

UPDATE on NJ Earned Sick Leave



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Employers Association of New Jersey

Rule Making Process

- ◆ Bill signed into law by Governor Murphy in May 2019
- ◆ Proposed regulations published in NJ Register on October 15, 2018 (although DOL released them in mid-September)
- ◆ Public hearing – November 13, 2018
- ◆ Written comments due – December 14, 2018
- ◆ DOL will publish final regulations, likely first quarter 2019



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What does the law require?

Each employer shall provide earned sick leave to each employee working for the employer in the State.



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◆ **Employer** – any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the State, including temporary help service firms.

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.

◆ **Employee** – an individual engaged in service to an employer in the business of the employer for compensation.

Employee does not include 1) employee in construction industry that is under a CBA; 2) per diem health care employee; or 3) public employee who is provided with full pay sick leave pursuant to any law, rule or regulation.



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Independent Contractors

ABC TEST

- a) The worker has been and will continue to be free from control and direction over the performance of services;
- b) The service (the worker is performing) is either outside the usual course of the business or the service is performed outside of all the places of business of the employer for which the service is performed; and
- c) The worker is customarily engaged in an independently established trade, occupation, profession or business.



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Existing Policies

An employer shall be in compliance if they provide each employee with paid time off (PTO), which may include leave types other than sick, such as personal leave and vacation leave, **so long as the PTO meets or exceeds all of the requirements in the Act**, including, but not limited to:

- ◆ Reasons for use;
- ◆ Accrual/Advancement;
- ◆ Paid in accordance with the Act;
- ◆ Payout and carry-over.



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What if we have a CBA?

- ◆ No provisions of the Act shall apply to employees covered by a collective bargaining agreement in effect at the time of the effective date of the Act (10/29/18) until the stated expiration of the CBA.
- ◆ Even then, employees or their representatives may waive the rights under the Act during the negotiation of the CBA.



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Two Methods

- 1) Accrual method
- 2) Advancing method



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Accrual Method

For every **30 hours worked**, the employee shall accrue **one hour** of earned sick leave.



“Hours worked” – as defined by NJ Wage Hour law.

The employer shall not be required to permit the employee to accrue or use in any benefit year...more than 40 hours of earned sick leave.



“Benefit year” – period of 12 consecutive months established by an employer in which all employees shall accrue and use earned sick leave. The employer shall establish a single benefit year for all employees.



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Exempt employees & hours worked

If an employer does not record hours worked of employees exempt under either the FLSA or NJ Wage Hour law, the employer may either:

1. Record actual hours worked for that employee for the purpose of calculating earned sick leave accrual; or
2. Presume, solely for the purpose of calculating earned sick leave accrual, that the employee works 40 hours per week.



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Start of accrual

An employee who commences employment on or before 10/29/2018, shall begin to accrue beginning on 10/29/18.

An employee who commences employment after 10/29/2018, shall begin to accrue on the date employment commences.



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Advancing Method

Rather than using the accrual method, an employer may, on the **first day of the benefit year**, provide the employee with **no less than 40 hours** of earned sick leave for use throughout the benefit year.



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 Regulation
Clarification

Using Time

- ◆ Except as provided for below*, an employee shall not be eligible to use earned sick leave until February 26, 2019 (120 days from 10/29/18) **OR** the 120th calendar day after employment commences, whichever is later.
- ◆ Following the 120 calendar day period, the employee shall be permitted to use earned sick leave immediately upon either 1) accrual; or 2) the earned sick leave having been advanced to the employee.

*Exception

- ◆ Where an employee has accrued earned sick leave prior to 10/29/18, he or she shall be eligible to use that earned leave prior to 2/26/19.

An employer can choose permit an employee to use earned sick prior to the 120 calendar days.



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<https://nj.gov/labor/>



New Jersey's Earned Sick Leave Law

All NJ employers must comply with the earned sick leave law on the effective date of the law. While the accompanying earned sick leave rules are being processed, workers and employers may use the proposed rules as guidance on the Department's interpretation of the law. Once the final rules are adopted and become effective (expected around February 2019), they will have the force and effect of law and will become binding. - [More](#)

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- ◆ The employer may choose the increment in which the employees may use earned sick time, provided the largest increment required is no more than the number of hours the employee was scheduled to work during that shift.
- ◆ Paid sick leave must be paid at the employees same rate pay with the same benefits as the employee normally earns.



