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Newark Follows Jersey City to Enact Paid Sick Time Law

By Eboneé Hamilton Lewis and Lauren Marcus

On January 29, 2014, the Mayor of Newark, New Jersey signed into law an ordinance that requires private employers to provide paid sick time to employees. With this new law, Newark joins Jersey City, which enacted an ordinance mandating paid sick leave for private sector employees in September of last year.¹ There are key distinctions between Newark's ordinance and Jersey City's ordinance. Notably, Newark's ordinance requires paid sick time and does not provide the option of unpaid sick time; collective bargaining agreements may expressly waive the provisions set forth in the ordinance; and individuals who work for small employers (with fewer than 10 employees) are capped at 24 hours of paid sick time per calendar year.

The Newark ordinance takes effect May 29, 2014, although employees covered by a current collective bargaining agreement (CBA) on that date will not be affected until after the expiration of the CBA. Notably, a subsequent CBA may expressly waive the protections set forth in the ordinance.

Covered Employers & Employees

To qualify for this benefit, an employee must work at least 80 hours in a calendar year for a private entity that operates in Newark. The ordinance specifically excludes all government employees, Rutgers employees, or members of construction unions.

The number of employees performing work for an employer, for purposes of this ordinance, includes all employees working for compensation on a full-time, part-time or temporary basis. If the number of employees fluctuates, the total number of employees shall be determined based on the average number of employees from the preceding year.

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

Paid sick time is accrued at a rate of one hour for every 30 hours of work performed by the employee. It is assumed employees that are exempt from overtime under the federal Fair Labor Standards Act (FLSA) work 40 hours per week, unless their normal work week is less than 40 hours, in which case accrual is based on actual hours worked.

¹ See Eboneé Hamilton Lewis and Sebastian Chilco, [Paid Sick Leave Ordinance Adopted in Jersey City](#), New Jersey, Littler ASAP (Oct. 22, 2013).

Employees cannot begin using accrued sick time until the 90th calendar day of their employment and, thereafter, may use sick time as it is accrued, subject to the following exceptions: Employers who employ 10 or more employees may cap paid sick time at 40 hours per calendar year; employers who employ fewer than 10 employees may cap paid sick leave at 24 hours per calendar year (with a further exception for child care, home health care and food service workers who are entitled to up to 40 hours of paid sick time per calendar year).

Accrued but unused sick time may be carried over; however, employers are neither required to carry over more than 40 hours of unused paid sick time from one calendar year to the next nor required to permit an employee to use more than 40 hours of sick time in a calendar year. Under the ordinance, employers do not have to permit employees to carry over unused time if the employee is paid for such time at the end of the calendar year in which such time is accrued.

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. If an employee is rehired within six months of separating from employment, the employer must reinstate previously accrued but unused sick time, and the employee's previous employment shall count towards the 90-day requirement prior to the commencement of paid sick time.

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

Employees can use sick time for the medical diagnosis, care, or treatment of their own or their family member's mental or physical illness, injury or health condition. 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 domestic partner; or a sibling.

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 health of others because of the family member's exposure to a communicable disease, regardless of whether the family member actually contracted the communicable disease.

The employer shall determine whether sick time may be used in increments of less than one day.

Employee Notice & Documentation

If foreseeable, an employer may require reasonable advance notice and may require notice before the beginning of the employee's work shift or work day. In emergencies, when such notice is not possible, an employee must provide notice as soon as practicable.

For sick time of more than three consecutive days (or three consecutive instances, if used in increments less than one day), an employer can require reasonable documentation signed by a health care professional that the sick time has been used for a covered purpose. An employer cannot require, however, that documentation explain the nature of the illness. If an employer possesses an employee's or his or her family member's health information, such information must be treated as confidential and cannot be disclosed, except to the affected employee with his or her permission.

Notice and Posting Requirements

Employers must provide individual written notice to each employee about his or her rights under the ordinance at the time employment commences (or as soon as practicable if the employee is already employed on May 29, 2014). The notice must describe the right to paid 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 properly requesting sick time, and the right to file a complaint or bring a civil action if paid sick time is denied or the employee is retaliated against for requesting or taking paid sick time. The notice must be in English and the primary language spoken by the employee, provided the employee's primary language is the first language of at least 10% of the employer's workforce.

Employers must also display a poster in a conspicuous and accessible place in each business establishment where employees are employed containing notice of the ordinance. The poster must be in English and in any language that is the first language of at least 10% of the employer's workforce. The Newark Department of Child and Family Well-Being will create and make available posters in English, Spanish, and any other language deemed appropriate for compliance with the ordinance.

Recordkeeping

An employer shall allow reasonable access to its records and monitor compliance with the ordinance. 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:

- 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 exercise of, or the attempt to exercise, any right protected under the ordinance.
- Require disclosure of details relating to an employee or family member's medical condition as a condition of providing sick time.
- Retaliate against an employee because he or she properly exercised rights protected under the ordinance. Retaliation is defined by the ordinance as the denial of any right guaranteed under the ordinance and any threat, discipline, discharge, suspension, demotion, reduction of hours, or any other adverse action against an employee for the exercise of any right guaranteed by the ordinance, including for filing a complaint or informing any person about any employer's alleged violation of the ordinance; cooperating with the Agency in its investigations of alleged violations of the ordinance; participating in any administrative or judicial action regarding an alleged violation of the ordinance; and informing any person of his or her potential rights under the ordinance.

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.

Penalties & Employee Remedies

An employer that violates any provision of this ordinance faces a fine up to \$1000 and/or up to 90 days imprisonment. The penalty will apply to each individual infraction.

The ordinance allows an aggrieved individual to submit a complaint to the Newark Department of Child and Family Well-Being. In addition, the ordinance provides a private right of action to employees; however, filing a complaint with the Newark Department of Child and Family Well-Being is neither a prerequisite nor a bar to filing any such action.

Impact on Existing Policies

The ordinance does not discourage or prohibit employers from adopting or retaining more generous sick time policies including, but not limited to personal time off (PTO) policies, that provide paid sick leave benefits sufficient to meet the ordinance requirements and that can be used for the same purposes and under the same conditions as provided by the ordinance. 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.

Recommendations

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

- Review and revise, if necessary, sick leave policies and procedures to ensure they meet the ordinance's requirements.
- Review and revise, if necessary, anti-retaliation policies.
- Monitor Newark Department of Child and Family Well-Being public notices and website² for template notices and workplace posters.
 - Employers should determine the primary languages of their employees and, if necessary, contact the Department of Child and Family Well-Being to request the necessary posters.
 - Ensure posters are obtained and displayed in a conspicuous and accessible place in each establishment where employees are employed in Newark.
- 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 ordinance requirements.
- Train supervisory and managerial employees, as well as human resources and payroll personnel, on ordinance requirements.

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² http://www.ci.newark.nj.us/government/city_departments/health_human_services/