

New Jersey Municipalities Catch Paid Sick Leave Fever

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Unlike many countries, the United States does not require private employers to offer paid sick leave. However, several states and an increasing number of local governments have recently passed paid sick leave laws. New Jersey has followed this trend by leading the nation in the number of municipalities (thirteen) that have passed local paid sick leave ordinances. Each ordinance is relatively similar, with nearly identical ordinances having been passed in Bloomfield, East Orange, Elizabeth, Irvington, Montclair, Morristown, Newark, Passaic, Paterson, Plainfield, and Trenton (collectively the "Eleven Ordinances"). Jersey City's and New Brunswick's ordinances are similar, but differences result in Jersey City's ordinance being more favorable to employees, and New Brunswick's ordinance being more favorable to employers.

New Jersey employers, and the attorneys who counsel them, must be cognizant of these local ordinances. In particular, employers operating multiple locations must keep a careful eye on the actions of their municipal government, as competing ordinances may require the adoption of different policies for different groups of employees across the State.

Bloomfield, East Orange, Elizabeth, Irvington, Montclair, Morristown, Newark, Passaic, Paterson, Plainfield, & Trenton:

Entitlement: All eleven ordinances require private employers to provide paid sick leave to all employees who work over 80 hours a year. Employers with 10 or more employees must provide 40 hours of paid sick leave, whereas smaller employers (nine or fewer employees) must provide at least 24 hours of paid sick leave. The one exception is employers in the areas of childcare, home healthcare, and food service, in which 40 hours of paid sick time must be provided, regardless of the number of employees. Sick leave can be used for an employee's own mental or physical illness, injury or health condition, or to care for a family member. Importantly, despite the ordinances providing employees with an entitlement to paid sick leave, employers are not required to compensate employees for accrued unused sick leave during an employee's separation.

Union Exceptions: The ordinances' requirements do not apply to employees who are members of construction unions and covered by a collective bargaining agreement ("CBA") (this exception does not apply in Irvington). For all other unionized employees, the ordinances are not applicable until expiration of the current CBA, at which time the ordinances will apply, unless expressly waived in a new CBA.

Accrual: Employees accrue paid sick time at a rate of one hour for every 30 hours worked, which begins on the first day of employment. Employees who are exempt from being paid overtime are assumed to work 40 hours per week, unless their normal workweek is less than 40 hours. Employees may not utilize paid sick time until the 90th day of their employment (except in Plainfield, where paid sick leave cannot be used until the 100th day). Further, if there is a separation of employment, but the employee is rehired within six months, previously accrued unused sick time is reinstated and can be

used immediately. The ordinances also allow employees to carry over unused accrued sick time to the following year (up to 40 hours per year). However, an employer may limit an employee's use of unpaid sick time to 40 hours per year, regardless of the number of hours carried over.

Employee Verification/Notice: An employer may request the employee confirm in writing that the leave was used for an authorized purpose. Further, when paid sick time is used for three or more consecutive days, an employer may require "reasonable documentation," which includes signed documentation from a health care professional indicating that the sick day was necessary. However, the employer cannot require documentation regarding the nature of the illness. Where the need to utilize paid sick time is foreseeable, an employer may require "reasonable advance notice" of the intention to utilize the leave. However, an employee is never required to give notice over seven days in advance. Where the need to use leave is not foreseeable, an employer may still require an employee provide notice before the beginning of the employee's work shift or workday, except in cases of emergencies, in which the employer may require notice "as soon as practicable."

Employer Notice: Employers must give written notice that describes the employees' rights under the ordinances to each employee at the commencement of employment (or as soon as practical for all current employees). Employers are also required to display a poster in a conspicuous and accessible place in each of its workplaces. The notice and poster must be in English and any primary language spoken by 10% of its employees.

