



NJ Employers Are One Step Closer To Mandatory Paid Sick Leave

STATE DOL PUBLISHES POSTER AND PROPOSED REGULATIONS IN ADVANCE OF LOOMING EFFECTIVE DATE

Insights

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In just a few short weeks, New Jersey employers will be required to comply with the state's new Paid Sick Leave Act. Once October 29 is upon us, New Jersey employers of all sizes will need to provide up to 40 hours of paid sick leave per year to covered employees. In advance of the impending effective date, the state Department of Labor and Workforce Development (DOL) has just published both a mandatory workplace poster and a set of sweeping regulations covering the new law—and you'll want to familiarize yourself with both.

For an overview of the Act's specific requirements, read our [comprehensive summary](#). And for an overview of the latest developments from the DOL, read on.

DOL Mandatory Workplace Notice

The New Jersey DOL just published the [New Jersey Paid Sick Leave Notice](#), which can be [found here](#). You must post the notice at a conspicuous place at all worksites and distribute it to all employees by November 29, and also again each time thereafter when an employee is hired or requests such a notice.

The proposed regulations provide that if you have an internet site or intranet site for the exclusive use by your employees and to which all employees have access, you can satisfy the "conspicuous-posting" requirement of the Act by posting the notice at such sites. Because the notice must be posted and distributed in any language that is the first language of a majority of your workforce, the DOL anticipates publishing the notice in 10 additional languages.

Proposed Regulations

The DOL also recently published [proposed regulations](#) to implement the requirements of the Act. New Jersey employers have been eagerly anticipating these regulations in the hopes that they would resolve some of the ambiguities in the law. While the proposed regulations further clarify certain provisions, some questions remain unanswered. Here are the highlights:

Benefit Year

The Act requires employers to designate any period of 12 consecutive months as a "benefit year." The proposed regulations clarify that you must establish a single benefit year for all employees. This

provision and the DOL Notice seemingly imply that you must use the same beginning and ending date for all employees and cannot use an employee's "anniversary year" as the designated benefit year.

The proposed regulations also outline the requirements for seeking DOL approval to change the designated benefit year. Requests must be submitted in writing at least 30 days prior to the proposed change. In addition to identifying the existing and proposed new benefit year and the reason for the change, the request must include a current list of employees with their contact information and history of accrual, use, payment, payout, and carryover of earned sick leave for the preceding two benefit years. The DOL may deny your request if it determines that the proposed change would prevent the use or accrual of earned sick leave.

PTO Policies

The Act makes clear that existing PTO policies may be used to satisfy the requirements of the Act if such policies can be used in the same manner provided by the Act and the time is accrued at the same rate or greater than the rate described in the Act. The proposed regulation expound upon this provision to state that the PTO policy must meet or exceed all requirements of the Act, relating to accrual rate, permitted use, rate of payment and carryover or payment for unused time.

Waiting Period For Use Of Paid Sick Leave

The Act states that employees can use accrued sick time after the 120th day of their first date of employment. The proposed regulations expressly clarify that this waiting period applies to employees whose paid sick leave time has been accrued or frontloaded.

The proposed regulations provide employees are not eligible to use sick leave accrued after October 29 of this year until February 26, 2019 (the 120th calendar day after October 29) or the 120th calendar day after the employee commences employment, whichever is later.

This is a surprising provision with respect to employees on the payroll prior to October 29 because the Act makes clear that employees can use accrued sick time after the 120th day of their first date of employment. Depending upon pressure from employee advocates, this provision may change in the final version of the regulations. Please note that you are not required to impose a 120-day waiting period and may permit earlier use for current or newly hired employees.

Rate Of Pay For Employees Without A Fixed Rate

The Act provides that employers must pay an employee for earned sick leave at the same rate of pay as the employee normally earns. This requirement, however, fails to consider those employees that are not paid on a fixed rate, such as employees who are paid at two or more rates, employees paid on a piecework basis, employees paid on commission basis, and employees whose pay includes the value of gratuities, food, or lodging.

The proposed regulations define the following methods for determining the rate of pay for such employees:

1. **Two or more rates**: Where an employee works at two or more rates, divide the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave by the total hours of work during that seven-day period.
2. **Commission**: Where an employee is paid by commission, whether base wage plus commission or commission only, pay an hourly rate that is the base wage or the state minimum wage rate, whichever is greater.
3. **Piecework**: When an employee is paid on a piecework basis, whether base wage plus piecework or piecework only, divide the employee's total earnings for the seven most recent workdays when the employee did not take leave by the number of hours the employee spent performing the work during those workdays.
4. **Gratuities, food, or lodging**: When the employee's pay includes the value of gratuities, food, or lodging, divide the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave by the number of hours the employee spent performing the work during those workdays. If it is not feasible to determine the employee's exact hourly wage using this method, the rate of pay for earned sick leave can be based on the agreed hourly wage no less than the State minimum wage rate.

Consideration Of Bonuses For Rate Of Pay

The proposed regulations provide that discretionary bonuses need not be included in the calculation of an employee's rate of pay. This implies that non-discretionary bonuses must be considered, creating an administrative hardship for employers that pay non-discretionary bonuses on a quarterly or annual basis.

