



OCTOBER 9, 2018

The New Jersey Department of Labor Issued Proposed Regulations Concerning the New Jersey Paid Sick Leave Acts

On September 13, 2018, the New Jersey Department of Labor and Workforce Development ("NJ DOL") issued proposed regulations to implement the New Jersey Paid Sick Leave Act (the "Act"). The proposed regulations have a 60-day public comment period, which may be extended. The proposed regulations follow the provisions of the Act, and address how sick leave must be accrued, used, paid, paid out, and carried over from year to year. In addition, the proposed regulations reprise the Act's notification and recordkeeping requirements, as well as its prohibitions against retaliation and discrimination

RECAP OF THE ACT

The Act -- which goes into effect on October 29, 2018 -- requires employers of all sizes to provide up to 40 hours of paid sick leave to employees during an employer-established benefit year. Under the Act, paid sick leave benefits accrue at a rate of one benefit hour for every 30 hours worked. For a full summary of the Act, please see our previous **Client Alert dated May 2, 2018** (see **New Jersey Paid Sick Leave Act Signed Into Law**).

KEY PROPOSED REGULATIONS CONCERNING THE ACT

A. Notice

On October 3, 2018, the NJ DOL issued its Earned Sick Leave notice ("Notice"), which summarizes the Act and employee rights. A copy of the Earned Sick Leave Notice -- which employers must post and distribute to their New Jersey employees -- may be found here: https://www.nj.gov/labor/forms_pdfs/mw565sickleaveposter.pdf.

Pursuant to the proposed regulations, the posting requirement may be satisfied by posting the Notice on an employer's website (internal or external), if that site is for the exclusive use of employees and all employees have access to it. In addition, employers must provide each employee with a copy of the Notice: (i) within 30 days of its issuance, and thereafter; (ii) upon hire, and; (iii) upon the request of an employee. The proposed regulations permit email distribution of the notice.

B. Paid Time Off

The NJ DOL's proposed regulations affirm that employers that currently provide employees with Paid Time Off ("PTO") will be in compliance with the Act as long as the employer's PTO program (e.g., sick, vacation, and personal days) meets all of the requirements of the Act and the proposed regulations.

C. The Employer's Proposed Benefit Year

The employer's established benefit year may be the calendar year, or another 12-month period. Once a benefit year has been established by the employer, however, it cannot be changed without providing notice to the NJ DOL Commissioner at least 30 days in advance. If the Commissioner determines that the proposed change would prevent the accrual or use of earned sick leave by an employee, the Commissioner may deny the change and impose a benefit year on the employer.

D. "Foreseeable" Leave

The Act permits employers to require up to seven calendar days' notice of the need to use sick leave if the need for leave is "foreseeable." Pursuant to the proposed regulations, the need for leave would be considered "foreseeable" when the employee is able to predict or have advance notice that he or she will need to use earned sick leave (examples include a scheduled doctor's visit, regularly occurring medical treatment or regularly scheduled therapy appointment). Employees would be required to make a reasonable effort to schedule the time off in a manner that does not unduly disrupt the operations of the employer.

E. Barring Use of Leave on Certain Dates

Under the Act, employers may prohibit employees from using foreseeable earned sick leave on "certain dates" and require reasonable documentation if sick leave that is not foreseeable is used during those dates. The "certain dates" on which an employer may prohibit employees' use of foreseeable leave or require documentation of the need for leave would be limited to "verifiable high-volume periods or special events" where the use of sick leave would unduly disrupt the employer's operations.

For example, an airline industry employer's verifiable "high volume period" would include the days in and around Thanksgiving. For a manufacturer of retail products, an example of a "special event" is the day or week of a product launch.

F. Payout and Carry Over

Employers may use an accrual method under which employees earn one hour of sick leave per 30 hours worked, up to 40 hours, or frontload the entire 40 hours at the beginning of the benefit year. According to the proposed regulations, **the following would apply to a payout and to carryover when the employer follows the accrual method:**

1. In the final month of the employer's benefit year, the employer may provide an offer to an employee for payout of unused earned sick leave. The employee may accept the employer's payout offer within 10 calendar days from the date the offer was made;
2. 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;
3. If the employee agrees to receive a payout, the employee shall choose either a payout for the full amount of unused earned sick leave or for 50 percent of the amount of unused earned sick leave;
4. If the employee declines a payout of unused earned sick leave or agrees to a payout of 50 percent of the amount of unused earned sick leave, the employee shall be entitled to carry forward to the following benefit year any unused earned sick leave, except that the employer shall not be required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave;
5. If the employee agrees to a payout of the full amount of unused earned sick leave, the employee shall not be entitled to carry forward to the following benefit year any unused earned sick leave;
6. The payout amount shall be based on the rate of pay that the employee is earning at the time of the payout.

The following would apply to a payout and to carryover when the employer frontloads leave:

1. In the final month of the employer's benefit year, the employer shall 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 shall not be required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave;
2. 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.

In accordance with the Act, the proposed regulations state that employees are not entitled to a payout of unused earned sick leave upon separation of employment.

G. Non-Retaliation and No-Fault Attendance Policies

Under the proposed regulations, employers would be prohibited from counting the use of earned sick leave as an absence that could subject the employee to "discipline, discharge, demotion, suspension, loss or reduction of pay or another adverse action." The proposed regulations affirm that this prohibition includes "no fault" attendance policies, whereby employees receive a demerit or are subject to discipline for any absence regardless of reason. However, the proposed regulations would not prevent employers from disqualifying employees who take leave under the Act from receiving perfect attendance bonuses.

H. Recordkeeping

The proposed regulations require employers to retain, for five years, records documenting as to each employee: (i) hours worked; (ii) the amount of leave accrued or advanced; (iii) the amount of leave used; (iv) the amount paid to the employee for leave taken; and (v) the amount of leave paid out and carried over.

I. Exempt Employees

The proposed regulations permit employers to presume --solely for the purpose of calculating earned sick leave accrual -- that exempt employees work 40 hours per week.

J. Collective Bargaining Agreements (CBA)

The proposed regulations confirm that, until a CBA expires, the Act does not apply to employees who, as of the October 29, 2018, effective date, are covered by the CBA. Moreover, employees or their representatives may waive rights under the Act during negotiations of a CBA.

Takeaway for Employers

Although the Act does not go into effect until October 29, 2018, employers should use this time to revise their handbooks and sick leave policies, using the NJ DOL's proposed regulations as a guide therefor. As the Act affects virtually every New Jersey employer, we encourage you to contact us for assistance in complying with the Act or interpreting the NJ DOL's proposed regulations.

* * *

For more information about sexual harassment prevention policies, complaint forms, or interactive training programs, feel free to contact us.