LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Earned Sick Leave Rules

Adopted New Rules: N.J.A.C. 12:69

Proposed: October 15, 2018 at 50 N.J.R. 2115(a).

Adopted: _____, 2019 by Robert Asaro-Angelo,

Commissioner, Department of Labor and Workforce Development

Filed: _____, 2019, as R.2019, d. _____, with non-substantive changes not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3), and not adopting N.J.A.C. 12:69:3.1(a).

Authority: N.J.S.A. 34:11D-11.

Effective Date: _____

Expiration Date: _____

Summary of Hearing Officer's Recommendation and Agency's Response:

A public hearing regarding the proposed new rules was held on November 13, 2018 at the Department of Labor and Workforce Development. David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony regarding the proposed new rules. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, the hearing officer recommended that the Department proceed with the new rules with non-substantive changes not requiring additional public notice or comment, and not adopting N.J.A.C. 12:69-3.1(a), reserving

that subsection for later rulemaking. The changes on adoption and the decision not to adopt N.J.A.C. 12:69-3.1(a) are discussed in detail below.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals.

1. Michael J. Riccobono, Mark Diana, Evan Shenkman, and Krystina L. Barbieri, Ogletree, Deakins, Nash, Smoke and Stewart, P.C., Morristown, NJ.

2. Adam Blecker and Joseph Maddaloni, Jr., Home Health Services Association of New Jersey, Parsippany, NJ.

3. New Jersey Civil Justice Institute, individually and on behalf of member organizations (individual commenter not identified).

4. Francine Esposito, Day Pitney LLP, Parsippany, NJ.

5. Joseph Maddaloni Jr. and Deborah A. Cmielewsi, Schenck Price Smith and King, LLP, Florham Park, NJ.

6. James M. McDonnell and Beth L. Braddock, Jackson Lewis, P.C., Morristown, NJ.

7. Anthony Russo, Commerce and Industry Association of New Jersey, Trenton, NJ.

8. Debra J. Bradley, New Jersey Principals and Supervisors Association, Monroe Township, NJ.

9. Pamela J. Moore, McCarter and English, Newark, NJ.

10. Alan M. Hershey, Lawrence Hopewell Trail Corporation, Pennington, NJ.

11. Steven Sokolic, Benefit Consultants Group, Cherry Hill, NJ.

12. Maria DiPipi, Checkpoint Systems, Thorofare, NJ.

13. William T. Athey Jr., Athey and Company, Certified Public Accountants, P.A., Bridgeton, NJ.

14. Michael A. Vrancik, New Jersey School Boards Association, Trenton, NJ.

15. Gregory J. Janz, Wayne, NJ.

16. Don Munro, Jones Day, Washington, DC.

17. Lynn Lippert, The Arc of Atlantic County, Egg Harbor Township, NJ.

18. Nicole Morella, New Jersey Coalition to End Domestic Violence, Trenton, NJ.

19. Madeleine Gyory and Sherry Leiwant, A Better Balance, New York, NY.

20. Dena Mottola Jaborska and Yarrow William-Cole, New Jersey Time to Care Coalition, Highland Park, NJ.

21. Mary Pranzatelli, Bridgewater NJ.

22. Debra L. Bell (no address provided).

23. Sheila Reynertson, New Jersey Policy Perspective (no address provided).

24. Melanie D. Lipomanis, Porzio Bromberg and Newman, P.C., Morristown, NJ.

25. Marilou Halvorsen, NJ Restaurant & Hospitality Association, Trenton, NJ.

26. Karen Cassway, Demountable Concepts, Inc., Glassboro, NJ.

27. Patrick T. Collins, Norris McLaughlin, P.A., Bridgewater, NJ.

28. Crystal McDonald, AARP New Jersey (no address provided).

29. Christian M. Abeel, New Jersey Credit Union League, Hightstown, NJ.

30. Amy M. Vazquez & John J. Sarno, Employers Association of New Jersey, Livingston, NJ.

31. Linda Doherty, New Jersey Food Council, Trenton, NJ.

32. Cynthia Jetter (no address provided).

33. Nicole Vail, Jersey City, NJ.

34. Quincy Bloxom, Burlington, NJ.

35. Abbie Spector, Eatontown, NJ.

36. Carol Levin, Bedminster, NJ.

37. Gary Brill, Somerset, NJ.

38. Lauren Agoratus, Mercerville, NJ.

39. David Rousseau, Association of Independent Colleges and Universities in NJ, Summit, NJ.

40. Member Institution Representatives, Association of Independent Colleges and Universities in NJ, Summit, NJ.

41. Frank Marshall, New Jersey State League of Municipalities, Trenton NJ

42. John R. Holub, New Jersey Retail Merchants Association (no address provided).

43. Dena Mottola Jaborska and Yarrow William-Cole, New Jersey Time to Care Coalition, Highland Park, NJ.

44. James Brian Appleton, New Jersey Coalition of Automotive Retailers, Trenton, NJ.

45. Christina M. Renna, Chamber of Commerce Southern New Jersey (no address provided).

46. Doug Kreis, K&M Maintenance Service, LLC, Watchung, NJ.

47. Lu Ann Aversa and Darrin Anderson, NJ YMCA, Trenton NJ.

48. Ian Meklinsky, Fox Rothschild, LLP, Lawrenceville, NJ.

49. Steven Statland, Chop Chop Bang Bang LTD (no address provided).

50. James M. McDonnell and Beth L. Braddock, Jackson Lewis, Morristown, NJ.

51. Randi W. Kochman, Cole Schotz, Hackensack, NJ.

52. Debra J. Bradley, New Jersey Principals and Supervisors Association, Monroe Township, NJ.

53. Eric DeGesero, Fuel Merchants Association, Cranford, NJ.

54. Althea D. Ford, New Jersey State Funeral Directors Association, Inc., Manasquan, NJ.

55. John W. Idyk, Health Care Association of New Jersey, Hamilton, NJ.

56. Joanne Bergin, The Arc of New Jersey, North Brunswick, NJ.

57. John G. Grepper, Jr., Scarinci and Hollenbeck, Lyndhurst, NJ.

58. David A. Cohen, Rutgers, The State University of New Jersey, New Brunswick, NJ.

59. Russell J. McEwan and Lauren Marcus, Littler Mendelson, P.C. Newark, NJ.

60. Judy Sailer (no address provided).

1. COMMENT: The commenter requests confirmation that N.J.S.A. 34:11D-8(b), within the Earned Sick Leave Law (ESLL), which states in pertinent part that employees "may waive the rights or benefits provided under the act during the negotiation of a collective bargaining agreement," means that "employers and unions may lawfully agree through collective bargaining, to provide employees fewer paid sick leave days than the number proscribed (sic) by the law."

RESPONSE: The ESLL does, in fact, state that "employees or employee representatives may waive the rights or benefits provided under [the ESLL] during the negotiation of a collective bargaining agreement." Consistent with the ESLL, proposed

N.J.A.C. 12:69-1.1(e) states that, “[e]mployees or employee representatives may waive the rights or benefits provided under [the ESLL or N.J.A.C. 12:69] during the negotiation of a collective bargaining agreement.” As suggested by the commenter, this means that during the negotiation of a collective bargaining agreement, an employees or employee representative may agree to accept rights or benefits relative to earned sick leave that are less favorable to employees than those required by the ESLL and may, in fact, waive all rights and benefits set forth in the ESLL, including the right to earned sick leave altogether.

2. COMMENT: The commenter asserts that there is an inconsistency between the ESSL and proposed N.J.A.C. 12:69-3.5(b). Specifically, the commenter observes that as to employees hired prior to the effective date of the ESLL (October 29, 2019), the law states that they shall be eligible to use earned sick leave beginning on the 120th calendar day after the commencement of employment, and that the same is true under the ESLL for those who are hired after the effective date of the law. The commenter observes that, by contrast, proposed N.J.A.C. 12:69-3.5(b) states that an employee shall not be eligible to use earned sick leave until February 26, 2019 (the 120th calendar day after October 29, 2018), or the 120th calendar day after the employee commences employment, whichever is later.

RESPONSE: The commenter is correct and has identified a bona fide inconsistency between the ESLL and the proposed new rules. The Department’s intent within proposed new N.J.A.C. 12:69-3.5(b) was to accurately capture within rule the 120-calendar-day waiting period for use of earned sick leave set forth in the ESLL. Although it seems intuitive that if those who are hired after the effective date of the law

must wait 120 calendar days from the commencement of their employment to use earned sick leave accrued under the law, then those who were hired prior to the effective date of the law should wait 120 calendar days from the law's effective date to use earned sick leave accrued under the law, the commenter correctly observes that this is not what the ESLL states. Consequently, the Department will make a change on adoption that will ensure consistency between the ESLL and N.J.A.C. 12:69 regarding use of earned sick leave. After the change, the rule regarding use of earned sick leave will simply state that an employee, regardless of whether hired before or after the effective date of the ESLL, shall not be eligible to use earned sick leave until the 120th calendar day after the employee commences employment. This change does not enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule; which is to say, we are now many months beyond February 26, 2019 and so even under N.J.A.C. 12:69-3.5(b) as proposed, the later of (1) February 26, 2019, or (2) the 120th calendar day following the employee's date of hire, will in every instance be the 120th calendar day following the employee's date of hire. Consequently, the impact of the N.J.A.C. 12:69-3.5(b) as proposed and the rule as changed on adoption will be identical. For that reason, the Department asserts that this modification is appropriate at adoption.

3. COMMENT: The commenter requests confirmation that a school sporting event, play, or similar activity is not a permitted reason to use earned sick leave under the ESLL and the proposed new rules.

4. COMMENT: The commenter suggests modifying proposed N.J.A.C. 12:69-3.5(a)(5) so as to indicate that earned sick leave for time needed by the employee in

connection with a child of the employee to attend a school-related event requested by a school administrator, teacher, or other professional staff member responsible for the child's education be limited to "scholastic or educational events," and that a sentence be added stating the following: "Any such time is limited to use for educational or health purposes and shall not apply to events not related to the education of the child including, but not limited to, school plays, recitals, parties, or other non-educational events."

RESPONSE TO COMMENTS 3 AND 4: A school sporting event, play, or similar activity may under certain circumstances constitute a permitted reason to use earned sick leave. Under N.J.S.A. 34:11D-3(a)(5) and proposed new N.J.A.C. 12:69-3.5(a)(5), among the permissible reasons for an employee to take earned sick leave is when the leave would be used "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." A sporting event, play or similar activity could reasonably be characterized as "a function, or other event." Whether attendance at such a function or other event would qualify for use by the employee of earned sick leave under the ESLL and the accompanying rules would hinge on whether attendance at the event had been "requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education." If the reason for use of earned sick leave meets both the former and latter criteria, then it is a legitimate basis under N.J.S.A. 34:11D-3(a)(5) and N.J.A.C. 12:69-3.5(a)(5) for use of earned sick leave. The Department declines to change proposed N.J.A.C. 12:69-3.5(a)(5) so as to expressly

exclude from the category of covered events school plays, recitals, parties or other "non-educational events."

5. COMMENT: The commenter observes that proposed N.J.A.C. 12:69-3.6(i) states, "[w]here 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" and asks whether this means that nondiscretionary bonus amounts should be included when determining an employee's rate of pay for earned sick leave purposes in the same way that such payments are included in the regular hourly wage for the purpose of calculating overtime compensation under state and Federal wage and hour laws.

RESPONSE: The commenter is correct. In the same manner as non-discretionary bonus payments are included in the regular hourly wage for the purpose of calculating overtime compensation under New Jersey's Wage and Hour Law, N.J.S.A. 34:11-56a et seq. (and implementing regulations), such payments should be included when determining an employee's rate of pay for earned sick leave purposes. As indicated in N.J.A.C. 12:56-6.6(a)(1), such non-discretionary bonus payments would include those that are measured by or dependent upon hours worked, production or efficiency.

6. COMMENT: The commenter questions the requirement within the ESLL and proposed new N.J.A.C. 12:69-3.7(b) that an employer who provides earned sick leave to its employees using the advancing method must in the final month of the employer's benefit year 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 is not required to permit the employee to carry forward from one benefit year to the next more than 40 hours of earned sick leave. Specifically, the commenter states the following:

> [I]f an employer uses the front load [advancing] method, does it need to carry over unused [earned sick leave], and if so, what is the purpose of that requirement? The [ESLL] states that an employer is never required to allow employees to use more than 40 hours of paid sick leave in a benefit year. Thus, if an employer uses the front load [advancing method], what is the purpose of requiring an employer to carry over unused [earned sick leave]?

The commenter adds, "requiring carryover of time that cannot be used may cause employees to misunderstand the amount of sick time that is available for use," and "requiring employers to track carryover hours that cannot be used creates needless work."

