

Advisory
on
Paid Sick Leave Statute
P.L. 2018, c. 10
N.J.S.A. 34:11D-1 et seq.

Effective Date: October 29, 2018

Provision of Earned Sick Leave

With three exceptions not applicable to dental offices, the New Jersey Paid Sick Leave statute requires each employer to provide earned sick leave to each employee working for the employer in this State.

Scope of Paid Sick Leave Requirement

An employer will be in compliance with the statute if it provides each employee with paid time off, which may include leave types other than sick, such as personal leave and vacation leave. However, to be compliant, the paid time off must meet or exceed all of the other requirements pertaining to employee rights and employer responsibilities in the statute and any regulation hereafter adopted.

Application of Statute to Independent Contractors

There is no requirement for an employer to provide earned sick leave to an independent contractor. However, an employer cannot evade responsibility to provide paid sick leave benefits by wrongly characterizing a person as an independent contractor. Under a regulation proposed by the New Jersey Department of Labor and Workforce Development (“DOL”), “The criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the ‘ABC test,’ and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether an individual is an employee or an independent contractor under the Act”. According to the ABC test, services performed for remuneration will be “deemed” to be employment unless and until it is shown to the satisfaction of DOL that, among other factors, “[s]uch service is . . . outside the usual course of the business for which such service is performed”. Services performed by a dentist for a dental office fall within the “deemer” clause.

Benefit Year

The regulation proposed by DOL provides that an employer must establish a single benefit year for all employees.

Earned Sick Leave

Under the statute, for every 30 hours worked, an employee shall accrue one hour of earned sick leave. However, employers are not required to permit an employee to accrue or use in any benefit year, or to carry forward from one benefit year to the next, more than 40 hours of earned sick leave.

Time Restriction Pertaining to Use of Earned Sick Leave

Unless an employee accrued earned sick leave prior to October 29, 2018 under a benefit provided by the employer, the earned sick leave will begin to accrue on October 29, 2018 for any employee who was hired and commenced employment before October 29, 2018 and the employee will be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commenced employment. If the employment commenced after October 29, 2018, earned sick leave will begin to accrue upon the date that employment commenced and the employee will be eligible to use the earned sick leave beginning on the 120th calendar day after the employment commenced, unless the employer agrees to an earlier date. Following the 120 day period, an employee may use earned sick leave as soon as it accrues.

Employees For Whom the Law Does Not Require a Record of Hours Worked

The regulatory proposal by DOL provides that where the employer does not record hours worked because an employee is an exempt employee under either the Federal Fair Labor Standards Act or the New Jersey Wage and Hour Law, the employer may either (1) record the actual hours worked for that employee for the purpose of calculating earned sick leave accrual; or (2) presume, solely for the purpose of calculating earned sick leave accrual, that the employee works 40 hours per week. As an alternative, an employer may, on the first day of the benefit year, provide employees with no less than 40 hours of earned sick leave for use throughout the benefit year.

Earned Sick Leave Use

An employee is entitled to use earned sick leave: (1) for diagnosis, care, treatment, or recovery related to the employee's illness; (2) to care for a family member during diagnosis, care, treatment, or recovery related to a family member's illness; (3) for certain absences resulting from the employee or a family member being a victim of domestic or sexual violence; (4) for time during which the employee is not able to work because of a closure of the employee's workplace, or the school or place of care of a child of the employee, in connection with a public health emergency or a determination that the presence of the employee or child in the community would jeopardize the health of others; or (5) to attend school-related conferences, meetings, or event, or to attend other meetings regarding care for the employee's child.

Definition of Family Member

In the statute, the word "Family Member" is defined to mean "a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of any 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.

Documentation of Sick Leave Use

The statute permits an employer to require reasonable documentation if the leave is for three or more consecutive days.

Use of Paid Sick Leave in Increments

An employer may choose the increments in which its employees may use earned sick leave, provided that the largest increment of earned sick leave that an employee may be required to use for each shift for which earned sick leave is used is the number of hours the employee was scheduled to work during that shift.

Foreseeable Sick Leave

Where an employee's need to use earned sick leave is foreseeable, the employee is required to make a reasonable effort to schedule the use of earned sick leave in a manner that does not unduly disrupt the operation of the employer. Earned sick leave is considered "foreseeable" when the employee is able to predict or know in advance that he or she will need to use earned sick leave, such as a scheduled doctor's visit, a regularly occurring medical treatment, or regularly scheduled therapy appointment. Where the employee's need to use earned sick leave is foreseeable, the employer may prohibit the employee from using earned sick leave during verifiable high-volume periods or special events, during which permitting the use of foreseeable earned sick leave would unduly disrupt the operation of the employer, provided the employer provides reasonable notice to its employees of the dates on which its employees are prohibited from using foreseeable earned sick leave.

