

# EMPLOYMENT LAW SUMMARY

## New Mexico Paid Sick Leave



*Because You're Different*

Under the New Mexico [Healthy Workplaces Act](#), most New Mexico employers are required to provide up to 64 hours of paid leave annually for specific reasons relating to the health or safety of employees or their family members, effective July 1, 2022. The benefit is paid by the employer.

### Covered Employers and Employees

All private employers are covered, including out-of-state employers with employees working in New Mexico. The only employer exceptions provided in the law are for government employers and businesses owned or operated by a tribe or tribal member.

All employees in New Mexico are eligible for leave, including part-time, seasonal and temporary employees, without regard to immigration status. However, employees of employers subject to Title II of the Federal Railway Labor Act are not covered.

The New Mexico Department of Workforce Solutions (the Department) will evaluate on a case-by-case basis complaints from **employees temporarily in New Mexico** (other than on tribal land). Cases will have to show sufficient "minimum contacts" with New Mexico for the act to apply. The more business activity an out-of-state employer has in the state, the more likely it is that the act applies.

**Telecommuters and remote workers** who perform services remotely but do so while physically outside New Mexico are not covered regardless of whether their employers are based in New Mexico or are out-of-state employers with minimum contacts. The work on which the accrual, use and payment of paid sick leave is based must have been performed in New Mexico for the act to apply. A guide to the act published by the Department provides further information about the act's applicability to telecommuters and remote workers. Employee rights under the act may not be waived by contract, including collective bargaining agreement.

### Paid Leave Accrual, Carryover and Use

#### *Accrual*

Employees must accrue at least one hour of paid leave for every 30 hours worked (including overtime hours worked), or employers may frontload 64 hours of paid leave on Jan. 1 each year. Employers who frontload must still meet the act's record-keeping requirements (explained later in this document). Employers may not limit how much leave employees accrue.

Employees do not accrue sick leave while on sick, vacation or any other type of leave.

Employers cannot deem an employee's hours to be "cut" to a lower number due to taking earned sick leave. The employer must pay the employee all earned sick leave used according to the employee's regularly scheduled hours. If the number of hours that the employee works fluctuates from week to week, the employer must use the average number of hours worked by the employee during the preceding two weeks when paying earned sick leave.

Employees who separate from employment but are rehired within 12 months retain their accrued sick leave and may use it immediately. However, any earned sick leave paid out by the employer on separation of employment does not have to be restored.

During the period July 1-Dec. 31, 2022, employers may **not** offset the required accrual under the act with leave employees already used or earned beginning Jan. 1, 2022. Employers that want to frontload for the rest of 2022 must frontload the full 64 hours, even though there will only be six months in the cycle for employers that choose the calendar year as their leave benefit year.

### Carryover

Leave carries over from year to year, but carryover may be capped at 64 hours annually. Employees with unused accrued leave at the end of the year should have that leave carried over to the next year; however, an employee may cash out a paid sick leave balance instead if the employer's policy allows it. Unused leave employees sell back or "cash out" under employer policies is deemed used and not subject to the carryover requirement.

### Use

Leave begins accruing and may be used at the start of employment or July 1, 2022, whichever is later. There is no waiting period for employees to begin using leave.

Employers may cap employees' use of leave at 64 hours per year. To determine the 12-month period in which leave may be used, employers may choose from the following: the calendar year; any fixed 12-month leave year (such as a fiscal year, a year required by other law or a year starting on an employee's anniversary date); the 12-month period measured forward from the employee's first use of sick leave; or a rolling 12-month period measured backward from the date an employee uses sick leave. Employers may elect a different 12-month period for employees covered by a collective bargaining agreement than for others.

Employees must be provided with leave when they make an oral or written request, which may also be made by an individual acting on the employee's behalf. Leave may be used in hourly increments or the smallest increment the employer's payroll system uses to account for absences or use of other time—whichever is smaller.

### Reasons for Leave

An employee may use paid sick leave for the following reasons:

- For the employee's or a family member's mental or physical illness, injury or health condition; medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or preventive medical care;
- For meetings at the employee's child's school or place of care related to the child's health or disability; or
- For absence necessary due to domestic abuse, sexual assault or stalking suffered by the employee or a family member of the employee, provided that the leave is for the employee to:
  - Obtain medical or psychological treatment or other counseling;
  - Relocate;
  - Prepare for or participate in legal proceedings; or
  - Obtain services or assist a family member with any of the above activities.

"Family member" means an employee's spouse or domestic partner or a person related to an employee or an employee's spouse or domestic partner as:

- A biological, adopted or foster child, a stepchild or legal ward, or a child to whom the employee stands in loco parentis;
- A biological, foster, step or adoptive parent or legal guardian, or a person who stood in loco parentis when the employee was a minor child;
- A grandparent, grandchild, or biological, foster, step- or adopted sibling;
- A spouse or domestic partner of a family member; or

- An individual whose close association with the employee or the employee's spouse or domestic partner is the equivalent of a family relationship.

FAQs from the Department state that the following are examples of the types of events that qualify for leave under the act:

- Dental treatment
- Medical conditions related to pregnancy or childbirth
- Acupuncture
- Children's individualized education plan (IEP) meetings
- Personal illness or the illness of a family member
- Surgical procedures
- Mental health therapy and counseling

## Compensation

Employees taking sick leave must be compensated at the same hourly rate and with the same benefits, including health care benefits, they normally earn. The hourly rate must be at least the applicable minimum wage, and employees who are ordinarily paid less than the full minimum wage due to a tip credit must receive the full state or local minimum wage (whichever is greater). Employees paid on task, piece or commission basis must receive the greater of their hourly or salary rate or the state or local minimum wage.

