

LEGAL SERVICES ADVISORY

SICK LEAVE FAQs

INTRODUCTION – The School Sick Leave Law (SSLL) significantly expands public school employees’ ability to use their sick leave and is a tremendous victory for our union. NJEA’s Legal Services division has created this Frequently Asked Questions document to respond to numerous inquiries that we have received since the law was signed by Governor Murphy in July 2023. If you have questions about the SSLL, please contact your UniServ Field Rep.

FREQUENTLY ASKED QUESTIONS – As a general matter, in responding to SSLL questions Legal Services has frequently referred to the regulations implementing the 2018 New Jersey Earned Sick Leave Law (ESLL), which required employers to provide at least 40 hours of paid sick leave to their employees. While the ESLL does not apply to employees who receive sick leave under the school law, since the SSLL in many cases contains the same language as the ESLL we view the ESLL’s regulations as persuasive evidence of how the SSLL may be interpreted. But the forthcoming SSLL regulations will provide more clarification of how the law should be interpreted.

I. USE OF SICK LEAVE

1. For what reasons can an employee use sick leave?

The SSLL expands the permitted use of sick leave to include the following reasons:

1. the employee is personally ill or injured;
2. for diagnosis, care, or treatment of, or recovery from, an employee’s mental or physical illness, injury, or other adverse health condition, or for preventive medical care for the employee;
3. 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 preventive medical care for the family member;
4. absence necessary due to circumstances resulting from the employee, or a family member of the employee, being a victim of domestic or sexual violence, if the leave is to allow the employee to obtain for the employee or the family member:
 - a. medical attention needed to recover from physical or psychological injury or disability caused by domestic or sexual violence;
 - b. services from a designated domestic violence agency or other victim services organization;
 - c. psychological or other counseling;
 - d. relocation;
 - e. legal services, including obtaining a restraining order or preparing for, or participating in, any civil or criminal legal proceeding related to the domestic or sexual violence;
5. the death of a family member for up to seven days;
6. to attend a child’s school-related conference, meeting, function, or other event requested or 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 conditions or disability;
7. the school or place of care of a child of the employee is closed by order of a public official or because of a state of emergency declared by the Governor, due to an epidemic or other public health emergency;
8. the employee has been exposed to a contagious disease or is quarantined for the disease in the employee’s immediate household.

2. Who is considered a family member under the SSLL?

The law recognizes the following as an employee's family member:

- Child of the employee (biological, adopted, or foster child, stepchild 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
- 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
- Any other individual whose close association with the employee is the equivalent of a family relationship

3. What does it mean to have a "close association with an employee that is the equivalent of a family relationship?"

This term is not defined in the law, but the ESLL, which also contained this term, defined it in regulations as "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." N.J.A.C. 12:69-2.1.

4. Do the expanded uses of sick leave apply to all of my accumulated sick leave?

Because the new law does not limit the application of the expanded permissible uses of sick time, locals may take the position that those uses also apply to accumulated sick days. This question may be addressed by future regulations or court interpretations of the law.

5. In order for an employee to use 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 also use sick leave due to circumstances resulting from a family member of the employee being a victim of domestic or sexual violence.

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.

7. Do the expanded uses of sick leave apply to my district's sick leave bank?

Because the new law does not limit the application of the expanded permissible uses of sick time, locals may take the position that those uses also apply to sick leave banks. This question may be addressed by future regulations or court interpretations of the law.

8. Can a district charge me additional sick leave time beyond what I have requested? For example, if I am absent for more than half of the school day, could I be charged for a full day?

There is nothing in the SSLL that permits a district to unilaterally charge additional sick leave time beyond what is requested by an employee. The increments that sick leave is taken in is a negotiable topic and subject to past practice.

9. May employees use sick leave for the health care of adult children?

Yes.

10. Does a "school-related conference, meeting, function or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education" apply only to education-focused events, or could it apply to social functions at the school?

It is unclear at this point, but the law does not expressly limit this to education-focused events. An important consideration would be whether the parent's attendance was "requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education."

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

It depends. An employee may use sick leave during any period of sickness or disability after the employee gives birth.

An employee may also use 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. However, an employee cannot use sick leave to bond with a newborn or newly adopted or fostered child. That is the position that the Department of Labor adopted with respect to the same provision in the ESLL.

12. My understanding is that a pregnant employee is presumed disabled for 30 calendar days before and after giving birth. Has that changed?

