4 Problems With NJ Sick Leave Law Regulations

By **Jed Marcus**

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In 2018, New Jersey enacted the New Jersey Earned Sick Leave Law, or ESLL.[1] The thrust of the ESLL is not complicated; employees working in New Jersey are entitled to up to 40 hours of earned sick leave for sicknesses and other legally recognized purposes (more on that later) either through advancement of those hours at the beginning of the benefit year or by accrual at the rate of one hour for every 30 hours worked.

Although there were some unusual features to the ESLL, including, for example, the manner and methods of end-of-year payouts and carry-overs, and some ambiguities that could be clarified in regulations, it seemed that employers, most of whom already had decades of experience with sick leave policies, would adapt to the new state mandate.

Unfortunately, the New Jersey Department of Labor and Workforce Development, or NJDOL, created more questions than it answered when, on Jan. 6, 2020, it adopted and finalized its regulations related to the ESLL.[2] To put it mildly, these regulations, which purport only to interpret the ESLL, suffer from what I call the four Cs: coverage creep, complication, conflict and cost.

Let me make it clear right from the start that this article is not a screed against paid sick leave. There are many valid public policy reasons for requiring paid sick leave, not the least of which involves public health and safety.

The article is, however, a clear-eyed look at statutory and regulatory excesses that extend this benefit and an employer's obligations well beyond its public policy purpose. It does not purport to be a full, detailed analysis of the statute and regulations, but a summary of some of the problems I see.

1. Coverage Creep: This Is Not Your Father's Paid Sick Leave Law

Let's begin by dispelling the notion that, despite its title, the ESLL is limited to sick leave; it's not. It's really a paid time off law, providing paid time off for a variety of nonmedical reasons. While employees are permitted to use their paid time off for things like diagnosis, care or treatment of, or recovery from illness or injury for themselves and their families, employees can use their paid time off for other reasons unrelated to illness or injury, including:

- Absences involving domestic or sexual violence;
- Time during which the employee is not able to work, under certain circumstances, because of a closure of the employee's workplace, or the school or place of care of a child of the employee; or
- 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.

This last permitted use may even include, as the NJDOL observed, "a school sporting event, play or similar activity."[3]

Another example of coverage creep involves employer PTO policies, which aggregate all time off into one pot rather than identifying specific numbers of paid sick days, vacation days and/or personal days. Most employers and employees like these policies; employees get greater flexibility in terms of their paid days off and employers have less paperwork.

Although the ESLL simply states that employers can comply with the law through their PTO policies, the NJDOL has ruled that all PTO must be available for use and the employer's PTO program must meet or exceed the other requirements of the ESLL, even though that is not mandated by the law.[4]

So, let us consider the following hypothetical: An employer's PTO policy allows for 15 PTO days a year that can be used for any purpose. Per the NJDOL, all 15, rather than just five, are covered by the ESLL. The employee uses 10 PTO days.

Unlike the federal Family and Medical Leave Act, the ESLL prohibits the employer from requiring an employee to use earned sick leave if the employee is eligible for such usage or asking for documentation showing eligibility for paid sick leave unless the employee is out for at least three or more consecutive workdays.[5] Thus, the employee is not required to tell the employer why he is using leave and, therefore, the employer has no way of knowing whether or not the employee has actually used any of those PTO days as covered paid leave.

What this means, of course, is that employers, if they haven't done so already, will split their leave policies so they have an earned paid leave policy that is compliant with the ESLL and other non-ESLL compliant policies for other types of leave. The only real losers here will be employees who previously enjoyed greater flexibility in taking their paid time off.

2. Complication: Figure It Out Yourself and Then We'll Decide Whether to Sue You

The calculation of earned sick leave pay presents another set of problems for employers that the regulations have either exacerbated or created all on their own. The ESLL states that the employer must pay the employee at the same rate of pay with the same benefits the employee normally earns, except that the pay rate shall not be less than the minimum wage required for the employee.

In the absence of any provision in the statute including bonuses in the calculation of the hourly rate, the NJDOL has decided that where the amount of a bonus is nondiscretionary, it must be included in the rate of pay calculation for earned sick leave, even if the nondiscretionary bonus is normally paid out quarterly or annually.[6]

How an employer would know how to include the bonus in the calculation of the hourly rate when the bonus itself is neither accrued nor earned when the employee demands leave pay is not addressed in the regulations, although that would be a useful piece of advice.

3. Cost: Windfalls, Gaming and Abuse

Commissioned employees get a windfall under the regulations, which provide that employees who are paid on a commission basis are paid the state minimum wage when they need to miss work.[7]

However, if an employee continues to earn commissions when they miss work (e.g., they get commissions on orders that come in even if they miss work), then they are, in fact, getting a windfall by being paid the minimum wage on those days. The NJDOL, while not denying that the commissioned employee might receive a double payment, disagreed without explanation.

Several rules require a seven-day look-back period to determine the earnings for several classes of employees, including piece-rate workers and employees who work more than one job at different rates.[8]

Administration issues aside, the seven-day look-back period, which has no statutory support, allows employees to manipulate leave payments by timing absences to immediately follow periods of higher earnings, much like some employees tend to be absent the day before or after paid holidays. There are other ways to handle the problem in a less burdensome way, such as relying on the previous payroll or paying the earned leave at the rate the employee would have earned for the jobs worked that day.

