

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Earned Sick Leave Rules

Proposed New Rules: N.J.A.C. 12:69

Authorized By: Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Authority: P.L. 2018, c. 10, Section 11.

Calendar Reference: See Summary below for explanation of exception to the calendar requirement.

Proposal Number: PRN 2018-095.

A **public hearing** on the proposed new rules will be held on the following date at the following location:

Tuesday, November 13, 2018

10:00 A.M.

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by December 14, 2018 to:

David Fish, Executive Director

Office of Legal and Regulatory Services

NJ Department of Labor and Workforce Development

PO Box 110

13th Floor

Trenton, New Jersey 08625-0110

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The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing new rules at N.J.A.C. 12:69 in order to implement P.L. 2018, c. 10 (the Act), which requires every employer to provide earned sick leave to each employee working for the employer in New Jersey.

Proposed new N.J.A.C. 12:69-1 would contain general provisions, including the purpose and scope of the chapter and sections that address violations, administrative penalties and fees, interest, hearings, the Act's prohibition against retaliatory personnel actions and discrimination, the keeping of certain employee records in relation to earned sick leave and the making of those records available for inspection to the Department, notification to employees of their rights under the Act and this chapter, the method for determining independent contractor status under the Act and this chapter, and the process for filing a complaint alleging a violation of the Act or this chapter with the Division of Wage and Hour Compliance within the Department of Labor and Workforce Development.

Proposed new N.J.A.C. 12:69-2 would define the words and terms used throughout the chapter.

Proposed new N.J.A.C. 12:69-3 would describe the manner in which employers are to provide earned sick leave to employees under the Act, including the accrual or advancing, use, payment, payout, and carry-over of earned sick leave. The subchapter would also address the Act's requirements regarding establishment by the employer of a benefit year, notification to the Commissioner of a proposed change in benefit year, and the circumstances under which the Commissioner may impose a benefit year upon the employer.

As the Department has provided a 60-day comment period for this notice of proposal, the notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative social impact might be felt would derive in the first instance from the Act and not the proposed new rules. As to the remainder of the proposed new rules, it is the Department's belief that they would have a positive social impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. Furthermore, the proposed new rules would have a positive social impact in that they would establish a process for the assessment of penalties and the hearing of appeals where a violation of the Act has occurred, thereby enabling the Department to effectively enforce the law. Finally, the proposed new rules would have an overall positive social impact in that they would

provide a regulatory framework for the Department's administration of an Act that has as its purpose, helping working people and their families confront the daily struggle of balancing responsibilities at work and at home. In that the Act's guarantee of earned sick leave to the State's workers will provide workers and their families with a greater degree of economic security and peace of mind, the proposed new rules would have the same social impact.

Economic Impact

As indicated in the Social Impact above, the vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative economic impact might be felt by employers would derive in the first instance from the Act, not the proposed new rules. That portion of the proposed new rules that addresses the levying of penalties by the Department against those who violate the Act would, of course, have a negative economic impact upon those employers who run afoul of the Act. As to the remainder of the proposed new rules, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act, among other important issues. It is the Department's hope that minimizing confusion as to these issues will avoid costs for those impacted by the Act of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to

the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Jobs Impact

The Department does not anticipate that the proposed new rules would result in either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would impact the agriculture industry in precisely the same way that it would impact any other industry which consists of employers, as that term is defined within the Act; which is to say, covered agriculture industry employers would be required to comply with the Act and the proposed new rules, as would any other covered employer.

Regulatory Flexibility Analysis

The proposed new rules would require all covered employers, including those that are small businesses, as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., to provide employees with earned sick leave in the amounts and in the manner prescribed in the Act and would prohibit covered employers from taking any retaliatory personnel action or discriminating against an employee because the employee requests or uses earned sick leave or because the employee files a complaint with the Department alleging that the employer violated any provision of the Act or this chapter, or because the employee informs any other person of his or her rights under the Act or this chapter. These rights and responsibilities are expressly dictated by the Act. The Act defines the term “employer” to mean any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, or other entity that employs employees in New Jersey, including temporary help service firms. The Act defines the term “employee” to mean an individual engaged in service

for compensation to an employer in the business of the employer who performs that service in New Jersey and excludes from the definition of “employee,” individuals engaged in service for compensation in the construction industry under contract pursuant to a collective bargaining agreement, per diem health care employees, and public employees who are provided with sick leave at full pay under any law or rule of New Jersey other than the Act. The proposed new rules would contain the same definitions of the terms “employer” and “employee.” The Department has no discretion to deviate from these definitions under the Act. One area where the Department does have discretion under the Act and where the proposed new rules would expressly take into consideration the size of an employer, is that they include the size of the employer among the factors to be considered when determining what constitutes an appropriate administrative penalty for a particular violation.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing or on the affordability of housing in the State. The basis for this finding is that the proposed new rules pertain to an employer’s obligation to provide earned sick leave to its employees in New Jersey.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain to an employer’s obligation to provide earned sick leave to its employees in New Jersey. The proposed new rules do not pertain to housing

production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 69

EARNED SICK LEAVE RULES

SUBCHAPTER 1. GENERAL PROVISIONS

12:69-1.1 Purpose and scope

(a) The purpose of this chapter is to implement P.L. 2018, c. 10 (the Act), which requires that every employer shall provide earned sick leave to each employee working for the employer in New Jersey and which establishes the manner in which such sick leave shall be accrued or advanced, used, paid, paid out, and carried over.

(b) The chapter is applicable to all employers and employees.

