

October 22, 2013

Paid Sick Leave Ordinance Adopted in Jersey City, New Jersey

By Eboneé Hamilton Lewis and Sebastian Chilco

On September 26, 2013, Jersey City, New Jersey became the latest jurisdiction to mandate that private sector employees receive paid sick leave. Jersey City joins a handful of U.S. cities¹ with a mandatory paid sick leave requirement: San Francisco, California; New York City, New York; Portland, Oregon; and Seattle, Washington.² Additionally, paid sick leave requirements exist in Connecticut and Washington, D.C. The ordinance takes effect January 24, 2014. However, for employees covered by a collective bargaining agreement (CBA) in effect on the ordinance's effective date, the ordinance covers them on the date the CBA terminates.

Covered Employers & Employees

The ordinance covers any entity that operates as a business in Jersey City. Moreover, it covers employees who work in Jersey City at least 80 hours in a calendar year. This includes non-Jersey-City-based employees of a franchise or business owner located in Jersey City who work at least 80 hours in a calendar year in Jersey City. Additionally, it covers employees who work in Jersey City at least 80 hours in a year, including employees of a franchise or business owner located in Jersey City.

Paid Versus Unpaid Sick Time

Whether sick time is paid or unpaid depends on the number of employees employed by the entity. If an employer has 10 or more employees, employees must receive paid sick time. If an employer

1 Nancy Ober, [Employers' New Headache: SF's Paid Sick Leave Law](#), Littler ASAP (Dec. 1, 2006); Nancy Delogu and Libby Henninger, [D.C. Passes the Accrued Sick and Safe Leave Act of 2008](#), Littler ASAP (May 30, 2008); Jason Stanevich and Jennai Williams, [Connecticut Looks to Mandate Paid Sick Leave for Service Workers](#), Littler ASAP (June 8, 2011); Daniel Thieme and Pamela Salgado, [Seattle Paid Sick Time and Paid Safe Time Ordinance Adopted](#), Littler ASAP (Oct. 3, 2011); Howard Rubin and Jennifer Nelson, [Portland City Council Unanimously Passes Sick Leave Law](#), Littler ASAP (Mar. 21, 2013); Terri Solomon, Jean Schmidt, and Jill Lowell, [Are You Feeling Sick? New York City Passes a New Sick Leave Law](#), Littler ASAP (May 10, 2013).

2 Philadelphia, Pennsylvania also has a paid sick leave law, but its private sector employee coverage is limited to employers awarded government contracts of a certain value. See Lisa Steele, [Philadelphia: The Most Recent City to Adopt Paid Sick Leave Requirements for Some Employers](#), Littler ASAP (Nov. 10, 2011). Long Beach, California also has a paid sick leave law, but it only applies to certain hotel workers. Milwaukee, Wisconsin previously had a paid sick leave law, but in 2011 the state passed SB 23, which prohibited city, village, town or county ordinances requiring an employer to provide an employee paid or unpaid leave for various reasons, including an employee or family member's health conditions and medical needs. See Wis. Stat. § 103.10(1m).

has fewer than 10 employees, employees must receive unpaid sick time. To determine the number of employees, all employees performing work for pay on a full-time, part-time, or temporary basis are counted. This includes all the employer's U.S. employees, not just employees based in Jersey City or non-Jersey-City-based employees who work at least 80 hours in a calendar year in Jersey City. When the number of employees fluctuates, the number may be determined for the current calendar year based on the average number of employees who worked for pay during the preceding calendar year.

The ordinance does not address when employee numbers must be examined to determine whether sick time is paid or unpaid. Accordingly, it is uncertain whether an employer must evaluate workforce levels when the ordinance takes effect, when leave is requested, or on an on-going basis. The Department of Health & Human Services will need to resolve this issue when it publishes guidelines or regulations.

Accrual, Advances, Caps, Carry-Over, Cash Value, and Cash-Out

Covered employees accrue one hour of sick time for every 30 hours worked. It is assumed that employees who are exempt from overtime under the federal Fair Labor Standards Act (FLSA) work 40 hours per week, unless their normal workweek is less than 40 hours, in which case accrual is based on actual hours worked. Sick time begins to accrue on an employee's first day of work, but employees are not entitled to use accrued sick time until the 90th calendar day of employment. After the 90th calendar day, employees may use sick time as it is accrued. At its discretion, an employer may loan sick time to an employee in advance of accrual. Employees employed before the January 24, 2014 effective date of the ordinance will begin accruing sick time on January 24, 2014, but they cannot use it until April 24, 2014.

