



# A GUIDE TO NEW MEXICO'S PAID SICK LEAVE LAW

LABOR RELATIONS DIVISION | PUBLISHED APRIL 2022

**DISCLAIMER:** *The information in this Reference Guide does not, and is not intended to, constitute legal advice; all information contained herein is only for informational purposes. This information may not constitute the most up-to-date legal or other information. Individuals wanting legal advice about the Healthy Workplaces Act should consult a qualified attorney.*

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## The Healthy Workplaces Act

The Healthy Workplaces Act of 2021 is a law requiring all private employers in New Mexico to allow employees to accrue and use a benefit called **earned sick leave**. The law takes effect on July 1, 2022. The Act lets employees earn and use up to 64 hours of sick leave per year. Employees may use this leave for various reasons listed in the Act, like the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues. Employers who do not honor an employee's rights to sick leave face potential civil liability. The Act authorizes the Labor Relations Division (LRD) of the New Mexico Department of Workforce Solutions (DWS) to investigate violations and enforce the Healthy Workplaces Act.

Employers with paid-time-off policies that are more generous than the minimum accrual and usage limits specified in Act are compliant with the Act if employees may use the leave for the same purposes and under the same terms and conditions specified in the Act.

The earned sick leave required by the Act is in addition to any paid time off provided by an employer pursuant to a collective bargaining agreement unless employees may use the paid time off for the same purposes and under the same terms and conditions specified in the Act.

### ***Earned Sick Leave***

"Earned sick leave" means time compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earns during hours worked and is provided by an employer for the purposes described in the Act. In no case will the hourly rate be less than the required minimum wage rate.

### ***Who is Covered***

All private employers in New Mexico, regardless of size, are covered. This includes corporations and other business organizations as well as individuals such as company owners, managers, and supervisors.

The Act covers all employees performing services for private employers in New Mexico, regardless of how long they have been employed or their age. This includes fulltime, part-time, seasonal, and temporary employees.

### ***Who is Not Covered***

The following individuals are not covered by the Healthy Workplaces Act:

- Anyone performing services for an employer outside the state of New Mexico.
- Anyone performing services on tribal land.
- Independent contractors.
- Any employee of an employer subject to Title II of the federal Railway Labor Act.
- An employee as defined in the federal Railroad Unemployment Insurance Act or the Federal Employers' Liability Act.
- Employees of the United States or the state of New Mexico or its cities, counties, and agencies.

## Accrual

Covered employees must earn at least one hour of sick leave for every 30 hours worked. Employees begin to accrue sick leave upon hire or July 1, 2022, whichever is later. Employees who are exempt from federal or state overtime pay requirements are assumed to work 40 hours per week for leave accrual purposes, unless they normally work less than 40 hours a week, in which case their leave accrual is based on their normal work hours per week.

An employer may grant employees the full 64 hours of earned sick leave for the upcoming year on January 1 each year or, for employees whose employment begins after January 1, a pro rata portion of the 64 hours for use in the remainder of that year. This is called “frontloading” the leave. If employer frontloads leave, the employer may not recoup the leave through payroll deductions, even if the employee signs a written agreement authorizing the employer to do so or if the employee is separated before accruing the frontloaded leave.

At least 64 hours of accrued but unused sick leave carries over from year to year. An employer is not required to let an employee to use more than 64 hours in a twelve-month period. An employer may choose to allow the accrual, carry-over, or use of more than 64 hours a year.

### ***Employee Separations and Transfers***

When an employee is terminated, resigns, retires, or separated from employment, an employer does not have to pay out or reimburse the employee for any earned but unused sick leave. However, if the employee is rehired by within 12 months, the sick leave the employee had accrued must be reinstated. The returning employee may use the restored leave and accrue new sick leave immediately upon returning to work.

If an employee is transferred to a separate division, entity, or location but is still employed by the same employer, the employee is entitled to keep and use all earned sick leave they earned prior to transfer.

### ***Change in Ownership of the Company***

When a different employer succeeds or takes the place of an existing employer, all employees who remain employed by the successor employer will keep all accrued sick leave and may use it with the successor employer.

## Usage

### ***Yearly Usage Limits***

Employees may use up to 64 hours of earned sick leave per 12-month period. An employer may increase this limit, but 64 hours is the minimum every employer must allow.

