

# Earned Sick Leave FAQs

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## I. GENERAL QUESTIONS

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### **1. When do employers have to start complying with the Earned Sick Leave Law?**

October 29, 2018

### **2. How is the term “employer” defined within the Earned Sick Leave Law?**

"Employer" means any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the State, including a temporary help service firm.

In the case of a temporary help service firm placing an employee with client firms, earned sick leave shall accrue on the basis of the total time worked on assignment with the temporary help service firm, not separately for each client firm to which the employee is assigned.

### **3. Are any employers exempt from coverage under the Earned Sick Leave Law?**

Yes. Public employers are exempt from the Earned Sick Leave Law for employees who are provided with sick leave at full pay pursuant to any law or rule of New Jersey other than the Earned Sick Leave Law (for example, N.J.S.A. 11A and N.J.A.C. 4A, civil service).

### **4. If some of a public employer’s employees are provided with sick leave at full pay under a law or rule of New Jersey other than the Earned Sick Leave Law and other employees of the public employer are *not* provided with sick leave at full pay pursuant to a law or rule of New Jersey other than the Earned Sick Leave Law, does the employer receive a blanket exemption from coverage under the Earned Sick Leave Law for all its employees?**

No. The public employer does not get a blanket exemption from coverage under the Earned Sick Leave Law for all of its employees, because some or even most of its employees are provided with sick leave at full pay under a law or rule of New Jersey other than the Earned Sick Leave Law. The *employees* of the public employer who are provided with sick leave at full pay under another law or rule of New Jersey are exempt from coverage under the Earned Sick Leave Law;

however, the employees of the public employer who are *not* provided with sick leave at full pay under another law or rule of New Jersey are covered under the Earned Sick Leave Law and must be permitted to accrue/be advanced, use, be paid, carry-over or receive payout of earned sick leave in accordance with the requirements of the Earned Sick Leave Law.

**5. Are nonprofit employers exempt from coverage under the Earned Sick Leave Law?**

No. Nonprofit employers are not exempt from coverage under the Earned Sick Leave Law. They must comply.

**6. Is there any minimum number of employees that an employer must have in order for its employees to be entitled to earned sick leave under the New Jersey Earned Sick Leave Law? For example, does the Earned Sick Leave Law only apply to those who work for an employer with more than 5 employees?**

No. There is no minimum number of employees that an employer must have in order for its employees to be entitled to earned sick leave under the Earned Sick Leave Law. Employers of every size are covered.

**7. Must an employer based outside of New Jersey provide earned sick leave to employees who work in New Jersey?**

Yes. Out-of-state employers with employees in New Jersey must provide earned sick leave to its employees who work in New Jersey. See below at Section II, questions 4. and 5. for more information.

**8. What is a “temporary help service firm?”**

The term “temporary help service firm” is defined within New Jersey law (specifically, N.J.S.A. 34:8-43) to mean “any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm’s customers in the handling of the customers’ temporary, excess or special workloads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries worker’s compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm’s customers.”

**9. When a temporary help service firm places a temporary employee with a client firm, who is responsible for ensuring compliance with the Earned Sick Leave law for that temporary employee?**

The temporary help service firm is the employer and is solely responsible for compliance with all of the provisions of the Earned Sick Leave Law relative to the temporary employee.

**10. Other than the FAQs, what informational resources are available for employees and employers regarding the requirements of and compliance with the Earned Sick Leave Law?**

Following is a link to a rule proposal published by the Department:

[https://nj.gov/labor/forms\\_pdfs/Roles/Legal/FinalAdminDecisions/2018/prn2018095.pdf](https://nj.gov/labor/forms_pdfs/Roles/Legal/FinalAdminDecisions/2018/prn2018095.pdf). For now, the rule text contained within the proposal may serve as guidance to employees and employers as to the Department’s interpretation of the Earned Sick Law. Once the Department

adopts final rules on the subject of earned sick leave, those rules will have the force and effect of law and will become binding. If you are unable to find the answer(s) you are seeking within these FAQs, please consult the proposed rules.

For more information, please contact the Department's Division of Wage and Hour Compliance by telephone at 609-292-2305 or by email at [wage.hour@dol.nj.gov](mailto:wage.hour@dol.nj.gov).

**11. May an employer have a different benefit year for each employee based on that employee's anniversary date?**

No. The employer is required to establish a single benefit year for all employees.

**12. The Earned Sick Leave Law requires an employer to provide notice to the Commissioner (of the Department of Labor and Workforce Development) at least 30 calendar days prior to any proposed change in the benefit year. When the law goes into effect, is the employer also required to provide notice to the Commissioner of the initial establishment of a benefit year?**

No. An employer need not provide notice to the Commissioner of the initial establishment of a benefit year. Notice to the Commissioner is required only for proposed changes in the benefit year.

## **II. EMPLOYEES COVERED/NOT COVERED BY THE LAW**

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**1. How is the term "employee" defined in the Earned Sick Leave law?**

"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.

