

# Management Alert



## If Pain, Yes Gain — Part XIV: Paid Sick Leave Developments Bring Holiday Chills in New Jersey

*By Christopher Lowe and Joshua D. Seidman*

As the year winds down, New Jersey paid sick leave continues to wind up.

The New Jersey Senate earlier this month approved statewide paid sick leave legislation (S785). While the bill still needs the Assembly's approval, and Governor Chris Christie's signature before becoming law (both are uncertain), if enacted, it would impose sick leave obligations on New Jersey employers of all sizes.<sup>1</sup> Employers with 10 or more employees would be required to allow employees to accrue paid sick leave at a rate of one hour for every 30 hours worked, up to 72 hours of paid sick leave per year. Smaller employers would be required to provide up to 40 hours of paid sick leave per year at the same accrual rate.<sup>2</sup>

Also earlier this month, New Brunswick became the eleventh city in the state to adopt a paid sick leave law.<sup>3</sup> Before the New Brunswick city council passed the Paid Sick and Safe Time Ordinance (the "Ordinance"), the New Jersey municipal sick leave laws were virtually identical. In fact, Jersey City recently [amended](#) its paid sick leave ordinance to better align its requirements with those of the state's other municipal sick leave laws. However, the New Brunswick Ordinance differs from these laws in several significant ways. As a result, employers with operations throughout the state will be challenged to develop streamlined paid sick leave policies.

The New Brunswick Ordinance becomes effective on **January 6, 2016**. This alert explains what is required of employers with operations in New Brunswick and answers some of the main concerns they face.

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<sup>1</sup> If passed, New Jersey would become the fifth state with a statewide paid sick leave law, joining Connecticut, California, Massachusetts, and Oregon. Please see our earlier posts for more information on the, [Connecticut](#), [California](#), [Massachusetts](#), and [Oregon](#) paid sick leave laws.

<sup>2</sup> Bill S785 states that no municipality can enact a local paid sick leave law after the statewide law's effective date, and that any existing municipal laws will not be preempted where they are at least as favorable as the statewide bill.

<sup>3</sup> 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; (9) Jersey City; and (10) Elizabeth. As we previously [reported](#), Jersey City's paid sick leave amendments become effective on December 28, 2015, and Elizabeth's "Sick Leave for Private Employees" Ordinance becomes effective on March 2, 2016.

## Which Employers Are Covered Under the Ordinance?

The Ordinance states that any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, and which maintains a business location within New Brunswick will be considered a covered employer. Unlike the other New Jersey municipal sick leave laws, employers with less than five full-time equivalent workers<sup>4</sup> are not covered by the Ordinance.

## Which Employees Are Covered by the Law?

The Ordinance applies to “any individual who works” in New Brunswick for a covered employer, excluding independent contractors, per diem employees, temporary hospital employees, individuals employed by a government entity, which includes any New Jersey school district or Board of Education, and members of a construction union who are covered by a collective bargaining agreement negotiated by that union.

Unlike other New Jersey municipal sick leave laws, the Ordinance includes definitions for “full-time” and “part-time” employees. The former are employees who average 35 hours of work per week in New Brunswick, and the latter are employees who average between 20 and 34 hours of work per week in New Brunswick. Notably, the Ordinance and corresponding administrative guidance expressly state that employees who work less than 20 hours per week in New Brunswick are not eligible to accrue sick leave.

## How Much Sick Leave Must Covered Employers Provide?

Covered employees are entitled to accrue one hour of paid sick leave for every 35 hours worked within New Brunswick -- a more pro-employer accrual rate than under the other New Jersey municipal ordinances. Exempt employees are presumed to work a 40-hour workweek for purposes of sick leave accrual unless the employee’s normal workweek is less than 40 hours, in which case sick leave accrues based on the employee’s actual workweek.

Eligible employees begin accruing sick leave on the Ordinance’s effective date (January 6, 2016) or their first day of employment, whichever is later.

If an employer has 10 or more employees, regardless of where the employees perform their work, it must allow full-time employees to accrue up to 40 hours of paid sick leave per year, and part-time employees to accrue up to 24 hours of paid sick leave per year. Smaller employers must allow all employees to accrue at least 24 hours of paid sick leave per year.<sup>5</sup>

Importantly, employers with paid leave policies, such as PTO, that provide an amount of paid leave sufficient to meet the Ordinance’s total annual accrual requirements and that may be used for the same purposes and under the same conditions as paid leave under the Ordinance are not required to provide additional paid sick leave. For example, if an employer provides full-time employees with five paid days off that can be used for vacation, personal time or sick/safe time, at the employees’ discretion, these paid days off meet the requirements for paid leave under the Ordinance.

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<sup>4</sup>The Ordinance defines “full time equivalent” to mean “the number of hours worked by Full Time and Part Time employees, as defined herein, for compensation that will add up to one Full Time employee.”

