



Client Alert Memorandum

Date: July 12, 2023
To: All School Law Clients
From: Jeffrey P. Catalano, Esquire and Stephen Holmes, Esquire
Re: Overview of New Enhanced Sick Leave Law

Introduction

On July 3, 2023, Governor Murphy signed into a law a bill which expands the scope of allowable uses of sick leave for school district employees. Prior to the enactment of the bill titled “A-5060/S-3440”, school employees could only use their sick leave in connection with a personal disability due to an illness or injury, or if they or someone in their immediate household needed to quarantine due to a contagious illness. The new law expands the circumstances under which a school employee may use sick leave.

It is unclear whether the legislature took into account the many issues that may result from the adoption of the bill. While the press surrounding the bill announces the bill as a victory for school district employee rights and while the policy underlying the bill is honorable, the new law does not address the practical concerns that affect the day-to-day operations of school districts.

This memorandum provides a road map for school districts on 1) how to best administrate the new sick leave law, 2) how the new sick leave law affects already negotiated CBA provisions, 3) how the new sick leave law affects FMLA/NJFLA leave entitlements, and 4) how school districts may wish to navigate collective bargaining leave provisions in future contracts.

The New Sick Leave Law

The new law amends N.J.S.A. 18A:30-1 to define sick leave as the absence from an employee’s post of duty, for any of 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;

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- (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: medical attention, services from a victim services organization, counseling, relocation, or legal services related to the 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.

School boards must now respect an employee's desire to use sick leave for any of the allowable uses stated above.

What Can A District Do To Administrate This New Sick Leave Law

Sick Leave Due To Personal Illness or Injury

Previously, N.J.S.A. 18A:30-4 permitted a board to require a physician's certificate to be filed with the secretary of the board in order for an employee to obtain sick leave. Under the new law, N.J.S.A. 18A:30-4 clarifies that a board may still require a physician's certificate be filed with the secretary, but only when sick leave is claimed due to personal illness or injury.

Foreseeable Sick Leave Due To Other Reasons

The new law allows a board to request advance notice or reasonable documentation for an employee's use of sick leave. N.J.S.A. 18A:30-4(b) states:

If an employee's need to use sick leave as defined pursuant to N.J.S.A. 18A:30-1 is foreseeable, a board may require advance notice, not to exceed seven calendar days prior to the date the leave is to begin, of the intention to use the leave and its expected duration, and the employee shall make reasonable effort to schedule the use of sick leave in a manner that does not unduly disrupt the operations of the board of education.

A board may also "prohibit employees from using foreseeable sick leave on certain dates, and require reasonable documentation if sick leave that is not foreseeable is used during those dates." N.J.S.A. 18A:30-4(d). Boards should develop and publicize to employees a list of dates on which foreseeable sick leave will be disfavored (e.g. the day before a holiday weekend).

Unforeseeable Sick Leave Due To Other Reasons

Even if the use of sick leave is unforeseeable, a board “may require an employee to give notice of the intention [to use sick leave] as soon as practicable”. N.J.S.A. 18A:30-4(c). Boards must notify employees of the requirement to give notice prior to mandating the requirement. Id.

Types of Reasonable Documentation

Boards may also institute other requirements under the statute to ensure that sick leave is being used in the manner envisioned by the new law. A board may require reasonable documentation in certain circumstances which include:

- If an employee claims sick leave for three or more consecutive days. N.J.S.A. 18A:30-4(e).
- If an employee claims sick leave for either their own or a family member’s diagnosis, care or treatment from illness, injury or other adverse health condition. N.J.S.A. 18A:30-4(f).
- If an employee claims leave because of domestic or sexual violence. N.J.S.A. 18A:30-4(g).

By strictly enforcing requirements for advance notice and reasonable documentation, school boards may avoid the disruption of operations and prevent employees from abusing the use of sick leave. However, there are still potential ways to abuse the new sick leave law. For example and in a recent PERC case, the Commission found that a Board had a managerial prerogative to verify sick leave with a physician’s note where a teacher was absent for reported personal illness days for three non-consecutive days surrounding the Eagles Super Bowl Parade. City of Burlington Board of Education, P.E.R.C. No. 2019-27. The operative facts of that case would still allow the District to request a physician’s certificate, as it was taken for personal illness.