**2. Which employees are not covered by the Earned Sick Leave Law?**

Under the Earned Sick Leave Law, "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 under any other law or rule of New Jersey.

**3. Does the Earned Sick Leave Law apply to part-time and seasonal employees?**

Yes. The Earned Sick Leave Law makes no distinction for coverage between part-time or seasonal employees and full-time employees. All employees are covered.

**4. Does the Earned Sick Leave Law cover an employee who works for an employer that is located outside of New Jersey, but who performs all of his or her work in New Jersey?**

Yes.

**5. Is an employee who works both within New Jersey and outside of New Jersey entitled to receive earned sick leave?**

It depends. The answer to the question depends largely on how much time the employee spends working in New Jersey. If the employee routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey, then the employee is entitled to receive earned sick leave under the Earned Sick Leave Law. This is the test applied by the Division on Civil Rights in its enforcement of the New Jersey Family Leave Act. The Department anticipates adopting the same approach through formal rulemaking.

**6. When the employee who works both within New Jersey and outside of New Jersey is entitled to receive earned sick leave, because he or she routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey, is the employee entitled to all of the earned sick leave required under the law, or may the employer prorate the employee's earned sick leave entitlement based on the percentage of work performed in New Jersey?**

Once it is determined that the employee is covered under the Earned Sick Leave Law, he or she must receive all of the earned sick leave to which one is entitled under the law. The employee would not be permitted to prorate the employee's earned sick leave entitlement based on the percentage of work performed in New Jersey.

**7. Do the same principles as expressed in 6. above relative to employees who work both within New Jersey and outside of New Jersey apply to a telecommuter who works both from home in New Jersey and for his or her employer on site in another state?**

Yes. The telecommuter who routinely performs some work in New Jersey is entitled to full earned sick leave coverage under the Earned Sick Leave Law so long as the employee's base of operations or the place from which such work is directed and controlled is in New Jersey. The telecommuter who performs all of his or her work in New Jersey will always be entitled to full earned sick leave coverage under the law.

**8. Are independent contractors covered by the Earned Sick Leave Law?**

No. Workers properly classified as independent contractors are not covered.

The test to determine whether a worker is an employee (and therefore covered under the Earned Sick Leave Law) or an independent contractor (and therefore not covered) will be the "ABC" test found within New Jersey's Unemployment Compensation Law.

**9. If an employee believes his or her employer misclassified him or her as an independent contractor and he or she is entitled to earned sick leave, can he or she file a complaint with the Department of Labor?**

Yes. Any employee who believes he or she has been misclassified as an independent contractor may file a complaint with the Division of Wage and Hour Compliance within the Department of Labor and Workforce Development. The Division of Wage and Hour Compliance will investigate and make a determination as to whether or not the individual is covered by the Earned Sick Leave Law. For more information regarding the filing of complaints, see Section XII below.

**10. Are supervisors and managers covered by the Earned Sick Leave Law?**

Yes.

**11. Does an employer have to provide earned sick leave to employees who also work for other, unrelated employers?**

Yes. Assuming that the employee is eligible to accrue earned sick leave from each employer, each employer must separately provide the employee with earned sick leave.

### **III. RIGHT TO EARNED SICK LEAVE – HOURS, ACCRUAL**

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**1. When do employees begin to accrue earned sick leave?**

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.

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

**2. How much earned sick leave do employers have to give employees?**

The employer is not required to permit the employee to accrue more than 40 hours of earned sick leave in any benefit year.

**3. How does earned sick leave accrual work under the Earned Sick Leave Law?**

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

**4. How does an employer calculate the accrual of earned sick leave for an employee whose hours of work the employer does not ordinarily track, because the employee is exempt from overtime requirements under either the Federal Fair Labor Standards Act (FLSA) or the New Jersey Wage and Hour Law (NJWHL)?**

Where the employer does not ordinarily record the hours worked by an employee because the employee is exempt from overtime requirements under either the FLSA or the NJWHL, the employer may either, (a) begin recording the actual hours worked for that employee for the purpose of calculating earned sick leave accrual, or (b) presume, solely for the purpose of calculating earned sick leave accrual, that the employee works 40 hours per week.

**5. If the employer opts to use the accrual method, must an employee work 30 hours in a given week in order to accrue one hour of earned sick leave, or is the employee entitled to the accrual of one hour of earned sick leave for every 30 hours worked, including when those 30 hours are worked over multiple workweeks? For example, if an employee works 10 hours one week and 20 hours the next, is he or she entitled to accrual of one hour of earned sick leave or no hours of earned sick leave?**

An employee is entitled to accrue one hour of earned sick leave for every 30 hours worked, regardless of whether those 30 hours are worked during a single workweek or over the course of

multiple workweeks. Thus, under the example cited above, the employee who worked 10 hours one week and 20 hours the next would accrue one hour of earned sick leave.