RESPONSE: N.J.S.A. 34:11D-2(a) states in pertinent part that "[t]he employer shall not be required to permit the employee to accrue or *use* in any benefit year, or carry forward from one benefit year to the next, more than 40 hours of earned sick leave." (emphasis added). N.J.S.A. 34:11D-3(d) states in pertinent part that an employer who uses the advancing method (advancing his or her employees the full complement of earned sick leave for a benefit year on the first day of each benefit year) "*shall* either provide to the employee a payment for the full amount of unused earned sick leave in the final month of the employer's benefit *year or carry forward any unused sick leave to the next benefit year*." N.J.S.A. 34:11D-3(d). The commenter correctly

observes that an employer's strict adherence to these two separate provisions within the ESLL may result in the carry-over from Benefit Year 1 to Benefit Year 2 of an employee's unused earned sick leave that the employee will never be permitted to use. That is to say, where the employer limits the use of earned sick leave within a single benefit year to 40 hours, as is permitted under the ESLL; and where that employer advances his or her employees the full complement (40 hours) of earned sick leave for a benefit year on the first day of each benefit year; and where an employee has 40 hours of unused earned sick leave to carry-over from the prior benefit year; the employee will start the new benefit year with 80 hours of earned sick leave, only 40 of which the employee will be permitted by his or her employer to use during that benefit year. This is what the ESLL provides and the Department has no discretion through rulemaking to deviate from the law. However, it is worth noting that elsewhere within the ESLL, it indicates that employers are permitted to agree through a collective bargaining agreement or employer policy to provide rights or benefits that are more favorable to employees than those required by the ESLL. In the event an employer determines that it would be in the best interests of both the employer and its employees (for example, as alluded to by the commenter, where the employer fears confusion would otherwise ensue among his or her staff) to permit employees to use more than 40 hours of earned sick leave in a benefit year during which the employee has accumulated more than 40 hours of earned sick leave through a combination of carryover of earned sick leave from the prior year and earned sick leave advanced by the employer in the current benefit year, then the employer may permit employees to use more than 40 hours of earned sick leave in a benefit year; for example, allowing for

the use of 80 hours of earned sick leave in a benefit year, thereby accounting for the situation where an employee carries forward a full year's complement of earned sick leave from one benefit year to the next; or in the alternative, allowing for the use of 60 hours of earned sick leave in a benefit year, so that the employee may derive a benefit in the current benefit year from at least 20 of the hours of accrued earned sick leave carried over from the previous benefit year.

7. COMMENT: The commenter asks whether an employer may create a "subaccount" in an existing Paid Time Off (PTO) policy that complies with the law as to just 40 hours of PTO (including accrual, use, and carryover requirements), and may treat all other PTO (including PTO for sick leave) per its existing policy.

8. COMMENT: The commenter states that many employers have PTO policies that provide well in excess of the 40 hours required under the ESLL and maintains that "the proposed regulations do not address how these employers are to handle carry over."

RESPONSE TO COMMENTS 7 AND 8: N.J.S.A. 34:11D-2(b) states that, "[a]n employer shall be in compliance with [N.J.S.A. 34:11D-2] if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days, and sick days, and may be used for the purposes of [N.J.S.A. 34:11D-3] in the manner provided by [the ESLL], and is accrued at a rate equal to or greater than the rate described in [N.J.S.A. 34:11D-2]." Consequently, proposed N.J.A.C. 12:69-1.1(c) states that "[a]n employer shall be in compliance with the ESLL if the employer provides each employee with PTO, which may include leave types other than sick, such as personal and vacation, so long as the PTO meets or exceeds all of the requirements

of the [ESLL]; that is, 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 [ESLL] and this chapter, including but not limited to: (1) Accrual in accordance with N.J.A.C. 12:69-3.4; (2) Use in accordance with N.J.A.C. 12:69-3.5; (3) Payment in accordance with N.J.A.C. 12:69-3.6; and (4) Payout and carry-over in accordance with N.J.A.C. 12:69-3.7." Consequently, the employer who seeks to meet the requirements of the ESLL using a compliant PTO program must adhere to *all of the requirements of the ESLL* and the Department's implementing rules, including the carry-over requirements, relative to *all of the PTO*, even where the employee is provided in excess of 40 hours of PTO. If the employer wishes to treat some PTO in a manner that does not comport with the requirements of the ESLL and implementing regulations, then that PTO program would not be ESLL compliant. In the event that the employer wishes to deviate from any one or more of the requirements of the ESLL relative hours of PTO afforded employees beyond the 40 hours required under the ESLL, the employer always has the option of splitting its leave policies so as to have an earned sick leave policy that is complaint with the ESLL and another non-ESLL compliant policy for other types of leave.

9. COMMENT: The commenter requests clarification regarding proposed N.J.A.C. 12:69-3.5(m)(2), which prohibits an employer from requiring an employee to use earned sick leave if the employee is eligible for such usage. The commenter specifically asks, if an employee is absent from work for a reason that is covered under the ESLL, may the employer "designate the time taken as [earned] sick leave under the [ESLL] regardless of whether the employee requests or desires it"? In the event that

the answer to this question is, no, the commenter suggests that the prohibition at N.J.A.C. 12:69-3.5(m)(2) against an employer requiring an employee to use earned sick leave "is contrary to the [ESLL], which contains no such restriction," adding, "[a]lso, this prohibition is inconsistent with the other Federal and state leave laws, such as the Federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (FLA), both of which permit employers to require employees to exhaust all other paid leave concurrently with the leave provided under these laws."

RESPONSE: The ESLL, at N.J.S.A. 34:11D-2(d), does, in fact, state that an employee "shall not be required to…use accrued earned sick leave." Proposed N.J.A.C. 12:69-3.5(m)(2) reflects this statutory prescription and indicates that "where an employee would be eligible to use earned sick leave under the [ESLL and N.J.A.C. 12:69], the employer shall be prohibited from requiring an employee to use earned sick leave." Consequently, the answer to the commenter's question is; no, an employer may not without the employee's consent designate time taken as earned sick leave. For example, if an employee must take leave in order to care for a seriously ill family member and is entitled under the New Jersey Family Leave Act (FLA) to take such leave with or without pay, the ESLL would require that the employee be given the option of taking unpaid leave under the FLA, while foregoing his or her right to use accrued earned sick leave, choosing instead to save that accrued earned sick leave for future use (or to carry over to the next benefit year or, if given the option by the employer, be paid out at the conclusion of the benefit year). Regarding the commenter's assertion that both the FMLA and FLA permit employers to require employees to "exhaust all other paid leave concurrently with the leave provided under these laws," following is

what N.J.A.C. 12:14-1.7, promulgated by the Division on Civil Rights, within the Department of Law and Public Safety, to implement the FLA, actually states:

> For the purpose of governing the use of accrued paid leave, employers shall treat family leave in the same manner as similar leaves of absence have been treated. If an employer has had a past practice or policy of requiring its employees to exhaust all accrued paid leave during a leave of absence, the employer may require employees to do so during a family leave. If an employer has a policy of allowing employees to take unpaid leaves without first exhausting accrued paid leave while on leave, it shall not require employees to exhaust accrued paid leave while on family leave. In situations where an employer does not have an established policy in this regard, the employee shall be entitled to utilize any accrued paid leave as part of the family leave. If such an employee determines not to utilize accrued paid leave, the employer shall not require such employee to utilize any accrued paid leave as part of the leave. Where an employer maintains leaves of absence which provide different policies and/or practices regarding the use of accrued paid leave, the employer shall treat family leave in the same manner as that other leave of absence which most closely resembles family leave.

Furthermore, the following is what 29 C.F.R. 825.207(a) and (b), promulgated by the United States Department of Labor to implement the FMLA actually state:

> (a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible

> employee to choose to substitute accrued paid leave for unpaid FMLA. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the ability to substitute accrued paid leave is determined by terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.
>
> (b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

The FLA rule cited above expressly states that if an employer has a policy of allowing employees to take unpaid leaves without first exhausting accrued paid leave while on

leave, it shall not require employees to exhaust accrued paid leave while on family leave. The FMLA rule states that an employer may require the employee to "substitute accrued paid leave for unpaid FMLA leave" and then defines "substitute" to mean "that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave." Both the FLA and FMLA speak of the interplay between an employer's paid leave policy and the designation of leave (paid or unpaid) as FLA or FMLA leave for the purpose of tracking FLA and FMLA leave exhaustion. Neither appears to contemplate the circumstance where a state law, rather than an independently established employer policy, creates an employee's entitlement to accrued paid leave and where that state law expressly indicates that an employee "shall not be required…to use" that statutorily mandated accrued paid leave. Therefore, there is no inconsistency between either the FLA or FMLA, and the prohibition within the ESLL against an employer requiring an employee to use accrued earned sick leave. For that reason and because the Department has no discretion to deviate from the ESLL's express prohibition, the Department will make no change to N.J.A.C. 12:69-3.5(m)(2)

10. COMMENT: The commenter states the following:

> As you may know, an employee who is unable to work due to illness or injury may be entitled to [temporary disability insurance benefits] after a period of seven days. Employees often request the use of sick days in order to be paid during this seven-day waiting period. An employee who remains incapacitated for over 21 days is retroactively paid [temporary disability insurance benefits] for the seven-day waiting period. We

respectfully request that the [Department] clarify whether an employer is able to recoup the earned sick leave paid to such an employee, with a corresponding restoration of the employee's earned sick leave entitlement, to avoid double payment for an absence.

RESPONSE: The commenter is correct that there should not be a double payment; which is to say, there should not be a payment of temporary disability insurance benefits from the state or a private plan carrier for the same period that the employee is using earned sick leave. However, consistent with the proscription within N.J.S.A. 34:11D-2(d) that an employee "shall not be required to…use accrued earned sick leave," and the corresponding prohibition within proposed N.J.A.C. 12:69-3.5(m)(2) against an employer requiring an employee to use earned sick leave, under the circumstance outlined by the commenter, regarding how to treat the one-week waiting period, the employee should be given the option of choosing. That is to say, the employee should decide whether to forego the retroactive temporary disability insurance benefit payment for the one-week waiting period in favor of using earned sick leave for that week; or to return the earned sick leave payments to the employer (and have his or her earned sick leave balance restored) in favor of receiving retroactive temporary disability insurance benefits for the one-week waiting period.

11. COMMENT: The commenter opposes the requirement set forth within proposed N.J.A.C. 12:69-2.1 and 12:69-3.1, that an employer establish a single benefit year for all employees of an employer. The commenter states that many employers use an employee's anniversary date to measure an employee's benefit year when determining the number of vacation, sick and personal days for which an employee is

eligible and the period of time within which the paid time off must be used. The commenter adds that to require employers to transition to a calendar year or fiscal year will create confusion for employees, especially where employers chose to maintain vacation time grant and usage based on an employee's anniversary date. The commenter asserts that permitting employers to establish a separate benefit year for each employee (based, for example, on the employee's anniversary date) or for different groups of employees (such as union-represented and management employees, or employees in different units or locations), is consistent with the definition of the term "benefit year," that appears within the ESLL. That is, the commenter maintains that because the ESLL defines "benefit year" to mean the period of 12 consecutive months established by an employer in which "an employee" shall accrue and use earned sick leave, it is clear that the Legislature intended to permit an employer to define the benefit year differently for each employee.

RESPONSE: The Department disagrees that use of the word "an" in the above quoted portion of the statutory definition for the term "benefit year" necessarily results in the inference suggested by the commenter, namely, that the Legislature intended to permit an employer to establish multiple benefit years for accrual, use, payment and carryover of earned sick leave. Nevertheless, the Department does believe that the ESLL's definition of "benefit year" affords the Department sufficient latitude to define the term in regulation in the manner suggested by the commenter, namely, so as to permit an employer to establish multiple benefit years, rather than require each employer to establish a single benefit year. Although to define the term "benefit year" in the manner suggested by the commenter may create an additional administrative burden on the

Department in its evaluation of employer benefit year change notifications, the Department finds the commenter's justification for its request to be persuasive and believes that the reduction in the burden on employers that would result from changing the definition of "benefit year," would outweigh any administrative burden on the Department. Consequently, the Department will not adopt proposed N.J.A.C. 12:69-3.1(a); that subsection will be reserved and in a subsequent rulemaking the Department will propose a new N.J.A.C. 12:69-3.1(a) that is consistent with this comment response. The Department will also make two changes on adoption so as to remove language that presumes employers have established a single benefit year for all employees as would have been required by proposed N.J.A.C. 12:69-3.1(a). Specifically, from proposed N.J.A.C. 12:69-3.1(b) the Department will remove the phrase, "Once the employer has established a single benefit year for all employees under (a) above," so that the subsection will now read simply, "In the event the employer proposes to change the benefit year, the employer shall provide notice to the Commissioner at least 30 calendar days prior to the proposed change." On adoption, the Department will also remove from the definition of "benefit year" within N.J.A.C. 12:69-2.1 the phrase "all employees" and replace it with the phrase, "an employee," taken verbatim from the definition of "benefit year" in the ESLL. Consequently, on adoption, the definition of "benefit year" within N.J.A.C. 12:69-2.1 will read, "the period of 12 consecutive months established by an employer in which an employee shall accrue and use earned sick leave." Neither of the latter two changes enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule; which is to say that in both instances, the new language is neutral on the issue of whether an employer must establish a single benefit year for all

employees. Consequently, the Department asserts that these modifications are appropriate at adoption.

12. COMMENT: The commenter takes issue with the Department's definition for the term "hours worked" that appears within proposed N.J.A.C. 12:69-2.1, namely, that "hours worked" means "hours worked" as that phrase is defined within N.J.A.C. 12:56-5. Specifically, the commenter asserts that N.J.A.C. 12:56-5, entitled "hours of work," does not contain an express definition for "hours worked." Instead, asserts the commenter, "the section describes certain scenarios where time may qualify as 'hours worked,' including on-call time and all time an employer requires an employee to be at the place of work." The commenter suggests that the Department adopt the following definition for hours worked: "(1) all the time the employee is required to be on duty, or (2) while on-call as described in N.J.A.C. 12:56-5.6(b)." The commenter also suggests that the Department's definition for "hours worked" within proposed N.J.A.C. 12:69-2.1 is inconsistent with another section of the proposed new rules. Specifically, the commenter maintains that N.J.A.C. 12:56-5.2(b), from the Wage and Hour rules' definition of "hours worked," which states that an employer is not required to pay an employee for hours the employee is not required to be at his or her place of work because of holidays, vacation, lunch hours, illness or similar reasons, is inconsistent with proposed N.J.A.C. 12:69-3.6(b), which states that "the taking of earned sick leave by the employee shall not result in the diminution in the employee's benefits."