But assume that the employee only took one day for a reason unrelated to personal illness or injury: would the District still be able to require a physician’s note? Without any clarifying regulations, the answer is likely **no**. N.J.S.A. 18A:30-4(e) states that “In case of sick leave claimed for three or more consecutive days, a board of education may require reasonable documentation that the leave is being taken for a purpose permitted pursuant to subsection a. of N.J.S.18A:30-1.”¹ For an unforeseeable leave taken for just one day, the statute provides no mechanism for a District to require documentation. A potential solution? Amend the list of prohibited days for foreseeable leave, so that the District may require reasonable documentation pursuant to N.J.S.A. 18A:30(d).

How Does The New Law Affect CBA Provisions?

In short, the new sick leave law leaves all previously negotiated CBA provisions involving leave entitlements unchanged. The bill also provides protection for an employee’s collective bargaining rights in a newly created paragraph which states:

¹ It is at best unclear whether the three consecutive days applies to sick leave for personal illness or injury. Currently, Districts can take the position that the three days applies to all other kinds of sick leave under N.J.S.A. 18A:30-1(a) except under subsection (a)(1), since the language applicable to that remained in N.J.S.A. 18A:30-4 except to clarify “due to personal illness or injury.”

The provisions of this section, and any regulations promulgated to implement or enforce this section, shall not supersede any law providing collective bargaining rights for school district employees, and shall not reduce, diminish, or adversely affect an employee's collective bargaining rights. N.J.S.A. 18A-30-1(b).

Thus, any previously negotiated CBA provisions are not mooted by the new sick leave law. Rather, the new sick leave law creates a new leave entitlement in certain situations.

Some illustrative examples are provided below to show how to administrate certain situations.

Example #1: Family Leave

The new sick leave law defines "family member" quite broadly: "...a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of an employee, or a spouse, domestic partner, or civil union partner of a parent or grandparent of the employee, or a sibling of a spouse, domestic partner, or civil union partner of the employee, or any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship." N.J.S.A. 18A:30-1(c).

Consider the situation where a District has the following negotiated language for family leave in a CBA:

Five (5) days absence without loss of pay shall be allowed for serious illness in the immediate family. All unused family sick days shall not be accumulated. "Immediate family" is defined as father, mother, spouse, child, brother, sister or any dependent member of the immediate household.

In this scenario, teaching staff members would have two (2) different leave entitlements with two (2) different sets of requirements:

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- Use the amount of days available in sick leave
- 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;
- Accumulates to extent granted by Title 18A
- Family member defined broadly as in N.J.S.A. 18A:30-1(c)

Negotiated CBA Provision

- Five (5) days maximum with pay
- For "serious illness in immediate family"
- Not accumulated
- "Immediate family" defined as father, mother, spouse, child, brother, sister or any dependent member of the immediate household

As an illustrative example, Teacher Jones is taking her mother to a doctor's appointment on Tuesday and wants to take the day off. If the doctor's appointment is for a "serious illness", Teacher Jones can use *either* a sick day from Title 18A *or* a family leave day from the negotiated CBA provision. In this situation, the District cannot force the teacher to use one over the other: Teacher Jones has a choice as to which leave entitlement to use.

However and in the same example, if the doctor's appointment for the mother is a regular check-up, Teacher Jones will *only* be able to use a sick day from Title 18A, as the negotiated provision limits use to "serious illness in the immediate family."

To change the example slightly, Teacher Jones is now taking her grandfather to a doctor's appointment for a "serious illness". Here and unless the grandfather is a "dependent member of the immediate household, Teacher Jones will *only* be able to use a sick day from Title 18A, as the negotiated provision limits use to "immediate family."

Example #2: Bereavement Leave

In the past, bereavement leave was a mandatorily negotiable term of collective bargaining. Newark, PERC No. 85-26, 10 NJPER 15256. Now, under the new law, bereavement leave is provided by statute under the new definition of sick leave. N.J.S.A. 18A:30-1(a)(5). If a school board has already negotiated bereavement leave for the district's employees, the district must now allow an employee to take leave in the event of a family death under either sick leave or under the negotiated bereavement leave policy. School boards should be aware of any differences between the definitions provided by the district's bereavement leave policy and the new permitted usage of sick leave in the event of the death of a family member.

Consider the situation where a District has the following negotiated language for bereavement leave in a CBA:

Up to five (5) working days at one time in the event of death of mother, father, spouse, and domestic partner and in-laws of each, child, legal ward, brother, sister, grandparents, grandchildren, and mother and father-in-law, son and daughter-in-law, sister and brother-in-law will be granted.

Employees shall be granted up to one (1) day as required in the event of a death of a relative outside the employee's immediate family as defined in Paragraph D above.