**6. May an employer have a policy that advances the employee 40 hours of earned sick leave at the beginning of each benefit year to avoid calculating accruals?**

Yes. An employer may have a policy that provides an employee with 40 hours of earned sick leave at the beginning of each benefit year. This option may be attractive to employers who prefer not to track the accrual of earned sick leave for each covered employee.

**7. May an employer advance earned sick leave to a part-time employee in an amount less than 40 hours based on the number of hours that the employer anticipates the part-time employee will work during the upcoming benefit year?**

Yes. At the beginning of the benefit year, an employer may advance a part-time employee the amount of earned sick leave he or she would accrue at the rate of one hour of earned sick leave for every 30 hours worked based on the hours the employer anticipates the employee will work during the upcoming benefit year. However, if the employer advances the part-time employee fewer than 40 hours of earned sick leave, the employer still must track the employee's hours worked and the employee's accrual of earned sick leave during the benefit year, because a part-time employee may work more hours than anticipated.

In the event that the employee does, in fact, work more hours than was anticipated, the employer must allow the employee to accrue earned sick leave at the rate of one hour for every 30 hours worked until the total amount of advanced earned sick leave, plus the amount of accrued earned sick leave reaches the maximum 40 hours for the benefit year. An employee who is advanced less than 40 hours of earned sick leave in a benefit year must be permitted to use up to 40 hours of earned sick leave in the benefit year if he or she has accrued it. An employer who advances an employee fewer than 40 hours of earned sick leave must permit the employee to carry over unused earned sick leave up to the maximum of 40 hours.

**8. May an employer prorate advanced earned sick leave for the remainder of the benefit year if an employee commences employment during a benefit year?**

Yes. An employer may prorate advanced earned sick leave for the remainder of the benefit year if an employee commences employment during a benefit year, so long as the employer tracks the hours that the employee actually works during the remainder of the benefit year and the amount of resulting earned sick leave accrual, so that in the event the employee works more hours than anticipated, the employer will have sufficient information to allow for the addition of accrued earned sick leave to the already advanced earned sick leave up to the maximum of 40 hours. To avoid tracking accruals, the employer would need to advance the full 40 hours of earned sick leave.

**9. May an employer advance 40 hours of earned sick leave to its full-time employees, but use the accrual method for its part-time employees?**

Yes. The employer does have that option.

**10. May an employer have a policy that permits employees to donate unused earned sick leave to other employees?**

Yes. An employer may have a policy that allows employees to donate unused earned sick leave to other employees, so long as the policy is voluntary.

**11. For an employee of a temporary help service firm, does his or her earned sick leave accrue separately for each client firm to which the temporary employee is assigned?**

No. The temporary employee's earned sick leave accrues on the basis of the total time he or she has worked with the temporary help service firm.

**12. Do employees who leave and return (seasonal, rehires, etc.) get to keep their accrued earned sick leave?**

If the employee is rehired within six months, the employer must reinstate previously accrued earned sick leave.

**13. If an employee is reinstated by an employer within six months of his or her separation from employment with that employer, must the employee wait 120 days after resuming employment with the employer to begin using accrued earned sick leave?**

No. If an employee is rehired within six months of separating from an employer, upon rehire the employer shall credit toward the new 120-day waiting period the total number of calendar days worked by the employee prior to the separation.

**14. What does the Earned Sick Leave Law require of employers who rehire employees after a break in employment of more than six months?**

If the employee's break in employment is more than six months, the Earned Sick Leave Law does not require the employer to reinstate unused earned sick leave. The employee would have a zero balance of accrued sick leave on the first day of reemployment and would not be eligible to use earned sick leave for 120 days after recommencing employment with the employer.

**15. Where an employee has been transferred to a separate division, entity, or location, but remains employed in New Jersey by the same employer, is the employee entitled to retain all earned sick leave that was accrued while working with the prior division, entity, or at the prior location?**

Yes. The employee gets to keep and can use all previously accrued earned sick leave.

**16. Where one employer takes the place of another employer, do the employees retain all earned sick leave accrued while working for the first employer?**

Where the new employer is the "successor" of the former employer, all employees will retain their earned sick leave accrued while working for the former employer. The new employer is presumed to be the "successor" of the former employer if the two share two or more of the following capacities or characteristics:

1. Performing similar work within the same geographical area;

2. Occupying the same premises;
3. Having the same telephone or fax number;
4. Having the same e-mail address or internet website;
5. Employing substantially the same workforce, administrative employees, or both;
6. Utilizing the same tools, equipment, or facilities;
7. Employing, or engaging the services of, any person or persons involved in the direction or control of the other; or
8. Listing substantially the same work experience.

**17. Do employers have to payout unused earned sick leave to employees who leave the employer?**

No. If an employee resigns, retires, is terminated, or is otherwise separated from employment, an employer is not required to payout unused earned sick leave to the employee.

**18. Can employers give employees more earned sick leave than the amount required by law?**

Yes. Employers may provide more generous leave.