### ***No Waiting Period***

As soon as an employee accrues sick leave, or if an employer grants the employee leave in advance of the employee accruing it, the employee may use it immediately.

### ***Timely Payment Required***

Employers must pay earned sick leave on the same scheduled payday as regular wages.

### ***Tipped Employees***

Employees who are usually paid less than the full minimum wage due to a “tip credit” must receive the full state or local minimum wage (whichever is greater) when using earned sick leave.

### ***Salaried Employees***

When using earned sick leave, salaried employees must receive their regular salary converted to an hourly rate based on the employee’s regular work week and weekly salary amount. For example, someone who normally earns a weekly salary of \$1,000 and whose normal work week consists of 40 hours, would be entitled to be paid \$25 per hour for any earned sick leave used (\$1,000 divided by 40). If the individual normally works 30 hours per week, then their hourly rate would be \$33.33 for any earned sick leave used (\$1,000 divided by 30). For a salaried employee whose work hours fluctuate from week to week, the hourly rate would be determined by dividing their weekly salary by 40.

### ***Task, Piece or Commissioned Employees***

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.

### ***Per Diem Employees***

Per diem employees may use earned sick leave for hours they were scheduled to work or for hours they would have worked absent a need to use earned sick leave. For per diem employees or employees with indeterminate shift lengths (e.g., employer needs dictate shift length), an employer must base the hours of earned sick leave used upon the hours the employer had a replacement employee for the same shift. If this method is not possible, the hours of earned sick leave are based on the hours worked by the employee when the employee most recently worked the same shift.

### ***Cutting Hours Due to Taking Earned Sick Leave Prohibited***

An employer may not 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 according to the employee’s regularly scheduled hours. If the number of hours worked fluctuates from week to week, the employer must use the average number of hours worked by the employee during the preceding two weeks.

### ***Permissible Reasons for Using Earned Sick Leave***

An employee may use earned sick leave for any of the following reasons:

- a mental or physical illness, injury, or health condition of the employee or the employee’s family member.<sup>1</sup>
- medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of the employee or the employee’s family member.

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<sup>1</sup> For the Healthy Workplaces Act, a “family member” means:

- an employee’s spouse or domestic partner;
- 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 or grandchild;
- a 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.

- preventive medical care for the employee or the employee’s family member.
- meetings at the employee’s child’s school or place of care related to the child’s health or disability.
- absences necessary due to domestic abuse, sexual assault, or stalking suffered by the employee or a member of the employee’s family to:
  - obtain medical or psychological treatment or other counseling
  - relocate
  - prepare for or participate in legal proceedings
  - obtain services or assist family members with the above activities

Note: Employees may use earned sick leave in the smaller of hourly increments or the smallest increment the employer’s payroll system uses to account for absences or use of other time.

## Employee Notice to Employer

When an employee needs to use earned sick leave, the employee or an individual acting on the employee’s behalf must make an oral or written request to the employer to use the leave. When possible, the request must include the expected duration of the sick leave absence.

When the need to use earned sick leave is foreseeable, the employee must make a reasonable effort to give the employer notice before using the earned sick leave. The employee must make a reasonable effort to schedule use of earned sick leave in a way that does not disrupt the operations of the employer. When the need to use earned sick leave is not foreseeable, the employee must notify the employer as soon as practicable.

An employer must never:

- Require an employee to search for or find a replacement worker as a condition of using earned sick leave.
- Require an employee to use other paid leave before using earned sick leave under the Act.

## When Documentation is Required

### *Documentation Not Required for Absences of One Day or Less*

Employers may not require documentation from an employee about their use of earned sick leave unless the employee uses two or more consecutive workdays of earned sick leave.

Documentation signed by a health care professional—which does not necessarily have to be a doctor—indicating the sick leave taken is necessary, is reasonable documentation.

For two or more consecutive absences related to domestic abuse, sexual assault, or stalking, an employee may provide one of the following:

- a police report,
- a court-issued document,
- a signed statement by a victim services organization, clergy member, attorney, advocate, the employee, a family member, or any other person.

The signed statement does not have to be notarized or be in any particular format. It only needs to affirm the employee took earned sick leave for one of the purposes specified by the Act. The statement does not have to be in English; it can be in the employee's native language.

When documentation is required under the Act, an employee will timely provide it to the employer upon request. The employee is allowed up to fourteen (14) days from the date they return to work to provide the documentation.

