Employers Association of New Jersey
*A nonprofit association serving employers since 1916*

November 29, 2018

David Fish
Executive Director
Office of Legal and Regulatory Services
NJ Department of Labor and Workforce Development
PO Box 110 – 13th Floor
Trenton, NJ 08625-0110

RE: Comments to Earned Sick Leave Rules, PRN 2018-095, proposed pursuant to the New Jersey Earned Sick Leave Act (Act).

Dear Mr. Fish,

The Employers Association of New Jersey (EANJ) submits the following comments to the N.J. Department of Labor and Workforce Development (LWD or Department) on behalf of its 3,000-plus employer-members. For your convenience, we submit these comments following the order and numbering of the proposed regulations.

**12:69-1.1 Purpose and scope**

Section (c) reads, in relevant part, "...an employee must be permitted to use **all** of the PTO for **any** of the purposes set forth at N.J.A.C. 12:69-3.5(a), and the employer's PTO program must meet or exceed the other requirements of the Act and this chapter..." (**emphasis added**)

- Please confirm our understanding that when an employer provides a PTO bank, which can be used for a variety of purposes including sick leave, and which provides for days off in excess of the 40 hours required by the Act, **all** of the days under the employer's policy must be made available for use for all of the purposes outlined by the Act.

- Employer's PTO policy provides for 20 days of PTO that can be used for vacation, sick and personal purposes. Please confirm our understanding that if an employee opts to use all 20 days for vacation purposes, the employer is not required to provide extra time off for sick leave purposes later in the same benefit year.

According to section (d)(1), "[No provisions of this chapter shall be construed as:] Requiring an employer to reduce, or justify an employer in reducing, rights or benefits provided by the employer pursuant to an employer policy or collective bargaining agreement that are more favorable to employees than those required by...the Act...."

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EANJ agrees that it would be detrimental to the state's economy and well-being if the earned sick leave law triggered a "race to the bottom" on worker protections and overall paid time off policies. For example, the N.J. Business and Industry Association reports that 13 percent of employers responding to a survey stated they would consider reducing benefits as a result of having to provide paid sick days. Eight percent stated they would consider reducing staff and seven percent reducing hours worked (NJBIA Health Benefits Survey, 2018). As both the statute and the proposal imply, many employers have more generous paid time off policies that are provided to employees voluntarily because of good business reasons, chief among them are 1) healthy workers tend to be more productive and 2) workers who can also meet their family responsibilities are more focused on the job. The foundation of these policies is the fact that the employer-employee relationship is voluntary in nature and rather than having a sense of "entitlement," employees earn their pay and benefits, including PTO, in good faith. It's this voluntary, good faith relationship between the employer and employee that is the basis of economic progress, innovation, self-esteem, and well-being.

Thus, it is important to ensure that employers be permitted to administer existing policies that are not incompatible with the Act. To do otherwise would trigger the race to the bottom that we are trying to avoid. Specifically, employers must be allowed to monitor and check abuse of earned sick leave. We have made prudent proposals to ensure employers will be able to maintain the good-faith relationship with their employees consistent with the Act. It is important to understand that if "earned" sick leave defaults to an "entitlement" subject to unchecked abuse, it will cause employers to be less generous and we will have a race to the bottom as an unintended consequence of the law.

**12:69-1.7 Retaliatory personnel actions and discrimination prohibited**

Section (b) reads, in relevant part, "No employer shall count **legitimate** use of earned sick leave under the Act...as an absence that may result in the employee being subject to discipline, discharge, demotion, suspension, loss or reduction of pay, or any other adverse action." (**emphasis added**)

- The use of the word **legitimate** implies there may be instances where earned sick leave is used for an **illegitimate** purpose. For example, an employee may simply fabricate the reason for his or her absence. While the employer may not discriminate against an employee that uses an earned sick day in accordance with the Act, the employer most certainly can take disciplinary action for employee misconduct or misrepresentation. In fact, the statute expressly states that nothing in the Act "shall be deemed to...prohibit the employee from taking disciplinary action against an employee who uses earned sick leave for purposes other than those identified in the law" (Section 3 c.).
    - Example: An employee wants to extend his or her approved vacation by two days (unapproved) and calls in sick. Under section 12:69-3.5(k) requests to use earned sick leave shall be treated by the employer "as presumptively valid." However, in this example, the employer has a reasonable believe that the two sick days, extending a vacation, are not legitimate.