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Determining Rate of Pay

- ◆ **Two or more rates; ROP fluctuates; Piece rate basis; Gratuities, food or lodging included in pay:** the employer must find an average by adding together the employee's total earnings, exclusive of overtime and premium pay, for the seven most recent workdays when the employee was not on leave, and dividing that sum by the total hours worked during that seven-day period.
- ◆ **Commission** – pay base wage or minimum wage, whichever is greater



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Determining Rate of Pay continued...

- ◆ When an employee uses earned sick leave during hours that would have been overtime if worked, the employers is **not required** to pay the overtime rate of pay.



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Reasons for Use

An employee must be permitted to use earned sick leave for any of the following reasons:

- 1) For diagnosis, care, or treatment of, or recovery from, an employee's mental or physical illness, injury or other adverse health condition or for preventive medical care for the employee;
- 2) For the employee to aid or care for a covered family member during diagnosis, care, or treatment of, or recovery from, the family member's mental or physical illness, injury or adverse health condition, or during preventive medical care for the family member;

Continued....



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Family Member

- | | |
|--|---|
| <p>1) Child (biological, adopted, foster, step-child or legal ward of employee or employee's domestic/civil union partner);</p> <p>2) Grandchild;</p> <p>3) Sibling (biological, foster or adopted);</p> <p>4) Spouse (husband or wife);</p> <p>5) Domestic partner;</p> <p>6) Civil union partner;</p> <p>7) Parent (biological, adoptive, foster, step-parent, legal guardian of employee or employee's spouse/domestic partner/civil union partner; or a person who stood in loco parentis of the employee or their spouse/domestic/civil union partner when the employee, their spouse or partner was a minor child).</p> | <p>8) Grandparent;</p> <p>9) Spouse or domestic/civil union partner of a parent or grandparent of the employee;</p> <p>10) A sibling of a spouse or domestic/civil union partner of the employee; or</p> <p>11) Any other individual related by blood to the employee or whose <u>close association with the employee is the equivalent of a family relationship.</u></p> |
|--|---|



"Close association with the employee is the equivalent of a family relationship" – shall include any person with whom the employee has a significant personal bond that is, or is like, a family relationship, regardless of biological or legal relationship.

Reasons for Use Continued

- 3) Certain absences resulting from the employee or a covered family member's status as a victim of domestic or sexual violence;
- 4) Closures of the employee's workplace or when an employee's child's school or child care is closed by order of a public official due to a public health concern; determination by a public health authority that the employee or family member in need of care by the employee, would jeopardize the health of others through their presence in the community;
- 5) For time needed by the employee to attend his/her 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.



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Foreseeable Leaves

- ◆ Employer may require up to **seven calendar days** advance notice of the intention to use leave and its expected duration.
- ◆ **The employer must notify the employee of this requirement**
- ◆ The employee shall make a reasonable effort to schedule the use of sick time in a manner that it does not unduly disrupt the operations of the employer.

When the need for leave is foreseeable, the employer may prohibit the employee from using earned sick leave on certain dates (blackout dates).



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Blackout Dates

The certain dates on which the employer may prohibit employees from using foreseeable earned sick leave shall be limited to **verifiable high-volume periods or special events, during which permitting the use of foreseeable earned leave would unduly disrupt operations.**

EXAMPLE – high-volume period for an airline industry employer, the period during which they experience a predictable increase in customer activities (flying) in and around a holiday (Thanksgiving).

EXAMPLE – special event for a manufacturer of retail products, the day or week during which it is making a new product available for the first time (a product launch).

The employer shall provide reasonable notice to its employees of these blackout dates on which its employees are prohibited from using foreseeable earned sick leave.



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 Regulation
Clarification

Unforeseeable Leaves

- ◆ Employer may require the employee provide notice **as soon as practicable**, of the intention to use leave and its expected duration.
- ◆ An employer must notify an employee, in advance, of the requirement to provide notice when leave is not foreseeable.

Where the employer has failed to so notify the employee, the employee must be permitted to use the unforeseeable earned sick leave without having provided the employer with any prior notice, practicable or otherwise.



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Can we require documentation to support the need for the leave?

- ◆ If an employee is absent for at least **three consecutive days**, the employer may require reasonable documentation that confirms the employee used sick leave for a covered purpose
- ◆ During black-out periods.



