

2018 LABOR & EMPLOYMENT LAW UPDATE

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Overview: NJ PAID SICK LEAVE

- ▶ Effective Oct. 29, 2018
- ▶ Requires 40 hours of paid sick leave per year
- ▶ Applies full time, part time and seasonal employees
- ▶ **Certain exception for Civil Service Jurisdictions**

EXCEPTIONS

- ▶ **Public employees who are provided sick leave with full pay pursuant to any state law, rule or regulation**
- ▶ **Employees who work less than 120 days with more than a 6 month break in service**

“OTHER” EXCEPTIONS

- ▶ **Non-employees:**
 - **Independent contractors: ABC Test/UE Comp law:**
Expansive definition of employee, presumed employee
 - **To overcome, must prove:**
 - Has been and will continue to be free from control and direction over performance of service
 - Service is either outside usual course of business OR outside of all places of business for which it is performed
 - Individual is customarily engaged in an independently established trade, occupation, profession or business
 - **Example: Sub-codes?**

“OTHER” EXCEPTIONS

- ▶ **Shared service agreements**
 - Primary employer designation
- ▶ **Contract with service organizations**

Collective Bargaining Agreements

- ▶ Existing CBA
 - applies after expiration
- ▶ Must bargain over during next contract term
- ▶ **CBA can waive rights under statute**
 - **Waivers – clear and unmistakable**
 - Include express language within new contract

EARNED SICK LEAVE

- ▶ 2 Methods of Sick Leave Credit Under Statute:
 - Accrual: 1 hour for every 30 hours worked - up to 40 hours in a 12 month "benefit year"
 - Front loading: grant 5 days (40 hours) at beginning of benefit year
- ▶ **HYBRID Permissible:**
 - Can move from accrual to front loading but not vice versa

EARNED SICK LEAVE

- ▶ New employees: 120 calendar day waiting period

- ▶ New employees during year - calculate eligible hours

BENEFIT YEAR

- ▶ Benefit year:
 - calendar year
 - fiscal year
 - any 12 consecutive months
- ▶ Employer decides the benefit year
 - Any change must be approved by Commissioner

CARRY OVER

- ▶ Two different carry over methods apply:
 - Tied to the method employees obtain the right to sick leave:
 - Accrual Method
 - Front Loading Method

CARRY OVER: ACCRUAL METHOD

- ▶ Carryover at end of benefit year – earned, unused sick leave
 - Up to 40 hours
 - BUT: employer is NOT required to pay more than 40 hours of paid sick leave

CARRY OVER: ACCRUAL METHOD

- ▶ Offer payment of earned / unused time
 - In final month of the benefit year
- ▶ Within 10 days of offer, employee can:
 - Accept payment offer
 - Decline payment and carry over hours (up to 40 hours)
 - Request only 50% of payment and carryover the balance

CARRY OVER: FRONT LOADING

- ▶ Employer has the option to:
 - Pay employees in full for the amount of unused earned sick leave in the final month of the benefit year
 - Carry forward any unused sick leave to the next benefit year (subject to the 40 hour maximum)
- ▶ Employers who pay the employees in full at the end of the benefit year cannot use the accrual process for earned sick leave during the next benefit year

EXISTING POLICIES

- ▶ Can utilize a current policy(ies) if same provide equal or greater benefits
 - Must abide by other provisions of the law such as
 - Anti-retaliation
 - Non-discrimination
 - Recordkeeping requirements

EXISTING POLICIES

- ▶ Typical policy revisions to establish compliance with the sick leave law:
 - Allow same scope of use;
 - Limit the notice requirements;
 - Limit the verification requirements;
 - Broaden the pool of eligibles (part-timer, seasonal, temps)
 - Review/revise accruals (e.g., monthly accruals and part-timers)
 - Add anti-retaliation provisions
- ▶ **Consider hybrid policies**
 - **Can not REDUCE benefits presently available to employees**

TERMINATION AND REHIRE

- ▶ NOT required to pay out upon termination
- ▶ Rehire within 6 months, requires reinstatement of unused time
 - Prior time worked counts toward meeting 120 calendar day eligibility requirement

USE OF PAID SICK LEAVE

- Diagnosis, care, treatment, or recovery related to the employee's illness; (FMLA)
- To care for a family member during diagnosis, care, treatment, or recovery related to a family member's illness; (FMLA, NJFLA)

USE OF PAID SICK LEAVE

- For certain absences resulting from the employee or a family member being a victim of domestic or sexual violence; (FMLA, NJ-FLA, NJ-SAFE Act)
- To attend school-related conferences, meetings, or events, or to attend other meetings regarding care for the employee's child.

