

New Jersey Department of Labor Releases Proposed Paid Sick Leave Regulations

By James M. McDonnell

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Proposed regulations on the New Jersey Paid Sick Leave Act (NJPSLA) were released by the New Jersey Department of Labor and Workforce Development (NJDOLE) on September 18, 2018. The NJPSLA will go into effect on October 29, 2018. The proposed Regulations address some questions created by the Act, but leave others unanswered.

Written comments on the proposed Regulations must be submitted to the NJDOLE by December 14, 2018.

The Law

The NJPSLA requires employers to provide up to 40 hours of paid sick leave to employees in an employer-designated "benefit year." (For details, see our articles, [New Jersey Enacts Paid Sick Leave Act and Springs Forward with Legislative Agenda](#) and [New Jersey Legislature Passes Paid Sick Leave Bill](#).)

Under the Act, employers may provide employees 1 hour of paid sick leave for every 30 hours worked (accrual method) or provide the full amount of 40 paid sick leave hours at the beginning of each benefit year. Alternatively, employers may create or rely upon a paid time off (PTO) policy to satisfy the requirements of the NJPSLA as discussed below.

Questions Addressed

The Regulations address a number of questions.

1. Exempt Employees

While other states omitted exempt employees from the scope of their paid sick leave laws, the NJPSLA does not. The Act, however, fails to explain precisely how an employer may account for exempt employees. The Regulations provide that an employer may:

- Record the hours actually worked by an exempt employee; or
- Presume that the exempt employee works 40 hours in a workweek for purposes of paid sick leave accrual.

2. Advanced Sick Leave for New Employees

If an employer uses the accrual method, the NJPSLA provides that a new employee is eligible to use paid sick leave 120 calendar days after commencement of employment. The Act, however, is silent as to any such waiting period if the employer advances the full amount of paid sick leave hours at the beginning of each benefit year. The Regulations provide that "[f]ollowing the 120-calendar-day period ... the employee shall be permitted to use earned sick leave immediately upon either accrual ... or the earned sick leave having been advanced to the employee." Accordingly, employers may limit advanced paid sick leave usage until 120 calendar days have elapsed from an employee's date of hire.

3. Normal Rate of Pay for Non-Hourly Employees

The Act states that "[t]he employer shall pay the employee for earned sick leave at the same rate of pay with the same benefits as the employee normally earns[....]" It provides no guidance on the proper calculation for non-hourly employees. The Regulations state:

- The employer is not required to compensate an employee at an overtime rate if the paid sick leave is used for hours which would have otherwise qualified for compensation at an overtime premium

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- If an employee works at 2 or more different rates, receives compensation on a piece-rate basis, the pay fluctuates or the compensation includes the value of gratuities, food or lodging, the employer must analyze the total earnings over the last 7 workdays for which leave was not taken — exclusive of overtime earnings — and divide by the total hours worked over those 7 workdays to determine the proper rate of pay for the sick leave benefit.
- If, however, it is not feasible for the employer to determine the exact hourly wage for an employee whose pay includes the value of gratuities, food or lodging, the paid sick leave may be based upon an agreed hourly wage that must be at least the minimum wage (currently, \$8.60).
- If an employee is compensated on a commission basis, whether base wage plus commission or commission only, the employer must pay either the hourly base wage rate or the State minimum wage, whichever is higher.

4. Benefit Eligibility

The Regulations state that the use of paid sick leave, for purposes of employee benefits, “shall be as if the employee worked those hours.”

5. Recordkeeping

The NJPSLA requires an employer to maintain records of employee hours worked and paid sick leave utilized for a 5-year period. The Regulations clarify the obligations as follows:

- The recordkeeping obligation applies also to sick leave accrued, advanced, used, paid, paid out, and carried over.
- The recordkeeping obligation does *not* apply to exempt employees to whom the employer advances the full complement of paid sick leave or for whom the employer assumes forty (40) hour workweeks for the purposes of accrual of paid sick leave hours.
- The records must be maintained at the place of employment or in a central office in New Jersey, available for inspection by the NJDOL.

6. Notice

Although the NJDOL has yet to release the form notice of rights under the NJPSLA, the Regulations permit an employer to meet the conspicuous-posting requirement with an internet or intranet site available to employees. Additionally, an employer may provide the individual notice required by the Act by email to employees.

