

Management Alert



If Pain, Yes Gain — Part XII: Paid Sick Leave Spreading in New Jersey

By Christopher Lowe, Joshua Seidman, and Meredith-Anne Kurz

After a wave of recent developments, New Jersey continues to solidify its status as the state with the most municipal paid sick leave laws in the country.

Earlier this month, voters in Elizabeth approved a paid sick leave law for private employers, making Elizabeth the tenth city in New Jersey to have adopted such a law.¹ The “Sick Leave for Private Employees” Ordinance (the “Elizabeth Ordinance”) goes into effect on March 2, 2016.² The Elizabeth Ordinance closely mirrors the state’s nine existing local paid sick leave laws by requiring employers with 10 or more employees to provide up to 40 hours of paid sick leave per year, while smaller employers need only provide up to 24 hours of paid sick leave per year. Employers with a paid leave policy, such as PTO, equal to or more generous than the Elizabeth Ordinance need not offer additional leave, provided that time can be used for the same purposes and under the same conditions as set forth in the Elizabeth Ordinance.

On October 28, Jersey City, home of New Jersey’s first paid sick leave law, also made news, as it approved an amended Earned Sick Time Ordinance (“amended Ordinance”).³ The amended Ordinance, which goes into effect on December 28, 2015 (60 days after its adoption by the Jersey City Council), largely aligns Jersey City with other New Jersey cities offering paid sick leave. Although Jersey City will now require that paid sick time be made available to more employees, the alignment of the state’s ten municipal paid sick leave laws should allow employers with operations throughout the state to develop more streamlined paid sick leave policies.

Elizabeth

How Much Sick Leave Must be Provided?

Like its counterparts throughout the state, sick leave is accrued at a rate of one hour for every 30 hours worked by an employee, up to either a 40 or 24 hour annual cap, with the larger cap being imposed on employers that have 10 or more

¹ The other New Jersey municipalities that have enacted or approved paid sick leave laws are: (1) Newark; (2) Passaic; (3) East Orange; (4) Paterson; (5) Irvington; (6) Montclair; (7) Trenton; (8) Bloomfield; and (9) Jersey City.

² The Elizabeth Ordinance goes into effect 120 days from its adoption. The Elizabeth Ordinance was approved by voters on November 3, 2015. One caveat exists for employees covered by a collective bargaining agreement (“CBA”) that exists at the time the Elizabeth Ordinance becomes effective. In such situations, no provision of the Elizabeth Ordinance shall apply to employees covered by the CBA until the CBA expires.

³ For more information on the Jersey City paid sick leave law, see our earlier posts [here](#) and [here](#).

employees in their workforce.⁴ In determining the size of the employer's workforce, all employees, whether performing work on a full-time, part-time, or temporary basis, shall be counted. It is unclear from the Elizabeth Ordinance if an employer's size is determined by its overall workforce, or only its workforce in Elizabeth.

For all employers, an employee is deemed eligible for paid sick leave if he or she works in Elizabeth for at least 80 hours per year. Importantly, the Elizabeth Ordinance will not apply to employees covered by a CBA where such requirements are expressly waived in the CBA in clear and unambiguous terms.

How Do Employees Use Sick Time?

Employees begin to accrue paid sick time on their first day of employment or, for existing employees, when the Elizabeth Ordinance goes into effect. Employees can begin using accrued sick time starting on the 90th day following the start of their employment, or on the 90th day following the effective date of the Elizabeth Ordinance, whichever is sooner. Sick time can be used in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

The Elizabeth Ordinance allows employees to carryover up to 40 hours of accrued, unused sick time from one year to the next. However, regardless of carryover balances, employers are not required to allow employees to use more than 40 hours of paid sick time per year.

Under What Circumstances May Employees Use Sick Time?

Employees may use accrued paid sick leave (a) for medical diagnosis, care or treatment of their own or a covered family member's⁵ mental or physical illness, injury or health condition, (b) where the employee's place of business, or the employee's child's school or daycare center has been closed due to a public health emergency, or (c) to care for a family member whose presence in the community would jeopardize the health of others due to the family member's exposure to a communicable disease.