Please confirm that when an employer has a reasonable belief that an employee is misusing or abusing earned sick leave, an employer may require appropriate documentation that such use was valid and/or legitimate. See also our comments on page 7 relating to section 12:69-3.5(k)

**12:69-1.8 Records**

Section (a) outlines five records which must be kept by employers for a period of five years: 1) all records documenting hours worked by employees; 2) earned sick leave accrued/advanced; 3) used; 4) paid; and 5) paid out and carried over.

- Assume an employer's PTO policy exceeds the requirements of the Act in all respects. The policy does not require, and management does not ask, an employee to provide a reason for their absence – if time is available, it is simply applied. Please confirm that an employer who has such a policy/practice will not be required to change this policy/practice and begin asking for and tracking the reasons for the absence.

**12:69-3.1 Payment**

Section (a) states, "The employer shall establish a single benefit year for all employees."

Section 34:11D-1 of the Act defines a benefit year, in relevant part, as "...the period of 12 consecutive months established by an employer in which an employee shall accrue and use earned sick leave..."

LWD's Frequently Asked Question document on Earned Sick Leave, published on its website (https://www.nj.gov/labor/forms_pdfs/lwdhome/Legal/earnedsickleave.pdf), provides the following question and answer (page 3, question 11): **Q – May an employer have a different benefit year for each employee based on that employee's anniversary date?** *A – No. The employer is required to establish a single benefit year for all employees.*

- An anniversary of hire date is a single methodology commonly used by employers to establish a benefit year for all employees. As such, the period of 12 consecutive months established by the employer would begin on each individual employee's date of hire (or month of hire) and end 365 days later (or 12 months later). As the statute does not require an employer to establish a "single" benefit year, the result of LWD's arbitrary interpretation expressed in the FAQ above will result in employers having to upend their existing administrative structures and procedures which otherwise comply with the Act's requirement to establish a 12 consecutive month period.

  It is understandable for the Department to think that the use of an employee anniversary date would cause an enforcement burden. However, using an anniversary date is a fair reading of the statute, which defines "benefit year" as "the period of 12 consecutive months established by an employer in which all employees shall accrue and use earned sick leave." The Department may also take notice that the many employers that are using an anniversary year are already keeping adequate records. Thus, the Department should have no difficulty responding to

employee complaints; the Department need only ask for the anniversary date and request existing records.

**12:69-3.2 Earned sick leave requirement**

This section provides for two methods under which an employer may provide for earned sick leave – 1) an accrual method, and 2) an advancing method.

- Are we correct in our understanding that it would be permissible for an employer using the accrual method to advance employees their time before it is accrued? For example, employees will earn one hour for every 30 hours worked, however, the employer will make the full 40 hours of time available for use at the start of the benefit year. Please confirm.

- Assuming our understanding in the question above is correct, would it be permissible for an employer who advanced unearned time in such a manner to withhold the advanced days from a final paycheck? Example: An employer using the accrual method provides access to the full 40 hours of time at the start of the benefit year, before it has been earned. An employee uses the full 40 hours in the first month of the benefit year, before it has been earned, and then quits. Can the employer withhold the **advanced but unearned** time from a final paycheck?

- Similarly, in a case where an employer opts to provide time pursuant to the advancing method, if an employee were to use their full advanced allotment early in the benefit year and then leave employment for any reason, could the employer calculate a prorated amount to be deducted from a final paycheck?

**12:69-3.3 Earned sick leave; accrual**

Section (a) states "For every 30 hours worked, the employee shall accrue one hour of earned sick leave."

Section (b) states "The employer shall not be required to permit the employee to accrue more than 40 hours of earned sick leave in any benefit year."

- Our understanding is that an employee will have the opportunity to accrue up to 40 hours even if their workweek is less than a standard 40 hours per week. For example, an employee who normally works a 37.5-hour workweek will have the opportunity to earn up to 40 hours of earned sick leave. Please confirm.

- Are we correct in our understanding that once an employee has accrued 40 hours in a benefit year, their accrual stops? Please confirm.

- Section 12:69-3.7(a)(5) provides that an employee can carry over up to 40 hours of unused earned sick leave from one benefit year to the next. If an employee carries over 30 hours of unused time into a subsequent benefit year, does this mean that the employee will only have

the opportunity to **earn (accrue)** 10 hours of earned sick leave in the new benefit year (30 hours carried over plus 10 hours earned equals the full 40 to which an employee will have access to use)? Similarly, if an employee were to carry over a full 40 hours of unused time, there would be no accrual necessary in the subsequent benefit year because the employee will have the full 40 already available to them. Please confirm.

