

Employers Association of New Jersey
Earned Sick Leave Questions & Commentary

May 24, 2018

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Employer/Employee Definitions

“Employee” means an individual engaged in service to an employer in the business of the employer for compensation. “Employee” does not include...a public employee who is provided with sick leave with full pay pursuant to any other law, rule, or regulation of this State.

“Employer” means any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the state, including a temporary help service firm....“Employer” does not include a public employer that is required to provide its employees with sick leave with full pay pursuant to any other law, rule or regulation of this State.

- **Question:** Will an employee working for a Civil Service Municipality, who is not otherwise eligible for earned sick leave benefits under the civil service law, for example a seasonal worker, be eligible for time off under the Act?
- **Question:** Will an employee who performs work in the state for an employer with no physical presence in the state be eligible for time off under the Act? In other words, does the law apply to out-of-state employers who employ workers within the state?
- **Question:** Will an employer with operations in NJ be required to provide an employee working out-of-state, but who is directed and controlled from NJ, earned sick time under this Act?
- **Question:** Which test will the Department of Labor and Workforce Development (Department or DLWD) apply when determining if a worker is an employee or an independent contractor? ABC test, economic realities test, IRS multi-factor test?

Hours Worked

Section 2.a. requires, in part, “For every 30 **hours worked**, the employee shall accrue one hour of earned sick leave....” (**emphasis added**).

- **Question:** Will “hours worked” be consistent with the definition used in New Jersey’s Wage Hour law defined at 12:56-5.2? (*12:56-5.2 (a) All the time the employee is required to be at his or her place of work or on duty shall be counted as hours worked*).
- **Question:** How is an employer determine the number of hours worked for employees for whom recording hours worked is not otherwise required (e.g. exempt employees)?

Rate of Pay

Section 2.c. requires, in part, “The employer shall pay the employee for earned sick leave at the same rate of pay with the same benefits as the employee normally earns...”

Section 3. c. requires the payout of accrued paid time at the end of the benefit year shall be “based on the same rate of pay that the employee earns at the time of payment.”

- **Question:** It is not uncommon for an employer to employ one individual at multiple rates of pay. For example, an employee of a gym may be employed as a lifeguard at \$11 an hour; a group swim instructor at \$12 an hour and a private swim coach at \$13 per hour. At which rate would earned sick leave be paid out when utilized? At which rate would it be paid out at the end of the benefit year?
- **Question:** How is an employer to determine the rate of pay for employees who are paid on a commission basis, fee-for-service basis or other non-hourly method of payment?
- **Question:** For the purpose of determining the regular rate, should the employer consider overtime, shift-differentials, other premium rates or bonuses?

Accrual and Carry Over

Section 2.a. states, in part: “The employer shall not be required to permit the employee to accrue **or use in any benefit year**, or carry forward from one benefit year to the next, more than 40 hours of earned sick leave.” (**emphasis added**)

Section 3.d. requires, in part: “If an employer foregoes the accrual process...the employer shall either provide to the employee a payment for the full amount of unused earned sick leave in the final month of the employer’s benefit year or carry forward any unused sick leave to the next benefit year.”

- **Question:** If the employer forgoes accrual process and makes available the full complement of earned sick time on the first day of the benefit year, would the provision in Section 2.a. limiting use to 40 hours in any benefit year apply? In other words, when time carries over at the end of the benefit year, would the employee have access **to use more than 40 hours** in the subsequent benefit year?
 - **Example:** Employer foregoes the accrual process and “front-loads” employees with the full 40 hours of earned sick time at the beginning of the benefit year. Employee A utilizes 20 hours of earned sick leave through the course of the benefit year. At year end, the employer opts to allow for carry over of the remaining 20 hours. Will Employee A have **available to use** 60 hours of earned sick leave (40 front-loaded + 20 carried over) in the next benefit year?
- **Question:** An employer has an existing policy providing for unlimited paid time off to be used by the employee as needed, e.g. illness, vacation, personal, etc. Assuming the policy meets all of the minimum standards as defined by the Act, how would the carryover/payout provisions of the Act be met?

“Front-loading” Earned Time

Section 2.a. requires, in part, “For every 30 hours worked, the employee shall accrue one hour of earned sick leave, except that an employer may provide an employee with the full complement of earned sick leave for a benefit year, as required under this section, on the first day of each benefit year in accordance with subsection c. or subsection d. of section 3 of this Act.”