Sick Leave Not Foreseeable

The need to use earned sick time will be considered "not foreseeable" when an employee requires time to care for, or obtain medical treatment for, themselves or a family member that was not reasonably anticipated.

Arrangement to Perform Work in Lieu of Use of Earned Sick Leave

Pursuant to a proposed regulation, where an employee would be eligible to use earned sick leave, the employee may, only with the employer's consent, choose to work additional hours to compensate for the hours of work missed, rather than use earned sick leave. However, where an employee would be eligible to use earned sick leave, an employer cannot (1) require an employee to work additional hours to compensate for the hours of work missed; (2) require an employee to use earned sick leave; or (3) require an employee, as a condition to using earned sick leave, to search for or find a replacement worker to cover the hours during which the employee will be using earned sick leave.

Applicability of the Statute to Successor Employers

The proposed regulation provides that where a successor employer takes the place of an existing employer, all employees of the predecessor employer shall retain all earned sick leave accrued while working for the predecessor employer. A rebuttable presumption of successorship will arise if the predecessor firm and the successor firm share two or more of the following characteristics: (1) Perform similar work within the same geographical area; (2) Occupy the same premises; (3) Have the same telephone or fax number; (4) Have the same e-mail address or Internet website; (5) Employ substantially the same work force, administrative employees, or both; (6) Utilize the same equipment or facilities; (7) Employ or engage the services of any person or

persons involved in the direction or control of the other; or (8) List substantially the same work experience. Where a successor employer takes the place of an existing employer and where all employees of the predecessor employer have retained all earned sick leave accrued or provided while working for the predecessor employer, the employee's entitlement to use accrued or provided earned sick leave shall not be adversely affected.

Payment for Accrued Unused Earned Sick Leave

In the final month of the employer's benefit year, the employer may, but is not required, to provide an offer to an employee for payout of accrued, unused earned paid sick leave. An employee may accept the employer's payout offer within 10 calendar days from the date the offer was made. If the employee does not accept the payout offer within 10 calendar days from the date of the employer's offer, the employee is deemed to have declined the employer's offer. An employee who agrees to receive a payout shall choose either a payout for the full amount or for 50% of accrued, unused earned sick leave. If the employee declines or agrees to a 50% payout, the employee is entitled to carry forward to the following benefit year any accrued, unused sick leave, except that the employer is not required to permit the employee to carry forward from one benefit year to the next more than 40 hour of accrued, earned sick leave. If the employee agrees to a payout of the full amount of accrued, unused earned sick leave, the employee is not entitled to carry forward to the following benefit year any accrued, unused earned sick leave.

Payment for Sick Leave Provided by Employer

In lieu of the accrual method, if an employer provides an employee with no less than 40 hours of earned sick leave for use throughout the benefit year, in the final month of the employer's benefit year, the employer must either provide to the employee a payout for the full amount of unused earned sick leave or permit the employee to carry-over any unused earned sick leave, except that the employer is not required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave. Further, if the employer provides to the employee a payout for the full amount of unused earned sick leave, the employer may not use the accrual method with respect to that employee during the next benefit year. Unless an employer policy or collective bargaining agreement provides for the payout of unused earned sick leave upon an employee's termination, resignation, retirement or other separation from employment, an employee is not entitled to a payout of unused earned sick leave upon separation from employment.

Payment for Unused Sick Leave

Under the proposed regulation, the employer is required to pay an employee for earned sick leave at the same rate of pay as the employee normally earns, except the payout amount for accrued, unused sick leave at the end of the benefit year must be based on the rate of pay that the employee is earning at the time of the payout and under no circumstances during a period of earned sick leave may an employer pay an employee less than the State minimum wage rate. If an employee is paid on a commission, production or collection basis, the rate of payment likely will be based upon the total

earnings for the seven most recent workdays when the employee did not take leave and dividing that sum by the number of hours the employee spent performing the work during workdays. When performing this calculation, the employer must consider workdays to mean the days or parts of days the employee worked. Where an employee uses earned sick leave during hours that would have been overtime if worked, the employer is not required to pay the overtime rate of pay.