No. There is nothing in the SSLL that has changed that presumption. Therefore, the employee's physician need not certify that the employee is disabled during that timeframe; a general doctor's certificate indicating the anticipated delivery date satisfies a board's request for medical certification of disability during this two-month period. This means an employee automatically qualifies to use accumulated sick days for any work days falling within 30 calendar days before or after delivery, if the employee wishes to use those days.

If an employee requests a disability leave or the use of sick time outside the two months of presumed disability, a board may require additional certification as to the actual dates the disability began or terminated.

13. Could a snow day or other weather event that closes my school or my child's daycare qualify as a permitted use of sick leave?

It is unclear at this point, but probably unlikely. First, it is important to note that an event that closes a school that an employee works at would not qualify as a permitted use of sick leave – the entity that must be closed is the school or childcare facility that an employee's child attends. This also means that if weather closed the roads leading to the school or childcare facility, or near the employee's home, that would not qualify as a permitted use.

Second, the event that closes the school or the childcare facility can only be

1. an order of a public official due to an epidemic or other public health emergency, or
2. a state of emergency declared by the Governor due to an epidemic or other public health emergency.

That is to say, there must be an epidemic or public health emergency that leads to the closure. If the Governor declared a state of emergency because of ordinary weather-related concerns, that would probably not meet the definition of an "epidemic or other public health emergency."

14. When does the new law take effect?

It is effective immediately from when it was signed into law in July of 2023.

II. NOTICE REQUIREMENTS

1. Is an employee required to provide advance notice of the need to use sick leave?

Yes, but if only the district establishes a policy requiring such notice. The district may require an employee to provide advance notice of the need to use foreseeable sick leave. Such notice is not to exceed seven calendar days prior to the date the sick leave is to begin and should include notice of the intention to use the leave and its expected duration.

If the reason for the leave is not foreseeable the district may require an employee to give notice of the intention to use the leave as soon as practicable, but only if the district has established such a requirement beforehand.

While the law gives management the right to require a notice period, we view the specific duration of the notice period (from 0-7 days) as negotiable.

2. What is a foreseeable use of sick leave?

The term is not defined in the law, but the ESLL defined it in regulations as "when the employee is able to know in advance that he or she will need to use sick leave," and included as examples a scheduled doctor's visit, regularly occurring medical treatment, and a regularly scheduled therapy appointment. N.J.A.C. 12:69-3.5(f).

3. What is an unforeseeable use of sick leave?

The term is not defined in the law, but the ESLL defined it in regulations as "when an employee requires time to care for, or obtain medical treatment for, themselves or a family member that was not reasonably anticipated," and included as examples when an employee wakes up in the morning with a fever and does not feel well enough to report work that morning. N.J.A.C. 12:69-3.5(h). It could also apply to medical emergencies.

4. What must be included in the advance notice to the district?

If the district so requires, the advance notice should include notice of the intention to use sick leave and its expected duration.

5. In providing advance notice, can the district require that the precise reason (personal illness or injury, school-related event, care for a family member, etc.) for the sick leave be included?

Possibly, if it has been a past practice. The law requires an employee to indicate the intention to use sick leave and its expected duration, and not the precise reason for the leave, but a past practice may modify this obligation. The precise reason for the leave would presumably be made clear if the employee submits documentation, but it is not required on the front end.

III. DOCUMENTATION REQUIREMENTS

1. May a district require an employee to provide documentation of the need for sick leave?

Yes, in two instances. First, where the employee uses sick leave for three or more consecutive days – this applies to both foreseeable and unforeseeable leave. Second, during a “blackout period,” when the employer can forbid the use of foreseeable sick leave and require documentation of any use of unforeseeable sick leave.

2. What are some accepted forms of documentation a district can require?

The documentation required must be “reasonable documentation,” which has different meanings depending on the circumstances.

The law prescribes the following as accepted documentation:

- For leave due to the employee’s health condition or the health condition of a family member: documentation signed by a health care professional who is treating the employee or the family member indicating the need for leave and, if possible, the number of days of leave.
- For leave due to incidents of domestic or sexual violence: medical documentation; a law enforcement agency or report; a court order; documentation that the perpetrator has been convicted of domestic or sexual violence; certification from a domestic violence specialist or a representative of a domestic violence agency or other victim services organization; and other documentation or certification provided by an appropriate individual who has assisted the employee or family member in dealing with the domestic or sexual violence.

- For leave due to the closure of the employee’s child’s school or place of care due to an epidemic or other public health emergency: a copy of the order of the public official or the determination by the health authority.