7. Revised Benefit Years

The Regulations provide the following process for an employer seeking to obtain NJDOL approval to change a designated benefit year:

- The employer must provide 30 calendar days’ notice to the Commissioner of the proposed change to the benefit year.
- The notice must: (a) be in writing; (b) identify the existing benefit year; (c) specify the proposed new benefit year; (d) advise of the proposed effective date of the new benefit year; (e) explain the reason for the change in the benefit year; and (f) provide a list of employees (with contact information and paid sick leave history over the past 2 benefit years).

If the NJDOL determines the proposed change would prevent an employee from accruing or using paid sick leave, it will impose a benefit year on the employer and the employer may not propose a change for at least another full year. The employer may appeal any such decision to the Commissioner within 15 business days.

8. Notice of Foreseeable Sick Leave

The Act permits an employer to require up to 7 calendar days’ notice of foreseeable sick leave. The Regulations define foreseeable sick leave to include any paid sick leave the employee is able to predict in advance, including a scheduled doctor’s appointment, regularly occurring medical treatment, or a regularly scheduled therapy appointment, among other situations.

9. “Blackout Dates” for Foreseeable Sick Leave

The NJPSLA broadly states that “[e]mployers 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 Regulations limits any such blackout dates. They permit blackout dates only for “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.” Examples provided include a new product launch or a predictable increase in customer activity, such as around a

holiday. An employer's ability to implement blackout dates, therefore, appears more limited than the Act originally suggested.

10. Notice Requirements for Unforeseeable Sick Leave

The Act permits an employer to require notice of unforeseeable sick leave "as soon as practicable." However, in order to implement this notice requirement, the employer must place the employee *on notice of the notice requirement*. Absent *notice of the notice requirement*, the employer must allow the employee to utilize accrued paid sick leave without providing any notice at all, *i.e.*, prior notice, as soon as practicable, or otherwise.

11. Reasonable Documentation for School-Related Sick Leave

The NJPSLA permits an employer to request reasonable documentation to support use of paid leave under certain circumstances; however, it fails to describe the documentation that may be used to support leave for school-related functions or events. The Regulations (vaguely) define "reasonable documentation" under such circumstances to include "tangible proof" of the school-related conference, function, event, or meeting.

12. Violation and Penalty Provisions

Any employer who knowingly and willfully violates the Act will be guilty of a disorderly persons offense. Upon conviction for a first violation, the violator will be punished by a fine of \$100.00 to \$1,000.00 or by imprisonment for 10 days to 90 days. For each conviction for a second or subsequent violation, the violator will be punished by a fine of \$500.00 to \$1,000.00, by imprisonment of 10 days to 100 days, or both.

Additionally, the NJDOL may assess administrative penalties of up to \$250.00 for a first violation and from \$250.00 to \$500.00 for subsequent violations. Similar to other NJDOL matters, further fees may be assessed as follows: (1) 10% of the amount of any payment for a first violation; (2) 18% of the amount of any payment for a second violation; and (3) 25% of the amount of any payment for each subsequent violation.

13. The "ABC Test"

The Regulations state that the "ABC Test" will be used to determine employment status under the Act. Employees are eligible for paid sick leave benefits, but independent contractors are not.

14. Compliant PTO Policies

The Regulations explain that a PTO policy that, at a minimum, includes paid sick, personal, and vacation time may satisfy an employer's obligations under the Act. The NJDOL clarifies that a compliant PTO policy must: (a) provide for accrual or advancement of PTO at an equal or greater rate than that provided for under the Act; (b) permit PTO to be used for the same reasons as in the Act; (c) calculate the rate of pay of the PTO in accordance with the Regulations; and (d) provide for payment or carryover of unused PTO as in the Act.

Although the recordkeeping regulations do not mention PTO in particular, employers generally should maintain and retain records (for a period of 5 years) regarding: (a) hours worked; (b) PTO accrued or advanced; (c) PTO used; (d) PTO paid; and (e) PTO paid out or carried over.

15. Policy Transition

If an employee already has accrued or advanced sick leave under an existing policy, the Regulations provide that the employee "shall be eligible to use that earned sick leave prior to February 26, 2019," which is the first day an employee is eligible to utilize paid sick leave under the Act. Accordingly, any policy transition must include an employee's right to use previously accrued or advanced paid sick leave immediately.

Unresolved Questions

Although the Regulations address many questions posed by the Act, some remain open and likely will challenge implementation of a compliant paid sick leave policy by October 29, 2018.

