

New Jersey Department of Labor Adopts Regulations Implementing Earned Sick Leave Law

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On January 6, 2020, the New Jersey Department of Labor and Workforce Development (“NJ DOL” or “Department”) issued [regulations](#) implementing the state’s [Earned Sick Leave Law](#) (“ESLL” or “Law”). Briefly, the ESLL, which we discussed in a previous [Act Now Advisory](#), requires New Jersey employers to provide employees up to 40 hours of paid sick leave per benefit year for the following purposes:

- an employee’s mental or physical illness, injury, or health condition, including the need for medical diagnosis, care, treatment, recovery, or preventative care;
- for the same purposes when caring for a family member (a “family member” is defined as “a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of an employee, or a spouse, domestic partner, or civil union partner of a parent or grandparent of the employee, or a sibling of a spouse, domestic partner, or civil union partner of the employee, or any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship”);
- the employee was a victim of domestic violence, sexual assault, stalking, or sexual contact, or is needed to provide certain care or assistance to a family member who was a victim of such conduct;
- to provide care for oneself or a family member because (1) the employee’s place of business has been closed due to a public health emergency, (2) a child’s school or place of care has been closed due to a public health emergency, or (3) the individual or a family member has a communicable disease that may jeopardize the health of others; and
- to attend a school-related conference, meeting, function, or other event requested or required by a 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 condition or disability.

The adopted regulations appear in the January 6, 2020, [New Jersey Register](#), which also published the more than 100 public comments received about the initially proposed rules and the NJ DOL's responses to the comments ("Responses"). The proposals, which we summarized in a previous [Act Now Advisory](#), have mostly been adopted without change. The Department's Responses, however, illuminate how the NJ DOL interprets the ESLL and employer compliance obligations. The regulations (without the comments and Responses) will be codified at N.J.A.C. 12:69 1.1, *et seq.*

The following summarizes some of the regulations and Responses of particular note.

➤ **Only one set of rules may apply to an umbrella paid time off ("PTO") policy.**

The ESLL permits employers to satisfy their paid sick leave obligations through a paid time off ("PTO") program, provided that the PTO policy conforms to all the Law's requirements, including as to use, accrual or frontloading, carryover or payout, notice, documentation, and non-retaliation. Under the regulations—and as underscored by the Department's Responses—employers that choose to have a single, umbrella PTO policy that covers its ESLL obligations, rather than a separate ESLL policy, may not have one set of rules and procedures that apply to the 40 hours of PTO an employee may use for ESLL purposes and another set of rules for the remaining PTO time. This means that the ESLL's requirements as to permitted use, documentation, deadlines for calling out, scheduling, payout and carryover, and the like, must apply to all PTO time used for a purpose covered by the ESLL. This may have significant ramifications for employers with respect to their attendance and related policies.

➤ **All requests by employees to use earned sick leave are considered presumptively valid.**

Except in the limited circumstance of unscheduled time being taken during an established, bona fide "black out period," employers may not require an employee to provide documentation supporting a need to be out for any absence of fewer than three days, if the absence is for a purported ESLL-covered purpose. For employers with a PTO policy, this restriction applies, regardless of the amount of time the employee has already taken, provided that the employee has PTO available. Thus, for example, if an employee with 15 days of PTO calls out sick every Monday from Memorial Day to Labor Day because of purported migraines, the regulations bar the employer from requiring a doctor's note to confirm the legitimacy of the employee's claimed need for absence.

➤ **Employers may require "return to work" notes.**

The prohibition against requiring documentation for ESLL absences of fewer than three days does not, however, bar employers from conditioning an employee's return to work on the submission of a doctor's note confirming that the employee is medically cleared to return to work. That said, employers may not require a doctor's note as proof of the employee's need to have used leave for a permitted ESLL purpose in the first place.

