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## Frequently Asked Questions About the New Jersey Paid Sick Leave Law, Part III

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The [New Jersey Paid Sick Leave Law](#) (PSLL) goes into effect on October 29, 2018. We have received hundreds of questions in the last few weeks from employers seeking guidance on what they must do to comply with the law in advance of its looming effective date.

This is part three in a three-part series answering some of these frequently asked questions. [Part one](#) addressed critical questions, such as who is covered by the law, how much paid sick leave do employees receive, how do employees earn sick leave, and for what purposes can employees use sick leave. In [part two](#), we covered payment for sick leave, employee advance notice and documentation requirements, limitations on the use of sick leave, and carryover requirements. Below, in part three, we dive deeper into the details of the law, examine the law's interplay with PTO policies and local paid sick leave laws, explain employers' recordkeeping and notice posting and distribution requirements, and explain penalties for violating the law.

Many of the answers provided are based on [proposed regulations](#) recently issued by the New Jersey Department of Labor and Workforce Development (NJDOLE). Some of these answers could change when the final regulations are issued.

### What happens to unused sick leave at termination?

- Employers are not required to pay employees for accrued but unused sick time upon termination, regardless of the reason for termination, unless an employer's policy or an applicable collective bargaining agreement provides otherwise.

### What happens if an employer rehires an employee who had unused sick leave?

- If an employee is discharged, laid off, furloughed, or otherwise separated from employment, and is rehired in New Jersey within six months, any unused accrued sick leave must be returned to the employee upon rehiring.
- The proposed regulations clarify that "the employee's entitlement to use the accrued or advanced earned sick leave shall not be adversely affected; which is to say, the employee shall be treated for the purpose of using his or her accrued or advanced earned sick leave as if there had been no break in employment."

### How does the law apply to employees who are transferred to another division or employed by a successor employer?

- If an employee is transferred to a separate division, entity, or location of the employer, the employee remains entitled to use his or her earned sick leave. The proposed regulations clarify this by stating, "For example, if prior to a transfer to a separate division of the employer, the employee had worked for the



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employer for more than 120 calendar days, the employee would immediately upon the transfer be permitted to use his or her accrued or advanced earned sick leave and would not be required to wait 120 calendar days after the transfer had occurred to use his or her accrued or advanced earned sick leave.”

- When a different employer succeeds or takes the place of an existing employer, all employees who remain employed by the successor employer are entitled to their accrued sick leave and are entitled to use it immediately. The proposed regulations provide criteria for determining if an entity is a successor.

## **What if an employer has an existing PTO policy?**

### *1. Do employers with existing PTO policies have to change their policies to comply with the law?*

- The PSLL provides that employers with existing PTO policies, including policies that allow paid sick, personal, and vacation days, will be in compliance with the law provided that employees can use their PTO days for all of the same reasons enumerated in the law and that their PTO days are accrued at a rate equal to or greater than the rate required by the law.
- The proposed regulations clarify that an existing PTO policy will comply with the law “so long as the PTO meets or exceeds all of the requirements in the Act; that is, an employee must be permitted to use all of the PTO for any of the purposes set forth [in the law], and the employer’s PTO program must meet or exceed the other requirements of the Act and this chapter, including, but not limited to:

1. Accrual . . . or advancing in accordance with [the law];
2. Use in accordance with [the law];
3. Payment in accordance with [the law]; and
4. Payout and carry-over in accordance with [the law].”

- Thus, an employer is not required to adopt a standalone sick leave policy to comply with the PSLL provided that the employer’s existing PTO policy satisfies all of the requirements of the law.

### *2. Is an employer with a PTO policy required to track sick leave time?*

- The recordkeeping requirements of the law appear to require that employers separately track sick leave earned, used, carried over, etc., even if the time is part of a general PTO policy (see recordkeeping questions below).
- Thus, although this is administratively burdensome, this means an employer will want to document when PTO is used for a purpose covered by the law. Some employers have opted to create a “Sick Leave Request” form, which employees must complete and submit when using PTO for a reason covered by the law so that the employer has an accurate record of when sick time is used.

### *3. Can an employer create a subaccount in an existing PTO policy just to comply with the law?*

- The law does not address this, but we believe an employer that does not want to comply with the law’s requirements for all PTO can likely create a subaccount in its PTO policy that provides for accrual, use, carryover, etc., of just 40 hours of sick leave in accordance with the law. For example, if an employer’s PTO policy does not provide for carryover of unused PTO, the employer can likely create a subaccount that satisfies the carryover requirements just as to the required sick leave time.

## **Can an employer designate leave taken as PSL under the law even if an employee does not request use of PSL?**

- The PSLL does not expressly address this, but we believe that if an employee takes leave for a reason that is covered by the PSLL, the employer can designate the time taken as sick leave under the law, regardless of whether the employee requests or desires it.

## **Are employers still required to comply with local paid sick leave laws?**

- No. The law preempts all existing local earned sick leave laws in New Jersey on the effective date of the law and prohibits the adoption of any new local earned sick leave laws.
- However, existing employees who have accrued but unused paid sick leave under any New Jersey municipal paid sick leave law must be permitted to use such leave in accordance with that local paid sick leave law. In other words, employees do not forfeit any sick time they have already earned under local paid sick leave laws.