- **Question:** Can an employer who opts to “front-load” employees with earned sick time, as described in this section, pro-rate the time provided to employees who work less than a full year? For example, when an employee is hired mid-year, the employer will provide a pro-rated complement of earned sick time corresponding to the point in the year when the employee is brought on board.
- **Question:** Can an employer “front-load” certain employees with earned sick time while requiring others to accrue the earned time?
 - **Example:** An employer opts to “front-load” ongoing employees with earned sick time on the first day of each benefit year. However, new hires who join the organization after the start of the benefit year will accrue time in accordance with the Act. The employer may then opt to transition the new hire onto the “front-loading” method at the start of the next benefit year following their hire date.

Records & Documentation

Section 6. requires employers to “**retain records documenting** hours worked by employees and **earned sick leave taken by employees...**” (**emphasis added**).

Section 2.b. states, in part, “An employer shall be in compliance with this section if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days, and sick days, and may be used for purposes of section 3 of this act in the same manner provide by this act and is accrued at a rate equal to or greater than the rate described in this section.”

- **Question:** Assume an employer’s existing PTO policy exceeds the requirements of the Act in all respects. The policy does not require, and management does not ask, an employee to provide a reason for their absence – if they have time available, it is simply applied. Will the employer now be required to ask for the reason for the absence in order to satisfy section 6. as stated above (i.e. earned sick leave taken)? Note: this is a typical “no-fault” policy.
- **Question:** How will these recordkeeping requirements apply to exempt employees – a group for whom recording of hours worked is not otherwise required? In other words, does this Act create a new ‘hours worked’ recordkeeping requirement for exempt employees?

Benefit Year Transition

“Benefit year” means the period of 12 consecutive months **established by an employer** in which an employee shall accrue and use earned sick leave as provided pursuant to section 2 of this act, provided that once the starting date of the benefit year is established by the employer it shall not be changed

unless the employer notifies the commissioner of the change in accordance with regulations promulgated pursuant to this act. (**emphasis added**)

- **Question:** Will there be transition guidance issued for employers who establish their benefit year as January through December, or any other 12-month period which does not coincide with the effective date of this act, October 29, 2018?
 - **Example:** Employer establishes a benefit year of January 1 through December 31st. The employer opts to forgo accrual and provide the full complement of earned sick time on the first day of the benefit year (i.e. 1/1/19). What actions, if any, would be required to comply with the act for the period of October 29, 2018 through December 31, 2018?

Prohibition of foreseeable earned sick leave on certain dates

Section 5.b. states, in part, “Employers may prohibit employees from using foreseeable earned sick leave on certain dates and require reasonable documentation if sick leave that is not foreseeable is used during those dates.”

- **Question:** Would it be acceptable for an employer to establish, as a matter of policy, that no earned sick leave may be used once notice of separation from employment has been given? (Example: once an employee provides two-week notice of separation, those two weeks become black-out dates for purposes of utilizing foreseeable leave.)
- **Question:** Is there any limitation on the number of dates an employer can prohibit the use of foreseeable earned sick leave?
 - **Example:** Could an employer establish, due to the demands of the business, the last week of each month a “black-out” period for which foreseeable leave cannot be scheduled?

120 Calendar Days

Section 2.a. requires, in part, “...the employee shall be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commences employment...or the effective date of this act.”

- **Question:** Can an employer who forgoes the accrual process and opts to provide the full complement of earned sick at the start of the benefit year require new hires to wait the 120 calendar days before utilizing their earned sick time?

Different Policies for Different Groups

- **Question:** May an employer establish different earned sick leave policies for different groups of employees, provided each policy meets the minimum requirements provided for under the Act? For example, an employer may establish a more generous policy for managerial or other exempt employees than for non-exempt employees, provided both policies meet the requirements of the Act?

Verification of Days Taken

Section 5.b. requires, in part, “Employers may prohibit employees from using foreseeable earned sick leave on certain dates and require reasonable documentation if sick leave that is not foreseeable is used during those dates. For earned sick leave of three or more consecutive days, an employer may require reasonable documentation that the leave is being taken for the purpose permitted under subsection a. of this section.”

- **Question:** In an instance where an employer requests verification of sick time taken as described by section 5.b. above, may the employer delay the payout of the earned sick time until the verification is provided by the employee?

Paid Time Off Banks

Section 2.b. provides, “An employer shall be in compliance with this section if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days and sick days, and may be used for the purposes of section 3 of this Act in the manner provided by this Act and is accrued at a rate equal to or great than the rate described in this section.”

- **Recommendation:** We recommend clarification through regulation. Provided the employer’s Paid Time Off policy (PTO) meets or exceeds all provisions of the Act, the employer will not be required to provide additional PTO when the employee exhausts the time in their bank for purposes other than those authorized under this Act.
 - **Example:** An employer provides 40 hours of PTO that can be used for any absence. Employee A utilizes the full 40 hours for a scheduled vacation. If the need for a sick day later arises for Employee A, the employer will not be required to provide additional time.