USE OF PAID SICK LEAVE

- Employee is unable to work because of a closure of the workplace, or the school or place of care of a child of the employee, **in connection with a public health emergency** or a determination that the presence of the employee or child in the community would jeopardize the health of others;

DEFINITION: FAMILY MEMBER

- ▶ 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

DEFINITION: FAMILY MEMBER

- ▶ 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

INCREMENTS OF USE

- ▶ **Can** establish increments of use
 - Largest increment no greater than the number of hours scheduled for work

NOTIFICATION

- ▶ Foreseeable -no greater than 7 days advance notice
- ▶ Otherwise, as soon as practicable
- ▶ May require documentation justifying the use of paid sick leave for three or more consecutive days

BLACK OUT DATES

- ▶ May prohibit use of earned and foreseeable sick leave on certain dates (must be in policy)
- ▶ Can require reasonable documentation if unforeseeable sick leave is used during those dates
 - Dr. Summeroff type note

EMPLOYER NOTICE AND POSTING

- ▶ Posting – conspicuously post notice issued by NJDOL
- ▶ Notice to employees
 - No later than 30 days after the date notification is issued (11/10/18)
 - At the time an employee is hired
 - Upon request by an employee

RECORDKEEPING

- ▶ **MUST** track sick leave hours earned and paid during each benefit year
 - Retention: 5 years
- ▶ Must keep for ALL employees – including Exempt

RETALIATION

- ▶ Statutory sick leave (40 hours), Act prohibits:
 - Disciplined for use of it
 - Counting its use as a violation of an attendance policy

RETALIATION

- ▶ Act prohibits “adverse action” within 90 days of the employee:
 - Filing a complaint alleging discrimination or retaliation under the Act
 - Informing any person about employer’s alleged discrimination or retaliation under the Act
 - Cooperating with an investigation or prosecution of alleged discrimination or retaliation
 - Opposing any policy, practice or act that employee in good faith believes constitutes discrimination or retaliation under the Act
 - Informing any person of their rights under the Act

PENALTIES

- ▶ Private right of civil action – Superior Court
- ▶ Actual damages suffered as a result of any violation plus liquidate damages
 - Back pay/lost wages
- ▶ Costs and attorneys fees.
- ▶ NJ-DOL = enforcement
 - Authority to investigate, hold hearings and impose penalties:
 - Up to \$250 for first violation
 - \$500 for each subsequent violation

ESTABLISHING COMPLIANCE

- ▶ REVIEW:
 - Employee handbooks/Personnel Manuals
 - Collective Bargaining Agreements
 - Individual contracts
 - Local ordinances
 - Notices and postings
 - Practices – both exempt and non-exempt (This may require interviewing managers and supervisors in various functions.)
 - Review time keeping programs/vendor abilities
 - Record keeping

ESTABLISHING COMPLIANCE

- ▶ Update policies
 - Determine the benefit year
 - Identify blackout dates
 - Determine buy-back vs. carry over
- ▶ Include union waiver provisions within CBA
- ▶ Distribute notices
- ▶ Start capturing working hours for all employees
- ▶ Educate managers/supervisors

Interaction With Other Laws

- ▶ NJ Paid Family Leave Insurance
- ▶ Worker Compensation (waiting week)
- ▶ NJ Disability (waiting week)
- ▶ Over 25 employees
 - NJ Safe Act
- ▶ Over 50 employees
 - NJFLA
 - FMLA
- ▶ NJLAD; EEOC and ADA considerations
 - NJ Pregnant Workers Fairness Act (NJLAD)

NEW JERSEY'S WORKPLACE DEMOCRACY ACT

UNDERPINNINGS

- ▶ **Public sector only**
 - NLRA preempts private sector application
- ▶ **Applies to “employee organization”**
 - Homegrown units
- ▶ **Grants access to and ability to communicate with employees represented by the organization**

ACCESS BY EXCLUSIVE REP

- ▶ At the employer’s location to:
- ▶ Meet with employees during the workday to investigate and discuss grievances, work related complaints, “other” workplace issues
- ▶ Conduct worksite meetings during non-working hours regarding matters related to the duties of the exclusive rep
- ▶ Meet with unit members regarding above and internal union matters
 - Must not interfere with operations
 - Does not include political action meetings
 - Must pay for maintenance, security, or other related costs no otherwise incurred.

ACCESS BY EXCLUSIVE REP

- ▶ Meet with new hires for 30 to 120 minutes on the employer’s dime:
 - Within 30 days of hire,
 - During new hire orientation
 - Or if no orientation during individual or group meetings.
- ▶ Use of employer email to communicate with unit members regarding workplace and union matters

DISCLOSURE REQUIREMENT

- ▶ **Within 10 days of a new hire into the unit, must provide excel file (or other agreed upon format) containing:**
 - Name
 - Job title
 - Worksite location
 - Home address
 - Work, home, personal cellular telephone numbers
 - Date of hire
 - Work and home email addresses on file
- ▶ **January 1, 2019 and every 120 calendar days thereafter: must provide the same info for all unit members**
- ▶ **Specifically exempt from OPRA**