## **IV. USE OF SICK LEAVE**

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**1. How much earned sick leave must an employer permit an employee to use?**

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

**2. May an employer discipline an employee who uses earned sick leave for an impermissible purpose?**

Yes. An employer may take disciplinary action against an employee who uses earned sick leave for purposes other than those provided for under the law.

Note: Employers may only require medical documentation where the employee uses earned sick leave for three or more consecutive days or where the employee's need to use earned sick leave is not foreseeable and the employee seeks to use such earned sick leave during a blackout period. For more information on blackout periods, see below, questions 18. and 19. later within this section.

**3. For what reasons can an employee use earned sick leave?**

The full explanation of the reasons for which an employer must permit an employee to use earned sick leave may be found within the Department rule proposal on page 29, at proposed new N.J.A.C. 12:69-3.5(a). You may use the following link to access the Department rule proposal:

[https://nj.gov/labor/forms\\_pdfs/Roles/Legal/FinalAdminDecisions/2018/prn2018095.pdf](https://nj.gov/labor/forms_pdfs/Roles/Legal/FinalAdminDecisions/2018/prn2018095.pdf).

Following is a simplified list of the reasons for which an employer must permit an employee to use earned sick leave:



- Time needed for diagnosis, care, or treatment of an employee’s mental or physical illness, injury, or other adverse health condition, or for preventative medical care for the employee.
- 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.
- Absence necessary due to circumstances resulting from the employee, or a family member of the employee, being the victim of domestic or sexual violence.
- 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, due to a public health emergency
- 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 the school, or to attend a meeting regarding care provided to the child in connection with the child’s condition or disability.

#### **4. Who is considered a family member under the Earned Sick Leave Law?**

The Earned Sick Leave Law recognizes the following as an employee’s family member:

- Child of the employee (biological, adopted, or foster child, step child or legal ward of an employee, or child of a domestic partner or civil union partner of the employee)
- Grandchild of the employee
- Sibling of the employee
- Spouse of the employee
- Domestic partner of the employee
- Civil union partner of the employee
- Parent of the employee (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)
- Grandparent of the employee
- Spouse, domestic partner, or civil union partner of a parent or grandparent of the employee
- Sibling of a spouse, domestic partner, or civil union partner of the employee
- Any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship

Note: For the purpose of the definition of “family member,” an individual whose “close association with the employee is 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.

#### **5. May an employee use earned sick leave for doctor, dentist, or eye doctor appointments?**

Yes.

**6. What is “preventive medical care?”**

Preventive medical care typically is routine health care that includes screenings, checkups, and patient counseling to prevent illnesses, disease, or other health problems. For examples of preventive care for adults, women, and children, go to HealthCare.gov, a federal government website: <https://www.healthcare.gov/what-are-my-preventive-care-benefits/>.

**7. May employees use earned sick leave for the health care of adult children?**

Yes.

**8. May employees use earned sick leave following the birth of a child or the placement of a new adoptive or foster child?**

It depends. An employee may use earned sick leave during any period of sickness or disability after she gives birth. An employee may also use earned sick leave to care for a family member during any period of sickness or disability after the family member gives birth. Employees may use earned sick leave to care for a child in need of medical diagnosis, care, or treatment for an illness, injury, or health condition, or preventive medical care. **Employees may not use earned sick leave to bond with a newborn or newly adopted or fostered child.**

Employees may be entitled to take time off from work for “bonding” purposes under federal or state laws. Currently, the federal [Family Medical Leave Act \(FMLA\)](#) and the [New Jersey Family Leave Act \(NJFLA\)](#) permit certain employees to take unpaid leave for the purpose of bonding with a newborn or newly adopted child. Also, under the New Jersey Temporary Disability Benefits Law, employees may apply to the Department of Labor and Workforce Development for Family Leave Insurance (FLI) Benefits during a period of leave from work to bond with a newborn or newly adopted child. For more information on FMLA, go to [dol.gov](http://dol.gov) and search “Family & Medical Leave.” For more information regarding the NJFLA go to <https://www.nj.gov/oag/dcr/downloads/fact-FLA.pdf>. For more information regarding FLI go to <https://www.nj.gov/labor/fli/fliindex.html>.

**9. Who decides how much earned sick leave an employee may use?**

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 by the employer 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.

**10. If an employee gets sick in the middle of a scheduled vacation, may the employee use earned sick leave?**

No. The employee may not claim this time as earned sick leave because the employee was not scheduled to work during the vacation.

**11. May employees use sick leave during overtime that they were required to work?**

Yes. An employer must allow an employee to use earned sick leave for any overtime hours that the employee was scheduled to work.

**12. May an employee work additional hours instead of using earned sick leave?**

Yes, but only with the consent of the employer. An employer cannot require an employee to work additional hours as makeup for earned sick leave.

**13. May an employer require an employee who wants to use earned sick leave to find a replacement employee for the missed hours?**

No.