Employers are permitted to cap accrued sick time at 40 hours in a calendar year, which is a regular and consecutive 12-month period determined by the employer. Employees must be able to carry over 40 hours of sick time to the following calendar year. Notably, under the ordinance, an employee is not entitled to use more than 40 hours of sick time in a calendar year.

Sick time hours are paid at the employee's regular hourly rate. When employment ends, an employer is not required to cash-out an employee's accrued, but unused, sick time hours.

Transferred and Rehired Employees, and Successor Employers

If an employee is transferred to a separate division, entity, or location, but remains employed by the same employer, he or she is entitled to and can use all previously accrued sick time. The ordinance does not address whether employees who are transferred outside Jersey City retain their accrued sick time. However, given the purpose of and intent behind the ordinance, it is likely the Department of Health & Human Services will interpret the language broadly to mean that the rule applies regardless of where the employee is transferred. This is another issue the Department of Health & Human Services will need to clarify via guidance or regulation.

If an employee is rehired within 6 months of separating from employment, previously accrued but unused sick time must be reinstated, and the employee can use this time immediately when employment recommences. As with employees generally, accrual of new sick time begins again when employment recommences.

When a different employer succeeds or takes the place of an existing employer, all employees of the original employer who remain employed by the successor employer are entitled to keep and use all previously accrued but unused sick leave.

Permitted Uses

An employee can use sick time for his or her own qualifying need, or for that of a "family member."³ Sick time can be used for the employee's or a family member's:

- Mental or physical illness, injury, or health condition;

3 Under the law, a "family member" includes: a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, a child of a civil union partner, or a child to whom the employee stands *in loco parentis*; a biological, foster, stepparent or adoptive parent or legal guardian of an employee or an employee's spouse, domestic partner or civil union partner or a person who stood *in loco parentis* when the employee was a minor child; a person to whom the employee is legally married under the laws of New Jersey or any other state or with whom the employee has entered into a civil union; a grandparent or spouse, civil union partner or domestic partner of a grandparent; a grandchild; a sibling; a domestic partner.

- Medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition;
- Preventive medical care.

Additionally, sick time can be used:

- If the employee's place of business is closed by order of a public official due to a public health emergency;
- If an employee needs to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or
- If an employee needs to care for a family member when health authorities or a health care provider determines the family member's presence in the community would jeopardize the others' health because of the family member's exposure to a communicable disease, regardless of whether the family member actually contracted the communicable disease.

Sick time may be used in hourly increments, or the smallest increment of time that an employer's payroll system uses to account for absences or use of other time, whichever is smaller.

Employee Notice & Documentation

Sick time must be provided upon an employee's oral request. Employees must provide employers with notice of the need to use sick time as soon as practicable.

For sick time of more than three consecutive days, an employer can require reasonable documentation that sick time has been used for a covered purpose, which includes documentation signed by a health care professional indicating sick time is necessary. However, an employer cannot require that documentation explain the nature of the illness. If an employer possesses health information about an employee or family member, it must be treated as confidential and cannot be disclosed, except to the affected employee with his or her permission.

Notice and Posting Requirements

When employment begins (or, for employees employed when the ordinance takes effect, as soon as practicable), employers must provide individual written notice to each employee about his or her rights under the ordinance. The notice must describe the right to sick time, the accrual rate, and the amount of sick time provided. Additionally, it must provide the terms for use of sick time as guaranteed by the ordinance, describe the right to be free from retaliation for requesting sick time, and detail the right to file a complaint or bring a civil action if sick time is denied or the employee is retaliated against for requesting or taking sick time. The notice must be in English and the primary language spoken by the employee, provided officials have made available a translation of the notice into such language.

Employers must also display a poster containing notice of the ordinance in a conspicuous and accessible place in each establishment where employees are employed. The poster must be in English and in any language that is the first language of at least 10% of the employer's workforce, provided city officials have made available a translation of the notice into such language.

The ordinance directs city officials to make notices and posters available in: English; Spanish; Italian; Chinese; Polish; Portuguese; Tagalog; and any other languages officials select.

The ordinance directs that the Jersey City Department of Health & Human Services create and make available to employers the required notices and posters.