What Employers Can and Cannot Do

Verification of Need for Sick Time: Employers may require employees to submit reasonable documentation that the paid sick leave was used for a purpose allowed under the Elizabeth Ordinance where the employee has used paid sick leave for three consecutive days or three consecutive instances. While employers may require a medical professional's note for this purpose, they cannot require that the documentation explain the nature of the illness, injury, or health condition.

Employee Notice of Need for Sick Time: If the need for leave is foreseeable, employers may require employees to provide notice seven days prior to the date of leave. Where the need is unforeseeable, however, the employer may require notification prior to the start of the workday or shift, except in emergencies where the employer can only require that notice be provided as soon as practicable.

Interference and Retaliation: Employers shall not interfere with, restrain, or deny an employee's exercise of, or attempt to exercise, any rights under the Elizabeth Ordinance. Employers also are prohibited from retaliating against an employee for exercising his or her rights under the Elizabeth Ordinance.

Separation of Employment: Upon separation of employment, an employer is not required to "cash out" an employee's unused paid sick leave. However, if an employee is separated from the company and rehired within six months, the employer must reinstate the employee's previously accrued, unused paid sick leave.

⁴ For employers in the food service, home health care and child care industries, employees must be able to accrue 40 hours of paid sick leave per year, regardless of the size of the employer's workforce.

⁵ Under the Elizabeth Ordinance, family member includes the employee's: (1) child; (2) parent or parent-in-law; (3) spouse, domestic partner, or civil union partner; (4) grandparent or grandparent's spouse, civil union partner, or domestic partner; (5) grandchild; or (6) sibling.

What Happens if I Violate the Ordinance?

Employees may lodge a complaint against an employer with the Elizabeth Department of Health and Human Services (the "Agency"), or they may bring an action in municipal court, where an employer may be subject to fines of between \$100 and \$1,250, in addition to restitution of any unpaid sick leave unlawfully withheld.

What Should Employers Do Now?

Businesses with operations in Elizabeth should take steps now to ensure that they achieve full compliance with the new law prior to its March 2, 2016 effective date. To this end, employers must be aware of the Elizabeth Ordinance's notice and posting, and record retention requirements.

Notice and Posting: Employers must give employees notice of certain rights under the Elizabeth Ordinance at the commencement of their employment or, for current employees, as soon as practicable after the law becomes effective. A poster also must be displayed in a conspicuous and accessible place in each of the employer's establishments where eligible employees work. The Agency can, and likely will, create a model notice and/or poster in the coming months. We will be sure to advise you in the event that such notices become available.

Record Retention: Employers must allow the Agency to have reasonable access to records of leave taken under the Elizabeth Ordinance. Failure to maintain records will create a rebuttable presumption that the employer is violating the Elizabeth Ordinance, absent "clear and convincing evidence" of compliance. The Elizabeth Ordinance is silent on how long employers must maintain these records.

Jersey City

How Much Sick Leave Must be Provided?

Previously, the Jersey City Ordinance only required small employers, which under the law means those with nine or fewer employees, to provide 40 hours of unpaid sick time. Under the amended Ordinance, however, small employers now will be required to provide their employees with one hour of sick leave for every 30 hours worked, up to 24 hours of paid sick time and 16 hours of unpaid sick time per year. The amended Ordinance also expressly prohibits employers from requiring employees who have accrued both paid and unpaid sick time to first use their unpaid sick time. Note that employers with 10 or more employees are still required to provide their employees with at least 40 hours of paid sick time per year.

What Employers Can and Cannot Do

Another major change from the amended Ordinance is how the law treats employees covered by a CBA. The amended Ordinance provides that employers do not have to follow the law's requirements with respect to employees covered by a CBA, *if the law's requirements are expressly waived in clear and unambiguous terms in the CBA*. The amended Ordinance will not apply to employees currently covered by a CBA until that CBA expires. And, even then, if the expired CBA offers more generous sick leave benefits than the amended Ordinance, the terms of the expired CBA will govern.

What Happens if I Violate the Ordinance?

In Jersey City, the fine for a violation has been increased from \$1,250 to a maximum of \$2,000 for each individual infraction.

What Should Employers Do Now?

Businesses with operations in Jersey City should take steps now to ensure that they will be able to achieve full compliance with the new law by year's end. Businesses should also be on the lookout for possible paid sick leave movement at the statewide level, given Jersey City's recent efforts to help employers achieve consistent compliance across the state.

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