

Management Alert



If Pain, Yes Gain—Part 56: New Jersey Publishes Paid Sick Leave FAQs Days Before Law Takes Effect on Oct. 29

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Seyfarth Synopsis: *The New Jersey Earned Sick Leave Law goes into effect on October 29, 2018—three days from now. As employers prepare for the statewide mandate, the New Jersey Department of Labor and Workforce Development released a set of detailed Frequently Asked Questions that reiterate and clarify certain aspects of the new legal requirements.*

Symptoms of the [paid sick leave epidemic](#) that has swept through nine other states and dozens of municipalities in recent years will officially begin in the state of New Jersey on Monday, October 29, 2018, when the state's Earned Sick Leave Law ("ESLL") goes into effect.¹ Earlier this week, the New Jersey Department of Labor and Workforce Development (the "Department") released a set of [non-binding](#) Frequently Asked Questions ("FAQs") that clarify certain aspects of the ESLL.

The Department's FAQs build on, and in many ways reiterate, aspects of the ESLL's [Proposed Rules](#) (the "Proposed Rules"), which the Department released last month. As a reminder, the Proposed Rules' written comment period closes on December 14, 2018. Thus, New Jersey employers should expect further guidance on the ESLL in the coming months when the sick time rules are finalized.

More recently, the Department published a model sick leave "[Notice of Employee Rights](#)." Employers must conspicuously post the Notice in a place accessible to all employees in each of the employer's workplaces and distribute the Notice to both new and existing employees.

Highlights from the non-binding New Jersey sick leave FAQs follow. For more information on the ESLL's substantive requirements, including the topics of employer coverage, employee eligibility, benefit year, use of PTO for compliance, accrual and usage, treatment of unused time at year-end, reasons for use, employee notice standards, documentation, and notice and posting, please see our previous alerts [here](#), [here](#), [here](#), [here](#), and [here](#).

- **Covered Employers (FAQ No. I.6):** The ESLL defines "employer" broadly, to include persons or entities that employ employees in New Jersey. The ESLL does not address whether an employer must employ a certain number of employees in New Jersey to be covered under the ESLL. The FAQs clarify this open question and note that there is no minimum number of employees that an employer must have in order for its New Jersey employees to be entitled to paid sick leave.

¹ The nine statewide paid sick leave laws that are currently in effect include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; (5) Vermont; (6) Arizona; (7) Washington; (8) Maryland; and (9) Rhode Island. Notably, last month, the Michigan legislature approved a sick time ballot initiative that is expected to go into effect on or about April 1, 2019.

- **Employee Eligibility (FAQ Nos. II.5-7):** “Employee” is defined broadly under the ESLL and means “any individual engaged in service to an employer in the business of the employer for compensation.” The FAQs explain the following:
 - Out-of-state employers with employees who perform all of their work in New Jersey (including telecommuter employees) must provide paid sick leave to those employees.
 - If an employee works both in and outside of New Jersey, whether the employee is entitled to receive paid sick leave under the ESLL depends largely on how much time the employee spends working in New Jersey. If **(a)** the employee routinely performs some work in New Jersey and **(b)** the employee’s (i) base of operations or (ii) the place from which such work is directed and controlled is in New Jersey, then the employee is entitled to receive earned sick leave under the ESLL. The FAQs further note that “[t]his is the test applied by the Division on Civil Rights in its enforcement of the New Jersey Family Leave Act” (“NJFLA”) and that “[t]he Department anticipates adopting the same approach through formal rulemaking.”
 - Relatedly, the FAQs state that once an employee is entitled to benefits under the ESLL, employers are not permitted to prorate the employee’s paid sick leave entitlement based on the percentage of work they perform in New Jersey.
- **Benefit Year (FAQ No. I.12):**² Under the ESLL, employers must notify the Department’s Commissioner of any planned changes to their paid sick leave benefit year. Per the FAQs, this notification obligation does not apply to an employer’s initial choice of sick leave benefit year. In other words, the FAQs establish that an employer does not need to provide notice to the Commissioner of the initial establishment of a benefit year and that this notice is required only for subsequent proposed changes to the benefit year.
- **Use of PTO (FAQ Nos. VII.1-5):** The ESLL states that employers can use non-sick paid time off programs (i.e., PTO, vacation, etc.) for compliance if the leave is fully paid, accrues at a sufficient rate, and can be used for the same purposes set forth under the ESLL and “in the manner provided” by the ESLL. The FAQs reiterate this standard. In addition, the FAQs note that as long as a non-sick paid leave program meets the above standards, the employer will not be required to payout or carryover unused sick leave at year-end in the event the employee uses their PTO during the benefit year for non-protected ESLL reasons.
- **Treatment of Full-Time and Part-Time Employees (FAQ No. III.9):** The FAQs provide that in adopting a paid sick leave policy, an employer has the option of setting up different, compliant systems for full-time and non-full-time employees (i.e., advancing at least 40 hours of paid sick leave to its full-time employees and using the accrual method for its part-time employees, instead of advancing the time).
- **Proration of Paid Sick Leave (FAQ Nos. III.7-8):** Notably, the FAQs discuss that employers can advance a prorated amount of paid sick leave to both part-time employees and new hires based on the anticipated hours they would have accrued under the ESLL during the applicable benefit year. In both cases, the employer must track the hours that part-time employees and newly hired employees actually work during a benefit year. To the extent that the employees would have accrued more hours of paid sick leave under a one hour for every 30 hours worked accrual rate than what the employer initially anticipated and advanced to the employee, the employer must provide them with additional paid sick leave.
- **Year-End Carryover (FAQ Nos. VI.3, 7):** The FAQs expressly state that “under both the accrual method and advancing method, the option of offering a payout of unused earned sick leave at the end of a benefit year is entirely within the discretion of the employer.” In other words, employers may choose not to offer employees the option of paying out unused sick leave at year-end, and instead proceed with a compliant year-end carry over setup.

² The ESLL defines “benefit year” as the period of 12 consecutive months established by an employer in which an employee shall accrue and use earned sick leave.

- **Reasons for Use/Covered Family Members (FAQ Nos. IV.7 and 24):** One of the covered reasons for use under the ESLL is that employees can use available sick leave for time needed by the employee to attend their child's school-related conference, meeting, function, or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education, or to attend a meeting regarding care provided to the child in connection with the child's health conditions or disability. The FAQs explain that to use available earned sick leave for this reason **(a)** the employee does not need to be the child's mother, and **(b)** the school-related event does not need to be tied to the child's health.³
- **Interplay Between Sick Leave and Overtime (FAQ Nos. IV.11 and V.5):** The FAQs note that while an employee can use earned sick leave for any overtime hours that the employee was scheduled to work, employers are not required to pay the overtime rate of pay when paid sick leave is used in this way.
- **Interplay Between Sick Leave and Other Leave Entitlements (FAQ Nos. VIII.1-4):** The FAQs discuss that employees' use of earned sick leave may be counted toward concurrent leave under federal or state law, such as the federal Family and Medical Leave Act and the NJFLA.

We will continue to monitor and provide updates on New Jersey paid sick leave developments as the ESLL effective date approaches and any changes that take place thereafter. Employers should take steps now to comply with the requirements of the ESLL before the New Jersey statewide sick leave symptoms begin on October 29, 2018.

As the paid sick 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 Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list. Companies interested in Seyfarth's paid sick leave laws survey should reach out to sickleave@seyfarth.com.

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³ The FAQs also add that "child" under the ESLL includes adult children.

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