**12:69-3.4 Earned sick leave; advancing**

Section (a) states, "Rather than use the accrual method...an employer may, on the first day of the benefit year, provide the employee with no less than 40 hours of earned sick leave for use throughout the benefit year."

- Must an employee who is out on a leave of absence at the start of the benefit year be advanced the full 40 hours on the first day of the benefit year? Or, alternatively, could the employer wait until the employee returns to work before advancing the time?

**12:69-3.5 Earned sick leave; use**

Section (a)(2) permits an employee to use earned sick leave "...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 preventative medical care for the family member."

- Please confirm our understanding that a normal birth is not an adverse health condition and that an employee would not be entitled to time off under the Act for purposes of caring for an adult child who recently gave birth, during her period of recovery.

Section (a)(4) permits an employee to use earned sick leave "...because of a closure of the employee's workplace, or the school or place of care of a child of the employee, **by order of a public official** due to an epidemic or **other public health emergency**..." (**emphasis added**).

- Please confirm that a snow day or other weather-related closure would not be considered to be a "public health emergency," including such days which may be declared a state-of-emergency by a public official.

Section (a)(5) permits an employee to use earned sick leave for "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 responsible for the child's education, or to attend a meeting regarding care provided to the child in connection with the child's health condition or disability" (**emphasis added**).

- Please confirm that attendance at school events that are requested or required by school officials would be those which are mandatory in nature and not discretionary. Similarly, a "request" by a school administrator, teacher, or other staff professional responsible for the

child's education implies that such requests would be formal in nature and individualized to a specific student, as opposed to a mass invitation to a school play, athletic event or recital. Please confirm our understanding that earned sick leave does not apply to mass, all-class, or all-school events or functions.

Section (f)(1) provides, "Where the employee's need to use earned sick leave is foreseeable, the employer may require advance notice, not to exceed seven calendar days prior the date the leave is to begin, of the employee's intention to use the leave and its expected duration."

- Please confirm that if an employee does not provide the required seven days advanced notice of their need for a foreseeable absence, despite the employer's clear policy outlining such a requirement, the employer can deny the use of an earned sick leave.

Section (g)(2) provides, "The 'certain dates' on which the employer may prohibit employees from using foreseeable earned sick shall be limited 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" (**emphasis added**).

- Please confirm our understanding that there is no limit on the amount of days the employer designates as high-volume periods or special events.

- A high-volume period or special event are not measurements which can be applied in all industries, for example in social services or in the educational sector. Yet, these industries have certain days within the year where an employee's absence would provide for great disruption to the operations of the employer, such as enrollment or orientation periods. In addition, the day after a holiday or semester break may require "all hands on deck." In these situations, requests for foreseeable leave the week before or after a holiday break would be particularly burdensome and disruptive to a school. We urge the Department to consider expanding these limitations in order to achieve more broad applicability across a variety of industries or to allow for the specific industry to select its own high volume or special events.

Section (j) provides, in part, "Where the employee's need to use earned sick leave is not foreseeable and the employee seeks use such earned sick leave during any of the "certain dates" ... or where the employee uses earned sick leave for **three or more consecutive days**, the employer may require the employee to provide reasonable documentation..." (emphasis added).

- Please clarify whether three or more consecutive days are calendar days or scheduled work days.

- Please confirm that in an instance where an employer requests reasonable documentation as described by this section, the employer may delay the payout of the earned sick leave until the verification is provided by the employee – or, deny the payout of the earned time if reasonable documentation is not provided by the employee.

Section (k) provides, in part, "Except where an employer exercises its right, under the limited circumstances outlined...**all request by employees to use earned sick leave shall be treated by the employer as presumptively valid**" (**emphasis added**).

- Please confirm the presumption of validity is a **rebuttable** presumption. An employer must maintain the ability to question employees for suspicious or pattern absences and obtain reasonable documentation. For example, if an employee were to use earned sick leave every Friday during the month of July, such a pattern would be highly suspect and the employer must be able to seek further information as to the validity of the absences.

Section (m)(2) indicates an employer shall be prohibited from requiring an employee to use earned sick leave.

- Please confirm that an employer must not allow an employee to have the option of taking a 'no-pay day' when there is earned sick leave available in their bank. Our understanding is that this provision prohibiting an employer from requiring an employee to use earned sick leave would only be applicable when, with mutual agreement, the employee makes up for the hours missed. Otherwise, if the time is not made up, the employer would apply any earned sick leave available to cover the absence, with or without an employee's agreement.