The law does not prescribe accepted documentation for other permitted forms of leave. The ESLL in regulations indicated that accepted documentation for school-related events or meetings would be “tangible proof” of the event. N.J.A.C. 12:69-3.5(j).

We do not view the documentation requirements contained in the law as the only forms of proof that should be accepted, and that other appropriate forms of documentation should also be acceptable.

3. Can a district require an employee to receive a fitness for duty examination after using sick leave for a certain number of consecutive days?

No. N.J.S.A. 18A:16-2 limits a district’s ability to send an employee for a fitness for duty examination only where there is “evidence of deviation from normal, physical or mental health,” and it preempts district policy.

4. Can a district require an employee to provide documentation for using sick leave for personal illness or injury for a period of 1 or 2 consecutive days?

Some districts have taken the position that N.J.S.A. 18A:30-4 permits them to require a doctor’s note after each use of sick leave for personal illness or injury. We view this as incorrect, and our position is that N.J.S.A. 18A:30-4 must be read alongside the new documentation requirements in the SSLL, which only permits districts to require documentation after 3 or more consecutive days or during a blackout period (for unforeseeable sick leave).

5. What about the privacy of my medical records?

Any employee medical records should be kept in a confidential medical file that is separate from their personnel file, and access to those medical records should be limited to a “need to know” basis. Regarding the medical records of family members, the family member’s health care provider will likely require that the family member sign a HIPAA release permitting them to give a note to the employee.

IV. "CERTAIN DATES" / BLACKOUT PERIODS

1. May the district establish blackout periods when an employee may not use sick leave?

Yes. The district may prohibit the employee from using foreseeable sick leave on "certain dates," which we refer to as "blackout dates" or a "blackout period." Additionally, during a blackout period a district can require the submission of reasonable documentation for any use of unforeseeable sick leave.

2. What limitations exist on a district's ability to designate a blackout period?

It is unclear at this point, and we expect that this issue will be clarified over time through regulations, negotiations, and possible litigation. We view the imposition of an unreasonable blackout period as subject to challenge because it can severely impact employees' ability to freely use their sick leave.

In the ESLL regulations, the Department of Labor required employers wishing to designate a blackout period to provide a business justification. Specifically, the regulations limited an employer's ability to designate a blackout period only 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." N.J.A.C. 12:69-3.5(h)(2). As examples of this, DOL included "for an airline industry employer, the period during which they experience a predictable increase in customer activity in and around a particular holiday, such as Thanksgiving," or "for a manufacturer of retail products, the day or week during which it is making a new product available for the first time." N.J.A.C. 12:69-3.5(h)(2). DOL indicated that designating a blackout period was an "extraordinary measure" that should not be available outside of these limiting circumstances. 52 N.J.R. 20(a)(2019).

Additionally, we view the impact of the designated blackout period as a negotiable issue, for example negotiation of the coverage of the cost of co-pays and/or mileage when a doctor's note is required for unforeseeable sick leave taken on a blackout date.

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

It is not required in the law, but we view the imposition of an unreasonable notice period as subject to chal-

lenge because it can severely impact employees' ability to freely use their sick leave.

Reasonable notice to employees is required in the ESLL regulations. N.J.A.C. 12:69-3.5(h)(3).

V. INTERACTION WITH OTHER CONTRACTUAL FORMS OF LEAVE

1. In my local contract we have negotiated separately for additional bereavement leave, family illness leave, and other conditions that now qualify as permitted uses of sick leave. Can a district require that my use of sick leave for these purposes runs concurrently with other forms of leave, or otherwise diminish these separately bargained provisions?

No. The law expressly prohibits the reduction or diminution of collective bargaining rights. Therefore, a district cannot unilaterally require that contractual leave be run concurrently with sick leave. These are two separate forms of leave and must be treated as such. For example, if your contract contains up to 5 days of bereavement leave, and the SSLL now affords you up to 7 days of sick leave for bereavement purposes, you can use both of those forms of leave for a total of 12 days.

Additionally, nothing in the SSLL prohibits negotiating for additional forms of leave that are now included as permitted uses of sick leave.

VI. ATTENDANCE POLICIES

1. In response to the SSLL, my district is attempting to unilaterally implement an attendance monitoring or improvement policy. Is this permitted?

It depends on the precise terms of the policy, but it likely must be negotiated with the union. An attendance policy that is disciplinary in nature (including using language that warns of potential discipline) cannot be unilaterally imposed. Trenton Board of Education, 2023 WL 3318562 (2023). If the district wishes to implement such a policy, please contact your UniServ Field Rep immediately.