(c) An employer shall be in compliance with the Act if the employer provides each employee with paid time off (PTO), which may include leave types other than sick, such as personal leave and vacation leave, so long as the PTO meets or exceeds all of the requirements in the Act; that is, an employee must be permitted to use all of the PTO for any of the purposes set forth at N.J.A.C. 12:69-3.5(a), and the employer's PTO program

must meet or exceed the other requirements of the Act and this chapter, including, but not limited to:

1. Accrual in accordance with N.J.A.C. 12:69-3.3 or advancing in accordance with N.J.A.C. 12:69-3.4;
2. Use in accordance with N.J.A.C. 12:69-3.5;
3. Payment in accordance with N.J.A.C. 12:69-3.6; and
4. Payout and carry-over in accordance with N.J.A.C. 12:69-3.7.

(d) No provision of this chapter shall be construed as:

1. Requiring an employer to reduce, or justifying an employer in reducing, rights or benefits provided by the employer pursuant to an employer policy or collective bargaining agreement that are more favorable to employees than those required by the Act or this chapter or which provide rights or benefits to employees not covered by the Act or this chapter;
2. Preventing or prohibiting the employer from agreeing, through a collective bargaining agreement or employer policy, to provide rights or benefits that are more favorable to employees than those required by the Act or this chapter or to provide rights or benefits to employees not covered by this Act or this chapter;
3. Prohibiting an employer from establishing a policy whereby an employee may donate unused accrued earned sick leave to another employee or other employees; or
4. Superseding any law providing collective bargaining rights for employees, or in any way reducing, diminishing, or adversely affecting those collective bargaining rights, or in any way reducing, diminishing, or affecting the obligations of employers under those laws.

(e) Employees or employee representatives may waive the rights or benefits provided under the Act or this chapter during the negotiation of a collective bargaining agreement.

(f) With respect to employees covered by a collective bargaining agreement in effect on October 29, 2018, no provision of the Act or this chapter shall apply until the stated expiration of the collective bargaining agreement.

12:69-1.2 Violations

(a) A violation of the Act and this chapter shall occur when an employer:

1. Willfully hinders or delays the Commissioner in the performance of the duties of the Commissioner in the enforcement of this chapter;
2. Fails to make, keep, and preserve any record required to be so made, kept, and preserved under the provisions of this chapter;
3. Falsifies any such record;
4. Refuses to make any such record accessible to the Commissioner upon demand;
5. Refuses to furnish to the Commissioner, on demand, a sworn statement of such record or any other information required for the proper enforcement of this chapter;
6. Fails to provide earned sick leave to each employee in the amount and in the manner prescribed in the Act or this chapter;
7. Takes a retaliatory personnel action or discriminates against an employee in violation of the Act or this chapter; or

8. Otherwise violates any provision of the Act or this chapter or of any order issued under the Act or this chapter.

(b) Any employer who knowingly and willfully violates any provision of the Act or this chapter shall be guilty of a disorderly person offense and shall, upon conviction for a first violation, be punished by a fine of not less than \$100.00, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 90, days or by both the fine and imprisonment.

(c) The employer shall, upon conviction for a second or subsequent violation, be punished by a fine of not less than \$500.00, nor more than \$1,000, or by imprisonment for not less than 10, nor more than 100, days or by both the fine and imprisonment.

(d) Each week, in any day of which an employee is not provided earned sick leave in the amount and in the manner prescribed in the Act or this chapter and each employee so affected, shall constitute a separate offense.

12:69-1.3 Administrative penalties

(a) As an alternative to, or in addition to, any other sanctions provided for in N.J.A.C. 12:69-1.2, when the Commissioner finds that an employer has violated the Act or this chapter, the Commissioner is authorized to assess and collect an administrative penalty in the amounts that follow:

1. First violation – not more than \$250.00; and
2. Second and subsequent violation – not less than \$250.00, nor more than \$500.00.

(b) No administrative penalty shall be levied pursuant to this section, unless the Commissioner provides the alleged violator with notification by certified mail of the violation and the amount of the penalty and an opportunity to request a formal hearing. A request for a formal hearing must be received within 15 business days following the receipt of the notice.

1. If a hearing is not requested, the notice shall become the final order upon the expiration of the 15-business-day period following receipt of the notice.

2. If a hearing is requested, the Commissioner shall issue a final order upon such hearing and a finding that a violation has occurred.

3. All wages due, fees, and penalties shall be paid within 30 days of the date of the final order. Failure to pay such wages due, fees, and/or penalties shall result in a judgment being obtained in a court of competent jurisdiction.

4. All payments shall be made payable to the Commissioner of Labor and Workforce Development, Wage and Hour Trust Fund, in the form of a certified check or money order, or such other form that is suitable to the Commissioner.

(c) In assessing an administrative penalty pursuant to this chapter, the Commissioner shall consider the following factors, where applicable, in determining what constitutes an appropriate penalty for the particular violation(s):

1. The seriousness of the violation;
2. The past history of previous violations by the employer;
3. The good faith of the employer;
4. The size of the employer's business; and

5. Any other factors that the Commissioner deems to be appropriate in determining the penalty assessed.

12:69-1.4 Administrative fees

(a) The Commissioner is authorized to supervise the payment of amounts due to employees under this chapter, and the employer may be required to make these payments to the Commissioner to be held in a special account in trust for the employee and earned on order of the Commissioner to the employee or employees affected.

(b) The employer shall also pay the Commissioner an administrative fee on all payments of gross amounts due to employees under the Act.

