



NEW LAW EXPANDS THE SCOPE OF SICK LEAVE FOR SCHOOL DISTRICT EMPLOYEES

On July 3, 2023, Governor Murphy signed a new law that significantly expands the scope of permissible sick leave for school district employees, raises major questions regarding implementing existing leave provisions in current collective bargaining agreements (“CBAs”), presents challenges on school district’s ability to provide substitute services for students, and may have a currently unknown impact on school district budgets. Prior to the immediate enactment of the new law, the applicable statute, N.J.S.A. 18A:30-1, required each school district to provide its employees with a minimum of ten (10) days of sick leave per school year, without loss of pay. N.J.S.A. 18A:30-2. The previous version of the statute narrowly defined sick leave as “the absence from his or her post of duty, of any person **because of personal disability due to illness or injury**, or because he or she has been excluded from school by the school district’s medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.” N.J.S.A. 18A:30-1 (emphasis added).

The new law (A5060) meaningfully amends the language in N.J.S.A. 18A:30-1 to expand the definition of “sick leave” to permit an employee’s use of sick leave for **any** of the following reasons¹:

- 1) Personal illness or injury (which was the sole permissible use of sick leave under the former language of the applicable statute);
- 2) 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) To aid or care for a family member 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 or family member to obtain medical attention and other related services to recover from physical/psychological injury or disability (including but not limited to psychological services and counseling, to relocate, or obtain legal services and/or attend a legal proceeding related to the domestic or sexual violence);

¹ Family members are defined broadly to include children, grandchildren, siblings, spouses, domestic partners, civil union partners, parents, grandparents, and those close relations that are the equivalent of a family relationship (a blood relation is not necessary).

REPLY TO

387 PARK AVENUE S
5TH FLOOR
NY, NY 10016
212 278 0058

450 MAIN STREET
METUCHEN, NJ 08840
732 243 9588
FAX: 732 243 9590

309 FELLOWSHIP RD
STE 200
MT LAUREL, NJ 08054
863 350 1030

- 5) Death of a family member for up to seven (7) 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; or
- 7) If 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.

The impact and application of the new legislation will vary on a case-by-case basis for each school district, depending on the language that is currently contained in any relevant CBA(s). Furthermore, it is anticipated that future negotiations will also be significantly affected by the impact of the new law. Prior to the new law, school boards were permitted, and remain permitted, to negotiate separate leave provisions in CBAs for personal, bereavement and/or flex time leave. The new law now calls into question how the expanded "sick leave" usage definition impacts those existing leave provisions.

Specifically, to the extent boards have negotiated bereavement, personal, and flex days in existing CBAs, it is questionable whether the new expanded use sick days should be implemented *concurrently* with any such negotiated leave days (such as personal, bereavement and/or flex time leave) which may be described in existing CBAs, or whether it should be implemented *consecutively*, meaning in addition to, any such leave days that are already described in existing CBAs. While subsection (b) of N.J.S.A. 18A:30-1, as amended, states that the new law "shall not reduce, diminish, or adversely affect an employee's collective bargaining rights," this language does not clearly address whether a CBA that currently provides employees with a number of days of a specific type of leave should be interpreted to provide those days in addition to (i.e., consecutively with) the expanded sick leave that is provided by the new law.

Because requiring the use of days concurrently could be construed as diminishing existing contractual rights, it is possible that doing so would be viewed as a negotiable change in terms and conditions of employment. Given the uncertainty created by the lack of clarity in the text of the law, boards may choose to adopt the "consecutive" interpretation, pending a review of the regulations that will eventually be promulgated under the new law, although those boards should be aware that doing so may result in the establishment of a past practice that could be difficult to change in the future.

In contrast, there are also plausible arguments relying upon the text of the law to support the "concurrent" interpretation for boards that may be in favor of a more aggressive position. For example, such an argument could point to the different ways that N.J.S.A. 18A:30-1(b) and the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, address the issue of bargaining rights. N.J.S.A. 18A:30-1 does not include the following critical language, which is contained in the New Jersey

Family Leave Act: “No provision of this act shall be deemed to justify an employer in reducing employment benefits provided by the employer or required by a collective bargaining agreement which are in excess of those required by this act.” Nor does N.J.S.A. 18A:30-1 expressly provide that “leave policies or benefit programs which provide benefits that exceed what is required” by law may be negotiated by the parties. This is language that could have, and arguably should have, been included in the new law if the Legislature had intended to allow school employees the expansive leave entitlements that would result from the ability to utilize contractual and newly expanded sick leave days consecutively, rather than concurrently.

However, until and unless a definitive clarification is forthcoming from a controlling authority, again, districts should be mindful that implementing the leave benefits consecutively could create a binding past practice in the absence of judicial or agency clarification. In addition, districts should be aware that as a result of the uncertainty created by the new law, at this time and until applicable regulations become available, it is impossible to accurately predict the outcome and likelihood of success of any arguments in support of the “concurrent” interpretation of the law.