- An employer must never require that the documentation explain the nature of any medical condition or the details of the domestic abuse, sexual assault, or stalking.
- An employer must never delay the use of earned sick leave because the employer has not yet received documentation.
- All information and documentation received about an employee's reasons for taking earned sick leave **is confidential**.
- Employers must not disclose the above-referenced information except with the employee's permission or as necessary for validation of disability insurance claims, accommodations consistent with the federal Americans with Disabilities Act (ADA), as required by the Healthy Workplaces Act, or by Court Order.

## Employer Notice and Record-keeping Requirements

Upon hire, an employer must give every employee written or electronic notice of the following:

- The employee's right to earned sick leave.
- How earned sick leave is accrued and calculated.
- The terms of use of earned sick leave as guaranteed by the Act.
- Retaliation for exercising one's rights to earned sick leave is prohibited.
- The employee's right to file a complaint with the LRD for alleged violations of the Act.
- All means of enforcing violations of the Act.

This notice must be in English, Spanish, or any other language, if requested by the employee, that is the first language spoken by at least ten percent of the employer's workforce.

Employers must display a poster containing the above information in a conspicuous and accessible place in each establishment with employees. A poster approved by the LRD containing the required information is available upon request at no cost. To request posters, contact the Labor Relations Division at (505) 841-4400.

Employers must also provide employees with an accurate year-to-date summary, in writing, of earned sick leave accrued and used at least once every calendar quarter. This may be electronically, including by email, website, mobile application, or other reasonable method. Employers will be in compliance with this requirement if this information is provided on regularly issued pay stubs.

Employers must keep records documenting hours worked by employees and earned sick leave taken by employees for four years. Employers must provide this information to the LRD upon request.

An employer's willful violation of these requirements could result in an assessment of damages of \$250 per violation.

## Retaliation is Prohibited

An employer may be sued and held civilly liable for money damages for:

- Taking or threatening any adverse action against an employee that is reasonably likely to deter the employee from exercising or attempting to exercise rights granted by the Act.
- Taking or threatening any adverse action against an employee because the employee has:
  - exercised or attempted to exercise such rights granted by the Act;
  - reasonably alleged violations of the Act; or
  - 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 other media.
- Requiring or attempting to require an employee to sign a contract or other agreement that limits or waives any rights afforded by the Act.
- Counting the use of earned sick leave in a way that will lead to discipline, discharge, demotion, non-promotion, less favorable scheduling, reduction of hours, suspension, or any other adverse action.

## Enforcement of the Healthy Workplaces Act

The LRD is authorized to administer and enforce the Healthy Workplaces Act. The LRD will adopt rules and regulations, receive and investigate complaints, and issue administrative determinations. Employees may file complaints by contacting the LRD to get a Healthy Workplaces Act complaint form. The form is also available online at [www.dws.state.nm.us/healthyworkplacesact](http://www.dws.state.nm.us/healthyworkplacesact). The form is available in English and Spanish. If an individual needs help filling out the form, or needs the form translated, the LRD will provide free help via telephone: (505) 841-4400. Complaints must be filed with the LRD within three years of when the alleged violation occurred.

The LRD may, in its discretion, file a civil action against noncompliant employers to enforce the Act. The state Attorney General's office or any person or entity with members affected by violations of the Act may also file a civil action. It is not a prerequisite that a complaint first be filed with the LRD before a lawsuit is filed. The LRD may also facilitate settlements between employers and employees to resolve complaints and collect wrongfully denied earned sick leave and damages.

An employer in violation of the Healthy Workplaces Act will be liable to the affected employee for monetary damages and other relief specified in the Act. In most cases, this means that the employer must pay more than just the wrongfully denied sick leave. The employer will be liable for more damages based on the type of violation and amount of sick leave wrongfully denied. An employer that retaliates against an employee under the Act will be ordered to rescind disciplinary action taken or reinstate a terminated employee. Any employer in violation of the Act may also be ordered to pay the costs and expenses of suit and reasonable attorney fees.

## More Information

The LRD recommends that employers and other interested parties carefully read the NMAC Regulations for the Healthy Workplaces Act. These regulations contain specific requirements that employers and employees must follow to be compliant with the Act. The regulations also outline the procedures the LRD follows for investigating complaints and enforcing the Act. The regulations may be found at [www.dws.state.nm.us/healthyworkplacesact](http://www.dws.state.nm.us/healthyworkplacesact).