(c) A schedule of the administrative fees follows:

1. First violation – 10 percent of the amount of any payment made to the Commissioner pursuant to this chapter;

2. Second violation – 18 percent of the amount of any payment made to the Commissioner pursuant to this chapter; and

3. Third and subsequent violations – 25 percent of the amount of any payment made to the Commissioner pursuant to this chapter.

12:69-1.5 Interest

(a) When the Commissioner makes an award of back pay, he or she may also award interest in the following situations:

1. When an employer has unreasonably delayed compliance with an order of the Commissioner to pay wages owned to an employee;

2. Where an equitable remedy is required in order to recover the loss of the present value of the money retained by the employer over an extensive period of time;
or

3. Where the Commissioner finds sufficient cause based on the particular case.
(b) Where applicable, interest deemed owed to an employee shall be calculated at the annual rate as set forth in New Jersey Court Rules, N.J.S.A. 4:42-11.

12:69-1.6 Hearings

(a) When the Commissioner assesses an administrative penalty under N.J.A.C. 12:69-1.3, the employer shall have the right to a hearing under (b) below.

(b) No administrative penalty shall be levied pursuant to this subchapter unless the Commissioner provides the alleged violator with notification by certified mail of the violation and the amount of the penalty and an opportunity to request a formal hearing. A request for a formal hearing must be received within 15 business days following receipt of the notice. All hearings shall be held pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedures Rules, N.J.A.C. 1:1.

(c) All requests for hearing will be reviewed by the Division of Wage and Hour Compliance to determine if the dispute may be resolved at an informal settlement conference. If the review indicates that an informal settlement conference is warranted, such conference will be scheduled. If a settlement cannot be reached, the case will be forwarded to the Office of Administrative Law for a formal hearing.

(d) The Commissioner shall make the final decision of the Department.

(e) Appeals of the final decision of the Commissioner shall be made to the Appellate Division of the New Jersey Superior Court.

(f) If the employer, or a designated representative of the employer, fails to appear at a requested hearing, the Commissioner may, for good cause shown, reschedule the hearing.

(g) If the Commissioner does not authorize such a hearing to be rescheduled under (f) above, then the Commissioner shall issue a final agency determination.

(h) Payment of the penalty is due when a final agency determination is issued.

(i) Upon final order, the penalty imposed may be recovered, with costs, in a summary proceeding commenced by the Commissioner pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq.

12:69-1.7 Retaliatory personnel actions and discrimination prohibited

(a) No employer shall take any retaliatory personnel action or discriminate against an employee because the employee requests or uses earned sick leave in accordance with the Act or this chapter or the employer's own earned sick leave policy, or because the employee files a complaint with the Department alleging that the employer violated any provision of the Act or this chapter, or because the employee informs any other person of his or her rights under the Act or this chapter.

(b) No employer shall count legitimate use of earned sick leave under the Act or this chapter as an absence that may result in the employee being subject to discipline, discharge, demotion, suspension, loss or reduction of pay, or any other adverse action. This includes "no fault" attendance policies, whereby an employee receives a point or a

demerit for any absence, no matter the reason, and are subjected to discipline or are foreclosed from a promotional opportunity(ies) after the accumulation of a certain number of points or demerits.

(c) There shall be a rebuttable presumption of an unlawful retaliatory personnel action whenever an employer takes adverse action against an employee within 90 days of when that employee either:

1. Files a complaint with the Department or a court alleging a violation of any provision of this section;

2. Informs any person about an employer's alleged violation of this section;

3. Cooperates with the Department or other persons in the investigation or prosecution of any alleged violation of this section;

4. Opposes any policy, practice, or act that is prohibited under this section; or

5. Informs any person of his or her rights under this section.

(d) The protections of this section shall apply to any person who mistakenly, but in good faith, alleges a violation of the Act or this chapter.

(e) An employer who violates any provision of this section shall be guilty of a disorderly person offense and shall, upon conviction therefor, be fined not less than \$100.00, nor more than \$1,000. Such employer shall be required as a condition of such judgment of conviction, to offer reinstatement of employment to any discharged employee and to correct any retaliatory personnel action, and also to pay to any such employee in full, all wages lost as a result of such discharge or retaliatory personnel action, under penalty of contempt proceedings for failure to comply with such requirement.

(f) As an alternative to, or in addition to, any sanctions imposed under (e) above, the Commissioner is authorized under P.L. 2018, c. 10, Section 5, and N.J.S.A. 34:11-56a24 to assess and collect administrative penalties as provided for in N.J.A.C. 12:69-1.3.

12:69-1.8 Records

(a) An employer shall retain for a period of five years, all records documenting hours worked by employees and earned sick leave accrued/advanced (N.J.A.C. 12:69-3.3 and 3.4), used (N.J.A.C. 12:69-3.5), paid (N.J.A.C. 12:69-3.6), and paid out and carried over (N.J.A.C. 12:69-3.7) by/to employees.

1. The employer is not required to maintain (or, therefore, retain) records documenting hours worked with regard to an employee who is exempt under either the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., or the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and for whom the employer either advances earned sick leave under N.J.A.C. 12:69-3.4, or for whom, under N.J.A.C. 12:69-3.3(c), the employer chooses to presume solely for the purpose of calculating earned sick leave accrual that the employee works 40 hours per week.

(b) The records described in (a) above shall be kept at the place of employment or in a central office in New Jersey and shall be open to inspection by the Commissioner at any reasonable time.