RESPONSE: The eight sections of N.J.A.C. 12:56-5 (entitled, "Hours Worked"), taken collectively, define the phrase "hours worked," for the purpose of determining when an employee is entitled to the protections afforded under the New Jersey Wage

and Hour Law, N.J.S.A. 34:11-56a et seq. What constitutes "hours worked" is a complex legal issue that does not lend itself to a simple one sentence definition, as suggested by the commenter. The contents of N.J.A.C. 12:56-5 have formed the basis for employers' and employees' understanding of the concept of "hours worked" under the state's Wage and Hour Law, not to mention the understanding of the Department and the courts, for many years; which is why the Department proposed to adopt it for the purpose of guiding employers and employees as to what constitutes "hours worked" under the ESLL. That is, since employers and employees have been operating under N.J.A.C. 12:56-5 for wage and hour compliance purposes for many years, it makes sense (in the absence of a definition within the ESLL for the phrase "hours worked") to adopt the same approach for the purpose of accruing earned sick leave at the statutory rate of one hour of earned sick leave "for every 30 *hours worked*" (emphasis added). In other words, the simplest and most effective approach is to consider an hour worked for wage and hour purposes to be an hour worked for the purpose of earned sick leave accrual. The Department believes that extracting two phrases from the eight sections of N.J.A.C. 12:56-5 to form a one sentence definition within the new earned sick leave rules for the phrase "hours worked," as suggested by the commenter, would result in confusion. Consequently, the Department declines to make the change.

As to the comment that the proposed definition of "hours worked" would be inconsistent with proposed N.J.A.C. 12:69-3.6(b), the Department disagrees. The concepts expressed in the two parts of the proposed rules cited by the commenter are separate and discrete from one another. The definition of "hours worked," adopted within proposed N.J.A.C. 12:69-2.1 from the wage and hour rules, excludes hours the

employee is not required to be at his or her place of work because of holidays, vacation, lunch hours, illness and similar reasons. That would impact which hours are included when calculating earned sick leave accrual. Consequently, an hour during which an employee is not at work because of earned sick leave (which would constitute "illness and similar reasons"), would not be counted as an hour worked toward the 30 hours needed to accrue one hour of earned sick leave. Proposed N.J.A.C. 12:69-3.6(b), by contrast, pertains exclusively to employee benefits, and stands for the principle that an employee should not suffer a diminution in employee benefits as a result of taking earned sick leave. So, for example, where an employer offers a defined benefit pension and the pension allowance calculation is based in part on years of service, the employee who takes earned sick leave should not have his or her years of service reduced by the hours or days of earned sick leave taken during the employee's career.

13. COMMENT: The commenter asks whether the term "public health emergency" that appears within proposed N.J.A.C. 12:69-3.5(a)(4) – taken verbatim from N.J.S.A. 34:11D-3(a)(4) – includes the closing of a school or office due to a snowstorm or similar whether event.

RESPONSE: The term "public health emergency" to which the commenter refers is used within proposed N.J.A.C. 12:69-3.5(a)(4), which indicates that among the reasons an employer must permit an employee to use earned sick leave is when the employee is not able to work 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, or because of the issuance by a public health authority of a determination that the presence in the community of the employee,

or a member of the employee's family in need of care by the employee, would jeopardize the health of others." Although the term, "public health emergency" is not defined within the ESLL, it is defined within the New Jersey Emergency Health Powers Act, N.J.S.A. 26:13-1 et seq., as an occurrence or imminent threat of an occurrence that: (a) is caused or is reasonably believed to be caused by any of the following: (1) bioterrorism or an accidental release of one or more biological agents; (2) the appearance of a novel or previously controlled or eradicated biological agent; (3) a natural disaster; (4) a chemical attack or accidental release of toxic chemicals; or (5) a nuclear attack or nuclear accident; and; (b) poses a high probability of any of the following harms: (1) a large number of deaths, illness, or injury in the affected population; (2) a large number of serious or long-term impairments in the affected population; or (3) exposure to a biological agent or chemical that poses a significant risk of substantial future harm to a large number of people in the affected population. If the Department is to be guided by this, the only definition for the term "public health emergency" that appears within the New Jersey Statutes, then it must concluded that a "public health emergency" could potentially include certain serious weather events; since the definition includes an occurrence or imminent threat of an occurrence that is caused or is reasonably believed to be caused by a natural disaster that poses a high probability of a large number of deaths or injury to the affected population. However, there is the added requirement within the ESLL and proposed N.J.A.C. 12:69-3.5(a)(4), taken verbatim from the ESLL, that in order for the "public health emergency" to constitute a legitimate reason for use of earned sick leave, the resulting closure of an employee's workplace, or the school or place of care of a child of the employee must be

ordered by a public official. Consequently, the existence of a "public health emergency," without an accompanying order of a public official directing the closure of the place of work of the place of work of the employee or the school or place of care of a child of the employee, due to the "public health emergency," will not constitute a legitimate reason for use of earned sick leave. Furthermore, neither the ESLL, nor N.J.A.C. 12:69-3.5(a)(4), include among the reasons for use of earned sick leave instances where a public official orders the closure of a road(s), or the like, due to a "public health emergency," or a weather event. Rather, again, both the ESLL and the accompanying rule only allow for use of earned sick leave due to a "public health emergency" when the "public health emergency" results in the order of a public official closing the actual place of work of the employee or the school or place of care of a child of the employee.

14. COMMENT: The commenter requests that the Department change proposed N.J.A.C. 12:69-3.5(i) so as to include a special requirement for direct care personnel, such as home health aides, that when their need to use earned sick leave is not foreseeable, they must provide the employer with two hours of advanced notice.

RESPONSE: N.J.S.A. 34:11D-3(b) expressly states that "[i]f the reason for the leave is not foreseeable, an employer may require an employee to give notice of the intention as soon as practicable, if the employer has notified the employee of this requirement." The Legislature's use of the phrase "as soon as practicable" necessarily forecloses the Department from imposing a set notice requirement for any particular class of employees, as is suggested by the commenter. That is, "as soon as practicable," by definition, requires an individualized, case-by-case, determination as to

the earliest that one is able to provide notice. Where a particular employee falls ill, for example, one hour prior to his or her scheduled work shift, one-hour notice would be "as soon as practicable." To establish a blanket rule for any class of employees requiring two-hours-notice where the need to take earned sick leave is not foreseeable would be inconsistent with the ESLL. Furthermore, it is not at all clear how requiring a direct care employee to provide notice to his or her employer of an unforeseeable circumstance before it actually occurs (an impossibility) would provide any benefit to the individuals receiving care. If a direct care worker falls down the stairs of her apartment on her way to work and breaks her leg, a rule requiring that she provide two-hours-notice of an event that occurred only one-half hour before the start of her work shift is not going to get a replacement worker to her client any faster. It will only provide her employer with an unjustified basis to impose disciplinary action. The ESLL and proposed N.J.A.C. 12:69-3.5(f) permit the employer to require advance notice up to seven calendar days where the need to use earned sick leave is foreseeable. However, where the need to use earned sick leave is unforeseeable the ESLL and proposed rules permit the employer to require advance notice only "as soon as practicable." That is entirely appropriate. Therefore, the Department must decline to make the change suggested by the commenter.

15. COMMENT: The commenter suggests that N.J.A.C. 12:69-3.5(d) "needs clarification." The commenter explains:

> This provision of the regulation allows employees that have accrued paid sick leave prior to October 29, 2018 to use that accrued sick leave prior to February 26, 2019. However, many employers have employees that accrued paid sick

leave pursuant to local ordinances, which are expressly invalidated by the Act. Thus, the regulation should be clarified to expressly provide that any accrued leave earned under any local ordinance is invalidated and employers need not permit employees to use such leave after October 29, 2018.

RESPONSE: N.J.S.A. 34:11D-8(a) provides that the governing body of a county or municipality shall not, after the effective date of the ESLL (October 29, 2018), adopt any ordinance, resolution, law, rule, or regulation regarding earned sick leave, and that the provisions of the ESLL shall preempt any existing ordinance, resolution, law, rule or regulation regarding earned sick leave previously adopted by the governing body of a county or municipality. In a county or municipality where such an ordinance, resolution, law or rule existed prior to October 29, 2018; where a particular employer, pursuant to such an ordinance, resolution, law or rule, adopted an employer policy providing earned sick leave to its employees; and where an employee accrued earned sick leave under that employer policy, N.J.S.A. 34:11D-8(a) does *not* mean that such an employee's balance of accrued earned sick leave should be wiped off the books as of October 29, 2018. Such an employee has *earned* his or her sick leave balance and has a vested right in it by virtue of the employer policy, not by virtue of the now preempted local paid sick leave ordinance, resolution, law, or rule. An employer is no more entitled to strip that employee of his or her balance of earned sick leave than he is to demand the return of earned wages. Regarding the latter, imagine if the State's Wage and Hour Law had been amended to reduce the Statewide minimum hourly wage, effective July 1, 2019, to the Federal rate of $7.25, and with a preemption provision identical to that found at N.J.SA. 34:11D-8(a), stating that the governing body of a county or municipality shall

not, after July 1, 2019, adopt any ordinance, resolution, law, or rule, regarding minimum wage, and that the provisions of the amended Wage and Hour Law shall preempt any existing ordinance, resolution, law, or rule regarding minimum wage previously adopted by the governing body of a county or municipality. That would *not* mean that the employer who had paid his employee during the first half of 2019 at the then statutory minimum wage of $8.85 could demand of its employee the return of $1.60 for each hour worked between January 1, 2019 and July 1, 2019. In fact, the ESLL acknowledges that there will be existing employer policies regarding earned sick leave and exempts employees who have accrued earned sick leave under such employer policies from the law's 120-calendar-day waiting period for use of such leave. See N.J.S.A. 34:11D-2(a). That exemption from the 120-calendar-day waiting period is predicated on the understanding that the employee who has accrued earned sick leave prior to the effective date of the ESLL will have an opportunity to use that accrued leave.

16. COMMENT: The commenter suggests that the Department include within the proposed new rules a provision giving employers "the ability to require direct care personnel, including nurses and caregivers, who are deemed 'essential personnel' and/or who are servicing acute level 1 or 2 clients, to report for work during any such closure (that is, closure due to a weather event) or public health emergency." The commenter adds that if "public health emergency" is deemed to include weather events, this would present a significant hardship to health care establishments, adding that staff with children will be excused from their essential health care responsibilities, while those without childcare responsibilities will be required to shoulder the responsibility of reporting to work.

RESPONSE: The ESLL requires that employees be permitted to use earned sick leave for time during which an employee is not able to work 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. The law contains no exemption for direct care personnel, including nurses and caregivers, who are deemed essential personnel and/or those who are servicing acute level 1 or 2 clients. Consequently, the Department has no discretion to create such an exemption by regulation.

17. COMMENT: The commenter asserts that proposed N.J.A.C. 12:69-3.5(h), which addresses the employer's right to limit the use of earned sick leave on "certain dates" is inconsistent with and more restrictive than the ESLL. The commenter states that the ESLL, "broadly provides that '[e]mployers may prohibit employees from using foreseeable earned sick leave on certain dates and require reasonable documentation if sick leave that is not foreseeable is used during those dates." The proposed rule, observes the commenter, limits any such blackout dates, and only permits blackout dates for "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." Thus, concludes the commenter, "the regulations limit an employer's ability to implement blackout dates in a manner that is not reflected in the Act.

RESPONSE: The ESLL indicates that employers may prohibit employees from using foreseeable earned sick leave on "certain dates." However, nowhere within the ESLL is the phrase "certain dates" defined. Under circumstances such as these, where a law contains an undefined term or phrase and where it has been determined by the

agency responsible for enforcing the law that a definition is needed, it is customary for the agency responsible for enforcing the law to define the term or phrase through notice and comment rulemaking. That is precisely what the Department has done at proposed N.J.A.C. 12:69-3.5(h)2, where it states that the "certain dates" on which the employer may prohibit employees from using foreseeable earned sick leave 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. The Department has made a policy decision that defining the phrase "certain dates" in this manner strikes the appropriate balance between the free exercise by an employee of his or her rights under the ESLL and the right of the employer to operate his or her business or enterprise without undue disruption. The Department's action in this regard is entirely appropriate and within the bounds of both the ESLL and the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., which governs state agency rulemaking.

18. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.5(h)(2), which addresses the "certain dates" on which the employer may prohibit employees from using foreseeable earned sick leave, be modified to include "where adequate staffing is required to maintain proper ratios under applicable laws, regulations, ordinances, or agreements, or where circumstances of the employer's operations dictate the need for a prohibition due to staffing requirements."