Therefore, school boards are urged to contact their board attorneys to discuss their unique situations, so that a strategy and course of action can be developed and tailored to a board’s willingness to “test the waters” and knowingly accept the high potential for litigation, which is expected to include challenges before the Commissioner of Education and the Public Employment Relations Commission, or the board’s preference for proceeding cautiously and avoiding litigation. To the extent that boards are inclined to take an aggressive approach that is likely to provoke litigation, they should consider a number of factors, which may include the extent to which they are willing to serve as a “test case” and assume the various costs and risks associated with such litigation, the nature of the board’s relationships with its local bargaining units, and whether there are any *quid pro quo* agreements that could be negotiated at the local level, in exchange for a desired interpretation of the new law.

Since most school districts are already experiencing staffing shortages post-Covid, this new law may also further compound existing staffing challenges, as employees use more of their sick leave time, as they are permitted to do, under the much broader scope of circumstances for which the use of sick leave is now permitted. Additionally, and perhaps of equal or greater importance, the new law will also likely cause many school districts to experience an increase in their annual expenditures, to the extent that districts will likely require increased use of substitute teachers as more permitted sick leave time is taken by district employees, which will likely require school districts to absorb the higher costs that will be associated with an increased reliance on substitute teachers on an annual basis. Accordingly, we recommend that whenever possible, school boards consider hiring of additional substitute teachers to combat anticipated shortages, and carefully examine budgets for the upcoming year to accommodate the projected increase in costs caused by these issues.

Similarly, boards would be well-advised to anticipate the extent to which existing sick leave banks may be impacted by the consequences of the expanded sick leave law, insofar as any “banked” days may now be subject to the expanded uses permitted by N.J.S.A. 18A:30-1, as amended. As a general matter, districts should consider requesting that their auditors review the possible impact on existing and future budgets that may be caused by expanding the permitted use of sick leave banks to comply with the new law.

Furthermore, the new law amends the language set forth in N.J.S.A. 18A:30-4, and grants the board discretionary authority to require a physician’s certificate to be filed with the Board secretary in order to utilize sick leave, *only* when an employee uses sick leave for his or her own personal injury or illness. Consequently, the new statutory language does not require an employee to file a physician’s certification in order to use sick leave pursuant to the other listed permissible categories of sick leave under N.J.S.A. 18A:30-1. Instead, the board may require reasonable documentation if the sick leave is used for three (3) or more consecutive days to verify that the days are being used for a permissible purpose pursuant to subsection (a) of N.J.S.A. 18A:30-1. Boards should be aware that this provision of the new law will likely be interpreted to negate, or at least limit, their previous right to request that an employee provide verification for sick leave at any time. However, boards are still permitted, and are encouraged, to require that staff identify the purpose of all sick leave taken, by indicating which of the categories described in N.J.S.A. 18A:30-1(a)(1) through (8) applies to the leave.

A signed document from a treating health care professional indicating the need for leave (and if possible, the number of days of leave) constitutes the requisite reasonable documentation for sick leave used under paragraph (2) or (3) of N.J.S.A. 18A:30-1(a). The statute also lists types of appropriate documentation for sick leave used by victims of domestic violence pursuant to paragraph (4) of N.J.S.A. 18A:30-1(a). Finally, leave permitted under paragraph (7) of N.J.S.A. 18A:30-1(a) requires a copy of the order of the public official or the determination by the health authority establishing the requisite epidemic or other public health emergency.

Subsection (b) of N.J.S.A. 18A:30-4 also states that a school board may require an employee to provide advance notice (not to exceed seven (7) calendar days prior to the start date of the leave) of the intended use of the leave and its expected duration if the sick leave is deemed “foreseeable”. The statute also requires school district employees to make a “reasonable effort” to schedule the use of the sick leave to avoid disruption of the operations of the district, and safeguards against misuse by granting the board authority to “prohibit employees from using foreseeable sick leave on certain dates.” In cases involving sick leave that is “not foreseeable,” subsection (c) of N.J.S.A. 18A:30-4 provides that school districts may require an employee to give notice of leave “as soon as practicable.” Moreover, districts may require reasonable documentation if unforeseeable sick leave occurs on dates on which the foreseeable use of sick leave is prohibited by the board.

Legal Alert: New Law Expands the Scope of Sick Leave for School District Employees

The Busch Law Group LLC

July 19, 2023

Page 5

It appears that some of the language in N.J.S.A. 18A:30-4 involving “foreseeability” of an employee’s use of sick leave, is ambiguous and open to multiple reasonable interpretations. Thus, we anticipate that future rulings from the lower courts as well as the passage of regulations will be needed in order to provide more clarity on the language above, as well as deliver insight into the long-lasting impact of this new law. In the interim, school districts will need to consider revisions to policies that address the notice requirements set forth above in N.J.S.A. 18A:30-4. As a result, school districts should consult their board attorneys on matters that may be impacted by the new law, until additional guidance is provided from the Legislature and/or the courts.

Should you have any questions or concerns, including how to best incorporate this new law at your schools, the attorneys at The Busch Law Group are available to counsel you on this matter.

This communication does not create an attorney-client relationship. The information contained herein is provided for informational purposes only and should not be construed as legal advice. No recipients of this correspondence should act or refrain from acting on the basis of any content without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from a licensed attorney. The Busch Law Group expressly disclaims any and all liability with respect to actions that may or may not be taken based upon any or all of the content of this correspondence.