**14. May an employer require an employee to telecommute or work from home instead of taking earned sick leave?**

No. An employer may not require an employee to work from home or telecommute instead of taking earned sick leave. But an employer may offer the employee the options of working from home or telecommuting. If an employee voluntarily agrees to work from home or telecommute, the employee would retain the earned sick leave that he or she has accrued.

**15. May an employer require employees to provide advance notice of the need to use earned sick leave?**

Yes. An employer may require an employee to provide advance notice of the need to use earned sick leave that is foreseeable. Such notice is not to exceed seven calendar days prior to the date the earned sick leave is to begin and must include notice of the intention to use the leave and its expected duration.

If the reason for the leave is not foreseeable an employer may require an employee to give notice of the intention to use the leave as soon as practicable, but the employer may require such notice from the employee only if the employer has notified the employee of this requirement. Where the employer has failed to so notify the employee, the employee must be permitted to use not foreseeable earned sick leave without having provided the employer with prior notice, practicable, or otherwise.

**16. What is a foreseeable use of sick leave?**

A foreseeable use of sick leave occurs when the employee is able to predict or know in advance that he or she will need to use sick leave, such as a scheduled doctor's visit or a regular psychotherapy appointment.

**17. What is an unforeseeable use of sick leave?**

An unforeseeable need for sick leave occurs when an employee requires time to care for, or obtain medical treatment for, themselves or a family member that was not reasonably anticipated. 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. That is an unforeseeable need for sick leave.

**18. May the employer establish blackout periods when an employee may not use earned sick leave?**

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. The "certain dates" on which the employer may prohibit employees from using foreseeable earned sick leave are 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.

**19. Must the employer provide notice to the employee of blackout dates?**

Yes. The employer must provide reasonable notice to its employees of blackout dates on which its employees are prohibited from using foreseeable earned sick leave. Although the Earned Sick Leave Law does not expressly require that this notice be in writing, it would be advisable for an employer to provide the notice in writing so that in the event of an investigation by the Department, the employer will have evidence of the notice having been provided.

**20. May an employer require an employee to provide documentation of the need for earned sick leave?**

Yes, but only 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 blackout dates designed by the employer, or where the employee uses earned sick leave for three or more consecutive days, and the documentation required must be "reasonable documentation."

The term "reasonable documentation" has different meanings depending on the circumstances. For example, where the leave is due to the employee's health condition or the health condition of a family member, "reasonable documentation" means documentation signed by a health care professional who is treating the employee or the family member indicating the need for the leave and, if possible, the duration of the leave; whereas when the leave is due to time needed in connection with a child of the employee to attend a school-related conference, meeting, function or other event, "reasonable documentation" means tangible proof of the school-related conference, meeting or function, or other event.

**21. Does an employer have to keep medical information about employees confidential?**

Yes. 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 must be treated as confidential and not disclosed except to the affected employee or with the written permission of the affected employee.

**22. Where a part-time employee is scheduled to work during a particular week on Tuesday, Thursday and Friday, but generally works on a flexible schedule where his or her hours may vary from week to week in response to the organization's needs and where the employee is given considerable discretion in determining exactly when he works so long as his tasks are completed, if that employee feels ill on Tuesday morning and informs his supervisor that he will be unavailable that day, but he feels better the next day and does his planned work on Wednesday, Thursday and Friday, assuming that the employee has sufficient accrued earned sick leave, must the employee be paid earned sick leave for the hours not worked on Tuesday?**

Yes. The employee must be paid his or her earned sick leave for the hours missed on Tuesday due to his or her illness; that is, unless both the employer and employee agree that the employee will work the additional hours on Wednesday to compensate for the hours of work missed, rather than use earned sick leave. Under no circumstances is the employer permitted to require

(without the employee's consent) that he or she will work additional hours to compensate for the hours of work missed.

**23. In order for an employee to use earned sick leave due to circumstances resulting from domestic or sexual violence, does the employee have to be the victim of domestic or sexual violence?**

No. An employee may use earned sick leave not only due to circumstances resulting from the employee being a victim of domestic violence, but also due to circumstances resulting from a *family member* of the employee being a victim of domestic violence. Specifically, the employee must be permitted by his or her employer to use earned sick leave if the leave is to allow the employee to obtain for him or herself or a 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.

**24. May an employee use earned sick leave in connection with an appointment at his or her child's school if the appointment is unrelated to the health of the child and if the employee is not the child's mother?**

Yes. Earned sick leave may be used by an employee in connection with a child of the employee, whether or not the employee is the child's mother, to attend a school-related conference, meeting, function, or other event 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.

## **V. HOW EARNED SICK LEAVE IS PAID**

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**1. How much does an employer have to pay an employee for earned sick leave?**

The employer is required to pay the employee for earned sick leave at the same rate of pay as the employee normally earns.

**2. How much does an employer pay an employee for earned sick leave when the employee has two or more different jobs for the same employer or an employee's rate of pay fluctuates for the same job?**

When the employee has two or more different jobs for the same employer or an employee's rate of pay fluctuates for the same job, the rate of pay for earned sick leave must be the amount that the employee is regularly paid for each hour of work as determined by adding together the employee's total earnings (not including any 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.