(c) If an employee files a claim that the employer has failed to properly accrue, advance, permit the use of, pay, payout, or carry-over earned sick leave under the Act or this chapter and the employer has not maintained or retained adequate records

documenting hours worked by the employee and earned sick leave accrued/advanced, used, paid, paid out, and carried over by/to the employee or has not allowed the Commissioner access to the records, it shall be presumed, absent clear and convincing evidence to the contrary, that the employer has violated the Act.

(d) Any information an employer possesses regarding the health of an employee or any family member of the employee or domestic or sexual violence affecting an employee or employee's family member shall be treated as confidential and not disclosed, except to the affected employee or with the written permission of the affected employee.

12:69-1.9 Notification to employees

(a) Each employer shall conspicuously post in a place or places accessible to all employees in each of the employer's workplaces, the notification issued by the Commissioner, which shall be posted by the Commissioner on the Department's website and made available in hard copy upon request, and which shall include the amount of earned sick leave to which employees are entitled, the terms of its use, and remedies provide in the Act and this chapter to employees, if an employer fails to provide the required earned sick leave or retaliates against an employee for exercising his or her rights under the Act or this chapter.

(b) Each employer shall provide each employee a written copy of the notification referred to in (a) above:

1. Not later than 30 days after the form of the notification is issued by the Commissioner;

2. At the time of the employee's hiring, if the employee is hired after the issuance of the notification by the Commissioner; and

3. Upon the first request of an employee.

(c) In the event that an employer has an internet site or intranet site for exclusive use by its employees and to which all employees have access, posting of the notification referred to in (a) above on the employer's internet site or intranet site shall satisfy the conspicuous posting requirement set forth in (a) above.

(d) Providing to an employee via e-mail the notification referred to in (a) above shall satisfy the requirement in (b) above, that the employer provide each employee a written copy of the notification.

12:69-1.10 Independent contractor status

The criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test," and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether an individual is an employee or an independent contractor under the Act and this chapter.

12:69-1.11 Processing of complaints

Any complaint filed with the Division that alleges a violation of the Act or this chapter shall be processed in the same manner as a complaint filed with the Division under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and the rules promulgated thereunder.

12:69-1.12 Applicability of N.J.S.A. 34:1A-1.11 et seq.

P.L. 2018, c. 10, Section 5, states that any failure of an employer to make available or pay earned sick leave as required by the Act, or any other violation of the Act, shall be regarded as a failure to meet the wage payment requirements of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq. Consequently, a violation of the Act would be considered a violation of a “State wage, benefit and tax law,” as that term is defined within N.J.S.A. 34:1A-1.11, thereby empowering the Commissioner on the basis of a violation of the Act, under the provisions of N.J.S.A. 34:1A-1.11 et seq., and the conditions set forth therein, to issue, where appropriate, a written determination directing an agency to suspend or permanently revoke any one or more licenses that are held by the employer or a successor firm.

SUBCHAPTER 2. DEFINITIONS

12:69-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

“Act” means P.L. 2018, c. 10.

“Benefit year” means the period of 12 consecutive months established by an employer in which all employees shall accrue and use earned sick leave.

“Certified Domestic Violence Specialist” means a person who has fulfilled the requirements of certification as a Domestic Violence Specialist established by the New Jersey Association of Domestic Violence Professionals.

“Child” means a biological, adopted, or foster child, stepchild or legal ward of an employee, or child of a domestic partner or civil union partner of the employee.

“Civil union” means a civil union as defined in N.J.S.A. 37:1-29.

“Collective bargaining agreement” means an agreement between an employer and a labor union that regulates terms and conditions of employment.

“Commissioner” means the Commissioner of the Department of Labor and Workforce Development or his or her designee.

“Department” means the Department of Labor and Workforce Development.

“Designated domestic violence agency” means a county-wide organization with a primary purpose to provide services to victims of domestic violence, and which provides services that conform to the core domestic violence services profile as defined by the Division of Child Protection and Permanency in the Department of Children and Families and is under contract with that division for the express purpose of providing the services.

“Division” means the Division of Wage and Hour Compliance within the Department of Labor and Workforce Development.

“Domestic or sexual violence” means stalking, any sexually violent offense, as defined in N.J.S.A. 30:4-27.26, or domestic violence as defined in N.J.S.A. 2C:25-19 and 17:29B-16.

“Domestic partner” means a domestic partner as defined in N.J.S.A. 26:8A-3.

“Employee” means an individual engaged in service for compensation to an employer in the business of the employer who performs that service in New Jersey.

The term “employee” does not include the following:

1. An individual engaged in service for compensation in the construction industry under contract pursuant to a collective bargaining agreement;
2. A per diem health care employee; or
3. A public employee who is provided with sick leave at full pay pursuant to any other law or rule of New Jersey.

“Employer” means any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, or other entity that employs employees in New Jersey, including a temporary help service firm. The term “employer” does not include a public employer that is required to provide its employees with sick leave with full pay pursuant to any other law, rule, or regulation of New Jersey.

“Family member” means a 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, 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.

1. For the purpose of this definition, an individual whose “close association with the employee is the equivalent of a family relationship” shall include any person with whom the employee has a significant personal bond that is, or is like, a family relationship, regardless of biological or legal relationship.

“Health care professional” means any person licensed under Federal, State, or local law, or the laws of a foreign nation, to provide health care services, or any other person who has been authorized to provide health care by a licensed health care professional, including, but not limited to doctors, nurses, and emergency room personnel.

“Hours worked” means “hours worked,” as that phrase is defined within N.J.A.C. 12:56-5.