In this scenario, teaching staff members would have two (2) different leave entitlements with two (2) different sets of requirements:

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- For the death of a family member
- For up to seven (7) days
- Accumulates to extent granted by Title 18A
- Family member defined broadly as in N.J.S.A. 18A:30-1(c)

Negotiated CBA Provision

- Up to five (5) working days at one time for “immediate family” as defined in first paragraph
- Up to one (1) working day in the event of a relative outside the employee’s immediate family.
- Not accumulated
- “Immediate family” defined as in first paragraph

As an illustrative example, Teacher Jones wants to use bereavement leave for the death of her father. Teacher Jones is able to utilize bereavement leave under both policies. However, there is nothing in the new sick leave law which allows a District to run the bereavement leave *concurrently*. If a District does run the bereavement leaves concurrently, it faces potential unfair practice charges for “diminishing or reducing” a collectively-bargaining for benefit in violation of the statute. Therefore and unfortunately, Teacher Jones is able to utilize **twelve (12) days** of bereavement leave: seven (7) days under the new sick leave law and five (5) from the CBA Provision.

Continuing the example: later during the same year, Teacher Jones wants to use bereavement leave for the death of her uncle. Here, Teacher Jones would be able to utilize **eight (8) days** of bereavement leave: seven (7) days under the new sick leave law and one (1) from the CBA Provision. Note, there is nothing in the statute that limits the use of sick leave for bereavement purposes to seven (7) days in a year; rather, the statute is written in a way to require up to seven (7) days *per death of a family member*.

Would the answer change if Teacher Jones wanted to use sick leave for the death of her uncle, but a month after he has passed? There is nothing in the statute that would prevent Teacher Jones from using the sick leave in this purpose. Unless regulations clarify this situation, the Board is unable to deny the use of sick leave for bereavement purposes if the teaching staff member wishes to take it at a later date.

Example #3: Personal Leave

Personal leave is a mandatorily negotiable term of collective bargaining. Cliffside Park, PERC No. 77-2, 2 NJPER 252. The number of days, criteria that must be met, and the approval procedure for personal leave are all negotiable. Id. Many of the newly accepted uses for sick leave may have previously required employees to use personal leave under a negotiated policy. School boards must now accept that employees may exercise their statutory right to use sick leave for the personal reasons provided in the new law to circumvent negotiated personal leave policies. Please consider both the new sick leave law and your negotiated provisions when administering personal days.

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Effect on FMLA/NJFLA

Previously, teaching staff members could utilize sick leave to maintain their salary during an unpaid FMLA leave for their serious health condition only. However and as per the new law, the District should review the following situations more carefully under the FMLA and should allow teaching staff members to utilize sick leave to maintain their salary for FMLA leaves with the following conditions:

- The care for a child, spouse, or parent who has a serious health condition,
- Reasons related to a family member's service in the military, military caregiver leave – leave when a family member is a current service member or recent veteran with a serious injury or illness.

Further, NJFLA provides for leaves similar to the FMLA except for the care of a serious health condition of the employee. Previously, sick leave would not have been able to be used during NJFLA leaves. However and as per the new law, the District should review NJFLA situations which implicate the reasons for leave under the new law and should, likewise, allow the teaching staff member to utilize sick leave to maintain their salary during a qualifying unpaid NJFLA leave.

A situation that is not covered under the new sick leave law is child rearing/child bonding leaves under either the FMLA or the NJFLA. Unless the child rearing/child bonding leave is for the “diagnosis, care, or treatment of, or recovery from, the family member's mental or physical illness, injury or other adverse health condition”, the District should not allow teaching staff members to utilize sick days during child rearing/child bonding leave (unless otherwise negotiated).

Another unresolved issue is how the new notice provisions for “foreseeable” sick leave interplay with FMLA/NJFLA policies that require substantially more notice than that. It is possible that Districts may be able to distinguish when a leave will convert to FMLA/NJFLA to allow for a longer notice period, but clarifying regulations may provide some clarity.

Effect on Future Negotiations

Due to the new law's effect on negotiated forms of leave, in future negotiations, school boards may choose to provide sick leave in excess of the statutory minimum of ten days or in excess of the amount of sick days which had been negotiated in prior collective bargaining agreements. School boards could then negotiate no bereavement leave as it is already provided for by the new law. School boards could also negotiate minimal personal leave and a policy which only allows for uses that are not provided for under the new acceptable uses of sick leave. However, until that time, boards must respect employees' right to use sick leave for the enumerated uses under the new law, whilst honoring current policies governing employee leave contained within collective bargaining agreements.

Conclusion

This area of the law is likely to continue to evolve in the near future. Our attorneys are available to help answer any specific questions you may have in administrating the new sick leave law.