RESPONSE: The Department believes that N.J.A.C. 12:69-3.5(h)(2) as proposed strikes the appropriate balance between the employee's right to use earned sick leave and the employer's operational needs. It is the ongoing responsibility of an employer to

manage staffing levels so as to “maintain proper ratios under applicable laws, regulations,” etc. Outside of the circumstances set forth in the proposed rule, the Department does not believe that employers should be permitted to take the extraordinary measure of identifying and imposing blackout dates. Consequently, the Department declines to make the change suggested by the commenter.

19. COMMENT: The commenter takes issue with proposed N.J.A.C. 12:69-3.5(j), which states that “[w]here the employee’s need to use earned sick leave is not foreseeable and the employee seeks to use such earned sick leave during any of the ‘certain dates’ described in (h) above, or where the employee uses earned sick leave for three or more consecutive days, the employer may require the employee to provide reasonable documentation that the leave is being taken for a permissible purpose under (a) above.” Specifically, the commenter asserts that its member agencies “are required to track and report when…caregivers and other direct care personnel are unable to report to work due to the flu, virus or other communicable condition that would put others, including our clients, at risk,” adding, “our member agencies must be permitted to not only question direct care personnel who call out sick whether they have a communicable condition, but they must also be permitted to require an employee who reports out with the flu, virus or other communicable condition to provide medical clearance from their treating physician before returning to work, regardless of the length of time that the employee has been out.”

RESPONSE: N.J.A.C. 12:69-3.5(j) mirrors N.J.S.A. 34:11D-3(b), which limits the circumstances where an employer is permitted to “require reasonable documentation that the leave is being taken for the purpose permitted under [N.J.S.A. 34:11D-3(a)]” to

(1) where the earned sick leave is not foreseeable and is being taken during one of the "certain dates" designated by the employer, and (2) where the employee uses earned sick leave for three or more consecutive days. This does not mean that a health care employer is prohibited from requiring a caregiver or other direct care worker who is returning to work following a flu, virus or other communicable condition, to provide medical clearance from his or her treating physician *as a condition to his or her return to work*. It simply means that the employer may not require such documentation *as proof that the employee is taking earned sick leave for a permitted purpose*. In other words, unless it is during one the "certain dates" designated by the employer (often referred to as "blackout dates") or the request for earned sick leave is for a period of three or more consecutive days, when the caregiver or direct care worker calls in to use earned sick leave and states that the reason he or she wishes to use earned sick leave is because, for example, he or she has the flu, the employer may not condition the employee's use of earned sick leave upon production of a doctor's note indicating that the employee does (or did), indeed, have the flu. Nothing in the ESLL prohibits that same employer from conditioning the caregiver or direct care worker's return to work on a medical clearance. Conditioning use of earned sick leave on the production of documentation that the leave is for a permitted purpose and conditioning an employee's return to work following an illness on medical clearance are two separate and distinct practices. Nothing in the ESLL prohibits the latter practice, so long as it is not a pretext for unlawfully denying an employee's request for earned sick leave.

20. COMMENT: The commenter requests "clarification of N.J.A.C. 12:69-3.7(a)(5) and N.J.A.C. 12:69-3.7(b)(1)," which according to the commenter, "provide[ ]

that an employer shall not be required to permit an employee to carry forward more than 40 hours of earned sick leave from one benefit year to the next." The commenter states, "[a]s written, the proposed regulation appears to allow employees to carry forward at least 40 hours of earned sick leave per benefit year, which suggests that employees could maintain 80 hours of earned sick leave in a given benefit year (i.e., 40 carried over and 40 earned)." The commenter maintains, "this was never the Legislature's intent." The commenter suggests that the Department amend the new rules to indicate that, "for example, if an employee carries over 20 hours of earned sick leave into a new benefit year, the employee will only be permitted to accrue an additional 20 hours of earned sick leave in the current benefit year, for a total bank of 40 hours."

RESPONSE: Proposed N.J.A.C. 12:69-3.7(a)(5) and 12:69-3.7(b)(1) are both entirely consistent with the ESLL, which states the following: (1) the employer must provide earned sick leave to each employee working for the employer in New Jersey, either accrued at a rate one hour of earned sick leave for every 30 hours worked, or "a full complement of earned sick leave for the benefit year" advanced to the employee on the first day of the benefit year; (2) where the employer uses the accrual method, if the employee declines a payout of unused earned sick leave or agrees to a payout of 50 percent of the amount of unused sick leave, the employee shall be entitled to carry forward to the following benefit year any unused earned sick leave, except that the employer shall not be required to permit the employee to carry forward from one benefit to the next more than 40 hours of earned sick leave; (3) where the employer uses the advancing method, the employer shall in the final month of the employee's benefit year

either provide 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 to the next more than 40 hours of earned sick leave; and (4) the employer shall not be required to permit the employee to accrue or use in any benefit year more than 40 hours of earned sick leave. Thus, by the express terms of the ESLL, if the employer advances the employee 40 hours of earned sick leave in Year 1 and the employee uses 20 hours of earned sick leave in Year 1, the employer must permit the employee to carry over 20 hours of unused earned sick leave from Year 1 to Year 2. Also, by the express terms of the ESLL, if the employer chooses to use the advancing method, he must advance "the full complement of earned sick leave for a benefit year" to the employee on the first day of the benefit year. Thus, the employer would advance the employee 40 hours of earned sick leave in Year 2, to be added to the 20 hours of earned sick leave carried over by the employee from Year 1, resulting in an earned sick leave bank on the first day of Year 2 of 60 hours of earned sick leave. This is what the ESLL dictates and the Department has no discretion to deviate from the law.

21. COMMENT: The commenter observes that proposed N.J.A.C. 12:69-1.4(b) provides that the "employer shall also pay the Commissioner an administrative fee on all payments of gross amounts due to employees under the [ESLL]," and asks that the Department clarify that the phrase, "gross amounts due employees" does not include attorney's fees awarded to employees and that, therefore, the administrative fee is not applied to attorney's fees.

RESPONSE: The substance of proposed N.J.A.C. 12:69-1.2, 1.3, 1.4, 1.5, and 1.6, regarding violations, administrative penalties, administrative fees, interest and hearings under the ESLL, respectively, were modeled on if not taken verbatim from, N.J.A.C. 12:56-1.2, 1.3, 1.4, 1.5 and 1.6, regarding violations, administrative penalties, administrative fees, interest and hearings under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq. This is because N.J.S.A. 34:11D-5 states in pertinent part that any failure of an employer to make available or pay earned sick leave as required by the ESLL, or any other violation of the ESLL, shall be regarded as a failure to meet the wage payment requirements of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and the remedies, penalties, and other measures provided by the Wage and Hour Law for failure to pay wages or other violations of that Act shall be applicable. N.J.A.C. 12:56-1.4 (administrative fees under the Wage and Hour Law) states in pertinent part that the "employer shall pay the Commissioner an administrative fee *on all payments of gross amounts due to employees*" (emphasis added). This is identical to proposed N.J.A.C. 12:69-1.4. Both rules apply within the context of administrative proceedings where the Commissioner seeks to supervise the payment of amounts due to employees. In such proceedings the Commissioner does not have the authority to award attorney's fees. That is, nowhere within either the ESLL, N.J.S.A. 34:11D-1 et seq., or the Wage and Hour Law, N.J.S.A. 34:11-56a et seq., is the Commissioner empowered to award attorney's fees in an administrative proceeding. The only mention of attorney's fees within either law is at N.J.S.A. 34:11-56a25, which applies exclusively to civil actions by employees to recover wages, where the court (not the Commissioner) is empowered to award attorney's fees. In such a civil action, the

court does not have the power to award an administrative fee to the Department. Consequently, the two remedies – administrative fee and attorney's fees – are mutually exclusive and there is no circumstance where the administrative fee within proposed N.J.A.C. 12:69-1.4 would be applied by the Department to attorney's fees.

22. COMMENT: The commenter correctly observes that the citation within proposed N.J.A.C. 12:69-1.5(b) to "New Jersey Court Rules, *N.J.S.A.* 4:42-11" is incorrect and suggests that it be changed to New Jersey Court Rules, *Rule* 4:42-11."

RESPONSE: The Department will make this technical change on adoption.

23. COMMENT: The commenter observes that proposed N.J.A.C. 12:69-2.1 defines the term "employee" to mean an individual engaged in service for compensation to an employer in the business of the employer who performs that service in New Jersey," and suggests that the rule should be modified to address how much time an employee who works both inside and outside of New Jersey must spend performing services in New Jersey to be eligible for earned sick leave. The commenter makes reference to a Frequently Asked Questions (FAQ) document posted on the Department's website, in which the Department indicates that for an employee who works both within New Jersey and outside of New Jersey, the question of coverage under the ESLL and resulting entitlement to earned sick leave will depend largely on how much time the employee spends working in New Jersey, adding that if the employee routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey, then the employee is entitled to receive earned sick leave under the ESLL. The FAQ explains that this is the test applied by the Division on Civil Rights (DCR) in its

enforcement of the New Jersey Family Leave Act (FLA) and states that the Department anticipates adopting the same approach through formal rulemaking. The commenter suggests that the Department make this change to the definition of "employee" at proposed N.J.A.C. 12:69-2.1, and that within that definition, the Department also indicate that the term "routinely" mean "more than fifty percent of an employee's hours worked."

RESPONSE: As indicated in the FAQ document referred to by the commenter, the Department does intend to adopt through formal rulemaking the DCR's approach to determining when the ESLL applies to those working both within and without New Jersey. See N.J.A.C. 13:14-1.2. However, this is not a change that the Department is permitted to make on adoption, as it would be substantive and would not meet the standard for permissible changes on adoption set forth at N.J.A.C. 1:30-4.3. The Department will propose through a subsequent rulemaking an amendment to N.J.A.C. 12:69-2.1 consistent with what has been suggested in the FAQ document (summarized above). For the purpose of the subsequent rulemaking, the Department will take the commenter's suggested definition of the term "routinely" into consideration.

24. COMMENT: The commenter observes that N.J.S.A. 34:11D-2(e) states, "If an employee is terminated, laid off, furloughed, or otherwise separated from employment with the employer, any unused accrued earned sick leave shall be reinstated upon the re-hiring or reinstatement of the employee ***to that employer***, within six months of termination, being laid off or furloughed, or separation, and prior employment with the employer shall be counted towards meeting the eligibility requirements set forth in this section" (emphasis added); whereas, proposed N.J.A.C.

12:69-3.3(g) states that, “[w]here an employee is terminated, laid off, furloughed or otherwise separated from employment with the employer and where the employee is reinstated or rehired in New Jersey within six months of the separation, any unused earned sick leave accrued by the employee prior to the separation shall be returned to the employee upon rehire or reinstatement.” The commenter suggests that the phrase “to that employment” be added to proposed N.J.A.C. 12:69-3.3(g) “to clarify that the employee must be hired by the same, or successor, employer.”

RESPONSE: In its translation of this particular provision from the ESLL to the proposed regulations, the Department engaged in limited editing so as to eliminate redundancy. That is, the Department believed that it was sufficient to state that the employee had been terminated, laid off, furloughed, or otherwise separated from employment with the employer and then was reinstated or rehired in New Jersey within six months of the separation; since an employee can only be *re*hired by or *re*instated to employment with “the employer” referred to earlier in the same sentence. That is to say, if the person is hired by a different employer, then he or she has not been *re*hired or *re*instated; he or she has simply been hired. Similarly, the Department saw no need to use the phrase “terminated, laid off, furloughed or otherwise separated” at the beginning of the sentence and then, as the legislation does, restate at the end of the sentence, “within six months of termination, being laid off or furloughed, or separation.” It seemed sufficient (and still does) at the end of the sentence to simply state, “within six months of separation,” since it has already been established that the individual’s separation was the result of being “terminated, laid off, furloughed or otherwise separated.” In any event, if the commenter believes that it would provide meaningful

clarification to include the phrase “to that employment” within the proposed rule, the Department will oblige. This change would not enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule, since it does not change the meaning of what was originally proposed. Consequently, the Department asserts that this modification is appropriate at adoption.

25. COMMENT: The commenter expresses support for proposed N.J.A.C. 12:69-3.5(h) as it appears in the notice of proposal and urges the Department not to make any changes to that section on adoption. In particular, the commenter expresses support for that part of proposed N.J.A.C. 12:69-3.5(h)(2), where the Department indicates that the “certain dates” on which the employer may prohibit employees from using foreseeable earned sick leave 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. The commenter adds, “[g]iven that high volume periods vary by business and industry, and from year to year, the number of blackout dates an employer identifies should not be limited.” The commenter also maintains that because employers may be unable to predict high volume times as they vary based on, among other things, customer, patient or client demands, employers should not be required to provide a “specific notice period” for identifying blackout dates.

RESPONSE: The Department is not making any change to proposed N.J.A.C. 12:69-3.5(h) on adoption. Consequently, the proposed definition of the phrase “certain dates,” which appears at proposed N.J.A.C. 12:69-3.5(h) will be adopted as proposed. There will also be no blanket rule setting forth a maximum number of blackout dates that an employer may identify and there will be no set period of notice (in days or

otherwise) that the employer must provide to its employees of its identification of blackout dates. Rather, the term of a blackout period will be limited by the employer's ability to verify for the entirety of the blackout period that it is due to high-volume or a special event, during which permitting the use of foreseeable earned sick leave would unduly disrupt the operations of the employer; and employer notice will be governed by the standard of reasonableness; which is to say, the notice provided to employees of a blackout period during which the use of foreseeable earned sick leave will be prohibited because it would unduly disrupt the operations of the employer, must be reasonable under the circumstances.

26. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-1.8(d), which states that any information an employer possesses regarding the health of an employee or any family member of the employee or domestic or sexual violence affecting an employee or employee's family member shall be treated as confidential and not disclosed, except to the affected employee or with the written permission of the affected employee; should "be modified to reflect that nothing contained in the regulation should be construed as prohibiting an employer from complying with applicable law or regulations or from responding to a court order," adding, "[n]otwithstanding the prohibition on disclosure of information, the spirit and intent of the proposed regulation is to foster adherence to existing law and regulations by employers and to enable employers to respond to valid legal process."

RESPONSE: The ESLL; specifically, N.J.S.A. 34:11D-3(e), states the following: "Any information an employer possesses regarding the health of an employee or any family member of the employee or domestic or sexual violence affecting an employee or

employee's family member shall be treated as confidential and not disclosed except to the affected employee or with the written permission of the affected employee." Proposed N.J.A.C. 12:69-1.8(d) is taken verbatim from the law. The Department declines to make the change suggested by the commenter.

27. COMMENT: The commenter requests "clarification" as to whether use of the word "remains" within proposed N.J.A.C. 12:69-3.3(f) means that in order for an employee transferred to a separate division, entity, or location to retain all earned sick leave that was accrued while working with the prior division, entity or location, the employee must have worked in New Jersey prior to the transfer.

RESPONSE: N.J.A.C. 12:69-3.3(f) states the following: "Where an employee has been transferred to a separate division, entity, or location, but remains employed in New Jersey by the same employer, the employee shall retain all earned sick leave that was accrued while working with the prior division, entity, or location." The commenter is correct as to the import of the word "remains." That is, it is axiomatic that the employee must have accrued earned sick leave while working in New Jersey in the first place in order to possess any accrued earned sick leave to retain following a transfer to a separate division, entity, or location in New Jersey with the same employer.

28. COMMENT: The commenter requests "clarification" as to proposed N.J.A.C. 12:69-3.3(g), which states that where an employee is terminated, laid-off, furloughed or otherwise separated from employment with the employer and where the employee is reinstated or rehired in New Jersey within six months of the separation, any unused earned sick leave accrued by the employee prior to the separation shall be returned to the employee upon rehire or reinstatement. That is, the commenter would like to

confirm that “the requirement applies only to employees who are employed within the State of New Jersey prior to the separation from employment.”

RESPONSE: The commenter is correct that the employee must have accrued earned sick leave while working in New Jersey in the first place in order to have any accrued earned sick leave to be returned to the employee following his or her reinstatement or rehire. That is, for example, if the employee had been working exclusively in Ohio prior to the separation from employment, the employee would have no accrued earned sick leave to be returned upon the employee’s reinstatement or rehire, since the ESLL is a New Jersey law, not an Ohio law.

29. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.3(g) “should be modified to require a reinstated or rehired employee to wait 120 days before he or she can use earned sick leave,” adding, “[i]n the absence of a waiting period, employees may decide to return to an employer or reactivate their status solely to recoup prior earned sick leave benefits and then resign from employment.”

RESPONSE: The Department disagrees with the commenter. N.J.S.A. 34:11D-2(e) states in pertinent part that the employee who is terminated, laid off, furloughed, or otherwise separated from employment with the employer and who is reinstated or rehired to that employment within six months of the separation must not only have any unused accrued earned sick leave restored upon his or her re-hiring or reinstatement, but also “prior employment with the employer shall be counted towards meeting the eligibility requirements set forth in [N.J.S.A. 34:11D-2],” which includes the 120-day waiting period requirement at N.J.S.A. 34:11D-2(a). Consequently, the Department proposed N.J.A.C. 12:69-3.5(o), which states, “[w]here an employee is terminated, laid

off, furloughed, or otherwise separated from employment with the employer, where the employee is reinstated or rehired within six months of the separation, and where pursuant to N.J.A.C. 12:69-3.3(g) or 3.4(c), any unused earned sick leave accrued or advanced by the employee prior to the separation has been returned to the employee upon rehire or reinstatement, the employee's entitlement to use the accrued or advanced earned sick leave shall not be adversely affected; which is to say, the employee shall be treated for the purpose of using his or her accrued or advanced earned sick leave as if there had been no break in employment." This rule is appropriate and consistent with the ESLL. Consequently, the Department declines to make the change suggested by the commenter.

30. COMMENT: The commenter suggests the following changes to proposed N.J.A.C. 12:69-1 et seq.:

1. "[T]he inclusion of a new provision excluding bona fide ministerial employees from the scope of the regulations since such issues are between the minister and the religious organization or entity;"

2. Modifying proposed N.J.A.C. 12:69-1.1(c) so as to indicate that a PTO program may be compliant where it "designates a portion of a PTO policy in at least an amount equal to forty (40) hours each benefit year" and so as to indicate that "[c]arry-over shall not be required if the employer advances the PTO in accordance with N.J.A.C. 12:69-3.4;"

3. Modifying proposed N.J.A.C. 12:69-1.1(d)(1) so as to indicate that, "[w]here an employer utilizes a sick leave bank or PTO policy with maximum time off in excess of the minimums of N.J.A.C. 12:69-3.3(b) and

N.J.A.C. 12:69-3.4(a), a compliant policy may suspend accruals pending employee use of available time without violating the [ESLL];"

4. Modifying proposed N.J.A.C. 12:69-1.7(a) so as to indicate that, "[i]f an employer that utilizes a PTO policy to satisfy its obligations under the [ESLL] provides written notice to its employees that any PTO used for purposes covered by the [ESLL] must be reported as such prior to use, the prohibitions of this section shall not apply, nor shall any action taken for violation of such a PTO policy be considered retaliatory, discriminatory, unlawful or actionable;"

5. Modifying proposed N.J.A.C. 12:69-1.7(b) so as to create an exception from the prohibition against an employer counting legitimate use of earned sick leave under the ESLL 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, for the circumstance where an employee runs afoul of the new provision suggested by the commenter in 4. above; and

6. Modifying proposed N.J.A.C. 12:69-1.8(c) so as to indicate that the presumption that a violation has occurred where the employer has not maintained relevant records or has not allowed the Commissioner access to such records, does not apply with respect to "PTO policies which may be used for reasons other than those covered by the [ESLL] or with respect to carry-over of paid sick time where the employer advances the paid sick time in accordance with N.J.A.C. 12:69-3.4."

RESPONSE: Each of the changes suggested by the commenter would be inconsistent with the ESLL and, therefore, the Department declines to make those changes.

31. COMMENT: Proposed N.J.A.C. 12:69-3.3(c) states that where the employer does not record hours worked for a particular employee because the employee is an exempt employee under the Federal Fair Labor Standards Act or the New Jersey Wage and Hour Law, the employer may either (1) record the actual hours worked for that employee for the purpose of calculating earned sick leave accrual; or (2) presume, solely for the purpose of calculating earned sick leave accrual, that the employee works 40 hours per week. The commenter suggests that a third option be added for "exempt employees who work on a part-time basis," whereby the employer would be permitted to presume eight hours worked for each day that such an employee works.

RESPONSE: Under N.J.A.C. 12:69-3.3(c) as proposed, if any employer of exempt employees, full time or part time, prefers not to presume a 40-hour work week for the purpose of calculating earned sick leave accrual, that employer has the option of recording the actual hours worked and permitting exempt employees to accrue earned sick leave for only the hours recorded. The Department is not persuaded that the third option suggested by the commenter for part time exempt employees is needed. Consequently, the Department declines to make the change suggested by the commenter.

32. COMMENT: The commenter asserts that the definition of "health care professional" that appears in proposed N.J.A.C. 12:69-2.1 is "far too limited to encompass the types of positions a health care facility may employ or whom physicians

may direct/authorize to provide health care," adding, "[t]he addition of technicians, assistants, and aids provides greater clarity to the scope of the definition."

RESPONSE: The definition for the term "health care professional" that appears within proposed N.J.A.C. 12:69-2.1 is taken verbatim from N.J.S.A. 34:11D-1. The Department has no discretion to make the changes suggested by the commenter.

33. COMMENT: The commenter suggests changing proposed N.J.A.C. 12:69-3.4(a) so as to permit prorating of advanced earned sick leave under certain circumstances and in a particular manner. The commenter makes reference to the FAQ document posted on the Department's website, which addresses an employer advancing earned sick leave to a part-time employee in an amount less than 40 hours based on the number of hours that the employer anticipates the part-time employee will work during the upcoming benefit year, and prorating advanced earned sick leave for the remainder of the benefit year if an employee commences employment during a benefit year.

RESPONSE: The Department does intend to address the prorating of advanced earned sick leave under the two circumstances described above. However, this is not a change that the Department is permitted to make on adoption, as it would be substantive and would not meet the standard for permissible changes on adoption set forth at N.J.A.C. 1:30-4.3. The Department will propose through a subsequent rulemaking an amendment to N.J.A.C. 12:69-3.4(a), whereby at the beginning of the benefit year, an employer will be permitted to advance a part-time employee the amount of earned sick leave he or she would accrue at the rate of one hour of earned sick for every 30 hours worked based on the hours the employer anticipates the employee will

work during the upcoming benefit year. However, under the yet to be proposed rule amendment, if the employer advances the part-time employee fewer than 40 hours of earned sick leave, the employer would still be required to track the employee's hours worked and the employee's accrual of earned sick leave during the benefit year, because a part-time employee may work more hours than anticipated. Under the yet to be proposed rule amendment, where the employee does, in fact, work more hours than anticipated, the employer would be required to permit the employee to accrue earned sick leave at the rate of one hour for every 30 hours worked until the total amount of accrued earned sick leave reaches the maximum 40 hours for the benefit year. The same would apply under the yet to be proposed rule amendment for employers who prorate advanced earned sick leave for the remainder of the benefit year if an employee commences employment during the benefit year. Under both circumstances, to avoid tracking accruals, the employer would need to advance the full 40 hours of earned sick leave.

34. COMMENT: The commenter suggests adding two new paragraphs to proposed N.J.A.C. 12:69-3.5(f) to state that (1) "where the employee fails to provide the requisite advance notice for foreseeable earned sick leave, the employer may deny any such request to use earned sick leave or discipline the employee if the employee utilizes earned sick leave for 'unforeseeable' earned sick leave used on the date for which the foreseeable earned sick leave was originally requested and denied by the employer," and (2) "an employer may deny a request for foreseeable earned sick leave, regardless of whether the employee provides any requested advance notice, where the employer must maintain staffing ratios to comply with applicable federal, state, or local

laws and regulations or pursuant to any contract with a federal ,state or local government entity."

RESPONSE: The ESLL and the proposed rules already state that where the employee's need to use earned sick leave is foreseeable, the employer may require advance notice of the employee's intention to use the leave, not to exceed seven calendar days prior to the date the leave is to begin. The obvious inference is that if the employee fails to provide the required notice, that the employer may deny the request. As to the remainder of the commenters suggested changes, the Department does not believe that they are consistent with either the letter or the spirit of the ESLL. Consequently, the Department declines to make any of the changes suggested by the commenter.

35. COMMENT: The commenter suggests that the definition of "employee" be modified to exclude interns and temporary employees from coverage under the ESLL.

RESPONSE: The term "employee" is defined within the ESLL. The Legislature excluded the following: (1) employees performing service in the construction industry under contract pursuant to a collective bargaining agreement, (2) per diem health care employees, and (3) public employees who are provided with sick leave with full pay pursuant to any other law, rule, or regulation of New Jersey. See N.J.S.A. 34:11D-1. The Legislature did not, however, exclude either part-time employees or interns. It would be inappropriate and beyond the Department's statutory authority for the Department to exclude any class of employees from the definition of the term "employee" other than those expressly set forth within the ESLL. Consequently, the Department declines to make the change suggested by the commenter.

36. COMMENT: The commenter requests that “overtime hours worked not be used in determining the rate of pay for [earned] sick leave purposes,” adding, “we believe a clarification is needed to ensure that any employees accruing or utilizing [earned sick leave] will be paid at their normal rate of pay.”

RESPONSE: Proposed N.J.A.C. 12:69-3.6 expressly states that (1) the employer shall pay the employee for earned sick leave “at the same rate of pay as the employee *normally earns*” (emphasis added); (2) where an employee’s rate of pay fluctuates, the rate of pay for earned sick leave shall be “the amount that the employee is regularly paid for each hour of work as determined by adding together the employee’s total earnings, *exclusive of overtime premium pay*, for the seven most recent workdays when the employee did not take leave and dividing that sum by the total hours worked during the seven day period” (emphasis added); and (3) “where an employee uses earned sick leave during hours that would have been overtime if worked, *the employer is not required to pay the overtime rate of pay.*” (emphasis added). The Department does not believe that any further clarification is needed.

37. COMMENT: The commenter requests that “for any unused [earned sick leave] carried forward to the next benefit year (and not used in that year) be forfeited at the end of the second benefit year, meaning the employer is not obliged to payout any unused sick time which was carried forward and not used.” The employer also asks that “employers should be allowed to preserve a policy of “use it or lose it” for exempt, salaried employees,” adding, “[t]he payout of unused sick time (not carried forward) will add significant costs to employers and is antithetical to the intent of the [ESLL]” and

“[the ESLL] and these rules should not be used to increase an employee’s compensation.”