“Parent” means a biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or of the employee’s spouse, domestic partner, or civil union partner, or a person who stood in *loco parentis* of the employee or the employee’s spouse, domestic partner, or civil union partner when the employee, spouse, or partner was a minor child.

“Per diem health care employee” means any:

1. Health care professional licensed in New Jersey employed by a health care facility licensed by the New Jersey Department of Health;

2. Individual that is in the process of applying to the New Jersey Division of Consumer Affairs for a license to provide health care services, who is employed by a health care facility licensed by the New Jersey Department of Health; or

3. A first aid, rescue, or ambulance squad member employed by a hospital system, who:

i. Works on an as-needed basis to supplement a health care employee, or to replace or substitute for a temporarily absent health care employee;

ii. Works only when the employee indicates that the employee is available to work, and has no obligation to work when the employee does not indicate availability; and

iii. Either has:

(1) The opportunity for full-time or part-time employment in his or her scope of practice under that healthcare provider, which offers under the terms of employment earned time off benefits greater in length than provided under the Act; or

(2) Waived earned sick leave as provided under the Act under terms of employment for alternative benefits or consideration.

The term “per diem health care employee shall not include any individual who is certified as a homemaker-home health aide.

“Retaliatory personnel action” means denial of any right guaranteed under the Act and any threat, discharge (including a constructive discharge), suspension, demotion, unfavorable reassignment, refusal to promote, disciplinary action, sanction, reduction of work hours, reporting or threatening to report the actual or suspected immigrant status of an employee or the employee’s family, or any other adverse action against an employee.

“Sibling” means a biological, foster, or adopted sibling of an employee.

“Spouse” means a husband or wife.

“State minimum wage rate” means the minimum wage set forth at N.J.A.C. 12:56-3.1.

SUBCHAPTER 3. BENEFIT YEAR; EARNED SICK LEAVE ACCRUAL, USE AND PAYMENT

12:69-3.1 Benefit year: establishment; notification to Commissioner of proposed change; imposition by the Commissioner

(a) The employer shall establish a single benefit year for all employees.

(b) Once the employer has established a single benefit year for all employees under (a) above, in the event the employer proposes to change the benefit year, the employer shall provide notice to the Commissioner at least 30 calendar days prior to the proposed change.

(c) Notice under (b) above shall:

1. Be in writing;
2. Specify the existing benefit year;
3. Specify the proposed new benefit year;
4. Indicate the effective date of the new benefit year;
5. Indicate the reason for the change in benefit year; and
6. Include a current list of employees with corresponding contact information, including phone number and home address, and a corresponding history of accrual, use, payment, payout, and carry-over of earned sick leave for each employee for the preceding two benefit years.

(d) Where, based on an evaluation of the information contained in the notification provided under (c) above and any other information obtained by the Commissioner, the Commissioner determines that the employer is proposing a change to the benefit year at a time or in a way that would prevent the accrual or use of earned sick leave by an employee, the Commissioner shall impose a benefit year on the employer.

(e) Where a benefit year has been imposed by the Commissioner upon an employer under (d) above, the employer shall not be eligible to submit a subsequent notification of proposed change to the benefit year prior to one year from the date of the earlier notification.

(f) When the Commissioner imposes a benefit year upon an employer under (d) above, the employer shall have the right to file an appeal.

(g) An appeal under (f) above must be received by the Commissioner within 15 business days following receipt by the employer of notification of the imposed benefit year under (d) above.

(h) The Commissioner shall decide any appeal filed under (f) above on the written record or shall provide a hearing in accordance with N.J.A.C. 12:69-1.6.

12:69-3.2 Earned sick leave requirement

Each employer shall provide earned sick leave to each employee, using either the accrual method under N.J.A.C. 12:69-3.3 or the advancing method under N.J.A.C. 12:69-3.4, which leave shall be for use by the employee for the reasons set forth at, and in the manner prescribed under, N.J.A.C. 12:69-3.5, to be paid in the manner prescribed

under N.J.A.C. 12:69-3.6 and subject to the rules governing payout and carry-over at N.J.A.C. 12:69-3.7.

12:69-3.3 Earned sick leave; accrual

(a) For every 30 hours worked, the employee shall accrue one hour of earned sick leave.

(b) The employer shall not be required to permit the employee to accrue more than 40 hours of earned sick leave in any benefit year.

(c) Where the employer does not record hours worked for a particular employee because the employee is an exempt employee under either the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., or the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., the employer may either:

1. Record the actual hours worked for that employee for the purpose of calculating earned sick leave accrual; or

2. Presume, solely for the purpose of calculating earned sick leave accrual, that the employee works 40 hours per week.

(d) For an employee who commences employment on or before October 29, 2018, earned sick leave shall begin to accrue no later than October 29, 2018.

(e) For an employee who commences employment after October 29, 2018, earned sick leave shall begin to accrue on the date that the employment commences.

(f) Where an employee has been transferred to a separate division, entity, or location, but remains employed in New Jersey by the same employer, the employee shall retain

all earned sick leave that was accrued while working with the prior division, entity, or location.

(g) Where an employee is terminated, laid off, furloughed, or otherwise separated from employment with the employer and where the employee is reinstated or rehired in New Jersey within six months of the separation, any unused earned sick leave accrued by the employee prior to the separation shall be returned to the employee upon rehire or reinstatement.

(h) Where a successor employer takes the place of an existing employer, all employees of the predecessor employer shall retain all earned sick leave accrued while working for the predecessor employer.