**3. How does an employer pay an employee for earned sick leave when the employee is paid by commission?**

When the 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.

**4. How does an employer pay an employee for earned sick leave when the employee is paid on a piecework basis?**

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 must 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.

**5. If an employee uses earned sick leave during hours that would have been overtime if worked, does the employer have to pay the overtime rate of pay?**

No. Employers are not required to pay the overtime rate of pay for sick leave used.

**6. How much does an employer have to pay an employee for paid sick leave if the employee's pay includes gratuities?**

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 (not including any 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 employees spent performing the work during workdays. Where it is not feasible to determine the employee's exact hourly rate for earned sick leave purposes using the method described above, the employer will be deemed to have paid the earned sick leave at an appropriate rate 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.

**7. Does the employer have to consider the employee's bonus in calculating the employee's rate of pay for earned sick leave?**

No. If the amount of a bonus is wholly within the discretion of the employer, then the employer is not required to count the bonus in determining the employee's rate of pay for earned sick leave purposes.

**8. How should employers determine the amount of earned sick leave used and required to be paid for employees who routinely have jobs, assignments, projects, or shifts of varying or indeterminate lengths?**

For work or shifts of an indeterminate length (e.g. shift until closing or a job that lasts until the required work is completed), employers should base the hours of earned sick leave used and paid on the hours worked by a replacement employee for the same shift. If there is no replacement employee, the hours of earned sick leave should be based on the hours worked by the employee or a similarly situated employee in the same or similar shift in the past.

**9. May an employer deduct money from an employee’s wages to cover the cost of earned sick leave?**

No. An employer that is required to provide earned sick leave may not require an employee to pay for all or part of that earned sick leave.

**VI. CARRY-OVER AND PAYOUT OF EARNED SICK LEAVE**

**1. How much earned sick leave must an employer permit an employee to carry over from one benefit year to the next?**

The employer may not be required to permit an employee to carry over more than 40 hours of unused earned sick leave from one benefit year to the next.

**2. If a new employee begins work when there are fewer than 120 days left in the benefit year, must the employer carry over the employee’s accrued earned sick leave into the next benefit year?**

Yes. If a new employee begins work when there are fewer than 120 days left in the benefit year, the employer must carry over the employee’s accrued earned sick leave into the next benefit year. After 120 days, the employee must be permitted to use his or her accrued earned sick leave, including those days accrued during the previous benefit year and carried over to the current benefit year.

**3. May an employer pay the employee for earned unused sick leave at the end of a benefit year instead of allowing the employee to carry it over?**

Yes. An employer may choose—but is not required—to pay an employee for unused earned sick leave at the end of the calendar year.

**4. May an employee agree with an employer to be paid for earned sick leave on an as-accrued basis instead of only at the end of the calendar year?**

No. The law only provides the option to employers of choosing to pay out unused earned sick leave in the final month of the employer’s benefit year.

**5. What is the advantage to the employee of carrying over earned sick leave?**

When unused earned sick leave is carried over into a new benefit year, an employee is able to use it right away instead of waiting to accrue new earned sick leave.

**6. If the carry over of earned sick leave from one benefit year to the next results in the accumulation of an earned sick leave balance of more than 40 hours in a benefit year, is the employer required to permit the employee to use more than 40 hours of earned sick leave in a benefit year? For example, if the employer advances the employee 40 hours of earned sick leave in Year 1; the employee uses 20 hours of earned sick leave in Year 1; the employee carries over 20 hours of unused earned sick leave from Year 1 to Year 2; the employee is advanced 40 hours of earned sick leave at the beginning of Year 2, resulting in a Year 2 starting balance of 60 hours of earned sick leave; is the employer required to permit the employee to use 60 hours of earned sick leave in Year 2?**

No. Under the express terms of the Earned Sick Leave Law, the employer is never required to permit the employee to use more than 40 hours of earned sick leave in any benefit year. That

said, the Earned Sick Leave Law also permits employers to agree through a collective bargaining agreement or employer policy, to provide rights or benefits that are more favorable to employees than those required by the Earned Sick Leave Law. In the event an employer determines that it would be in the best interests of both the employer and its employees to permit employees to use more than 40 hours of earned sick leave in a benefit year during which the employee has accumulated more than 40 hours of earned sick leave through a combination of carryover of earned sick leave from the prior year and advancing earned sick leave or accrual of earned sick leave in the current benefit year, then the employer may permit employees to use more than 40 hours of earned sick leave in a benefit year.