NEGOTIATION REQUIREMENT

- ▶ **Upon request by exclusive rep:**
 - **Must negotiate in good faith contract provisions memorializing implementation**
 - **Must commence negotiations within 10 days from the date of the request**
 - Existing contract is not a bar
 - **Must be an enforceable part of the grievance procedure including binding arbitration**
 - **If unable to agree within 30 calendar days:**
 - Either may file a petition with PERC
 - PERC will assign an arbitrator

PROHIBITIONS

- ▶ Can not encourage resignation, relinquishment of membership or revocation of authority to deduct fees
- ▶ Can not encourage or discourage joining, forming or assisting an employee organization
- ▶ Violation constitutes an unfair practice
 - PERC process

NEGOTIATIONS UNIT

- ▶ **Units now automatically include all part time employees performing unit work**
- ▶ Exclusions:
 - Typical PERC exclusions: managerial, confidentials, elected officials, board members
 - Casual employees: average of fewer than 4 hours per week over a period of 90 days.

MEMBERSHIP & JANUS OPINION

- ▶ **Workplace Democracy Act limits employee's right to withdraw (10 days after their anniversary, effective 30 days after anniversary)**
 - **Not a requirement of negotiations provision**
- ▶ Supreme Court Janus v. AFSCME Decision
- ▶ Recent litigation filed to declare the WPDA limits on withdrawing from membership as invalid under Janus.

NEW JERSEY'S EQUAL PAY ACT

BACKGROUND

- ▶ Substantial increase in pay discrimination claims
 - Greater awareness
 - Shameless
 - EEOC added questions on charge intake about pay discrimination
 - OFCCP focusing on compensation audits

OVERVIEW

- ▶ Effective July 1, 2018
- ▶ **Equal pay for “substantially similar work”**
- ▶ **Amends the NJ Law Against Discrimination (LAD)**
 - All employers are covered under LAD
- ▶ **Applies to ALL protected classes**

PROTECTED CLASSES

- ▶ **Race, color, sex, religion, creed, national origin, ancestry, age,** affectional and sexual orientation, gender identity or expression, **political, domestic partnership, civil union or marital status, pregnancy** (including pregnancy related medical condition), childbirth, **physical or mental disability,** atypical hereditary or cellular blood trait, genetic information, **citizenship, and veteran status.**

PROHIBITS

- ▶ Paying any employee-protected class member
- ▶ **A rate of compensation, including benefits**, which is less than that paid non-protected class members
- ▶ For **substantially similar work**, when viewed as a composite of skill, effort and responsibility.

VIOLATIONS

- ▶ Violation when compensation is paid in furtherance of an unlawful practice
 - Each paycheck is evidence of a new and/or continuing violation
 - Each paycheck restarts the statute of limitations

PROHIBITIONS & RECOVERY

- ▶ Cannot lower compensation to remedy discriminatory conduct
- ▶ Back pay for up to 6 years
 - Contract SOL; not Tort SOL
 - LAD: Tort based, 2 years
 - Equitable exception: continuing violations

EXCEPTIONS

- ▶ **Bona Fide factors include:**
 - **Training**
 - **Education**
 - **Experience**
 - **Quantity or Quality of Production**

ANTI-RETAILIATION

- ▶ **Can not retaliate:**
 - **For discussing with, or disclosing to any other employee or former employee, counsel and/or government entity relevant information concerning compensation and benefits**

ANTI-RETAILIATION

- ▶ **Cannot require a waiver or agreement not to make requests or disclosures or change any protections provided by LAD**

RECOVERY

- ▶ Treble damages
- ▶ Punitive damages
- ▶ Costs and attorney's fees

ACTION PLAN

- ▶ Review compensation practices
 - "Stipends"
 - Roll-ins, Pensions, Separations
 - Pay Equity
- ▶ Update job descriptions
- ▶ Create/Update Org Chart
 - Add in compensation for each position
 - Do not include names, gender etc.
- ▶ Compare compensation to positions and determine whether disparity exists for "substantially similar work"

ACTION PLAN

- ▶ Promptly remedy any potential violations
- ▶ Review annual pay increases
 - Make sure any difference is expressly explained/tied to KSAs
- ▶ Document basis for pay decisions
- ▶ Train managers/supervisors
 - Scope of rights
 - Anti-retaliation
- ▶ Don't base starting salary on prior salary
 - Base decision on job related factors

ETHICS UPDATE

- ▶ **Martin v. Local Finance Board, 2018 N.J. AGEN LEXIS 3 (1/2/18 Office of Administrative Law)**
- ▶ **O'Hern v. Local Finance Board, 2018 N.J. AGEN LEXIS 250 (4/23/18 Office of Administrative Law)**
- ▶ **I/M/O Kubs and Rutherford, 2018 N.J. CSC LEXIS 417 (5/25/18 Office of Administrative Law -Civil Service Commission)**

THANK YOU!

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Labor/Employment Matters

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