➤ **Employers may not require employees to use accrued earned sick leave.**

Mirroring language in the ESLL, the regulations confirm that “[w]here an employee would be eligible to use earned sick leave, the employer is nevertheless prohibited from requiring the employee to use earned sick leave” [N.J.A.C. 12:69-3.5(m)]. While acknowledging that both the New Jersey Family Leave Act (“FLA”) and the federal Family and Medical Leave Act (“FMLA”) permit employers to require employees to exhaust all other paid leave concurrently, the Department reasoned that “neither the FLA, nor the FMLA, appear[s] to contemplate the circumstance where a State law, rather than an independently established employer policy, creates an employee’s entitlement to accrued paid leave and where that State law expressly prohibits an employer from requiring an employee to use the statutorily mandated accrued paid leave.”

➤ **Employers need not have a single ESLL benefit year.**

The proposed regulations would have required employers to establish a single ESLL benefit year for all employees. In its Responses, the NJ DOL declined to adopt this limitation and stated its intention to propose a new rule to explicitly permit employers to use multiple benefit years (such as a benefit year based on an employee’s anniversary date) for determining an employee’s ESLL benefits. Employers, however, remain obligated to provide 30 days’ notice to the Department before changing a benefit year to ensure that implementation of the change will not reduce employees’ ESLL entitlement.

➤ **Employers need not permit employees to use more than 40 hours of earned sick leave in any benefit year.**

In its Responses, the NJ DOL acknowledged the confusion that may arise because the ESLL requires employers to permit employees to carry over up to 40 hours of unused earned sick leave from one benefit year to the next but, at the same time, expressly states that “[t]he 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[,]” and need not pay out unused leave. To clarify and to avoid any confusion, the Department added a regulatory provision explicitly reiterating that “the employer shall not be required to permit the employee to use more than 40 hours of earned sick leave in any benefit year” [N.J.A.C. 12:69-3.6(t)].

➤ **The NJ DOL intends to adopt a formal regulation for determining when an employee who works both inside and outside New Jersey will be covered under the ESLL; in the meantime, guidelines in the Department’s FAQs should be followed.**

The regulations define the term “employee” within the meaning of ESLL as “an individual engaged in service for compensation to an employer in the business of the employer who performs that service in New Jersey” [N.J.A.C. 12:69-2.1]. The Frequently Asked Questions (“FAQs”) posted on the Department’s website state that the question of coverage under the ESLL will depend primarily on how much time the employee spends

working in New Jersey. Further, if the employee routinely performs some work in New Jersey and the employee's base of operations or 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 explain that this is the test applied by the Division on Civil Rights ("DCR") in its enforcement of the FLA and states that the Department intends to adopt—through formal rulemaking—the DCR's approach to determining when the ESLL applies to those working both inside and outside New Jersey. In its Responses, the Department reiterated this intention.

What New Jersey Employers Should Do Now

- If you have PTO policies that encompass earned sick leave, consider whether it would be preferable to have a separate policy for New Jersey earned sick leave, with ESLL regulations applicable only to those 40 hours of leave per benefit year.
- If you wish to separate or otherwise revise your earned sick leave or PTO policies, make sure you do so in a way that ensures that employees will not lose any earned sick leave entitlement.
- If you have PTO policies that encompass earned sick leave and you wish to keep a single PTO policy, then review and, as necessary, revise your policies to ensure that they meet all the ESLL's requirements relating to documentation, notice, scheduling, mandatory use of accrued leave, etc., for time off taken for ESLL-covered purposes.
- Consider whether it is administratively more convenient for your workplace to maintain a single benefit year (e.g., based on the calendar year), or to have multiple benefit years (e.g., based on an anniversary date). If you decide to change the benefit year, follow the necessary NJ DOL procedures for implementing such change.
- Provide training to management, payroll, and human resources on the requirements of the Law and new regulations, particularly with regard to procedures for requesting leave, presumed validity of unscheduled use of earned sick leave, and when and what type of documentation may be requested.

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