- Please confirm an employer can require an employee to use earned sick days as part of a disability or family leave of absence.

Section (q) allows for an employer to choose the increments in which its employees may use earned sick leave.

- An employer with a 37.5-hour workweek chooses to require earned sick leave to be taken in full-day increments (7.5 hours). An employee either earns 40 hours of earned sick leave or is advanced 40 hours in a benefit year, however, because of the employer's full-day increment decision, the most the employee would have access to use in a benefit year is 37.5 hours (7.5-hour days x 5 full-day increments). It is unclear as to how the additional 2.5 hours earned/advanced shall be treated. Would such hours be subject to the payout/carryover provisions?

- It is unclear how an employee **who does not work a defined schedule** will utilize their earned sick leave. Consider the following examples:

    - A commissioned sales employee is not required to report to the office. They set their own schedule. How do they take a sick day?
    - A per diem employee is typically called upon to work when work is available. How does a per diem employee, who has the opportunity to decline an offer of work with no repercussions, take a sick day?
    - Adjunct professors are commonly paid a set fee or stipend to teach for a semester. The fee is set and the professor is paid for the semester in full, regardless of whether they

call out sick. Must an employer now pay these individuals a sum in addition to the agreed upon fee/stipend for an earned sick day?

- A Results Oriented Work Environment (ROWE) is a management strategy focused on output and results. Employees are not required to set a schedule, or even report into the office, provided they meet their clearly defined goals. Employees can perform their work from anywhere and at any time. How does an employee working in this type of environment take a sick day?

**12:69-3.6 Earned sick leave; payment**

Section (b) – notes that the "taking of earned sick leave by the employee shall not result in any diminution in employee benefits; in other words, for the purpose of employee benefits, when an employee takes earned sick leave, it shall be as if the employee worked those hours."

- It is unclear what is meant by this section. If its purpose is to state that taking an earned sick day constitutes "hours worked," the section is ultra vires (outside the scope of the Department's authority) as hours worked is defined by the N.J. Wage and Hour law and the N.J. Family Leave law, among other equivalent federal laws. Moreover, benefit laws are exclusively governed by ERISA, thus plan documents will determine the benefit plan's administration. We suggest that the proposal state that the taking of earned sick leave shall be deemed "working hours" subject to benefits' plan documents or relevant law. For example, an absence for personal reasons, including illness, may not constitute working time under federal or state wage and hour and/or benefits laws.

Section (i) provides "Where the amount of a bonus is **wholly within the discretion of the employer**, the employer is not required to include the bonus when determining the employee's rate of pay for earned sick leave purposes" (**emphasis added**).

- Allowing the exclusion of discretionary bonuses from the regular rate for earned sick leave purposes implies that non-discretionary bonuses must be included when determining the regular rate. Non-discretionary bonuses are often paid out infrequently – annually, semi-annually or quarterly, for example. The administrative burden of having to calculate the new regular rate of pay for earned sick leave purpose would be tremendous, especially on a smaller employer.

**12:69-3.7 Payout and carry-over of earned sick leave**

Section (b) provides that where the employer provides earned sick leave to its employees using the advancing method, "In the final month of the employer's benefit year, the employer shall either provide to the employee a payout for the full amount of unused earned sick leave or permit the employee to carry-over any unused earned sick leave, except that the employer shall not be required to permit the employee to carry forward from one benefit year to the next, more than 40 hours of earned sick leave."

- In the case where an employer provides a payout of unused earned sick leave, please confirm that as a practical administrative issue, the actual payment need not be received by the employee in the final month of the benefit year. Rather payroll administrators will have the opportunity to determine the unused time remaining near the end of the final month of the benefit year and process the payment during a subsequent payroll period, even if such payment occurs after the conclusion of the benefit year.

- The carry-over of unused time when an employer is using the advancing method for providing earned sick leave is 100% superfluous. The regulations require unused time be carried over into the next benefit year in the case where the employer opts not to make an offer of a payout, however, the employee is also being advanced their full complement of 40 hours on the first day of the next benefit year. Any carry over will exist only on paper as an employer is not required to allow the use of more than 40 hours in a benefit year. This requirement amounts to no more than an exercise in recordkeeping for employers and will result in total confusion by employees who will not understand why they are unable to access the hours carried over from the previous year.

EANJ respectfully requests that the LWD clarify and/or revise its Proposed Rules consistent with these comments and suggestions that are primarily focused on the practical day-to-day administration of this new law.

Respectfully submitted,

Employers Association of New Jersey
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