employees are not entitled to earn or use more than forty (40) hours of sick leave, in a given benefit year. In practice, employers can choose to accomplish this through one of two methods: *accrual* or *front-loading*. The accrual method requires tracking the “hours worked” by each employee, beginning on the first day of each benefit year, and awarding 1 hour of sick leave for every 30 hours worked, presuming that an exempt employee works 40 hours per week. Alternatively, employers can choose to front-load sick time, by granting 40 hours of sick time to employees on the first day of each benefit year.

5) Can employers use a paid time off (PTO) policy to satisfy the NJSLL's requirements?

Employers with PTO policies that allow paid sick, personal and vacation days will be in compliance with the law provided that the employees can use their PTO days for all of the same reasons enumerated in the law and that their PTO policy meets or exceeds all of the requirements of the NJSLL, including with respect to accrual, payment, pay out, carry-over, etc.

6) What happens to unused leave at the end of the benefit year?

While there is no obligation to pay employees for unused sick time, employees are entitled to carry over as many as 40 hours of unused sick leave, from one benefit year to the next. There are special rules that apply if an employer allows employees the option to be paid for unused time at the end of the year.

7) What can employees use sick leave for?

Employers must allow their employees to use their accrued sick time for any of the following reasons:

- For the diagnosis, care, or treatment of, or recovery from, the employee's own mental or physical illness, injury, or other adverse health condition, or to obtain preventative medical care;
- For the employee to aid or care for a family member during diagnosis, care, or treatment of, or recovery from, the family member's mental or physical illness, injury, or other adverse health condition, or while obtaining preventative medical care;
- To address circumstances arising from the employee or the employee's family member being the victim of sexual or domestic violence, including seeking medical attention, victim's services, psychological counseling, relocation, or to participate in legal proceedings;
- If the employee's workplace, or the school of their child, has been closed by order of a public health official, or if the employee or a member of their family has been quarantined by order of a public health official; or
- To attend a school-related conference, by request of the employee's child's school.

8) Can an employer require advanced notice?

Similar to other state and federal leave laws, the NJSLL allows employers to require up to seven days advanced notice for any *foreseeable* use of sick leave. Where the leave is *not foreseeable*, employees must notify their employers “as soon as practicable.”

9) Can an employer require documentation?

The NJSLL and regulations provide two circumstances where an employer can require documentation to support a request for sick leave. First, employees may be required to provide documentation whenever they use sick leave on three or more consecutive days.

Second, an employer can require documentation from employees who request to use leave for a reason that is *not foreseeable*, on days that the employer has identified as “blackout” days. “Blackout” days are predictable days of increased productivity, that the employer must identify beforehand, and inform employees that *foreseeable* leave will not be permitted. In order to verify that employees are not abusing leave, the regulations allow the employer to request documentation whenever employees claim to need sick leave during the “blackout” dates, for reasons that are *not foreseeable*.

Under the regulations, the term “reasonable documentation” differs depending on the reason for the leave.

10) At what rate should employees be paid while taking sick leave?

The regulations provide different answers depending on how the employee is normally compensated, whether by fixed hourly rate, fluctuating pay for different jobs, paid by commission or pay by piecemeal.

For example, while employees paid a fixed hourly rate are entitled to their normal rate of pay, excluding any overtime premium, the regulations also account for employees who are paid different hourly rates due to working two or more jobs for the same employer. In such circumstances, employees are paid a rate that equals their total earnings from the last seven workdays, excluding overtime, and divided by the number of hours worked.

Employer Tips

Needless to say, implementation of and compliance with the NJSLL is complicated. The points summarized above cover the basic elements and do not address the details and nuances that exist in the law and proposed regulations. Put simply, employers need to educate themselves; particularly since they will be required to post and distribute a DOL approved notice (which can be found [here](#)) to their employees that inform them of their rights. To ensure that policies are in full compliance, employers are encouraged to have experienced legal counsel review their current leave policies in order to avoid the risk of penalties.

The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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