1. There shall be a rebuttable presumption of successorship if the two parties (the predecessor firm and the successor firm) share two or more of the following capacities or characteristics:

- i. Performing similar work within the same geographical area;
- ii. Occupying the same premises;
- iii. Having the same telephone or fax number;
- iv. Having the same e-mail address or Internet website;
- v. Employing substantially the same work force, administrative employees, or both;
- vi. Utilizing the same tools, equipment, or facilities;
- vii. Employing, or engaging the services of, any person or persons involved in the direction or control of the other; or
- viii. Listing substantially the same work experience.

12:69-3.4 Earned sick leave; advancing

(a) Rather than use the accrual method under N.J.A.C. 12:69-3.3, an employer may, on the first day of the benefit year, provide the employee with no less than 40 hours of earned sick leave for use throughout the benefit year.

(b) Where an employee has been transferred to a separate division, entity, or location, but remains employed in New Jersey by the same employer, the employee shall retain all earned sick leave advanced while working with the prior division, entity, or location.

(c) Where an employee is terminated, laid off, furloughed, or otherwise separated from employment with the employer and where the employee is reinstated or rehired in New Jersey within six months of the separation, any unused earned sick leave advanced by the employee prior to the separation shall be returned to the employee upon rehire or reinstatement.

(d) Where a successor employer takes the place of an existing employer, all employees of the predecessor employer shall retain all earned sick leave advanced while working for the predecessor employer.

1. There shall be a rebuttable presumption of successorship if the two parties (the predecessor firm and the successor firm) share two or more of the capacities or characteristics listed at N.J.A.C. 12:69-3.3(h)1.

12:69-3.5 Earned sick leave; use

(a) An employer shall permit an employee to use earned sick leave for any of the following reasons:

1. Time needed for diagnosis, care, or treatment of, or recovery from, an employee's mental or physical illness, injury, or other adverse health condition, or for preventative medical care for the employee;

2. Time needed for the employee to aid or care for a family member of the employee during diagnosis, care, or treatment of, or recovery from, the family member's mental or physical illness, injury, or other adverse health condition, or during preventative medical care for the family member;

3. Absence necessary due to circumstances resulting from the employee, or a family member of the employee, being a victim of domestic or sexual violence, if the leave is to allow the employee to obtain for the employee or the family member; medical attention needed to recover from physical or psychological injury or disability caused by domestic or sexual violence; services from a designated domestic violence agency or other victim services organization; psychological or other counseling; relocation; or legal services, including obtaining a restraining order or preparing for, or participating in, any civil or criminal proceeding related to the domestic or sexual violence;

4. Time during which the employee is not able to work because of a closure of the employee's workplace, or the school or place of care of a child of the employee, by order of a public official due to an epidemic or other public health emergency, or because of the issuance by a public health authority of a determination that the presence in the community of the employee, or a member of the employee's family in need of care by the employee, would jeopardize the health of others; or

5. Time needed by the employee in connection with a child of the employee to attend a school-related conference, meeting, function, or other event requested or

required by a school administrator, teacher, or other professional staff member responsible for the child's education, or to attend a meeting regarding care provided to the child in connection with the child's health condition or disability.

(b) Except under (d) or (e) below, an employee shall not be eligible to use earned sick leave until February 26, 2019 (the 120th calendar day after October 29, 2018), or the 120th calendar day after the employee commences employment, whichever is later.

(c) Following the 120-calendar-day period set forth in (b) above, the employee shall be permitted to use earned sick leave immediately upon either accrual under N.J.A.C. 12:69-3.3 or the earned sick leave having been advanced to the employee under N.J.A.C. 12:69-3.4.

(d) Where the employee has accrued earned sick leave prior to October 29, 2018, he or she shall be eligible to use that earned sick leave prior to February 26, 2019 (the 120th calendar day after October 29, 2018).

(e) The employer may permit an employee to use earned sick leave prior to the 120-calendar-day period set forth in (b) above.

(f) Where the employee's need to use earned sick leave is foreseeable, the employer may require advance notice, not to exceed seven calendar days prior to the date the leave is to begin, of the employee's intention to use the leave and its expected duration.

1. For purposes of this subsection, the need to use earned sick leave shall be considered "foreseeable," when the employee is able to predict or know in advance that he or she will need to use earned sick leave, such as a scheduled doctor's visit, a regularly occurring medical treatment, or regularly scheduled therapy appointment.

(g) Where the employee's need to use earned sick leave is foreseeable, the employee shall make a reasonable effort to schedule the use of earned sick leave in a manner that does not unduly disrupt the operations of the employer.

1. For purposes of this subsection, the need to use earned sick leave shall be considered "foreseeable," when the employee is able to predict or know in advance that he or she will need to use earned sick leave, such as a scheduled doctor's visit, a regularly occurring medical treatment, or regularly scheduled therapy appointment.

(h) Where the employee's need to use earned sick leave is foreseeable, the employer may prohibit the employee from using earned sick leave on certain dates.

1. For purposes of this subsection, the need to use earned sick leave shall be considered "foreseeable," when the employee is able to predict or know in advance that he or she will need to use earned sick leave, such as a scheduled doctor's visit, a regularly occurring medical treatment, or regularly scheduled therapy appointment.

2. The "certain dates" on which the employer may prohibit employees from using foreseeable earned sick leave shall be limited to verifiable high-volume periods or special events, during which permitting the use of foreseeable earned sick leave would unduly disrupt the operations of the employer.

i. An example of a high-volume period would be, for an airline industry employer, the period during which they experience a predictable increase in customer activity (which is to say, flying) in and around a particular holiday, like Thanksgiving.

ii. An example of a special event would be, for a manufacturer of retail products, the day or week during which it is making a new product available for the first time (that is, a product launch).

