

COVID-19 and the Workplace: Navigating New Jersey's Earned Sick Leave Amendment, New Jersey Law Journal, March 23, 2022

The sweeping changes made to New Jersey's employment laws during the pandemic are here to stay, and employers must either adapt and adhere to the revamped laws or risk exposing their businesses to liability.

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Nearly two years after the World Health Organization declared COVID-19 a global pandemic, the novel coronavirus continues to affect New Jersey workplaces. While experts agree that the worst of the pandemic is behind us, the sweeping changes that have been made to New Jersey's employment laws are here to stay and employers must either adapt and adhere to the revamped laws with all their nuances and complexities or risk exposing their businesses to liability.

Compliance is easier said than done and the revamped employment laws have allowed employees to insulate themselves from adverse employment actions simply because employers are afraid of liability should they fail to adhere to all legal requirements. In particular, the Earned Sick Leave Law, N.J.S.A. §§34:11D-1 through 34:11D-11, as amended, has left employers afraid to make necessary business decisions and awarded many employees with newfound job security. This was hardly the intent of the legislature when it enacted the amendment, but it is the unfortunate reality that New Jersey employers face today.

In May 2019, New Jersey became the tenth state to enact a mandatory paid sick-leave law when Gov. Phil Murphy signed the New Jersey Paid Sick Leave Act, which is also known as the Earned Sick Leave Law. The Act became effective Oct. 29, 2019. The Earned Sick Leave Law is among the employment laws forever changed during the COVID-19 pandemic. The Earned Sick Leave Law gives New Jersey employees the right to accrue and use up to 40 hours of paid sick leave in any period of 12 consecutive months. Under the law, employees accrue earned sick leave at the rate of one hour for every 30 hours worked, up to a maximum of 40 hours of paid leave per benefit year. Employers may also provide employees with 40 hours of earned sick leave up front at the beginning of the year. The law prohibits employers from retaliating against employees for requesting and using earned sick leave, filing complaints for alleged violations of the law, and participating in an investigation regarding an alleged violation of the law. Employers that violate the Act can be subject to significant administrative and civil charges with liquidated damages exposure and could even face criminal charges.

On March 25, 2020, New Jersey amended the Earned Sick Leave Law at the beginning of the pandemic, to prohibit employers from terminating or penalizing an employee for requesting or taking time off because the employee has or is likely to have an infectious disease (including, without limitation, COVID-19) that may infect others in the workplace. N.J.S.A. §34:11D-12. The amended legislation permits employees who are required to quarantine due to suspected exposure to an infectious or communicable disease to use paid sick leave, meaning an employee need not test positive for COVID-19 or some other communicable or infectious disease in order to exercise his or her rights under the law.

The amended law requires that an employee's medical status must be (1) supported by the express recommendation of a licensed New Jersey medical professional, and (2) include a specified time for the employee's absence. If these requirements are met, an employer cannot refuse to reinstate the employee following the specified period of absence, and reinstatement must be without reduction in seniority, status, employment benefits, pay, or any other terms and conditions of employment. As such, employers cannot take adverse employment actions against employees for taking time off to test, isolate, or quarantine because of COVID-19, provided the employees produce a doctor's note confirming COVID-19 symptoms or diagnosis and specifies the time for the excused absence. However, an employee is not entitled to reinstatement if an "employer experiences a reduction in force or layoff and the employee would have lost the employee's position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement, where applicable." N.J.A.C. §12:70-1.3(b).

New Jersey employers are still grappling to make sense of the amended law and its implications and fear that the wrong decision will expose them to retaliation claims. As a result, employees that have exercised their rights to leave seem to enjoy job security that they did not have before the pandemic.

Accepting that COVID-19 and its policies are likely here to stay for the foreseeable future, New Jersey employers must find a way to comply with still new employment laws without compromising on autonomy and the best interests of their businesses. Therefore, it is imperative that prudent employers develop universally applicable policies and procedures for laying off employees that are neutral on their faces and include legitimate, nondiscriminatory, and non-retaliatory reasons as to why certain employees or categories of employees were selected for lay off. Generally speaking, the more facially neutral criteria that employers can rely on to justify their legitimate, non-discriminatory and non-retaliatory business decisions, the better. This approach, coupled with exemplary recordkeeping, should allow employers to adhere simultaneously to the amended law by showing that an employee or group of employees would have been selected for layoff even if those same employees had never taken statutorily protected leave while continuing to make decisions and act in the best interests of their businesses.

These nuances and requirements will continue to grow as New Jersey courts interpret the amended law. Unfortunately, this creates a great deal of uncertainty for employers as the amended law poses many questions that have not yet been answered. Most notably, the amended law is silent and courts have yet to address the amount of time an employer must wait to lay off an employee that has taken paid sick leave.

Fortunately, New Jersey case law is instructive in this regard. Relying on case law involving similar employment claims under New Jersey law, an employer's exposure to a potential retaliation claim will likely depend on the timing of when the adverse employment action was taken; specifically, the amount of time that passes between when an employee took paid sick leave and when the employee was laid off. *Percella v. City of Bayonne*, No. CV143695KMJBC, 2020 WL 6559203, at *22 (D.N.J. Nov. 9, 2020), on reconsideration, 2021 WL 926613 (D. N.J. Mar. 10, 2021); *Maddox v. City of Newark*, 50 F. Supp. 3d 606, 623-24 (D. N.J. 2014). To raise an inference of discrimination on its own, temporal proximity must be "very close."

This New Jersey case law allowing causation to be inferred from temporal proximity, i.e., protected conduct that is "closely followed" by the adverse employment action—in this example, the layoff—sheds some light on the application of the amended law, but also further complicates its interpretation. *Abramson v. William Paterson College of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) (NJLAD case) (citing *House v. Carter-Wallace*, 232 N.J. Super. 42 (1989)). Unfortunately, there is no hard and fast rule when it comes to temporal proximity under New Jersey's Law Against Discrimination. However, New Jersey courts have found that a gap of three months or more between the protected activity and the adverse employment action, without more, cannot create an inference of causation. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007); *Toll v. Sills Cummis & Gross, P.C.*, No. A-6092-10T2, 2013 WL 3305450, at *7 (N.J. Super. Ct. App. Div. July 2, 2013).

To avoid the appearance of impropriety, business owners should ideally wait for a minimum of three months after an employee returns from paid sick leave before laying off the employee and, of course, document the legitimate, non-discriminatory and non-retaliatory reason for the layoff. The longer, the better. In any event, employers should consult with experienced employment counsel before taking any adverse action against an employee who is either on or just returning from earned sick leave or making any sweeping changes to their leave policies.

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