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(addendum added below, June 2018)

Addendum June 2018

Existing Paid Time Off Policies

Section 2.b. states “An employer shall be in compliance with this section if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days, and sick days, and may be used for purposes for section 3 of this act **in the manner provided by this act**, and is accrued at a rate equal to or greater than the rate described in this section.” (**emphasis added**)

- **Question:** How will “in the manner provided by this act” be interpreted? For example, will existing policies providing for paid time off be held to all of the requirements and standards outlined in the statute (e.g. recordkeeping, carry over, payout, 120 day waiting period after hire, etc.)?
- **Question:** Can an employer, whose PTO policy exceeds all of the provisions provided for by this Act, only provide pay out and/or carry over to the 40 hours required by this Act?
 - **Example:** Company PTO policy provides for the full complement of 15 PTO days (120 hours) at the start of the benefit year and time can be used for any purpose, including for compliance with this Act. Through the course of a benefit year, an employee only utilizes 5 days (40 hours) for vacation. Must the company offer to pay out or carry over the remaining 10 days (80 hours)? Or can they cap the payout/carry over at the 40-hour mark with the remaining being subject to a use-it-or-lose it provision?

Standard Workweek

Section 2.a. states, in part, “For every 30 hours worked, the employee shall accrue one hour of earned sick leaveThe employer shall not be required to permit the employee to accrue or use in any benefit year, or, carry forward from one benefit year to the next, more than 40 hours of earned sick leave.”

- **Question:** May an employer with a standard workweek of less than 40 hours (e.g. 37.5 hours, 35 hours, etc.) cap the usage, accrual and carry over to match their normal workweek? Example – employer with a 37.5 hour standard workweek would allow employees to use, accrue and carry over a maximum of 37.5 hours.

Prohibition of foreseeable earned sick leave on certain dates (“black-out” dates)

Section 5.b. states, in part, “Employers may prohibit employees from using foreseeable earned sick leave on certain dates and require reasonable documentation if sick leave that is not foreseeable is used during those dates.”

Recommendation: We recommend clarification through explanatory examples contained within the regulations.

- **Example:** Is there a limit on the number of dates during which the employer could prohibit the use of foreseeable sick leave? (e.g. once per year; once per month; once per week).
- **Example:** Is there any limitation on how long the “black-out” periods can be? (For example, can an employer prohibit the use of earned sick time during an entire month? Or during a full workweek?)
- **Example:** Must “black-out” dates be established in advance through policy or can they be established as the need arises?
- **Example:** Can “black-out” dates be weather related? (For example, employees in a call center would be prohibited from utilizing foreseeable sick leave during an anticipated snow storm so the employer can ensure proper staffing?)
- **Example:** Can an employer establish the last two weeks of employment, after notice of separation has been given by the employee, as a “black-out” period?
- **Example:** Can the day before and the day after a holiday be “black-out” periods?
- **Example:** Can an employer establish “black out” dates on a per-employee, per incident basis?

Full Complement

Section 2.a. states, in part, “For every 30 hours worked, the employee shall accrue one hour of earned sick leave, except that an employer may provide an employee with the full complement of earned sick leave for a benefit year, as required under this section, on the first day of each benefit year in accordance with subsection c. or subsection d. of section 3 of this act.”

- **Question:** What is meant by the “full complement”? Is the full complement the same for a full-time employee as for a part time employee?

Example: A part time employee is anticipated to work a 15-hour workweek. If the employer were utilizing the accrual method (i.e. granting one hour of earned sick time for every 30 hours worked), the most the employee would have earned in the year is 26 hours (15 hours per week x 52 weeks = 780 hours. $780/30\text{hours} = 26$ hours). Would the full complement be 26 hours for this individual?

Example: Same scenario as above, however, the employer is unable to anticipate the part time employee’s schedule for the year. How are they to determine the full complement?

Reasonable Documentation

Section 5.b. states, in part, “Employers may prohibit employees from using foreseeable earned sick leave on certain dates, and require reasonable documentation if sick leave that is not foreseeable is used during those dates. For earned sick leave of three or more consecutive days, an employer may require reasonable documentation that the leave is being taken for the purpose permitted under subsection a. of this section.” This section goes on to describe what would be considered ‘reasonable documentation’ under paragraphs (1), (2), (3), and (4) of subsection a.

- **Question:** May the employer request reasonable documentation when the leave is taken for a purpose permitted under paragraph (5) of subsection a.? (i.e. when the leave is taken in connection with a school-related conference, meeting, function or other event requested by a school, teacher, etc.). This would likely only arise if an unforeseeable sick day was utilized during a date foreseeable leave was prohibited.