3. The employer shall provide reasonable notice to its employees of those “certain dates” on which its employees are prohibited from using foreseeable earned sick leave.

(i) Where the employee’s need to use earned sick leave is not foreseeable, the employer may require an employee to provide notice as soon as practicable, of the employee’s intention to use the leave and its expected duration.

1. For purposes of this subsection, the need to use earned sick leave shall be considered “not foreseeable,” when an employee requires time to care for, or obtain medical treatment for, themselves or a family member that was not reasonably anticipated.

i. An example of a need to use earned sick leave that is “not foreseeable,” is when an employee wakes up in the morning with a fever and does not feel well enough to report for work that morning.

2. As a condition to requiring an employee to provide notice to the employer of the need to use earned sick leave that is not foreseeable, the employer must first notify the employee of this requirement. Where the employer has failed to so notify the employee, the employee must be permitted to use the “not foreseeable” earned sick leave without having provided the employer with any prior notice, practicable, or otherwise.

(j) Where the employee’s need to use earned sick leave is not foreseeable and the employee seeks to use such earned sick leave during any of the “certain dates” described in (h) above, or where the employee uses earned sick leave for three or more

consecutive days, the employer may require the employee to provide reasonable documentation that the leave is being taken for a permissible purpose under (a) above.

1. The term “reasonable documentation” shall have the following meanings under the following circumstances:

i. If the earned sick leave is sought by the employee under (a)1 or 2 above, “reasonable documentation” shall mean documentation signed by a health care professional who is treating the employee or the family member of the employee indicating the need for the leave and, if possible, the duration of the leave;

ii. If the earned sick leave is sought by the employee under (a)3 above, “reasonable documentation” shall mean medical documentation; a law enforcement agency record or report; a court order; documentation that the perpetrator of the domestic or sexual violence has been convicted of a domestic or sexual violence offense; certification from a certified Domestic Violence Specialist or a representative of a designated domestic violence agency or other victim services organization; or other documentation or certification provided by a social worker, counselor, member of the clergy, shelter worker, health care professional, attorney, or other professional who has assisted the employee or family member in dealing with the domestic or sexual violence;

iii. If the earned sick leave is sought by the employee under (a)4 above, “reasonable documentation” shall mean a copy of the order of the public official or the determination by the health authority;

iv. If the earned sick leave is sought by the employee under (a)5 above, “reasonable documentation” shall mean tangible proof of the school-related conference,

meeting, function, or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the education of the employee's child; or tangible proof of the meeting regarding care provided to the child of the employee in connection with the child's health conditions or disability.

(k) Except where an employer exercises its right, under the limited circumstances outlined in (j) above, to require the employee to provide reasonable documentation that the leave is being taken for a permissible purpose under (a) above, (that is, foreseeable earned sick leave during the "certain dates" described in (h) above, or requests for three or more days of earned sick leave), all requests by employees to use earned sick leave shall be treated by the employer as presumptively valid.

(l) Where an employee would be eligible to use earned sick leave under the Act and this chapter, the employee may, only with the employer's consent, choose to work additional hours to compensate for the hours of work missed, rather than use earned sick leave.

(m) Where an employee would be eligible to use earned sick leave under the Act and this chapter, the employer shall be prohibited from:

1. Requiring an employee to work additional hours to compensate for the hours of work missed;

2. Requiring an employee to use earned sick leave; or

3. Requiring an employee, as a condition to using earned sick leave, to search for or find a replacement worker to cover the hours during which the employee will be using earned sick leave.

(n) Where an employee has been transferred to a separate division, entity, or location, but remains employed by the same employer, and where, pursuant to N.J.A.C. 12:69-

3.3(f) or 3.4(b), the employee has retained all earned sick leave accrued or advanced while working with the prior division, entity, or location, the employee's entitlement to use the accrued or advanced earned sick leave shall not be adversely affected.

1. For example, if prior to a transfer to a separate division of the employer, the employee had worked for the employer for more than 120 calendar days, the employee would immediately upon the transfer be permitted to use his or her accrued or advanced earned sick leave and would not be required to wait 120 calendar days after the transfer had occurred to use his or her accrued or advanced earned sick leave.

(o) Where an employee is terminated, laid off, furloughed, or otherwise separated from employment with the employer, where the employee is reinstated or rehired within six months of the separation, and where pursuant to N.J.A.C. 12:69-3.3(g) or 3.4(c), any unused earned sick leave accrued or advanced by the employee prior to the separation has been returned to the employee upon rehire or reinstatement, the employee's entitlement to use the accrued or advanced earned sick leave shall not be adversely affected; which is to say, the employee shall be treated for the purpose of using his or her accrued or advanced earned sick leave as if there had been no break in employment.

(p) Where a successor employer takes the place of an existing employer, and where pursuant to N.J.A.C. 12:69-3.3(h) or 3.4(d), all employees of the predecessor employer have retained all earned sick leave accrued or advanced while working for the predecessor employer, the employee's entitlement to use accrued or advanced earned sick leave shall not be adversely affected.

1. For example, if prior to a transfer to a separate division of the employer, the employee had worked for the employer for more than 120 calendar days, the employee would immediately upon the transfer be permitted to use his or her accrued or advanced earned sick leave and would not be required to wait 120 calendar days after the transfer had occurred to use his or her accrued or advanced earned sick leave.