<sup>5</sup> In both situations, an employer is only required to provide paid sick leave if it has at least five full-time equivalent workers.

## What Are the Rules Governing Sick Leave Use?

Eligible employees may begin using accrued sick leave 120 calendar days after the start of their employment. By comparison, the other New Jersey municipal sick leave laws allow employees to start using accrued time 90 days after the start of their employment. According to the New Brunswick paid sick leave [FAQs](#), employees who are employed with an employer as of the Act's January 6, 2016 effective date are entitled to start using accrued sick time on May 5, 2016.

Employers are not required to allow employees to use more than 40 hours of sick leave each year. The Ordinance states that employers shall determine whether paid leave can be used in increments of less than one day or one shift.

## Do Employees Carryover Accrued, Unused Sick Leave at the End of the Year?

An employee who does not use all of his or her accrued sick leave within a given year is entitled to carryover up to 40 or 24 hours of unused sick leave to the following year, depending on the employee's status and the size of the employer's workforce.<sup>6</sup> However, and as noted above, regardless of carryover balances, an employer is not required to allow employees to use more than 40 hours of paid leave per year.

## Under What Circumstances May Employees Use Sick Leave?

The New Brunswick Ordinance differs considerably from other New Jersey municipal sick leave laws in the allowable reasons for sick time use. First, a New Brunswick employee may use earned sick leave for essentially the same reasons as provided under the existing municipal laws, which include:

- An employee's or an employee's family member's<sup>7</sup> a) mental or physical illness, injury, or health condition, b) need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or c) need for preventive medical care;
- Closure of the employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; and
- Care for a family member when it has been determined that the family member's presence in the community would jeopardize the health of others because of exposure to a communicable disease, whether or not the family member has actually contracted the communicable disease.

Second, and unlike the other New Jersey municipal sick leave laws, the Ordinance allows eligible employees to use paid sick leave for "safe" purposes relating to domestic violence, sexual assault, or stalking of the employee or the employee's family member. These purposes include to:

- Seek legal or law enforcement assistance, including preparing for, or participating in civil or criminal legal proceeding;
- Seek or attend treatment by a health care provider for physical or mental injuries;
- Obtain services from domestic violence shelter, rape crisis center, or other social services program;

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<sup>6</sup> No carryover is required if an employer cashes out an employee's accrued, unused sick time at year end.

<sup>7</sup> Under the ordinance "Family Member" includes: a) children; b) parents; c) spouses; d) civil union partners; e) domestic partners; f) grandparents; g) spouses, civil union partners or domestic partners of a grandparent; h) grandchildren; and i) siblings.

- Obtain mental health counseling; and
- Conduct safety planning or relocate.

Importantly, under the New Jersey Security and Financial Empowerment Act (“NJ SAFE Act”), certain employees are eligible to receive an unpaid leave of absence for up to 20 days in a 12-month period to address circumstances resulting from domestic violence or a sexually violent offense. The Ordinance notes that any time used under the Ordinance to address the effects of domestic violence does not extend the amount of leave provided under the NJ SAFE Act. However, to the extent an employee uses leave under the NJ SAFE Act for reasons not covered by the Ordinance, or vice versa, it is possible that an employee’s leave entitlements under the laws may not run concurrently. Please see our earlier [post](#) for more information on the NJ SAFE Act and its covered uses for leave.

## 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 Ordinance where a) the employee has used paid sick leave for more than three consecutive shifts and/or days, or b) the employer reasonably observes a pattern of absences indicating potential fraudulent use by an employee. The Ordinance lists examples of “reasonable documentation” for the various covered absences. Employers cannot require that the documentation explain the nature of the illness or the domestic violence, sexual assault or stalking.

**Employee Notice of Need for Sick Time:** If the need for leave is foreseeable, employers may require employees to provide reasonable advance notice at least 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 Ordinance. Employers also are prohibited from retaliating or discriminating against an employee for exercising his or her rights under the 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.

## What Happens if I Violate the Ordinance?

Employees may lodge a complaint against an employer with the New Brunswick Department of Planning, Community and Economic Development (the “Agency”). If the Agency cannot resolve the dispute, the Agency or an employee can bring an action in municipal court. If deemed noncompliant, an employer may be subject to fines between \$100 and \$2,000, in addition to restitution of any unpaid sick leave unlawfully withheld.

## What Should Employers Do Now?

Businesses with operations in New Brunswick should take steps immediately to ensure that they achieve full compliance with the new law prior to its January 6, 2016 effective date. To this end, employers must be aware of the Ordinance’s notice and posting, and record retention requirements.

**Notice and Posting:** Employers must give employees notice of certain rights under the Ordinance at the commencement of their employment or, for current employees, as soon as practicable after the Ordinance 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 recently released a [model notice](#) for employers to use in satisfying the above notice and posting requirements.

**Record Retention:** The Ordinance states that employers are required to keep records of their compliance with the Ordinance for at least three years.

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