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Documentation

- ❖ **MEDICAL** - documentation signed by the health care professional treating the employee or the family member which indicates the **need for the leave**, and if possible, **the number of days**.
- ❖ **DOMESTIC/SEXUAL VIOLENCE** - medical documentation; a law enforcement agency record or report; a court order; documentation that the perpetrator of the domestic/sexual violence has been convicted of a domestic/sexual violence offense; certification from a certified Domestic Violence Specialist or representative of a designated domestic violence agency or other victim services organization, certification by a social worker, counselor, member of the clergy, shelter worker, health care professional, attorney, or other professional who has assisted the employee or family member in dealing with the domestic/sexual violence.
- ❖ **EMERGENCY CLOSING** - a copy of the order or determination by the health authority shall be considered reasonable documentation.
- ❖ **SCHOOL EVENTS** – tangible proof of the school-related conference, meeting, function or other event.



DOCUMENTATION MUST BE KEPT CONFIDENTIAL



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- ❖ Employee **shall not** be required to work additional hours or shifts to make up for lost time.
- ❖ Employer **may not require** the employee search for or find a replacement worker to cover the hours during which the employee is using earned sick time.

With mutual consent between employee and employer, the employee may voluntarily choose to work additional hours/shifts during the same or following pay period (and not have paid sick time apply).



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- ◆ **Transfer to different division, entity or location, but remains employed by same employer** – employee shall be entitled to all earned sick leave accrued at the prior division, entity or location.
- ◆ **Terminated, laid off, furloughed, or otherwise separated from employment with the employer** – any unused accrued earn sick leave shall be reinstated upon the re-hiring or reinstatement of the employee within six-months of the separation.
- ◆ **Succession** – when a different employer takes the place of an existing employer, all employees of the original employer who remain employed by the successor are entitled to all accrued earned sick leave and may utilize any accrued time immediately.



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Payout and Carry Over when time is accrued

- ◆ An employer **MAY** provide an offer to an employee for payment of unused earned sick leave in the final month of the benefit year. The **EMPLOYEE** shall choose, no later than 10 calendar days from the date of the employer's offer, whether to accept or decline a payment.
- ◆ **IF** the employee agrees to a payment, the **EMPLOYEE** shall choose a payment for 100% or 50% of the amount of unused earned time.
- ◆ If the employee declines the payout, or agrees to a 50% payout, the employee shall be entitled to carry forward any unused or unpaid earned sick time.



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Payout and Carry Over when time is front-loaded

- ◆ If employer forgoes the accrual process and provides the employee with the full complement of earned sick leave on the first day of each benefit year, then the **employer shall either** 1) provide to the employee payment for the **full amount** of unused earned in the final month of the benefit year; OR 2) carry forward any unused sick leave to the next benefit year, up to 40 hours of earned sick leave.
- ◆ The employer may pay the employee the full amount of unused earned sick leave in the final month of the benefit year **ONLY** if the employer forgoes, with respect to that employee, the accrual process for earned sick leave during the next benefit year.



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End of Employment

- ◆ No requirement to pay out earned sick leave upon termination, resignation, retirement or other separation from employment.



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Records

An employer shall retain for a period of five years:

1. All records documenting hours worked by employees; and
2. Earned sick leave accrued/advanced; and
3. Used;
4. Paid;
5. Paid out and carried over.



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 Regulation
Clarification

Change in Benefit Year

Employers who wish to change the benefit year shall provide 30 calendar days notice to the Commissioner, prior to the proposed change.

Notice shall:

1. Be in writing;
2. Specify the existing benefit year;
3. Specify the proposed new benefit year;
4. Indicate the effective date of the new benefit year;
5. Indicate the reason for the change in the benefit year; and
6. Include a current list of employees with corresponding contact information, including phone number and home address, and a corresponding history of accrual, use, payment, payout, and carry-over of earned sick leave for each employee for the preceding two benefit years.



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Retaliation

- ◆ No employer shall take retaliatory personnel action or discriminate against an employee because the employee requests or uses earned sick leave.
- ◆ No employer shall count earned sick leave taken under this act as an absence that may result in the employee being subject to discipline, discharge, demotion, suspension, or loss or reduction of pay, or any other adverse action.



This includes “no fault” attendance policies, whereby an employee receives a point or demerit for any absence, no matter the reason, and are subjected to discipline after the accumulation of x amount of points/demerits



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Retaliation continued...

Rebuttable presumption of an unlawful retaliatory personnel action whenever an employer takes adverse action against an employee with 90 days of when the employee:

- 1) files a complaint with the department/court;
- 2) informs any person about an employer’s alleged violation;
- 3) cooperates with the department or other person in the investigation of any alleged violations;
- 4) opposes any policy, practice or act that is unlawful; and
- 5) informs any person of his or her rights under this act.