Per Diem Workers

Various types of organizations and industries utilize the services of per diem employees. Typically, these employees are called up when work is available and they have the opportunity to accept or decline the offer of work on any given day with no repercussions. While the organization will be able to track their hours worked and accrual rates of earned sick time, it is unclear how the per diem employee will be able to actually use an earned sick day.

- **Example:** A local YMCA maintains a list of individuals who are interested in performing various types of work when available. When work is available, the company goes down the list of interested individuals and reaches out to check availability. If the individual expresses a desire to work on the date and time necessary, they work. If not, the company moves to the next individual on their list, with no repercussions to the individual unable to work. Because these individuals have complete control over whether they accept an assignment, it is unclear how an earned sick day would be applied.

Health care professional

“Health care professional” is defined by the statute as “any person licensed under federal, state or local law, or the laws of a foreign nation, to provide health care services, or any other person who has been authorized to provide health care by a licensed health care professional, including but not limited to doctors, nurses and emergency room personnel.”

- **Question:** Will individuals who have earned “certifications” through extended courses of study be considered to have met the definition above?

120 Calendar Days

Section 2.a. requires, in part, “...the employee shall be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commences employment...or the effective date of this act.”

Section 2.e. requires, in part, “If an employee is terminated, laid off, furloughed, or otherwise separated from employment with the employer, any unused accrued earned sick leave shall be reinstated upon the re-hiring or reinstatement of the employee to that employment, within six months of termination, being laid off or furloughed, or separation, and prior employment with the employer shall be counted towards meeting the eligibility requirements set forth in this section.”

- **Question:** Can the employer apply the 120-day waiting period to a worker rehired after a break in service of less than six months?

Disability Banks

The Act requires either pay out or carry over of unused earned time in the final month of the benefit year. An employer's existing policy allows for carry over of such time, however, it places the unused earned days into a "disability bank" for employees which can be utilized in the case of a long-term disability. Would carrying over time in this manner be acceptable?

Full Accrual

Section 2.a. states, in part, "For every 30 hours worked, the employee shall accrue one hour of earned sick leaveThe employer shall not be required to permit the employee to accrue or use in any benefit year, or, carry forward from one benefit year to the next, more than 40 hours of earned sick leave."

- **Question:** When an employee reaches the maximum accrual of 40 hours as provided for under the Act, does the accrual process stop? How will this work in a carry-over situation?
 - **Example:** Employee carries over a full 40 hours of accrued but unused time from one benefit year to the next. Those 40 hours of time are available for use immediately in the next benefit year. Must the employer track the new accrual in the current benefit year since the employee is already at the maximum accrual amount for the year?

Reasonable Documentation

Section 3.b. states, in part, "For earned sick leave of **three or more consecutive days**, an employer may require reasonable documentation that the leave is being taken for the purpose permitted under subsection a. of this section." (**emphasis added**)

- **Question:** Is "three or more consecutive days" considered calendar days? Or scheduled work days?
 - **Example:** Employee's schedule is Monday, Tuesday, Friday and Saturday. Employee calls out sick Tuesday, Friday and Saturday. Would it be acceptable to ask for reasonable documentation for these three absences which are separated by a non-working day?

Waived Use of Earned Sick Time

Under some existing company policies, employees may opt to take **unpaid** days off work, even if they have earned time available to them in their bank. The earned days would then remain in their bank and available for use at a later point in time. Is maintaining this type of policy acceptable?

Also, would the reverse be acceptable? Could the company adopt a policy whereby if the employee has time available, and the employer knows they are out for a qualifying reason, the employer will mandate that the time be applied to the absence?

- **Example:** Employee calls out sick on a Tuesday in March. They request that the employer not apply an earned sick day even though such time is available. The employee would prefer to save their earned time for an upcoming scheduled medical procedure in April.
- **Example:** Employee calls out sick on a Tuesday in March and requests not to be paid their earned sick time from their bank. Can the employer require the use of such time if they are out for a qualifying reason?

Retaliation

Section 4. makes it an unlawful act for an employer to retaliate against an employee because the employee requests or uses earned sick leave either in accordance with this act or the employer's own earned sick leave policy, as the case may be, or file a complaint with the commissioner alleging the employer's violation of any provision of this act.

- **Question:** A common employer policy surrounding holiday pay is that in order to be eligible for the holiday pay, the employee must work the day before and the day after the holiday. If an employee subject to such a policy utilizes an earned sick day the day before or after a holiday, would it be considered retaliatory for the employer to withhold the holiday pay?