RESPONSE: The commenter appears to believe that under the proposed rules there are circumstances where an employer would be “obliged” to pay out unused earned sick leave at the end of a benefit year. This is not so. Under both the accrual method and advancing method, the option of offering a payout of unused earned sick leave at the end of the benefit year is entirely within the discretion of the employer. Specifically, where the employer provides earned sick leave to its employees using the accrual method, the employer (at his or her discretion) may provide an offer to the employee for payout of unused earned sick leave. Once that offer has been made, the employee may choose either a payout of the full amount of unused earned sick leave or a payout of 50 percent of the amount of unused earned sick leave. If the employee declines a payout of unused earned sick leave or agrees to a payout of 50 percent of the amount of unused earned sick leave, the employee is entitled to carry forward to the following benefit year any unused earned sick leave, except that the employer shall not be required to carry forward from one benefit year to the next more than 40 hours of earned sick leave. Where the employer provides earned sick leave to its employees using the advancing method, the employer (at his or her discretion) may choose either to provide the employee a payout of the full amount of unused earned sick leave or permit the employee to carry over any unused earned sick leave, except that the employer is not required to permit the employee to carry forward from one benefit year to the next more than 40 hours of earned sick leave. Again, under both the accrual

method and advancing method, the employer decides whether to offer a payout of unused earned sick leave and may choose not to do so.

38. COMMENT: The commenter opposes any move to modify proposed N.J.A.C. 12:69-3.5(h), regarding the employer's ability to prohibit the employee from using foreseeable earned sick leave on "certain dates."

RESPONSE: The Department is not changing proposed N.J.A.C. 12:69-3.5(h) on adoption.

39. COMMENT: The commenter "urges [the Department] to fully exclude the public schools from the parameters of the [ESLL]" and requests that the proposed rules "be clarified to this effect." The commenter maintains that the Legislature intended to apply a blanket exemption from coverage under the ESLL to all public employers and all of the employees who work for them, regardless of whether all of those employees are provided with sick leave at full pay pursuant to any other law, rule, or regulation of the state.

RESPONSE: The ESLL defines the term "employee" so as to exclude only those public employees "who [are] provided with sick leave with full pay pursuant to any other law, rule, or regulation of this state." The Legislature could have indicated that the term "employee" does not include any employee of a public employer, thus creating the blanket exemption sought by the commenter. It did not. Consequently, it is the Department's position, based on the terms of the ESLL, that the public employer does not, on the basis that some or even most if its employees are provided with sick leave at full pay under a law other than the ESLL, get a blanket exemption from coverage under the ESLL.

40. COMMENT: N.J.S.A. 34:11D-2(a) states that an employer shall not be required to permit the employee to accrue or use in any benefit year or carry forward from one benefit year to the next, more than 40 hours of earned sick leave. The commenter observes that although proposed N.J.A.C. 12:69-3.3(b) states that the employer shall not be required to permit the employee to *accrue* more than 40 hours of earned sick leave in any benefit year, there is no corresponding provision within the proposed new rules reflecting the statutory prohibition against requiring an employer to permit an employee to *use* more than 40 hours of earned sick leave in a benefit year.

RESPONSE: Since this limitation is clearly and unequivocally stated within the ESLL it is not technically necessary for there to be a corresponding provision within the new rules. Nevertheless, so as to avoid any possible confusion, the Department will add a new N.J.A.C. 12:3.5(t) on adoption, which states, as is clearly indicated within the ESLL, that the employer shall not be required to permit the employee to use more than 40 hours of earned sick leave in any benefit year.

41. COMMENT: The commenter inquires about a "part-time employee [who] works on a flexible schedule;" presenting the following scenario and suggesting that the proposed rules do not adequately address it:

> Suppose that our employee expects, in a given week, to work on Tuesday, Thursday, and Friday, for a total of 24 hours. He feels ill Tuesday morning and informs his supervisor that he will be unavailable that day, but he feels better the next day and does his planned work Wednesday, Thursday and Friday. He works, and is paid for, 24 hours as planned. Under the

proposed [earned sick leave] rule, would he be entitled to claim [earned sick leave] pay for Tuesday, increasing his paid hours for the week to 32?

RESPONSE: Proposed N.J.A.C. 12:69-3.5(l) and (m) expressly address the situation about which the commenter inquires. Therefore, no change to the proposed rules is necessary. Specifically, proposed N.J.A.C. 12:69-3.5(l) states that where an employee would be eligible to use earned sick leave under the ESLL and N.J.A.C. 12:69, the employee may, only with the employer's consent, choose to work additional hours to compensate for the hours of work missed, rather than use earned sick leave; and proposed N.J.A.C. 12:69-3.5(m)(1) states that where an employee would be eligible to use earned sick leave under the ESLL and N.J.A.C. 12:69, the employer is prohibited from requiring an employee to work additional hours to compensate for the hours of work missed. In other words, under the scenario presented by the commenter, where the employer and the employee both agree, the employee may work on Wednesday to compensate for the hours of work missed on Tuesday, rather than use earned sick leave.

42. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.3(g) and 3.4(c), regarding the return of unused earned sick leave to an employee who is terminated, laid off, furloughed, or otherwise separated from employment with the employer where the employee is reinstated or rehired to that employment in New Jersey within six months of the separation, should be modified so as to clarify that the employer is not required to return to the reinstated or rehired employee earned sick leave that has already been paid to the employee by the employer.

RESPONSE: When proposed N.J.A.C. 12:69-3.3(g) and 3.4(c) refer to “unused earned sick leave,” that means that the earned sick leave has not yet been used/paid. It is clear from the rules as proposed that if an employee has already used the earned sick leave, which includes using the earned sick leave for one of the permissible purposes under the ESLL or having been paid out for unused earned sick leave at the conclusion of a benefit year, then the employer need not return that used earned sick leave to the separated employee upon his or her reinstatement or rehire. No change to the proposed rules is necessary.

43. COMMENT: The commenter asks “how long (number of days) does the employee have to choose a partial payout or carryover of unused earned sick leave after the employee declines the payout offer under N.J.A.C. 12:69-3.7(a)(3)” and “if the employer does not elect or refuses to elect any of the options set forth under N.J.A.C. 12:69-3.7 for payout or carryover of earned sick leave, how does the employer comply with this section?”

RESPONSE: Proposed N.J.A.C. 12:69-3.7 mirrors the ESLL and sets forth in detail the procedure for payout and carry-over of unused earned sick leave at the conclusion of a benefit year. Under the ESLL and the proposed rule, the employee does not have the ability to “refuse to elect any of the options.” Rather, the employee has the option of accepting the employer’s offer of payout at the conclusion of the benefit year (if that offer is made) and if the employee elects not to accept the payout offer, then the employer must carry-over to the following benefit year any unused earned sick leave, except that the employer is not required to permit the employee to carry forward from one benefit year to the next more than 40 hours of earned sick leave.

As to the number of days the employee has to choose a partial payout (which only applies to employees for whom the employer is using the accrual method), the above-cited rule and the ESLL state that the employee has 10 calendar days from the date that the payout offer was made to accept the offer. Presumably the employer who is using the accrual method will present the payout offer to employees as an "all or 50 percent" proposition and the employee will select all or 50 percent at the same time that the employee accepts the payout offer (within 10 calendar days from the date that the payout offer was made).

44. COMMENT: The commenter requests that the Department add a rule permitting school district employers to require all "substitute, intermittent, per diem, on-call or 'as-needed'" employees to provide a minimum amount of advance notice in order to use earned sick leave.

RESPONSE: Proposed N.J.A.C. 12:69-3.5(f) and 3.5(i) address the ability of employers to require advance notice of the need to use accrued earned sick leave. The first of those subsections states that 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 to the date the leave is to begin. The second subsection states that where the need to use earned sick leave is not foreseeable, the employer may require an employee to provide notice as soon as practicable. The ESLL contains no special notice requirement for substitute, intermittent, per-diem (other than per diem health care employees, who are exempt from coverage under the law altogether), on-call or "as-needed" employees. Consequently, the Department declines to make the change to the proposed rules suggested by the commenter.

45. COMMENT: The commenter states, “[w]hen drafting sick leave rules please consider providing guidance to a school district indicating they need to modify their sick leave use rules to comply with the utilization rules of the new law.”

RESPONSE: The ESLL indicates (and the proposed new rules reflect) that public employees who are provided with sick leave at full pay pursuant to any other law or rule of the state are excluded from coverage under the ESLL and proposed new N.J.A.C. 12:69. Therefore, where a school district has a sick leave policy for employees covered under N.J.S.A. 18A, for example, and where that sick leave policy is compliant with N.J.S.A. 18A, the employer need make no change to its existing sick leave policy regarding those particular employees. As to school district employees who are not provided with sick leave at full pay pursuant to another state law or rule, the school district must adopt an earned sick leave policy that is consistent with the ESLL. All of this is already included within the proposed new rules. Consequently, no change to the proposed new rules is necessary.

46. COMMENT: The commenter requests confirmation that the ESLL does not apply to railroad employees subject to the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. 351 et seq. The commenter explains that the RUIA contains the exclusive provision for the payment of sickness benefits to railroad employees and the RUIA expressly states that, “no employee shall have or assert any right to…sickness benefits under a sickness law of any State with respect to sickness periods occurring after June 30, 1947.” The commenter cites to a number of decisions in various jurisdictions where courts have ruled in favor of the preemptive effect of the RUIA relative to state laws that provide sick leave for an employee’s personal illness.

RESPONSE: The Department is not able to confirm within the context of this rulemaking whether for railroad employees working in New Jersey the RUIA preempts the ESLL. It is worth noting that the ESLL entitles employees to use earned sick leave for a number of reasons beyond personal illness, such as absence necessary due to circumstances resulting from the employee, or a family member of the employee, being a victim of domestic or sexual violence; and time during which the employee is not able to work because of 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; and time needed 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. This is not to conclude that the RUIA does not preempt the ESLL, but the Department is not persuaded that it is a settled matter. Consequently, the Department is unable to provide the confirmation sought by the commenter, nor will the Department make a change to the proposed rules on adoption.

47. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-1.8(d), which states that any information an employer possesses regarding the health of an employee or any family member of the employee or domestic or sexual violence affecting an employee or employee's family member shall be treated as confidential and not disclosed (except to the affected employee or with the written permission of the affected employee), be modified "to indicate that this includes any documentation or information directly related to the employee's experience with domestic violence, any

services offered or accessed by the employee, and any changes in the employee's employment including employment status, schedule, location, etc."

RESPONSE: Proposed N.J.A.C. 12:69-1.8(d) is taken verbatim from the ESLL; specifically, from N.J.S.A. 34;11B-3(e). It is already clear (without any change to the proposed rules) that documentation or information directly related to the employee's experience with domestic violence and any services offered or accessed by the employee due to the employee's experience with domestic violence would be considered confidential under the ESLL and proposed N.J.A.C. 12:69-1.8(d). However, it is not clear from the ESLL that the confidentiality established by the law for information the employer possesses regarding the health of an employee or any family member of the employee or domestic violence or sexual violence affecting an employee or an employee's family member, would extend to "changes in the employee's employment including employment status, schedule, or location." Consequently, the Department would prefer simply to adopt the statutory language from N.J.S.A. 34:11B-3(e) as proposed and will make no change to proposed N.J.A.C. 12:69-1.8(d).

48. COMMENT: The commenter suggests a change to proposed N.J.A.C. 12:69-1.9, which requires each employer to conspicuously post and individually distribute to its employees a notification, made available to employers by the Department, setting forth the following information regarding the ESLL: amount of earned sick leave to which employees are entitled, the terms of its use, and remedies provided in the ESLL and N.J.A.C. 12:69 to employees, if an employer fails to provide the required earned sick leave or retaliates against an employee for exercising his or her rights under the ESLL or N.J.A.C. 12:69. Specifically, the commenter recommends that the employee

notification also include the statewide Domestic Violence and Sexual Violence 24 hour Helpline numbers, and where possible, the helpline numbers for county level domestic and sexual violence services.

RESPONSE: The list of items to be included in the notification, which appears within proposed N.J.A.C. 12:69-1.9, is taken verbatim from the ESLL; specifically, N.J.S.A. 34:11D-7(a). The Department declines to make any change to the rule.

49. COMMENT: The commenter recommends “training for employers regarding domestic violence in the workplace, the role of employers in the coordinated community response to domestic violence, how to safety plan with employees, information about domestic violence resources available in their local community and the ways local domestic violence providers can support employers in their response to domestic violence.”

RESPONSE: The commenter’s concerns do not pertain to the proposed new rules; however, it is worth noting that the ESLL; specifically, N.J.S.A. 34:11D-10, directs the Department to develop and implement a multilingual outreach program to inform employees, parents, and persons under the care of health care providers about the availability of earned sick leave under the Act. The Department will make every effort to incorporate into its outreach program, at the intersection of earned sick leave and domestic and sexual violence, education and outreach of the nature described by the commenter.

