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New Jersey's Earned Sick Leave Law: Final Regulations and COVID-19 Amendments

The New Jersey Department of Labor and Workforce Development (NJDOL) issued its final regulations to implement the New Jersey Earned Sick Leave Law (ESLL), providing much-needed clarification on critical aspects of the law. That law was also amended to address COVID-19 reasons for absences.

Covered Reasons to Use ESLL

As previously reported, the ESLL requires New Jersey employers to provide employees up to 40 hours of paid sick leave per benefit year. Employees are permitted to use earned sick leave for specifically enumerated purposes, including:

> (1) Time needed for diagnosis, care, or treatment of, or recovery from their own mental or physical illness, injury or other adverse health condition, or for preventative medical care;
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> (2) Time needed to aid or care for a family member during diagnosis, care, or treatment of, or recovery from their own mental or physical illness, injury or other adverse health condition, or for preventative medical care;
>
> (3) Absence necessary due to circumstances resulting from they or a family member being a victim of domestic or sexual violence (including to obtain medical attention, domestic violence/victim services, psychological or other counseling, or legal services; or for relocation or legal proceedings);
>
> (4) Time needed to attend school-related conferences, meetings, or any event requested or required by a school administrator, teacher, or other professional staff member responsible for their child's education, or to attend a meeting regarding care provided to their child in connection with their child's health conditions or disability; or
>
> (5) Absence necessary due to a public health emergency declared by a public official that causes the closure of their workplace or their child's school or childcare facility, or that their presence or that of their family member requiring care would jeopardize the health of others.

With regard to the last reason above, due to the COVID-19 pandemic, on March 25, the ESLL was specifically permanently amended to enable employees to also use their earned sick leave entitlement relating to a declaration of a state of emergency by the Governor, or the issuance of orders or recommendations by a health care provider or the Commission of Health, including when they must be isolated or quarantined, or care for a family member in quarantine, because of exposure of suspected exposure to a communicable disease.

The Impact of the Final Regulations

Below are some of the more noteworthy clarifications contained in the final regulations, issued in January:

- Perhaps the most significant provision in the final regulations relates to an employer's use of a combined bank of paid time off (PTO) of more than 40 hours per year to be used for any purpose, including those under the ESLL. The final regulations make clear that an employee must be able to use ***all*** of the time included in a PTO bank for sick leave purposes, and that the PTO program "must meet or exceed" the ESLL's requirements, ***including but not limited to, accrual rate, use, payment, and payout and carryover***. For example, the ESLL prohibits employers from asking for medical documentation for absences of three days or less. If an employee has exhausted his first 40 hours of PTO and

then calls out sick for an ESLL reason for one day, it was previously thought that the employer could ask for medical documentation for this single-day absence, because it fell outside the 40 hours of sick leave under the ESLL. That is no longer the case. Instead, the final regulations make clear that if an employer wants to dispense with any of the ESLL's requirements, it may split its leave policies "so as to have an earned sick leave policy that is compliant with ESLL and another non-ESLL compliant policy for other types of leave." As set forth in the next bullet, there is a question as to whether employers may force employees to use PTO time, including for purposes other than those covered by the ESLL.

- Employers ***are prohibited*** from requiring an employee to use earned sick time, even when an employee is absent from work for a reason the employer knows to be covered by the ESLL but does not elect to use earned sick leave.
- "All requests by employees to use earned sick leave are presumptively valid." Thus, even if the employer suspects that an employee is misusing or abusing earned sick leave, the employer cannot request medical documentation for absences, unless the duration is more than three consecutive days.
- The definition of "benefit year" was revised to be "the period of 12 consecutive months established by an employer in which ***an employee*** shall accrue and use earned sick leave." This change will allow employers to have different benefit years for different employees if desired, such as employees' anniversary of hire date. The impact of this change will avoid a potential benefit year-end rush of employees to use sick leave, and reduce the administrative burden and/or confusion caused when employers calculate other time-off benefits, such as vacation, by anniversary date.
- The union representing employees covered by a collective bargaining agreement may negotiate for benefits that are less favorable than the ESLL requires, and may waive all rights and benefits conferred by the ESLL, up to and including the right to any earned sick leave.
- Interns and temporary employees are included within the definition of "employee" and subject to the provisions of the ESLL.
- Employees who work both within and outside of New Jersey are entitled to the benefits provided by the ESLL if they routinely perform work in New Jersey and their base of operations, or the place from which their work is directed/controlled, is in New Jersey.
- Employees' attendance at activities, such as a school sporting event or play, may qualify for use of earned sick leave if attendance at the event had been "requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education."
- The ESLL permits employers to limit the use of foreseeable sick leave during "certain dates," often referred to as "blackout periods." Such dates must be communicated to employees in advance and are "limited to 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."
- Employers who do not clearly communicate the applicable notice requirements to employees in a policy cannot penalize employees from using earned time without notice.
- In New Jersey, employees who are unable to work due to illness or injury may be entitled to temporary disability benefits after a seven-day waiting period. Employees who continue to be unable to work for 21 days are retroactively paid for the seven-day waiting period. If employees used earned sick leave during the waiting period, the retroactive payment would result in a double payment to the employee for that time. The final regulations state that, in such case, employees should be given the option of forgoing the retroactive payment under the temporary disability law or returning the earned sick leave payments to the employer (and having their sick leave balance restored).

There were 118 comments addressed in the NJDOL's final regulations, so the above is not an exhaustive list. Employers should confer with counsel and once again review their sick leave and/or paid time off policies to ensure compliance with the new guidance as well as the recent amendments.

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Authors



Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com