(q) An employer may choose the increments in which its employees may use earned sick leave, provided that the largest increment of earned sick leave that an employee may be required to use for each shift for which earned sick leave is used shall be the number of hours the employee was scheduled to work during that shift.

(r) Nothing in this chapter shall be construed to require an employer to permit the use of earned sick leave for a purpose other than one identified in (a) above.

(s) Nothing in this chapter shall be construed to prohibit an employer from taking disciplinary action against an employee who uses earned sick leave for a purpose other than one identified in (a) above.

12:69-3.6 Earned sick leave; payment

(a) The employer shall pay the employee for earned sick leave at the same rate of pay as the employee normally earns.

(b) The taking of earned sick leave by the employee shall not result in any diminution in the employee's benefits; in other words, for the purpose of employee benefits, when an employee takes earned sick leave, it shall be as if the employee worked those hours.

(c) Under no circumstances during a period of earned sick leave may an employer pay an employee less than the State minimum wage rate.

(d) Where an employee has two or more different jobs for the same employer or if an employee's rate of pay fluctuates for the same job, the rate of pay for earned sick leave shall be the amount that the employee is regularly paid for each hour of work as determined by adding together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave and dividing that sum by the total hours of work during that seven-day period.

(e) Where an employee is paid by commission, whether base wage plus commission or commission only, the employer must pay the employee during earned sick leave an hourly rate that is the base wage or the State minimum wage rate, whichever is greater.

(f) When an employee is paid on a piecework basis, whether base wage plus piecework or piecework only, to calculate the employee's rate of pay for earned sick leave, the employer shall add together the employee's total earnings for the seven most recent workdays when the employee did not take leave and divide that sum by the number of hours the employee spent performing the work during workdays.

1. When doing this calculation, the employer shall consider workdays to mean the days or parts of days the employee worked.

(g) Where an employee uses earned sick leave during hours that would have been overtime if worked, the employer is not required to pay the overtime rate of pay.

(h) When the employee's pay includes the value of gratuities, food, or lodging, to calculate the employee's rate of pay for earned sick leave, the employer shall add together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave and divide that sum by the number of hours the employee spent performing the work during workdays.

1. Where the employee's pay includes the value of gratuities, food, or lodging and it is not feasible to determine the employee's exact hourly wage for earned sick leave purposes using the method described in (h) above, the employer shall be deemed to have fulfilled the requirement of this section regarding the payment of earned sick leave if the rate of pay for earned sick leave is based on the agreed hourly wage, but in no event shall earned sick leave be paid at a rate less than the State minimum wage rate.

(i) Where the amount of a bonus is wholly within the discretion of the employer, the employer is not required to include the bonus when determining the employee's rate of pay for earned sick leave purposes.

12:69-3.7 Payout and carry-over of earned sick leave

(a) Where the employer provides earned sick leave to its employees using the accrual method under N.J.A.C. 12:69-3.3, the following applies relative to payout and carry-over of earned sick leave:

1. In the final month of the employer's benefit year, the employer may provide an offer to an employee for payout of unused earned sick leave.

2. The employee may accept the employer's payout offer within 10 calendar days from the date the offer was made.

3. If the employee does not accept the payout offer within 10 calendar days from the date of the employer's offer, the employee is deemed to have declined the employer's offer.

4. If the employee agrees to receive a payout, the employee shall choose either a payout for the full amount of unused earned sick leave or for 50 percent of the amount of unused earned sick leave.

5. If the employee declines a payout of unused earned sick leave or agrees to a payout of 50 percent of the amount of unused earned sick leave, the employee shall be entitled to carry forward to the following benefit year any unused earned sick leave, except that the employer shall not be required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave.

6. If the employee agrees to a payout of the full amount of unused earned sick leave, the employee shall not be entitled to carry forward to the following benefit year any unused earned sick leave.

7. The payout amount shall be based on the rate of pay that the employee is earning at the time of the payout.

i. Where an employee has two or more different jobs for the same employer or if an employee's rate of pay fluctuates for the same job, the rate of pay for the payout of unused earned sick leave shall be the amount that the employee is regularly paid for each hour of work as determined by adding together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave and dividing that sum by the total hours of work during that seven-day period.

ii. Where an employee is paid by commission, whether base wage plus commission or commission only, the rate of pay for the payout of unused earned sick

leave shall be an hourly rate that is the base wage or the State minimum wage rate, whichever is greater.

iii. When an employee is paid on a piecework basis, whether base wage plus piecework or piecework only, to calculate the employee's rate of pay for payout of unused earned sick leave, the employer shall add together the employee's total earnings for the seven most recent workdays when the employee did not take leave and divide that sum by the number of hours the employee spent performing the work during workdays. When doing this calculation, the employer shall consider workdays to mean the days or parts of days the employee worked.

(b) Where the employer provides earned sick leave to its employees using the advancing method under N.J.A.C. 12:69-3.4, the following applies relative to payout and carry-over of earned sick leave:

1. In the final month of the employer's benefit year, the employer shall either provide to the employee a payout for the full amount of unused earned sick leave or permit the employee to carry-over any unused earned sick leave, except that the employer shall not be required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave.

2. If the employer provides to the employee a payout for the full amount of unused earned sick leave, the employer may not use the accrual method with respect to that employee during the next benefit year.

(c) Unless an employer policy or collective bargaining agreement provides for the payout of unused earned sick leave upon an employee's termination, resignation,

retirement, or other separation from employment, an employee shall not be entitled to a payout of unused earned sick leave upon separation from employment.