1. Paid Sick Leave Bank Limitations

The NJPSLA limits at 40 hours an employer's obligation to permit an employee to accrue, use, and carryover paid sick leave from one benefit year to the next. The Regulations, however, do not contain any provisions regarding limits on a paid sick leave bank. If an employee does not utilize paid sick leave during 3 consecutive benefit years, for example, an employer arguably must carryover a total of 120 paid sick leave hours, even though the employee may be limited to using 40 during a single benefit

year.

2. Multistate Employees

The Regulations contain no guidance for multistate employees. Therefore, the obligations placed upon an employer whose employees may perform work within New Jersey on a temporary, casual, or infrequent basis are uncertain. The Regulations' silence poses challenges to employers with multistate operations whose employees may be based in other states but perform work within New Jersey.

3. Out-of-State Employers

Similarly, the Regulations do not contain any information on remote or telecommuting employees. The paid sick leave obligations are dependent upon an employee's situs of work, not the employer's location. However, the Regulations do not provide any guidance as to out-of-state employers who may have employees telecommuting from New Jersey or working on a project in New Jersey.

4. Definition of "Family Member"

The NJPSLA defines a family member to include, among others, any individual "whose close association with the employee is the equivalent of a family relationship." The Regulations provide little guidance as to what type of relationship meets the definition. The NJDOL explains a family member includes "any person with whom the employee has a significant personal bond that is, or is like, a family relationship, regardless of biological or legal relationship." Accordingly, employers likely will need to interpret the definition rather broadly with respect to administration of any paid sick leave policy.

5. Prorating Advanced Paid Sick Leave

While advancing paid sick leave frees an employer from the more burdensome accrual requirements, the Regulations provide no guidance on whether an employer may prorate advanced sick leave if an employee commences employment during a benefit year. Furthermore, the Regulations do not address the proper calculation of any advanced paid sick leave hours for part-time employees if the employer decides to advance such hours to a part-time employee. Neither the NJPSLA nor the Regulations expressly authorize an employer to prorate advanced paid sick leave based upon an employee's start date or part-time status.

6. PTO Carryover

The Regulations require a PTO policy to contain a carryover provision satisfying the requirements of the NJPSLA. However, PTO policies may provide well in excess of the 40 hours required under the Act. For example, if a policy provides for 80 hours of PTO, and the employee utilizes 40 hours of PTO (*i.e.*, the amount the Act requires in paid sick time), it is uncertain whether the employer must carryover the remaining 40 hours of PTO to the next benefit year. In other words, it is uncertain whether the Act's carryover obligation is extinguished by an employee's use of 40 hours of PTO in a single benefit year.

New Questions Raised

Surprisingly, the Regulations raise new questions. Issues unaddressed and not contemplated in the NJPSLA appear for the first time in the Regulations. Employers must consider these in a compliant policy.

1. Hours Worked

Although the Act does not define "hours worked," the Regulations state that it "means 'hours worked' as that phrase is defined in N.J.A.C. § 12:56-5." That section of the Administrative Code, however, does not contain an express definition for "hours worked." Instead, the section describes certain scenarios where time may qualify as "hours worked," including on-call time, all time an employer requires an employee to be at the place of work, and on-call time at home. Accordingly, any policy must account for such time if the employer implements an accrual method paid sick leave policy.

2. Bonus Payments

The NJPSLA is silent on the inclusion of bonus payments in the calculation of the paid sick leave benefit rate. The Regulations, however, exclude discretionary bonuses from the determination of the appropriate paid sick leave benefit rate. Consequently, this raises the question of whether non-discretionary bonuses must be included in the calculation of the benefit rate. The provision is peculiar and raises additional questions as to the proper method for including the amount of such non-discretionary bonus in the benefit rate.

3. Infeasible Hourly Wage for Tipped Employees

The Regulations provide that, where an employee's pay includes tips, food, or lodging "and it is not

feasible to determine the employee's exact hourly wage for earned sick leave purposes," an employer may pay sick leave at an agreed hourly wage, but not less than the minimum wage. The provision offers little guidance as to when, and under what circumstances, it would be infeasible for an employer to determine the exact hourly wage of a tipped employee.

The Regulations are not final and NJDOL may further clarify the issues outlined above. Please contact a Jackson Lewis attorney with any questions about the Act and the Regulations or for assistance in submitting comments to NJDOL.

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