Recordkeeping

Employers must keep for three years all records documenting hours worked by employees, as well as all sick time taken by employees. An employer's failure to maintain or retain adequate records creates a rebuttable presumption the employer violated the ordinance, absent clear and convincing evidence otherwise.

Prohibitions

Under the ordinance, an employer cannot:

- Take adverse action against an employee for taking sick time.
- Require, as a condition of taking sick time, that an employee search for or find a replacement worker to cover the hours during which the employee is absent.
- Interfere with, restrain, or deny the attempted or actual exercise of rights under the ordinance. The protections apply to a person who mistakenly, but in good faith alleges a violation of the ordinance.
- Have an absence control policy which counts sick time taken under the ordinance as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.
- Require disclosure of details relating to an employee or family member's medical condition as a condition of providing sick time.

The ordinance is silent, however, on whether an employer is prohibited from requiring its employees to exhaust all accrued paid sick time during a family leave of absence covered by either the federal Family and Medical Leave Act or the New Jersey Family Leave Act.

Additionally, an employer cannot retaliate against an employee because he or she exercised protected rights under the ordinance. Retaliation is defined as the denial of a right guaranteed by the ordinance, and any threat, discipline, discharge, suspension, demotion, reduction of hours, or any other adverse action against an employee for exercising his or her rights under the ordinance, which include, but are not limited to: requesting and using sick time pursuant to the ordinance; filing a complaint or informing a person about an employer's alleged violation of the ordinance; cooperating with city officials in investigating alleged violations of the ordinance; participating in any administrative or judicial action regarding an alleged violation; informing any person about his or her potential rights under the ordinance.

A rebuttable presumption of unlawful retaliation exists when an employer takes adverse action against a person within 90 days of when the employee:

- Files a complaint with local officials or a court alleging a violation of the ordinance;
- Informs any person about an employer's alleged violation of the ordinance;
- Cooperates with local officials or other persons in investigating or prosecuting any alleged violation of the ordinance;
- Opposes any policy, practice, or ordinance that is unlawful under the ordinance; or
- Informs any person of his or her potential rights under the ordinance.

Penalties & Employee Remedies

An employer that violates the notice requirement is subject to civil fine up to \$100 for each employee who was not provided appropriate notice. An employer that violates the posting requirement is subject to a civil fine up to \$500 for each establishment in which a poster was not displayed. The maximum penalty for violating the ordinance is, in a court's discretion, a fine up to \$1,250 and/or a period of community service up to 90 days. The penalty will apply to each infraction.

An aggrieved individual can file a private lawsuit. Submitting a complaint to the Jersey City Department of Health & Human Services is not required before filing suit, nor does filing a complaint bar an individual from filing a private action.

Impact on Existing Policies

If an employer has a paid sick leave policy, such as PTO, which provides an amount of paid sick leave sufficient to meet the ordinance's requirements, which may be used for the same purposes and under the same conditions as paid sick leave under the ordinance, it need not provide additional paid sick time.

The ordinance does not diminish an employer's obligation to comply with a contract, CBA, employment benefit plan, or other agreement providing more generous sick time to employees. Moreover, the ordinance does not discourage or prohibit employers from adopting or retaining more generous sick time policies.

Recommendations

In the next few months, Jersey City employers, as well as multi-state and nationwide employers with Jersey City operations, should:

- Review and revise, if necessary, sick leave and/or PTO policies and procedures to ensure they meet the ordinance's requirements.
- Review and revise, if necessary, anti-retaliation policies.
- Monitor Jersey City Department of Health & Human Services public notices and website⁴ for template notices and workplace posters.
 - Employers should ensure that they obtain and display the posters in a conspicuous and accessible place in each establishment where employees are employed in Jersey City.
 - Employers that want to develop their own notice should consult with knowledgeable employment counsel to ensure the notice satisfies all ordinance requirements. Additionally, employers should consider creating acknowledgment forms to guard against claims that notice was not provided.
- Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail accrued and used sick time. If a third-party payroll processor is used, ensure it is aware of and complies with the requirements of the ordinance.
- Train supervisory and managerial employees, as well as HR and payroll personnel, on the requirements of the ordinance.

[Eboneyé Hamilton Lewis](#) is a Shareholder in Littler Mendelson's Newark office and [Sebastian Chilco](#) is a Research Attorney in the San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Lewis at enlewis@littler.com, or Mr. Chilco at schilco@littler.com.

⁴ Available at: <http://www.cityofjerseycity.com/hhs.aspx?id=870>.