

As New Jersey Sick Leave Law Debuts, Some Confusion Remains on Finer Points

By Charles Toutant

Now that New Jersey's Paid Sick Leave Act has gone into effect, the great unknown among employment lawyers is how much enforcement activity the new law will generate.

The law, which took effect on Oct. 29, requires employers to provide up to 40 hours of paid sick leave per year to full- and part-time workers. The law permits the use of paid sick time when an employee or a family member is sick, to attend to routine medical care, or to attend a child's school-related meeting or event. Employers who fail to comply with the law are subject to fines and administrative penalties, and civil actions.

But compliance with the new law is complicated by the fact that the state is putting finishing touches on the administrative code relating to the statute. Interested parties are still submitting comments, and those regulations won't be finalized until January.

Noncompliance with the paid sick leave law is no small matter, said Michael Shadiack, head of the

labor and employment practice at **Connell Foley** in Roseland. Since the new legislation is technically an amendment to the state wage-and-hour law, the penalties that apply under it could apply to a paid sick leave violation, he said. That includes holding owners and officers of noncomplaint companies personally liable, Shadiack said.

What's more, violations of the paid sick leave law might not be covered by an employer's insurance carrier, since employment practices liability insurance policies generally don't cover wage-and-hour violations, he said.

"An employer may get a rude awakening when his insurance carrier does not cover the claim," said Shadiack. "In my view, it really behooves employers to be proactive, to engage their employment attorneys, and do the training" of managers about the new law, he said.

Shadiack and his colleagues have been busy helping employers adjust their policies to comply with the new law.

Perhaps the biggest snag facing employers is that a business that



courtesy of Michael Shadiack

already provides sick leave to its employees may have to rewrite its policy to comply with the New Jersey law. Many companies compute annual benefits by using the anniversary of each employee's first day on the job, but the new law requires annual benefits to be calculated by using the same date for every employee, whether it is Jan. 1, the end of the fiscal year, or another date, said Shadiack.

In addition, employers must decide whether to front-load 40 hours of leave to workers, or allow it to accrue, one hour for every 30 hours worked, Shadiack said. The new law also requires companies to either carry over unused sick pay at the end of the year, or pay

employees to cash it in, Shadiack said. A company that wants to pay its employees for unused sick time has to make an offer and allow 10 days for the employee to decide.

Other aspects of the new law that employers have to contend with are the option for a blackout period when foreseeable uses of sick time would not be allowed, Shadiack said. For example, a retail store that anticipates a high volume of business on Black Friday could bar employees from taking leave on that day for a purpose known in advance. Employers also have to decide what increment of time they allow employees to use sick leave—a half hour at a time, or a half day, or some other amount, he said.

Even though the paid sick leave law is now in effect, employers are still in the dark about some aspects of its implementation, such as how to compute benefits for workers with no fixed rate of pay, such as those who get paid commission or tips, or those paid on a piecework basis, said Alvaro Hasani of Fisher & Phillips in Murray Hill. In addition, it's unclear how the law will impact telecommuters or other workers whose job is split between New Jersey and another state, said Hasani.

Hasani said state officials have responded to his questions about the paid leave law and have issued a list of frequently asked questions with answers, but questions remain.

"Given some of the lingering ambiguities, there will certainly be well-intentioned employers who are, for whatever reason, not complying with the law. The risk is you will always have disgruntled employees who are willing to sue," Hasani said.

In addition, the state can also impose monetary penalties and imprisonment on violators, with higher penalties for each successive violation.

"The kicker here is that the proposed regulations make clear that each week [of noncompliance] shall constitute a separate offense. It can really add up," Hasani said. "You would think that, to the extent that a violation resulted from a given ambiguity in the law, you would hope the Department of Labor would have some mercy to use their discretion" when enforcing the law.

When it comes to the new sick leave law, "the million-dollar question" is what stance state officials will take with employers who provide paid sick leave in excess of what the new law provides, but provide it in a different manner than the statute, said James

McDonnell of Jackson Lewis in Morristown. "I presume as long as you're providing it, you're not really violating the law," he said.

"The problem is the regulations aren't clear enough and neither are the FAQs. I don't think every employer knows exactly what they need to comply with," McDonnell said.

Beth Braddock, also with Jackson Lewis, said the state law doesn't exempt smaller businesses, unlike some municipal sick leave ordinances that have been passed in the state in recent years. Smaller businesses have a lot of practical concerns about the new law, like how to keep their operations running when an employee is away on leave, Braddock said.

The paid sick leave law is likely to be subject to litigation to "flesh out the contours" of the law, like "every piece of legislation that creates or recognizes a right," said Kevin Costello, a plaintiff-side employment lawyer at Costello & Mains in Mount Laurel. But he does not anticipate a large volume of suits related to the new law.

"There are a great number of employers in New Jersey. A few of them try not to do the right thing. The reasonable employer may or may not like the new law, but they follow it," he said. ■