**7. Is an employer ever required to pay out earned sick leave at the end of a benefit year?**

No. Under both the accrual method and advancing method, the option of offering a payout of unused earned sick leave at the end of a benefit year is entirely within the discretion of the employer. Specifically, where the employer provides earned sick leave to its employee using the accrual method, the employer (at his or her discretion) may provide an offer to the employee for payout of unused earned sick leave. Once that offer has been made, the employee may choose either a payout of the full amount of unused earned sick leave or a payout of 50 percent of the amount of unused earned sick leave. Where the employer provides earned sick leave to its employee using the advancing method, the employer (at his or her own discretion) may choose either to provide the employee a payout of the full amount of unused earned sick leave or permit the employee to carry over any unused earned sick leave. Again, under both the accrual method and advancing method, the employer decides whether to offer a payout of unused earned sick leave and may choose not to do so.

**8. Where an employer is in a seasonal business, where he or she employs part-time employees exclusively, and where those employees will be laid off from the middle of December 2018 through the middle of April 2019 (during which time they will likely apply for and collect unemployment benefits), is that employer required to carry over his employees' accrued earned sick leave to their next work period (mid-April 2019 through December 2019)?**

Yes. 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 must be returned to the employee upon rehire or reinstatement. Since the period from December 2018 to April 2019 is less than six months, upon their return to work in April 2019, the employee would be entitled to the carry over (up to 40 hours) of any unused earned sick leave from 2018.

## **VII. OTHER PAID TIME OFF (PTO) POLICIES**

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**1. Can other PTO policies satisfy the requirements of the earned sick leave law?**

Yes, so long as the PTO meets or exceeds all of the requirements of the earned sick leave law and may be used for the purposes listed within the earned sick leave law. For example, some



employers allow employees PTO for other purposes, such as vacation or personal leave. The employer is not required to provide additional time designated for earned sick leave if the vacation or personal leave days may be used for earned sick leave and the employer's policy meets all requirements of the law.

**2. Is an employer with a compliant PTO policy required to retain records documenting hours worked, earned sick leave accrued, used, paid, paid out and carried over?**

The employer with a compliant PTO policy need not retain separate records documenting the accrual, use, payment, payout and carry over of leave taken for purposes covered under the Earned Sick Leave Law. That is, the employer is not required to keep such records separate from records documenting leave taken for other purposes under the PTO policy. However, an employer with a compliant PTO policy must for the five-year period specified in the law retain records of the accrual, use, payment, payout and carry over of their employees' PTO so as to allow the Department during a possible inspection to confirm that the employer is continuing to comply with the requirements of the Earned Sick Leave Law relative to the PTO policy.

**3. The Earned Sick Leave Law states that an employer who offers a PTO policy, which is fully paid (including but not limited to personal days, vacation days and sick days), where the PTO may be used for the purposes listed in the law and in the manner provided in the law and is accrued at a rate equal to or greater than the rate described in the law, that PTO policy is compliant with the law. If an employer has such a PTO policy, is the employer required to record hours of leave used for the purposes listed in the Earned Sick Leave Law separately from hours of leave used for other purposes under the PTO policy? For example, would the employer be required to record leave used by an employee for a typical vacation separate from leave used to care for an ill family member?**

No. The employer who has a compliant PTO policy is not required to record leave used for purposes covered under the Earned Sick Leave Law separate from leave used for other purposes. Thus, in the example cited above, both the vacation leave and the leave to care for an ill family member would simply be recorded as PTO.

**4. If an employer has an existing PTO policy that provides more than the 40 hours required under the Earned Sick Leave Law—for example, if the PTO program provides for 80 hours of PTO —and where under the existing PTO policy an employee had never been permitted to carry over PTO from one benefit year to the next; if after the Earned Sick Leave Law goes into effect the employee uses 40 hours of PTO in a given benefit year, must the employer permit the employee to carry over the remaining 40 hours of PTO to the next benefit year?**

In a compliant PTO policy where the employer chooses to advance PTO, rather than have the employee accrue PTO, in the final month of the employer's benefit year, the employer must either provide the employee a payout for the full amount of unused PTO (up to 40 hours) or permit the employee to carry over any unused PTO, except that the employer is not required to permit the employee to carry forward from one benefit year to the next more than 40 hours of PTO. Thus, in the example cited above, the employer would be required to permit the employee to carry over the remaining 40 hours of PTO; which is to say, the carry-over requirement would not be extinguished by the employee's use of 40 hours of PTO in a single benefit year. That said, however, as mentioned elsewhere in these FAQs, the Earned Sick Leave Law also

expressly states that an employer shall not be required to permit the employee to use in any benefit year more than 40 hours of earned sick leave. Consequently, in the example cited above, although the employer would be required to permit the carry over of the remaining 40 hours of PTO, the employer would not be required to permit the use of more than 40 hours of PTO in any benefit year. That said, as mentioned in an earlier FAQ, the Earned Sick Leave Law also permits employers to agree through a collective bargaining agreement or employer policy, to provide rights or benefits that are more favorable to employees than those required by the Earned Sick Leave Law. In the event that an employer determines that it would be in the best interests of both the employer and its employees to permit employees to use more than 40 hours of PTO in a benefit year during which the employee has accumulated more than 40 hours of PTO through a combination of carry over of PTO from the prior year and advancing of PTO or accrual of PTO in the current benefit year, then the employer may permit employees to use more than 40 hours of PTO in a benefit year.