50. COMMENT: The commenter expresses support for the following:

1. The definition of the term “family member,” which appears in proposed N.J.A.C. 12:69-2.1;

2. Proposed N.J.A.C. 12:69-1.2(d), which states that each week, in any day of which an employee is not provided earned sick leave in the amount and in the manner prescribed in the ESLL or N.J.A.C. 12:69 and each employee so affected, shall constitute a separate offense;

3. Proposed N.J.A.C. 12:69-1.7(e), which provides in pertinent part that an employer who is found to have terminated an employee in retaliation for having requested or used earned sick leave in accordance with the ESLL and N.J.A.C. 12:69 must offer reinstatement to the terminated employee;

4. Proposed N.J.A.C. 12:69-1.7(b), which states that no employer shall count legitimate use of earned sick leave under the ESLL or N.J.A.C. 12:69 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;

5. Proposed N.J.A.C. 12:69-1.8(a) and (b), which spell out that employers just maintain records of all earned sick leave accrued, advanced, used, paid and carried over at the place of employment or at a central New Jersey office;

6. Proposed N.J.A.C. 12:69-3.3(c), which indicates that for “exempt” employees under the Federal Fair Labor Standards Act and the New Jersey Wage and Hour Law, the employer may either presume, solely for the purpose of calculating earned sick leave accrual, that the employee

works 40 hours per week, or record the actual hours worked for that employee for the purpose of calculating earned sick leave accrual;

7. Proposed N.J.A.C. 12:69-3.3(h, 3.4 and 3.5(n)-(p), regarding the rights of employees transferred, rehired within six months, and after a successorship; and

8. Proposed N.J.A.C. 12:69-1.1(c), which states that an employer shall be in compliance with the ESLL if the employer provides each employee with paid time off (PTO), which may include types of leave other than sick, such as personal leave and vacation leave, so long as the PTO meets or exceeds all of the requirements of the ESLL.

RESPONSE: The Department thanks the commenter for her support.

51. COMMENT: The commenter suggests the following changes be made to proposed N.J.A.C. 12:69-3.5(h), regarding the employer's right under the ESLL to establish "certain dates" on which employees are prohibited from using foreseeable earned sick leave:

1. That the rule set a limit on the number of days per year that an employer may blackout and how many continuous days may be blacked out by the employer; specifically recommending that the limit be set at seven days per year, and no more than three consecutive days in a row;

2. That the rule include "explicit factors" employers can use to evaluate when employees' use of foreseeable earned sick leave during blackout dates would unduly disrupt the operations of the employer;

3. That the rule require that all blackout dates be approved by the Department in advance of each benefit year;

4. That the rule define the term “reasonable notice;” and

5. That the rule require notice of blackout dates to be provided to employees in writing at the beginning of each benefit year.

RESPONSE: The Department declines to make the changes suggested by the commenter. The Department has made a policy decision that limiting the use by employers of “blackout dates” to verifiable high-volume periods or special events, without establishing a set maximum total number of days per benefit year or maximum consecutive days that an employer may designate, strikes the appropriate balance between the free exercise by an employee of his or her rights under the ESLL and the right of the employer to operate his or her business or enterprise without undue disruption. The Department believes that the remaining suggestions of the commenter would also unnecessarily disrupt this balance. Each of the provisions suggested by the commenter could have been included within the ESLL, but the Legislature chose not to do so. The Department simply is not comfortable adding such substantial limitations to the employer’s ability to use “blackout dates.”

52. COMMENT: The commenter states there may be confusion in some of the cities within New Jersey whose pre-existing paid sick leave laws are now preempted by the ESLL and suggests that the Department “make explicit in the regulations that workers who live in cities with paid sick leave laws that are preempted by the state law nevertheless retain the sick time they have earned under those laws, and can use that time immediately with no waiting period imposed.”

RESPONSE: The Department believes that this is clear from the terms of the ESLL and N.J.A.C. 12:69 as proposed. Consequently, the Department declines to make a change to the proposed rules.

53. COMMENT: The commenter suggests that the rules be modified "to clarify…that healthcare workers must be covered, unless they fit into an extremely narrow exception [for per diem health care employees]."

RESPONSE: The Department believes that this is clear from the terms of the ESLL and N.J.A.C 12:69 as proposed. Consequently, the Department declines to make a change to the proposed rules.

54. COMMENT: The commenter states that it is extremely important that the rules emphasize that temporary help service firms must count all hours worked when calculating earned sick leave accrual. Consequently, the commenter urges the Department to add to the rules "a provision identical to what is currently in the statute: "In the case of a temporary help service firm placing an employee with client firms, earned sick leave shall accrue on the basis of the total time worked on assignment with the temporary help service firm, not separately for each client firm to which the employer is assigned." N.J.S.A. 34:11D-1.

RESPONSE: The language quoted by the commenter appears within the definition of the term "employer," within the ESLL. The Department inadvertently neglected to include it in the regulatory definition for the term "employer." The Department will correct this oversight through a change on adoption.

55. COMMENT: Proposed N.J.A.C. 12:69-3.5(i)(2) states that as a condition to requiring an employee to provide notice to the employer of the need to use earned sick

leave that not foreseeable, “the employer must first notify the employee of this requirement,” adding, “[w]here the employer has failed to so notify the employee, the employee must be permitted to use the ‘not foreseeable’ earned sick leave without having provided the employer with any prior notice, practicable, or otherwise.” The commenter suggests that this provision be changed so that “notice…be in writing and be given before they request leave.” The commenter also urges the Department to “clarify” that employers may not require employees to appear in person or provide prior documentation for unforeseeable leave.

RESPONSE: Proposed N.J.A.C. 12:69-3.5(I)(2) does already state that the employer must “*first* notify the employee” of the requirement and that where the employer has failed to “first notify the employee” the employee must be permitted to use the “not foreseeable” earned sick leave without having provided the employer with any notice, practicable, or otherwise. In this context, “first” and “before” mean precisely the same thing. Consequently, adding the word “before” would be superfluous and, for that reason, the Department declines to make the change suggested by the commenter. As to the suggestion that the employer be required by rule to notify the employee in writing, the ESLL says nothing of written notification. The Legislature is familiar with written notification requirements. They appear throughout the New Jersey Statutes. If the Legislature had wanted this notification to be in writing, it would have stated so within the body of the ESLL. It did not. For this reason, the Department declines to make the change suggested by the commenter. Regarding the commenters suggestion that the rules expressly state that an employer be prohibited from requiring an employee to appear in person during his or her use of earned sick leave in order to provide

documentation of the need to use unforeseeable earned sick leave, it goes without saying that when one is out of work on sick leave he or she cannot be forced by his or her employer to report to work; or else what would be the purpose of the use of earned sick leave. For this reason, the Department does not believe it is necessary to make the change suggested by the commenter.

56. COMMENT: The commenter observes that the ESLL permits employers to offer employees a payout of their unused earned sick leave at the end of a benefit year either at the full amount or at 50 percent and suggests that "[i]t would be helpful if the regulations clarify that when an employee chooses a 50 percent payout of their unused earned sick leave, they retain the right to carry over any remaining unused, unpaid earned sick leave to the next benefit year." The commenter adds that, "[t]his conclusion is implied by the statutory language, but is not clearly stated in the proposed regulations."

RESPONSE: The ESLL actually permits an employer who provides earned sick leave to its employees using the accrual method to offer a payout of unused earned sick leave at the conclusion of the benefit year and then gives *the employee* the option of agreeing to receive a payout, permitting the employee to choose either a payout for the full amount of unused earned sick leave or for 50 percent of the amount of unused earned sick leave. This is all explained within proposed N.J.A.C. 12:69-3.7(a). It also states explicitly within N.J.A.C. 12:69-3.7(a); specifically, at N.J.A.C. 12:69-3.7(a)(5), that "[i]f the employee declines a payout of unused earned sick leave or agrees to a payout of 50 percent of the amount of unused earned sick leave, *the employee shall be entitled to carry forward to the following benefit year 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" (emphasis added). No change to the proposed rules is necessary.

57. COMMENT: The commenter recommends that the employer's payout offer be in writing and that the employee's acceptance be in writing.

RESPONSE: For the same reason expressed in response to Comment 55, in the absence of a requirement within the ESLL that the payout offer be in writing or that the employee's acceptance be in writing, the Department declines to impose such requirements through rulemaking.

58. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.1 be modified so as to require not only that the employer notify the Commissioner 30 days in advance of a proposed change to the benefit year, but also that the employer be required to send notice to all affected employees 30 days prior to the change.

RESPONSE: The ESLL only requires that prior notice of a change in benefit year be provided by the employer to the Commissioner so that the Commissioner will have an opportunity to determine whether the change in benefit year is occurring at a time or in a way that prevents the accrual or use of earned sick leave by an employee. Where the Commissioner makes such a determination, the Commissioner is empowered to impose a benefit year on the employer. The ESLL does not require that prior notice of a change in benefit year be delivered to affected employees. The Department believes that without a statutory mandate, it would be inappropriate to impose such a requirement on employers through agency rulemaking.

59. COMMENT: The commenter suggests that the proposed N.J.A.C. 12:69-1.9 should be modified so as to require that the notification that employers must post and distribute to employees include the employer's benefit year.

RESPONSE: The ESLL; specifically, N.J.S.A. 34:11D-7(a), expressly enumerates what information is to be included within the notification created by the Commissioner and made available on the Department's website for use by all employers; namely, the amount of earned sick leave to which employees are entitled, the terms of its use, and remedies provided in the ESLL to employees if the employer fails to provide the required benefits or retaliates against employees for exercising their rights under the ESLL. It would appear that the purpose of the notification is to advise employees generally of their rights and remedies under the ESLL; which is to say, it would not appear that the Legislature intended the notification to be tailored to each specific employer with information regarding its particular earned sick leave policy. Furthermore, the Department has no reason to believe that employers would withhold the benefit year from their employees. Consequently, the Department declines to make the change to the proposed new N.J.A.C. 12:69-1.9 suggested by the commenter.

60. COMMENT: The commenter urges the Department to add a provision to the proposed new rules "explicitly stating that domestic workers working directly for an employer are covered in order to provide clear guidance to employers about their sick time obligations."

RESPONSE: Within proposed N.J.A.C. 12:69-2.1, the Department has adopted verbatim the definitions of "employee" and "employer" that appear within the ESLL. Coverage under the ESLL and new N.J.A.C. 12:69 is governed by those definitions;

which is to say, under the ESLL and new N.J.A.C. 12:69 each employer shall provide earned sick leave to each employee working for the employer in New Jersey. The change to the proposed new rules suggested by the commenter is not necessary and might actually cause confusion. That is, indicating within the rules, beyond the above described definitions, that a particular type of work is covered under the ESLL, may give rise to an unwanted inference that those engaged in other types of work are not covered under the ESLL.

61. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.3, regarding earned sick leave accrual, be modified so as to indicate that the rate of accrual for adjunct faculty is set at 2 ¼ hours worked for each hour of in-classroom teaching.

RESPONSE: The ESLL contains no special provisions for adjunct faculty; which is to say, there is no indication within the ESLL that the Legislature intended to treat adjunct faculty differently than any other employee. Consequently, the Department declines to make the change suggested by the commenter.

62. COMMENT: The commenter states the following:

> The law permits employers to 'choose the increments in which its employees may use earned sick leave, provided that the largest increment of earned sick leave that an employee may be required to use for each shift for which earned sick leave is used shall be the number of hours the employee was scheduled to work during that shift.' N.J.S.A. 34:11D-2(f). The regulations should make clear that if a worker works part of their shift, but leaves early to take earned sick time, the employer cannot deduct the

full shift hours from the worker's accrued sick leave bank. For example, if an employee works three hours of a seven-hour shift, but becomes ill while at work, that employee may wish to use their earned sick time for the remaining four hours of their shift. That employee should not be considered to have used seven hours of earned sick time merely because their shift was scheduled to be seven hours.

RESPONSE: The change suggested by the commenter would be inconsistent with the express terms of the ESLL. That is to say, as indicated within the comment itself, the ESLL expressly states that the employer may choose the increments in which its employees may use earned sick leave and that the largest increment of earned sick leave that an employee may be required to use for each shift for which earned sick leave is used shall be the number of hours the employee was scheduled to work during that shift. Consequently, where an employer establishes a policy whereby no employee may use earned sick leave in increments less than the number of hours the employee is scheduled to work during a given shift (as the employer may do under the express terms of the ESLL), then the employee who is scheduled to work a seven-hour shift, may not take earned sick leave during that shift in an increment less than seven hours and where the employee leaves work during the shift and indicates that he or she wishes to use earned sick leave for the absence, then the employer may deduct the full shift hours from the worker's accrued earned sick leave bank. Of course, the ESLL also states that an employer may not require an employee to use earned sick leave. So, where the employee wishing to leave a seven-hour work shift four hours early due to illness, and where that employee decides that he or she would prefer *not* to use seven

hours of earned sick leave (the smallest available increment under the employer's earned sick leave policy), he or she should be permitted to avail himself or herself of any employer policy, or law other than the ESLL, which entitles that employee to four hours of paid or unpaid leave due to personal illness.

63. COMMENT: The commenter objects to the exclusion from the definition of "employee" and, therefore, the exclusion from coverage under the ESLL, of per diem health care employees. The commenter states that these employees, like any other class of employees, suffer for lack of earned sick leave and should benefit from the protections afforded by the ESLL. The commenter is particularly concerned about per diem paramedics. She understands that inclusion of these employees would have a major financial impact on the hospital industry, but asserts that this situation exists because of "the major reliance on per diem employees in the [heath care] industry."

RESPONSE: The ESLL expressly excludes per diem health care employees form coverage under the Act. The Department has no discretion to deviate from this statutory mandate.

