

NJ's Expanding Leave Laws Give Employees More Paid Time Off



A helpful overview of the recent changes to family leave and paid sick leave in the Garden State.

By Wendy Johnson Lario, Courteney Caine and Danielle Gonnella | April 11, 2019 | New Jersey Law Journal

New Jersey has been at the forefront of providing paid leave for sick employees and workers caring for ill family members. Recently enacted laws have expanded those leave entitlements. Now, the ability to take sick days or time off to help family members with serious health conditions is broader than ever. This article provides an overview of the recent changes to family leave and paid sick leave in the Garden State.

Earned Sick Leave

On Oct. 29, 2018, New Jersey enacted the Earned Sick Leave (ESL) Law for all businesses in New Jersey—irrespective of their size. The law provides employees up to 40 hours of fully-paid sick leave each year and covers all employees—full-time or part-time—who work in New Jersey, except for per diem hospital or health-care employees; construction industry employees governed by a collective bargaining agreement; or public employees who already get sick leave with full pay pursuant to any other law.

Approved Reasons for ESL

Employees can use ESL for the following reasons:

- Caring for their own, or a family member's, physical or mental health or injury;
- Addressing domestic or sexual violence against themselves or a family member, including preparation for or attendance at court proceedings, treatment or counseling;
- Attending a child's school-related meeting, conference, or event;
- Taking care of their children when school or child care is closed due to an epidemic or public health emergency.

As is evident from the list of approved reasons, ESL covers more than an employee's own sickness. ESL also broadly defines family member to include: biological, adopted, foster and stepchildren, adult children; a legal ward; child of a domestic partner or civil union partner; grandchildren; siblings; spouse; domestic partner or civil union partner; parents; grandparents; a spouse, domestic partner or civil union partner of an employee's parent or grandparent; the sibling of an employee's spouse, domestic partner or civil union partner; or any individual related by blood to the employee or whose close association is the equivalent of family.

Accrual, Use and Carry Over of ESL

Earned sick leave hours accrue at the rate of one hour for every 30 hours worked. Employees can accrue and use up to 40 hours of ESL in any benefit year and must be able to carry over up to 40 hours of any unused ESL into the next benefit year.

ESL for existing employees could be used beginning on Feb. 26, 2019, or 120 days after the ESL Law was enacted on Oct. 29, 2018. For employees hired after Oct. 29, 2018, ESL can be used 120 days after the employee commences employment. If an employee is terminated but is rehired within six months, an employer must reinstate the employee's previous ESL, and the employee must be able to immediately use it. If an employee resigns, retires, is terminated or otherwise separated, unused ESL does not have to be paid to the employee.

Paying Employees for ESL

Employers must pay employees for ESL at the same rate of pay as the employee normally earns. However, if any employee takes ESL during scheduled overtime, employers are not required to pay the overtime rate. Notably, hours of ESL count toward employees' hours worked for purposes of determining when employees must be paid overtime. An employer may not require employees to make up the hours missed for ESL, but employees may voluntarily choose to work additional hours or shifts. Also, employees taking ESL may not be made to find a replacement for a missed shift.

Notice and Documentation of ESL

If an employee's leave is foreseeable, an employer can require notice up to seven calendar days prior to the date leave is to begin. Foreseeable leave includes time off that an employee knows in advance, such as a scheduled doctor's visit or school meeting, or a regularly occurring medical or counseling treatment. If the leave is not foreseeable, an employer may require an employee to give notice of the intention to take leave as soon as practicable, which cannot and should not be limited to any set time frame. Employees must be notified of the necessity to provide notice and the mechanisms for doing so.

Employers generally cannot request evidence of ESL. There are only two permissible circumstances when employers may request reasonable documentation:

1. If an employee requests ESL for three or more consecutive days.
2. If an employee takes unforeseeable ESL on a verifiable high-volume day or special event, when permitting use of foreseeable leave would unduly disrupt the operations of the employer. The employer must provide reasonable advance notice of these dates.