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Violations

A violation of the Act will occur when an employer:

- ❖ Willfully hinders or delays the Commissioner in the enforcement of the Act;
- ❖ Fails to make, keep and preserve any record required under the Act;
- ❖ Falsifies any such record;
- ❖ Refuses to make records accessible to the Commissioner upon demand or refuses to furnish to the Commissioner a sworn statement of such record or any other information required for proper enforcement;
- ❖ Fails to provide earned sick leave to each employee in the amount and in the manner prescribed by the Act;
- ❖ Takes a retaliatory personnel action or discriminates against an employee in violation of this Act; or
- ❖ Otherwise violates any provision of this Act.



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Penalties

Any employer who knowingly and willfully violates any provisions of the Act shall be guilty of a disorderly person offense.

- ❖ First violation – fine of not less than \$100 nor more than \$1,000, or by imprisonment for not less than 10, nor more than 90 days, or by both fine and imprisonment.
- ❖ Second or subsequent violations – fine of not less than \$500 nor more than \$1,000, or by imprisonment for not less than 10, nor more than 100 days, or by both fine and imprisonment.

Each week in which an employee is not provided earned sick leave in the amount and manner required, shall constitute a separate offense.



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Failure of an employer to make available or pay earned sick leave, or any other violation of the Act, shall be regarded as a failure to meet the wage payment requirements of NJ Wage and Hour law.

Consequently, a violation of the Act would be considered a violation of a “State wage, benefit and tax law” thereby empowering the Commissioner to issue a written determination directing an agency to suspend or permanently revoke any one or more licenses that are held by the employer or a successor firm.



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Administrative Penalties

Penalties


- ◆ First violation – not more than \$250; and
- ◆ Second and subsequent violations – not less than \$250 nor more than \$500

In assessing administrative penalties, the Commissioner shall consider the following factors:

- ◆ Seriousness of the violation;
- ◆ Past history of the previous violations by the employer;
- ◆ Good faith of the employer;
- ◆ Size of the employer’s business; and
- ◆ Any other factors the Commissioner deems appropriate




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Employer Notification

- ◆ Employers shall provide **written notification** to employees:
 - ◆ By November 29, 2019; and
 - ◆ At the time of the employee's hiring, if hired after issuance; and
 - ◆ At any time requested by the employee.
- ◆ Employers shall **conspicuously post** the notification in each of the employer's workplaces.
- ◆ Electronic posting and distribution are acceptable.



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New Jersey Department of Labor and Workforce Development

New Jersey Earned Sick Leave

Notice of Employee Rights

Under New Jersey's Earned Sick Leave Law, most employees have a right to accrue up to 40 hours of earned sick leave per year. Go to nj.gov/labor to learn which employees are covered by the law.

New employees must receive this written notice from their employer when they begin employment, and existing employees must receive it by November 29, 2018. Employers must also post this notice in a conspicuous and accessible place at all work sites, and provide copies to employees upon request.

YOU HAVE A RIGHT TO EARNED SICK LEAVE.

Amount of Earned Sick Leave

Your employer must provide up to a total of 40 hours of earned sick leave every benefit year. Your employer's benefit year is:

Start of Benefit Year: _____ End of Benefit Year: _____

Rate of Accrual

You accrue earned sick leave at the rate of 1 hour for every 30 hours worked, up to a maximum of 40 hours of leave per benefit year. Alternatively, your employer can provide you with 40 hours of earned sick leave up front.

Date Accrual Begins



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NJ's Earned Sick Leave Law is effective October 29, 2018. Below are a list of resources to assist in compliance.

EANJ's Law Summary
Model Policy - Accruing Method
Model Policy - Advancing Method
DOL Poster/Notification
DOL Proposed Regulations

Online Helpline
Create or Revise your Employee Handbook
Legal Compliance Manual

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Policy Tips

- ◆ Do your existing policies define "family member" broadly enough?
- ◆ Are the reasons for taking leave broad enough?
- ◆ Do your employees accrue time off at the appropriate rate (1 hour for every 30 hours worked)?
- ◆ Are part time employees eligible to accrue time?
- ◆ New hire access 120 days after hire?
- ◆ Does your policy define your 'benefit year'?
- ◆ Have you indicated the number of days (not to exceed 7) for which an employee must give you advance notice of their need for foreseeable leave?
- ◆ Have you reiterated your call out procedures for unforeseen absences?
- ◆ Will you pay out earned sick days upon separation of employment? Will there be any conditions (e.g. only if the employee provides 2-weeks notice)?



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Stay Tuned!!

Questions?

Visit for Earned Sick Leave Resources

<https://www.eanj.org/members-only/legal-center/nj-earned-sick-leave-resources>

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