Another area of concern involves the ability of employees to game the system. Under the ESLL, employers may not ask for documentation showing eligibility for paid sick leave unless the employee is out for at least three or more consecutive workdays.[9]

Fair enough, but the regulations go farther, declaring that — with the exception of foreseeable absences during blackout periods — "all requests by employees to use earned sick leave shall be treated by the employer as presumptively valid."[10] There is no statutory support for this rule and the ESLL states that an employer is not required to provide paid leave for reasons other than specified in the act.[11] Preventing employers from confirming the reason for an absence encourages abuse.

4. Conflict: Pretending That Federal Law Doesn't Exist

Aspects of the regulations place the ESLL in potential conflict with various federal laws, including both the Employee Retirement Income Security Act, and the National Labor Relations Act. For example, employees who earn one hour of sick leave for every 30 hours worked, the regulations have defined "hours worked" for purposes of eligibility to mean hours actually worked in the performance of one's job, and not pay in lieu of hours worked, such as sick or vacation pay.

However, the regulations also note that "when an employee takes earned sick leave, it shall be as if the employee worked those hours."[12] In other words, any employee benefits (such as a pension or health and welfare plan) based on hours worked must treat earned sick leave pay as hours worked. This interpretation, however, is in direct conflict with, and preempted by, ERISA, where, for example, an ERISA-governed benefit or pension plan excludes such hours.[13]

Another potential conflict between state and federal law involves the ESLL and collective bargaining agreements. The ESLL specifically provides that employees or employee representatives may waive the rights or benefits provided under the ESLL during the negotiation of a CBA.[14] The NJDOL's regulations, however, state that the ESLL will apply immediately upon expiration of the CBA, even where the parties are operating under the terms of the expired CBA while negotiating a successor agreement[15] and even where they agree to a short-term, seven-day rolling extension.

This regulation, which finds that PTO benefits do not survive expiration of the CBA, is potentially preempted by the NLRA, which mandates that an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining (of which sick pay is one), until the parties either negotiate a new agreement or bargain to a lawful impasse.[16]

This strange position is contrary to the express language of the ESLL, which specifically prohibits any interpretation that has the effect of:
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.[17]

Conclusion

In sum, there is nothing wrong with the state mandating paid sick leave as a matter of public policy. However, the NJDOL's interpretation of the ESLL suffers from coverage creep, unnecessary complication, potential conflict with federal law and an approach that makes employer compliance extremely difficult and costly. Worse still, the law and its regulations seem to assume that employees are simpletons and employers are evil liars, thieves and cheats.

For example, it's right to prohibit retaliation against employees who utilize their rights under the ESLL, but wrong to include a statutory presumption that an employer engages in unlawful retaliatory conduct whenever it takes an adverse personnel action against an employee.[18] In the end, New Jersey has produced a lazy and thoughtless law which, while producing some good, may engender bitterness, endless litigation and, I fear, lost job opportunities down the road.

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[1] N.J.S.A. 34:11D-1 et. seq.

[2] 52 N.J.R. 20(a).

[3] N.J.S.A 34:11D-3(a)(1) – (5); 52 N.J.R. 20(a), response to comments 3 and 4.

[4] N.J.A.C. 12:69-1.1(c) and 52 N.J.R. 20(a), response to comments 8 and 9.

[5] N.J.S.A. 34:11D-2(d) and 3(b); N.J.A.C. 12:69-3.5(m)(2).

[6] N.J.S.A. 34:11D-2(c); N.J.A.C. 12:69-3.6(i) and 52 N.J.R. 20(a), response to comments 5 and 67.

[7] N.J.A.C. 12:69-3.6(e) and 52 N.J.R. 20(a), response to comment 108.

[8] N.J.A.C. 12:69-3.6(d), (f), (h) and 12:69-3.7(7).

[9] N.J.S.A. 34:11D-3(b).

[10] N.J.A.C. 12:69-3.5(k).

[11] N.J.S.A. 34:11D-3(c).

[12] N.J.A.C. 12:69-3.6(b) and 52 N.J.R. 20(a), response to comment 13.

[13] ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, with limited exceptions. ERISA, §514(a), 29 U.S.C., §1144(a). A state law has a prohibited relation to an ERISA plan if it makes reference to, or has a connection with, employee benefit plans. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

[14] N.J.S.A. 34:11D-8(b)(2).

[15] N.J.A.C. 12:69-1.1(f) and 52 N.J.R. 20(a), response to comments 73 and 94.

[16] States may not regulate activity that is even "arguably" protected or prohibited by The NLRA. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959). Under the NLRA, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. Litton Financial Printing Division v. NLRB, 501 U.S. 190, 198-199 (1991). Sick leave is a mandatory subject of bargaining. Prime Healthcare Servs. – Garden Grove, LLC, 357 NLRB 653 (2011).

[17] N.J.S.A. 34:11D-8(b)(4).

[18] N.J.S.A. 34:11D-4(b).