Salaried employees on sick leave must receive their regular salary converted to an hourly rate based on their regular work week and weekly salary amount. For a salaried employee whose work hours fluctuate weekly, the hourly rate would be determined by dividing their weekly salary by 40.

Employees paid on a task, piece or commission basis must receive the greater of their hourly or salary rate or the state or local minimum wage.

Employers must pay for sick leave used on the same scheduled payday as regular wages. Payout on separation of employment is not required.

## Employee Notice Requirements

When leave is foreseeable, employees must make a reasonable effort to provide advance oral or written notice of the need for leave to their employer. [Regulations](#) for the law define "foreseeable" to mean the employee is aware of the need to use leave seven or more days before use. Similarly, employees must make a reasonable effort to schedule foreseeable leave so as to not unduly disrupt the employer's operations.

When leave is not foreseeable, the employee must notify the employer orally or in writing as soon as practicable.

When possible, employee requests for leave must include the expected duration of the leave.

## Employer Notice Requirements

Employers must notify employees of their rights under the act at the start of employment and on a [poster](#) displayed in a conspicuous and accessible place in any workplace with employees. The notice must be in English, Spanish or any other language that is the first language spoken by at least 10% of the employer's workforce, as requested by the employee. The poster must be in English, Spanish or any other language that is the first language spoken by at least 10% of the employer's workforce.

Fully remote businesses may meet the posting requirement via website, email or another form of electronic communication or publishing employees can access easily.

## Certification

Employers may require reasonable documentation that sick leave was used for a covered purpose if the employee uses two or more consecutive work days of sick leave. Documentation signed by a health care professional indicating the amount of sick leave taken was necessary is considered reasonable documentation.

In cases of domestic abuse, sexual assault or stalking, reasonable documentation consists of one of the following:

- A police report;
- A court-issued document; or

- A signed statement from a victim services organization, clergy member, attorney, advocate, the employee, a family member of the employee or another person affirming that the sick leave was taken for a purpose permitted under the act.

The signed statement may be written in the employee's native language and need not be notarized or in a particular format. Employers may not require the documentation to explain the nature of any medical condition or the details of the domestic abuse, sexual assault or stalking.

Employees must be allowed 14 days from the date they return from leave to provide any required documentation. All information and documentation received about an employee's reasons for taking earned sick leave is confidential and may not be disclosed without the employee's permission or as necessary for validating disability insurance claims, accommodations consistent with the federal Americans with Disabilities Act, as required by the Healthy Workplaces Act or by court order.

## Interaction With Other Leave

Employers may not require that employees use paid sick leave under the act, even if the employee takes leave for a reason that would qualify for the leave, and even if it results in the employee taking unpaid leave, for example, under the federal Family and Medical Leave Act or the Promoting Financial Independence for Victims of Domestic Abuse Act.

Employers may permit workers to take paid sick leave concurrently with other leave, as long as the reason for leave is permissible under the act.

In addition, employers are barred from requiring employees to take other paid leave beyond what is required by the act (such as vacation or paid time off) before taking paid sick leave.

## Alternate Employer Policies

Employers with policies that provide leave benefits equivalent to or more generous than those in the law (earned on the same basis, used under the same conditions and subject to the same notice and other requirements) will be deemed in compliance. The FAQs state that employers relying on equivalent policies must keep track of any time used so that if a complaint is filed, the Department will be able to determine whether the employee accrued and was allowed to use the mandatory minimum amounts of leave.

The FAQs also state that the Department will require employers to honor their own policies and enforce their more generous provisions. In addition, if an employer allows accrual of more earned sick leave than the minimum required by the act but still characterizes it as paid sick leave accrued or earned pursuant to the act, then the act's rules and requirements will apply.

## Record-keeping

Employers must provide employees with a year-to-date written summary of earned sick leave accrued and used at least once every calendar quarter. This may be done electronically and may be included on regular pay records or earnings statements provided to employees. Additionally, earned sick leave is a "benefit earned" that must be reported on employee paystubs.

Employers must retain records of employees' hours worked, sick leave accrued or earned, and earned sick leave taken for a minimum of 48 months.

## Retaliation

The act prohibits employers from taking or threatening adverse action against employees that is reasonably likely to deter them from exercising or attempting to exercise rights under the act. Employers are also barred from taking or threatening adverse action because an employee:

- Has exercised or attempted to exercise rights under the act;
- Has reasonably alleged violations of the act; or
- Has raised a concern about violations of the act to the employer, the employer's agent, other employees, a government agency, or to the public through print, online, social or any other media.

In addition, employers may not count the use of sick leave in a way that will lead to discipline, discharge, demotion, nonpromotion, less favorable scheduling, reduction of hours, suspension or any other adverse action.

## Enforcement and Penalties

Employees, the state and any person or entity with a member who has been affected by a violation of the Act may bring a civil action within three years from the date the alleged violation occurred. (The time limit is suspended during a state investigation of the violation.)

Penalties for employer violations of the act include damages, back pay, reinstatement and attorneys fees, among others.

### **More Information**

The Department has [published](#) FAQs, a poster and a guide about the law. Contact Heffernan Insurance Brokers for more information on employee leave laws in New Mexico.

This guide is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. It is provided for general informational purposes only. Readers should contact legal counsel for legal advice. © 2022 Zywave, Inc. All rights reserved.

a conspicuous and accessible place in any