**5. Under a compliant PTO policy, where an employee exhausts his or her PTO during the benefit year but where none of the leave taken during the benefit year was for any of the purposes set forth within the Earned Sick Leave Law, is the employer required to payout 40 hours of earned sick leave at the conclusion of the benefit year or permit the carry over of 40 hours of earned sick leave to the next benefit year?**

No. Relative to payout and carrying over, the employer with a compliant PTO policy is required only to treat the PTO in the same manner as the law requires earned sick leave be treated. If the employee has exhausted his or her PTO during the benefit year, it does not matter for what purpose under the compliant PTO policy the leave was taken. Regardless of the reason(s) for the leave, there is no PTO to be paid out or carried over and no such payout or carry over would be required.

**6. May an employer provide a more generous PTO policy to some employees and not others?**

Yes. The law provides the minimum earned sick leave requirements with which covered employers must comply. The law also expressly permits employers to provide more generous leave policies. As long as an employer gives all employees at least the benefits to which they are entitled under the Earned Sick Leave Law, the law does not prohibit the employer from providing one group of employees – for example only full-time employees – with more generous earned sick leave benefits than it provides to another group. An employer must ensure, however, that its policies do not violate any other applicable laws or regulations.

## **VIII. OTHER FEDERAL AND STATE LAWS RELATED TO LEAVE**

### **TIME**

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**1. What about overlapping jurisdiction between federal and state laws—which would take precedence?**

Federal and state laws, such as the Family Medical Leave Act (FMLA), the Americans with

Disabilities Act (ADA) and the New Jersey Family Leave Act (NJFLA) take precedence when they require employers to do more than the Earned Sick Leave Law.

**2. Is leave under the FMLA and the NJFLA paid leave?**

No. These federal and state laws do not require employers to give time off with pay.

**3. What are some of the other differences between the FMLA, the NJFLA, and the Earned Sick Leave Law?**

The FMLA and NJFLA provide qualified employees with 12 weeks of job-protected unpaid leave for specific purposes. The FMLA and NJFLA apply only to employers that meet certain criteria and only eligible employees are entitled to take FMLA and NJFLA leave. For more information concerning the FMLA, visit the U.S. Department of Labor website at <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>. For more information regarding the NJFLA, visit the Division on Civil Rights website at <https://www.nj.gov/oag/dcr/downloads/fact-FLA.pdf>.

**4. Can an employee’s use of earned sick leave be counted toward leave entitlements under other laws?**

Yes. An employee’s use of earned sick leave may be counted toward concurrent leave under federal or state law, such as the FMLA and the NJFLA.

## **IX. RETALIATION**

**1. May an employer retaliate against an employee for using earned sick leave?**

No. Retaliation is illegal. An employer may not retaliate against an employee for exercising or attempting to exercise rights under the law.

**2. What is retaliation?**

Retaliation is any act that is reasonably likely to deter an employee from exercising rights guaranteed under the law and includes any threat, discipline, discharge, demotion, suspension, or reduction in employee hours.

**3. Does the Earned Sick Leave Law protect an employee from retaliation if the employee mistakenly, but in good faith, alleges a violation of the Earned Sick Leave Law?**

Yes.

## **X. NOTICE TO EMPLOYEES**

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**1. Are employers required to give employees notice of their right to earned sick leave?**

Yes. 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

made available 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 provided in the Earned Sick Leave Law and rules promulgated in accordance with the law 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 Earned Sick Leave Law or the rules promulgated in accordance with the law.

**2. When must the employer provide employees with the notice of employee rights?**

Each employer shall provide each employee a written copy of the notification:

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.

**3. May an employer satisfy the notification posting and individual distribution requirements through electronic means?**

Yes. 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 on the employer's internet or intranet site shall satisfy the conspicuous posting requirement. Also, providing to an employee via e-mail the notification will satisfy the individual distribution requirement.

**4. Should an employer save a signed copy of the notice of employee rights or an email receipt for the notice?**

Yes. It would be advisable to keep or maintain records establishing the date the notice was provided to an employee and proof that the notice was received by the employee. Saving signed copies of the notice or email receipts is a good way to document that employers gave employees the required notice.

## **XI. EMPLOYER RECORD KEEPING**

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**1. What records must an employer keep?**

An employer shall retain all records documenting hours worked by employees and earned sick leave accrued/advanced, used, earned, paid out and carried over by employees.

**2. How long must employers keep their records?**

An employer must retain records for five years.

## **XII. COMPLAINTS**

**1. How does an employee file a complaint against his or her employer for violating the Earned Sick Leave Law?**

Complaints will be filed with the Department of Labor and Workforce Development's Division of Wage and Hour Compliance. Following is a link to the appropriate Division complaint form:

[https://www.nj.gov/labor/forms\\_pdfs/lse/MW-31C.pdf](https://www.nj.gov/labor/forms_pdfs/lse/MW-31C.pdf).