## **Are employers required to post and distribute any notices?**

- Yes. On October 3, 2018, the required New Jersey PSLL notice was released. For more information on the

poster and the law's posting and distribution requirements, please see our article, "[New Jersey Paid Sick Leave Law Update: Required Poster Released.](#)"

## **Are employers required to include a paid sick leave policy in their employee handbooks?**

- No, but employers may want to do so because employers must give employees notice of certain terms under the law if they intend to apply them.
- For example, as noted in [part two of this three-part series](#), when the need for leave is unforeseeable, employers may require that employees provide notice as soon as practicable of their intent to take leave and its expected duration, but only if the employer has notified the employee of this requirement.
- Also the proposed regulations state that the employer shall provide reasonable notice to its employees of the blackout dates ([see blackout date discussion in part two](#)) on which its employees are prohibited from using foreseeable earned sick leave.

## **Are there any recordkeeping requirements?**

### *1. What records are employers required to keep?*

- The law states that employers must keep records "documenting hours worked by employees and earned sick time taken by employees, for a period of five years."
- The proposed regulations clarify and expand the recordkeeping requirements by providing that employers must keep "all records documenting hours worked by employees and earned sick leave" accrued/advanced, used, paid, and paid out and carried over by or to employees.
- If an employee makes a claim that the employer failed to provide earned sick leave as required by the law and the employer has failed to maintain the required records, it will be assumed that that employer failed to provide the required paid sick leave, absent clear and convincing evidence otherwise.
- An employer that fails to maintain the required records shall be subject to the same penalties for recordkeeping violations under the state's wage and hour laws.

### *2. Are employers required to keep records of the hours worked by exempt employees?*

- As noted in [part one of this three-part series](#), the proposed regulations clarify that an employer is not required to maintain (or retain) records of the hours worked by exempt employees if (1) the employer uses the front-load method or (2) if the employer presumes, for purposes of the accrual method, that the employee works 40 hours per week.
- All of the other required records must be kept for exempt employees.

### *3. Are employers required to include information about sick leave on paystubs?*

- No, the PSL does not require employers to do so.

## **What are considered violations of the law?**

- Under the proposed regulations, a violation of the law "shall occur when an employer:
  1. Willfully hinders or delays the Commissioner in the performance of the duties of the Commissioner in the enforcement of [the law];
  2. Fails to make, keep, and preserve any record required to be so made, kept, and preserved under [the law];
  3. Falsifies any such record;
  4. Refuses to make any such record accessible to the Commissioner upon demand;
  5. Refuses to furnish to the Commissioner, on demand, a sworn statement of such record or any other information required for the proper enforcement of [the law];
  6. Fails to provide earned sick leave to each employee in the amount and in the manner prescribed in [the law]";
  7. Takes a retaliatory personnel action or discriminates against an employee because the employee uses or requests paid sick leave or files a complaint against the employer for a violation of the law; or
  8. Otherwise violates any provision of the law.
- Notably, the law creates a "rebuttable presumption" of retaliatory action whenever an employer takes adverse action within 90 days after an employee files a complaint alleging a violation of the PSL or engages in other forms of protected activity under the PSL.
- As noted in [part two of this three-part series](#), however, the law expressly provides that it does not prevent an employer from disciplining an employee "who uses earned sick leave for purposes other than those

identified” in the law.

## What are the penalties for violating the law?

- An employer that violates the PSSL is subject to the penalties and remedies provided under the state’s wage and hour law and the state’s criminal code for failing to pay wages under the wage and hour law, and is subject to a civil action for actual damages and liquidated damages in an equal amount.
- The proposed regulations include the following penalties for any such violations:
  - **First Violation:** An employer that “knowingly and willfully violates any provision of [the law] shall be guilty of a disorderly person offense and shall, upon conviction for a first violation, be punished by a fine of not less than \$100.00, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 90, days or by both the fine and imprisonment.”
  - **Second Violation:** “An employer shall, upon conviction for a second or subsequent violation, be punished by a fine of not less than \$500.00, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 100, days or by both the fine and imprisonment.”
  - Note that “[e]ach week, in any day of which an employee is not provided earned sick leave in the amount and in the manner prescribed in [the law] and each employee so affected, shall constitute a separate offense.”
- The law also imposes administrative penalties of not more than \$250 for a first violation and not less than \$250, nor more than \$500, for a second violation and subsequent violations.
- Finally, the law imposes an administrative fee on all payments of gross amounts due to employees under the law as follows:
  1. **First Violation:** 10 percent
  2. **Second Violation:** 18 percent
  3. **Third and Subsequent Violations:** 25 percent
- The law also allows the commissioner to award interest on any such award of back pay in the following circumstances:
  1. “When an employer has unreasonably delayed compliance with an order of the Commissioner to pay wages owed to an employee;
  2. Where an equitable remedy is required in order to recover the loss of the present value of the money retained by the employer over an extensive period of time; or
  3. Where the Commissioner finds sufficient cause based on the particular case.”

## Can employees sue their employers for violations of the law?

- Yes. The law permits employees to sue employers for violations and to recover, among other remedies, liquidated damages in an amount equal to the actual damages incurred by the harmed employee.

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