

Management Alert

If Pain (or Anything Else), Yes Gain—Part 73: Bernalillo County, NM Enacts First Local Paid Time Off Ordinance

By Marlin Duro, Joshua D. Seidman, Tracy M. Billlows, and Ryan Schneider

Seyfarth Synopsis: Last month, Bernalillo County, NM became the first local jurisdiction to enact a mandatory paid time off ordinance. The Ordinance, which goes into effect on July 1, 2020, requires covered employers located within the County's unincorporated limits to allow employees to use earned paid leave for any reason. Albuquerque could also be next.

New Mexico municipalities, in particular Albuquerque, have flirted with proposed paid sick leave mandates on multiple occasions over the last few years. However, no such proposal became law, and New Mexico remains free of the [paid sick leave epidemic](#) that has infected 11 states, including neighboring [Arizona](#), and dozens of municipalities (including [multiple cities in neighboring Texas](#)) across the country.

The first cases of mandatory PTO laws appeared earlier this year in Maine and Nevada.¹ Then, on August 20, 2019, Bernalillo County became the first municipality, and third jurisdiction overall, to enact a law mandating that certain employers provide eligible employees with PTO for any reason.

Importantly, although Albuquerque is located in Bernalillo County, the County's mandatory PTO law, known as the "Employee Wellness Act" (the "Ordinance"), has a limited scope. Specifically, the Ordinance applies only to covered employers with "a physical premises" within the unincorporated limits of Bernalillo County. This limitation is significant because it shields employers in the County's incorporated jurisdictions, such as the City of Albuquerque, from the Ordinance's effects.² Albuquerque councilmembers, however, have ordered an economic analysis to determine whether adopting the recently passed Bernalillo County PTO Ordinance would be feasible in Albuquerque.

Covered employers have until July 1, 2020 to develop a plan that complies with the Bernalillo County PTO Ordinance. In the meantime, here are some highlights of the Ordinance:

- **Covered Employers:** Employer is defined to include, among others, any person, business trust, corporation, or other entity or group of persons or entities that is required to apply for a business registration from the County of Bernalillo and has a physical premises within the unincorporated limits of the County. In addition, to be covered, the employer must employ two or more employees within the unincorporated limits of the County.
- **Eligible Employees:** Employee is defined as any person a covered employer suffers or permits to perform work for monetary compensation for at least 56 hours in a year within the unincorporated limits of Bernalillo County. The definition of employee includes full-time, part-time, seasonal, and temporary basis employees, but lists multiple exclusions, such as many overtime exempt employees and independent contractors.

¹ As noted above, [Maine](#) and [Nevada](#) enacted mandatory paid time off laws earlier this year. Also, the [New York City](#) Council is considering amending the current sick/safe time ordinance yet again to add a mandatory paid personal time component.

² Bernalillo County has [resources](#) available to the public regarding the breakdown of incorporated and unincorporated areas of the County.

- **Accrual:** Under the Ordinance, no later than the 90th day of employment, employees must be permitted to accrue a minimum of one hour of earned PTO for every 32 hours worked. Accrual will begin on the Ordinance's effective date for eligible employees who have already been employed with the employer for at least 90 days as of the effective date.
- **Accrual Cap:** Employees must be permitted to accrue PTO up to the following amounts:
 - **July 1, 2020:** 24 hours of PTO in a year;
 - **July 1, 2021:** 40 hours of PTO in a year;
 - **July 1, 2022:** 56 hours of PTO in a year.
- **Frontloading:** Rather than permit accrual, employers may frontload the required amount of PTO, per the above caps, at the start of the year.
- **Carryover:** Employers must permit employees to carry over unused, accrued PTO to the following year, but employees are not entitled to carry over more than the total annual accrual amount, unless the employer's policy provides otherwise. The Ordinance is silent on whether frontloading the required amount of PTO at the start of each year absolves an employer's year-end carryover obligations.
- **Usage Cap:** The Ordinance is silent on whether employers can impose a limit on the amount of available PTO an employee can use in a year.
- **Benefit Year:** Benefit year is defined as a regular and consecutive 12-month period as determined by the covered employer.
- **Reasons for Use:** An employer shall permit an employee to use earned PTO for any reason.
- **Usage Waiting Periods:** An employer need not permit an employee to use PTO until the employee has worked 56 hours in a year. In addition, the Ordinance states that employers cannot impose more than a 90-day delay on employees' use of earned PTO.
- **Notice to Employer:** The employer must provide PTO upon the request of an employee or a family member, caretaker, or medical professional acting on the employee's behalf. At the time of employment, the employer must notify the employee whether a PTO request may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. The request for PTO must include the expected duration of the absence when possible.
 - **Foreseeable Leave:** When the use of PTO is foreseeable, the employee must provide notice to the employer as soon as practicable. When possible, employees must schedule the use of PTO in a manner that does not unduly disrupt the operations of the employer.
 - **Unforeseeable Leave:** Employers cannot require advance notice for PTO taken due to an emergency or illness.
- **Notice to Employees:** At the time of employment, the employer must provide notice to each employee of the following: (1) the entitlement to PTO for employees, the amount of PTO provided to employees and the terms under which PTO may be used; (2) ways in which an employee may submit a request for, or notify, an employer of the use of PTO and to whom; (3) that retaliation by the employer against the employee for requesting or using PTO for which the employee is eligible is prohibited; and (4) that the employee has a right to file a complaint with the County for any violation of the Ordinance.
- **Posting:** Employers may comply with the above notice requirement by displaying a poster that contains the required information in a conspicuous place, accessible to employees, at the employer's place of business. The information must be included in both English and Spanish. The County will make a model poster available on or before the effective date of the Ordinance.
- **Recordkeeping:** Employers must accurately track and record the amount of PTO accrued or used by each employee for each pay period in any format the employer chooses, keep such records for the time period required for employment and payroll records provided in 11.3.400.401(F) of the New Mexico Administrative Code, and make such records available to the County upon request.
- **Notification of PTO Accrual and Usage:** An employer must inform an employee of the amount of PTO accrued and used by the employee, upon the employee's request.

Employers should begin taking steps to comply with the Bernalillo County PTO law before its July 1, 2020 effective date. Here are some steps to consider:

- Assess whether the employer is covered under the Bernalillo County PTO Ordinance, with a particular focus on whether the employer has a physical premises within the County's unincorporated limits;
- Review existing paid time off policies and either implement new policies or revise existing policies to satisfy the Bernalillo County PTO law;
- Monitor the Bernalillo County's website for information on the PTO law, including draft and final rules; and
- Train supervisory and managerial employees, as well as HR, on the new requirements.

We will continue to monitor and provide updates on Bernalillo County paid leave developments as the law's effective date approaches and on any subsequent changes.

As the paid leave landscape continues to expand, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this Law and sick leave requirements generally. To stay up-to-date on paid leave developments, click here to sign up for Seyfarth's Paid Sick Leave mailing list.

If you would like further information, please contact [Marlin Duro](mailto:mduro@seyfarth.com) at mduro@seyfarth.com, [Joshua D. Seidman](mailto:jseidman@seyfarth.com) at jseidman@seyfarth.com, [Tracy M. Billows](mailto:tbillows@seyfarth.com) at tbillows@seyfarth.com, and Ryan Schneider at rschneider@seyfarth.com

www.seyfarth.com

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Seyfarth Shaw LLP Management Alert | September 6, 2019

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