Overtime Rate

The proposed regulations clarify that where an employee uses earned sick leave during hours that would have been overtime if worked, you are not required to pay the overtime premium.

Prohibition Of Use On "Certain Dates"

Under the Act, employers may prohibit employees from using foreseeable sick leave on certain dates and require reasonable documentation if sick leave that is not foreseeable is used during those dates. The proposed regulations limit those "certain dates" 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."

For example, a "high-volume period" for an airline industry employer would include the days or weeks around Thanksgiving. An example of a "special event" for a manufacturer of retail products includes the days or weeks around a new product launch.

Recordkeeping Requirements

The Act requires employers to retain, for a period of five years, records documenting hours worked by employees and paid sick time taken by employees. The proposed regulations expand the employers' obligations in this regard. Under the proposed regulations, employers must retain, for a

employers' obligations in this regard. Under the proposed regulations, employers must retain, for a period of five years, records documenting the following: 1) hours worked; 2) amount of sick leave accrued/advanced; 3) amount of sick leave used; 4) amount paid out for leave taken; and 5) the amount of leave paid out and/or carried over.

The proposed regulations clarify that you are not required to maintain or retain records documenting hours worked by an exempt employee if you choose to presume (solely for the purpose of calculating earned sick leave accrual) that the exempt employee works 40 hours per week.

Retaliation And Attendance Policies

The Act already prohibits employers from counting sick leave absences as an absence that may result in the employee being subject to discipline, discharge, demotion, suspension, a loss or reduction of pay, or any other adverse action. The proposed regulations clarify that this includes "no-fault" attendance policies, whereby an employee receives a point or a demerit for any absence, no matter the reason, and are subjected to discipline or are foreclosed from a promotional opportunity(ies) after the accumulation of a certain number of points or demerits.

Other Employee Benefits

If there was ever any doubt, the proposed regulations state that for purposes of employee benefits "when an employee takes earned sick leave, it shall be as if the employee worked those hours."

Independent Contractors

The proposed regulations provide that the standard commonly referred to as the "ABC test" will be used to determine whether an individual is an employee or an independent contractor under the Act.

Penalties For Violations

The proposed regulations also set forth the penalties for violating the Act. An employer who knowingly and willfully violates any provision of the Act will be guilty of a disorderly person offense. Upon conviction for a first violation, the employer will be punished by a fine of not less than \$100, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 90, days or by both the fine and imprisonment.

Upon conviction for a second or subsequent violation, the employer will be punished by a fine of not less than \$500, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 100, days or by both the fine and imprisonment. The DOL may assess additional administrative penalties of up to \$250 for the first violation and up to \$500 for a second or subsequent violations.

Each week, in any day where an employee is not provided earned sick leave in the amount and in the manner prescribed in the Act, each time an employee is so affected shall constitute a separate offense.

Hearing And Comment Period For Proposed Regulations

The DOL has announced that it will hold a public hearing regarding the proposed regulations on November 13, 2018, at the DOL's offices in Trenton, NJ. Written comments may be submitted by December 14, 2018, to David Fish, Executive Director, Office of Legal and Regulatory Affairs. Thus, it is unlikely that the DOL's final regulations will be issued prior to 2019.

Unanswered Questions

As stated, while the proposed regulations clarify certain provisions of the Act, there are still questions left unanswered. For example, there is still no clarity as to what the rate of pay should be for employees that are paid on a stipend, such as graduate students and part-time coaches, or those employees that are paid on a commission basis but that do not have to report to work, such as outside sales employees. Likewise, there is no clarity as to the status of remote employees that work from their homes in New Jersey and for an out-of-state employer. Lastly, many employers that advance paid sick leave time to their employees at the beginning of the year find the carryover provision of the Act to be an unnecessary burden. To elaborate, under those circumstances, the employee is guaranteed to have the minimum hours of paid sick leave at the beginning of each year. Because the employer can cap the amount of time that is used in a given year, there is no point in permitting carryover of accrued unused time. This moot exercise becomes an administrative burden, particularly for small employers.

In light of these and other concerns, our attorneys at Fisher Phillips will likely participate in the hearing and comment portion for the proposed regulations. We intend to convey the concerns of our New Jersey clients to the DOL in the hopes that the outstanding issues regarding this new law will get resolved.

What Should Employers Do Now?

You should review your paid time off, vacation, or other paid leave policies to determine whether you will have to implement a paid sick time policy for your employees or amend your existing policies to ensure compliance with the Act and proposed regulations. You should consider revising your employee handbooks to account for these changes. For example, if you choose not to pay out accrued but unused sick leave upon termination, you must make that abundantly clear in your written policies.

If you have not already done so, you would be well-advised to establish recordkeeping procedures that are consistent with the requirements of the Act and regulations. You should also inform and train managers and supervisors of any new policy changes and of the importance of the retaliation provisions of the law.

Lastly, you should reassess your policies once the DOL issues its final regulations, which are expected sometime in early 2019. The finalized regulations may require changes in policies and practices. We will update you once they are released and provide practical suggestions for compliance.

For more information on how this legislation will affect your workplace, contact any attorney in our [New Jersey office](#) or your Fisher Phillips attorney.

This Legal Alert provides an overview of a recent update to New Jersey law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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