Reasonable documentation varies depending on the reason for the ESL. Examples of reasonable documentation include a letter signed by a health-care professional who is treating the employee or the family member, an attorney or law enforcement agency report or record, a court order, or any tangible proof of a school-related conference or meeting.

ESL records must be kept by employers for five years and must include the hours worked by employees and the ESL accrued, advanced, used, paid, and the unused ESL that is paid out or carried over. If records are not kept, there is a presumption that the law has been violated absent clear and convincing evidence to the contrary.

Retaliation

The law contains a rebuttable presumption of retaliation whenever an employer takes an adverse employment action within 90 days of the employee:

1. Filing a complaint with the Department of Labor (DOL) or a court;
2. Informing any person about an employer's alleged violation of this law;
3. Cooperating with the DOL or other persons in the investigation or prosecution of any alleged violations of the law;
4. Opposing any policy, practice or act that is prohibited; or
5. Informing any person of his or her rights under the law.

NJ Family Leave Changes

On Feb. 19, 2019, New Jersey significantly expanded New Jersey's Family Leave Act (FLA), which provides employees with 12 weeks of unpaid job-protected leave to care for family members with serious health conditions. The FLA originally took effect approximately 10 years ago on July 1, 2009, and made New Jersey the third state program in the country to mandate job-protected family leave. The new amendments, which become effective on June 30, 2019, provide even greater benefits for a broader group of employees in New Jersey. Below are some of the key expansions:

- *Employer Size:* The FLA originally applied to employers with 50 or more employees. The recent amendments will expand FLA to any employer with 30 or more employees.
- *Enlarged Definitions:* Under the recent amendments to the FLA, the definition of "family members" is expanded to include siblings, grandparents, grandchildren, parents-in-law, domestic partners, any individuals related to the employee by blood, and even more broadly, "any other individual that the employee shows to have a close association with the employee which is the

equivalent of a family relationship.” Previously, a “family member” only included a child, parent, spouse, or partner in a civil union couple. The definition of a “parent” was also broadened to include foster parents and those who became parents via a gestational carrier.

- *Shortened Advance Notice Required:* The FLA originally required advance notice of 30 days for all leave requests. The new notice requirement is reduced to 15 days for intermittent leave requests to care for a family member with a serious health condition.

Paid Family Leave Amendments

On Feb. 19, 2019, New Jersey also expanded New Jersey’s Family Leave Insurance Law (FLI), which provides pay to employees for qualifying family leaves. The FLI amendments become effective on July 1, 2020. Here is a summary of the key changes:

- *Paid-Leave Increase:* Under the original FLI, employees could take up to six weeks, or 42 intermittent days, of paid leave to care for a child during the first 12 months after birth or adoption or to care for a family member with a serious health condition. With the amendments, paid leave under the FLI is increased to 12 weeks of consecutive leave or 56 days of intermittent leave.
- *Weekly Paid-Leave Benefit Increase:* The amendments also increase the maximum pay during FLI leave from 66.6 percent to 85 percent of an employee’s weekly salary, up to a maximum of 70 percent of the statewide average weekly wage (also increased from 53 percent of the average weekly wage). These increases result in a maximum weekly benefit of \$860, instead of the previous \$633 cap.
- *Inclusion of NJ SAFE Act:* Employees will also be eligible to take paid FLI leave under the New Jersey Security and Financial Empowerment Act (NJ SAFE Act) to care for any “family member” involved in a domestic violence or sexually violent incident.
- *Use of PTO:* The amendments will prohibit employers from requiring employees to use up to two weeks of paid time off (PTO) in lieu of FLI benefits. If an employee elects to use PTO for a leave qualifying for FLI, that employee is still entitled to the full leave benefits available under the FLI after the PTO election is exhausted.

Conclusion

Employers should take heed and ensure employment policies, handbooks and employment agreements have been updated to comply with these changes. Verify that all employee notices have been properly issued and posters correctly displayed. If you have any questions about the new laws, or are uncertain as to whether any existing policies need or should be updated, speak with your employment counsel.

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