Anti-Retaliation/Violations: Employers are prohibited from retaliating against employees based on an employee's use of paid sick leave. Retaliation includes threatening, disciplining, discharging, suspending, demoting, reducing hours, or any other adverse action taken against an employee. Employers who violate any provision of the ordinances are subject to a fine (which varies depending on the municipality) and payment of restitution of the inappropriately withheld paid sick time. Each municipality has empowered one of its municipal agencies to implement and enforce the ordinance. The ordinances also authorize this agency and the employee to file a complaint in municipal court.

Jersey City: There are several substantive differences between the Jersey City ordinance and the Eleven Ordinances. In addition to the requirement that smaller employers (less than 10 employees) provide up to 24 hours of paid sick leave, the Jersey City ordinance requires these employers also provide an additional 16 hours of unpaid sick time. The Jersey City ordinance also provides greater protections to employees against retaliation. Notably, any adverse employment action taken against an employee within 90 days of when an employee engages in protected conduct (this does not include utilizing paid sick leave) creates a "rebuttable presumption" of unlawful retaliatory conduct. In addition, the Jersey City ordinance reduces employee's notice requirement to "as soon as practical" (compared to requiring "reasonable advance notice"). The last substantive distinction is that the employer may be subject to a fine for failure to provide written notice to an employee of his/her rights (up to \$100 per employee) and for not displaying the requisite poster (up to \$500 per poster), which is in addition to fines for violating the ordinance (which is found in the other ordinances).

New Brunswick: There are significant substantive differences between the New Brunswick ordinance and the Eleven Ordinances. Notably, while the other ordinances require an employee work only 80 hours in a year to be eligible, New Brunswick mandates an employee work at least 20 hours per week to qualify for paid sick time. It also does not apply to any employer with fewer than five full-time equivalent employees. Accrual of paid sick time also is more favorable to employers, as employees accrue only one hour of leave for every 35 hours of work (compared to 30 hours). The amount of paid sick leave provided by larger employers (10 or more employees) also differs. Notably, full-time employees (working 35 hours or more per week) must be provided with 40 hours of paid sick leave (similar to the Eleven Ordinances). However, part-time employees (employees who work between 20–30 hours per week) are provided only 24 hours of paid sick leave (compared to the 40 hours provided to these employees under the Eleven Ordinances). Further, new employees cannot use their accrued sick leave benefit until the 120th day of employment (compared to 90 days). Finally, unlike the other ordinances (in which no statute of limitations is provided), the New Brunswick ordinance requires all complaints be filed within 180 days of the alleged violation.

For employers, keeping up with this ever-changing area can be daunting. Due to the strain on employers to comply with varying municipal paid sick leave ordinances, the Legislature is considering legislation that would provide uniformity throughout the State. The bills fall into two camps. The first requires universal paid sick leave throughout the State. (See Senate Bill 799 and Assembly Bill 2785). Both bills require employees accrue one hour of leave for every 30 hours worked. However, the Senate bill (third reprint) only applies to employers with greater than 10 employees, whereas the Assembly bill applies to all employers. The second camp of bills prevents local governments from passing ordinances requiring private employers to provide paid sick leave and declares all current ordinances null and void. (See Senate Bill 488 and Assembly Bills 2433 and 2875).

Requiring paid sick leave be provided in some municipalities in the state, while not in others, has presented employers with significant administrative hurdles and left many questions unanswered. Among these unanswered questions is how employees who work in multiple offices or from home are to be treated. There is also a lack of clarity in the interplay between the ordinances and the unpaid leave entitlements under the Family Medical Leave Act and the New Jersey Family Leave Act (it is the authors' opinion that the leaves could run concurrently, but employers must have clear policies outlining the interplay for employees). In addition, employers must now determine whether their policies meet the ordinance's requirements and determine how to lawfully track the number of hours employees accrue. Because municipal courts are charged with addressing these and other issues, even identical ordinances are unlikely to be applied uniformly. Unfortunately, until the Legislature passes statewide legislation, employers are left with little guidance and increased administrative costs in attempting to comply with each ordinance's requirements. Paid leave is certainly the trend, however. Therefore, employers must remain vigilant in this area and should consult with legal counsel in crafting and implementing leave policies.