64. COMMENT: The commenter takes issue with proposed N.J.A.C. 12:69-3.6(h) which addresses the method for calculating the rate at which tipped employees will be paid for earned sick leave. The proposed rule states that a tipped employee's rate of pay for earned sick leave shall be calculated by adding together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave and dividing that sum by the number of hours spent performing the work during workdays. The proposed rule goes on to state that for tipped employees, where it is not feasible to determine the employee's exact hourly

wage for earned sick leave purposes using the method described above, the employer shall be deemed to have paid earned sick leave to a tipped employee if the rate of pay for earned sick leave is based on the agreed hourly wage, but in no event shall earned sick leave be paid at a rate less than the State minimum wage rate. The commenter asserts that, "[t]he legislative intent was discussed several times throughout the process that employees would receive the current state minimum wage as their rate of pay when using their paid time off," adding, "[t]he proposal incorrectly reflects the legislative discussion by suggesting that a seven-day average of the tipped wage and actual tips be used to determine the hourly wage."

RESPONSE: N.J.S.A. 34:11D-2(c) states, "The employer shall pay the employee for earned sick leave at the same rate of pay with the same benefits as the employee normally earns, except that the pay rate shall not be less than the minimum wage required for the employee pursuant to N.J.S.A. 34:11-56a4." The method for calculating tipped employees' rate of pay for earned sick leave set forth within proposed N.J.A.C. 12:69-3.6(h) is intended to approximate with as much precision as possible the "same rate of pay…as the employee normally earns." The method excludes overtime premium pay; and it acknowledges that it is sometimes not feasible for employers of tipped employees to determine those employees' exact hourly wage by dividing total earnings by hours worked, in which case the proposed rule permits the employer to set the rate of pay for earned sick leave at the state minimum hourly wage. Nowhere within the body of the ESLL does it indicate that all tipped employees shall be paid for earned sick leave at the state minimum wage.

65. COMMENT: The commenter suggests that the Department indicate within the proposed new rules that PTO policies existing prior to the October 29, 2018 effective date of the ESLL "may use a benefit year that is different from the benefit year established for the New Jersey earned sick leave policy."

RESPONSE: If, pursuant to N.J.S.A. 34:11D-2(b), the employer intends to use a PTO policy (including one that existed prior to October 29, 2018) to satisfy the requirements of the ESLL, then beginning October 29, 2018, the employer's PTO policy must adhere to each and every requirement of the ESLL, including those pertaining to establishment of a benefit year. Consequently, the Department declines to make the change suggested by the commenter.

66. COMMENT: Proposed N.J.A.C. 12:69-3.6(d) states that where an employee has two or more different jobs for the same employer or if an employee's rate of pay fluctuates for the same job, the rate of pay for earned sick leave shall be the amount that the employee is regularly paid for each hour of work as determined by adding together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent workdays when the employee did not take leave and dividing that sum by the total hours of work during that seven-day period. The commenter suggests that this subsection be changed to indicate that if an employer's business is in an industry where a seven-day lookback period does not accurately or fairly reflect the "same rate of pay as the employee normally earns," the employer will be deemed to have fulfilled this requirement if the employer uses a lookback period that is reasonable and fair to the employee, but in no event should the lookback period be less than seven days.

RESPONSE: The method set forth within proposed N.J.A.C. 12:69-3.6(d) to calculate the rate of pay for earned sick leave when an employee has two or more jobs for the same employer or if an employee's rate of pay fluctuates for the same job, is an established rule, to be applied uniformly, which is important for purposes of ensuring consistent compliance and enabling effective and efficient enforcement by the Department; which is to say, on an issue like this – calculating the appropriate rate of pay for earned sick leave for employees with two or more jobs for the same employer or a fluctuating rate of pay for the same job – the Department would prefer not to complicate the matter by introducing a new issue for possible dispute; that is, whether the alternate period of lookback chosen by the employer was "reasonable and fair." The Department has made a determination that as a general rule, the method set forth within proposed N.J.A.C. 12:69-3.6(d) – the seven-day workday lookback - is, in fact, reasonable and fair. Consequently, the Department declines to make the change suggested by the commenter.

67. COMMENT: The commenter observes that the proposed rules imply that non-discretionary bonuses must be included in the rate of pay calculation for earned sick leave. The commenter asserts that this requirement creates an administrative hardship for employers that pay non-discretionary bonuses on a quarterly or annual basis. Consequently, the commenter urges the Department to eliminate this requirement.

RESPONSE: Proposed N.J.A.C. 12:69-3.6(i) states that "[w]here 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." The commenter is correct that this means where the amount of a bonus is non-discretionary, it must be included in the rate of pay calculation for earned sick leave. The Department believes that this is appropriate in that a non-discretionary bonus is consistent and predictable and as much a core component of an employee's compensation as is his or her bi-weekly paycheck. As such, it is the Department's position that it should be included in the earned sick leave rate of pay calculation. The Department declines to make the change suggested by the commenter.

68. COMMENT: The commenter seeks confirmation that if an employer's PTO policy provides for 20 days of PTO that can be used for vacation, sick and personal purposes, 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.

RESPONSE: So long as the employer's PTO policy is compliant with the entirety of the ESLL; which is to say, all 20 days in the commenter's example can be used for any of the purposes set forth within the ESLL and the policy is complaint for all 20 days with all of the other accrual/advancing, use, payment carry-over and payout provisions of the ESLL, then if the employee uses all 20 days for vacation, the employer is not required to provide extra time off for sick leave purposes later in the same benefit year.

69. COMMENT: The commenter seeks confirmation 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."

RESPONSE: The commenter is incorrect. Proposed N.J.A.C. 12:69-3.5(j), which mirrors N.J.S.A. 34:11D-3(b), indicates that the only instances when an employer may require “reasonable documentation” that the leave is being taken for a permissible purpose are (1) where the employee’s need to use earned sick leave is not foreseeable and the employee seeks to use such earned sick leave during any of the “certain dates” described in N.J.A.C. 12:69-3.5(h), or (2) where the employee uses earned sick leave for three or more consecutive days. Proposed N.J.A.C. 12:69-3.5(k) instructs that except under the limited circumstances set forth in proposed N.J.A.C. 12:69-3.5(j), all requests by employees to use earned sick leave shall be treated as presumptively valid.

70. COMMENT: The commenter seeks confirmation that an employer who has a compliant PTO policy, which does not require an employee to provide any reason for his or her absence (that is, if time is available, it is simply applied), need not change this practice and is not required to begin asking for and tracking the reasons for absences.

RESPONSE: Where an employer has a compliant PTO policy and where under that policy the employer grants every request to use PTO without ever questioning the employee’s reason for use of the PTO; where this practice is both documented (and available for review by the Department) and communicated to the employees, it is reasonable to assume that the employer need not alter its past practice, nor must it begin asking for and tracking the reasons for absence.

71. COMMENT: The commenter seeks confirmation of the following:

1. Employers may advance employees the full complement of 40 hours of earned sick leave at the beginning of the benefit year;

2. An employee will have the opportunity to accrue up to 40 hours of earned sick leave even if the employee's workweek is less than the standard 40 hours per week;

3. Once an employee has accrued 40 hours in a benefit year (not counting hours carried over from the prior benefit year), their accrual stops;

4. Where the employer uses the advancing method (as opposed to the accrual method), an employee who is out on a leave of absence at the start of the benefit year must be advanced the full 40 hours of earned sick leave on the first day of the benefit year;

5. Where the employee's need to use earned sick leave is foreseeable, the employer has first communicated to the employee a policy requiring seven-days advance notice of the need for foreseeable earned sick leave, and the employee has failed to provide the required seven-days advance notice, the employer may deny the employee's request to use earned sick leave;

6. For the purpose of identifying "certain dates" on which employees are prohibited from taking foreseeable earned sick leave, there is no limit within proposed N.J.A.C. 12:69-3.5(h) on the number of days the employer may designate as high volume or special events;

7. Within proposed N.J.A.C. 12:69-3.5(j), "three or more consecutive days" means three or more consecutive work days;

8. In the instance where an employer is permitted under the ESLL and N.J.A.C. 12:69 to request reasonable documentation, the employer may

delay payout of the earned sick leave until the reasonable documentation is provided by the employee, or deny the payout of the earned sick leave if reasonable documentation is not provided by the employee;

9. Where an employer with a 37.5-hour workweek (7.5-hour work days) chooses to require earned sick leave to be taken in full-shift increments, and where consequently, an employee is only able to use 37.5 hours of earned sick leave in a given benefit year, the remaining 2.5 hours of accrued earned sick leave are subject to the payout-carryover provisions of the new rules; and

10. In the case where an employer provides a payout of unused earned sick leave, the actual payment need not be received by the employee in the final month of the benefit year and may be processed and paid during a subsequent payroll period, even if such payment occurs after the conclusion of the benefit year.

RESPONSE: Confirmed.

72. COMMENT: The commenter refers to the FAQ document posted on the Department's website in which the Department indicates that where a compliant PTO policy provides employees with more than 40 hours of paid time off per benefit year, the employer is not required under the ESLL to permit employees to carry over from one benefit year to the next more than 40 hours of PTO, and requests that this statement be included within the proposed new rules.

RESPONSE: The change suggested by the commenter is not necessary. Proposed N.J.A.C. 12:69-1.1(c) already states that an employer shall be in compliance

with the ESLL if the employer provides each employee with PTO so long as the PTO meets or exceeds all of the requirements of the ESLL; and N.J.S.A. 34:11D-2(a), within the ESLL, states that an employer shall not be required to permit an employee to carry forward more than 40 hours of earned sick leave from one benefit year to the next.

73. COMMENT: The commenter asks for guidance as to when the benefit year would begin for employees covered under a just expired collective bargaining agreement that was in effect prior to October 29, 2018 and that contained a benefit year based on the calendar year, where the collective bargaining agreement expired in the middle of the calendar year.

RESPONSE: If the expired collective bargaining agreement is replaced by a new collective bargaining agreement, then the new benefit year may be set forth in the new collective bargaining agreement (or the collective bargaining agreement may waive ESLL coverage altogether). If the expired collective bargaining agreement is not replaced by a new collective bargaining agreement, then the ESLL would necessarily apply and the employer would be required to establish a benefit year. If the employer retains the benefit year based on the calendar year, then for the period from the expiration of the collective bargaining agreement to next January 1, the employer may either advance employees 40 hours of earned sick leave; advance employees a prorated amount of earned sick leave based on the number of days remaining until the start of the next benefit year; or permit employees to accrue earned sick leave at the statutory rate of one hour for every 30 hours worked.

74. COMMENT: The commenter expresses support for retaining the following provisions within the proposed new rules: (1) N.J.A.C. 12:69-3.6(g), which states that

where an employee uses earned sick leave during hours that would have been overtime if worked, the employer is not required to pay the overtime rate of pay; and (2) N.J.A.C. 12:69-3.5(h)(2), which states that the “certain dates” on which the employer may prohibit employees from using foreseeable earned sick leave 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.

RESPONSE: The Department thanks the commenter for her support.

75. COMMENT: The commenter asserts that the ESLL places an undue burden on small employers and suggests that the Department promulgate a rule excluding small employers from coverage under the ESLL.

RESPONSE: The Department does not have the statutory authority to exclude small employers from coverage under the ESLL.

76. COMMENT: The commenter supports proposed N.J.A.C. 12:3.3(h)(1), which establishes a rebuttable presumption of successorship for the purpose of retaining accrued earned sick leave when a successor employer takes the place of an existing employer.

RESPONSE: The Department thanks the commenter for her support.

77. COMMENT: The commenter states that higher education institutions “have policies and practices in place that allow faculty members to set or change their schedules on a particular day (including rescheduling a class) to address a health or wellbeing need, and they have the ability to do so without penalty.” The commenter adds, “[t]hese policies were created in part to acknowledge the difficulty of recordkeeping, given the flexible schedules, while allowing paid time off for any number

of reasons, including health and wellbeing." The commenter states that, "[u]nder these policies, the leeway given faculty to take sick leave or other necessary time off is far more generous than the forty hours of sick time allotted under the [ESLL]." The commenter asks that the proposed new rules be modified so as to reflect that such policies of higher education institutions meet the requirements of the ESLL.

RESPONSE: The ESLL does not exclude higher education institutions from the definition of "employer," nor does it exclude faculty members from the definition of "employee." Consequently, in order to comply with the ESLL, any employer, including a higher education institution, has two options: (1) ensure that it has an earned sick leave program that meets each one of the ESLL's requirements for accrual/advancing, use, payment, carry-over and payout of earned sick leave; or (2) ensure that it offers PTO, which is fully paid; which includes, but is not limited to personal days, vacation days, and sick days; which may be used for the purposes set forth at N.J.S.A. 34:11D-3 in the manner prescribed in the ESLL; and that is accrued at a rate equal to or greater than the rate described in N.J.S.A. 34:11D-2.

78. COMMENT: The commenter requests that the Department "consider a modification to the proposed regulations for an exemption for student workers who are employed at college or university that they are attending.

RESPONSE: The Department does not have the statutory authority to exempt student workers from coverage under the ESLL.

79. COMMENT: The commenter suggests that the proposed rules should "affirmatively make clear that the employer retains the prerogative to discipline employees who fail to use earned sick leave on a legitimate basis."

RESPONSE: Proposed N.J.A.C. 12:69-2.5(r) states, “[n]othing in this chapter shall be construed to require an employer to permit the use of earned sick leave for a purpose other than one identified in [N.J.A.C. 12:69-3.5(a)].” Proposed N.J.A.C. 12:69-2.5(s) states, “[n]othing in this chapter shall be construed to prohibit an employer from taking disciplinary action against an employee who uses earned sick leave for a purpose other than one identified in [N.J.A.C. 12:69-3.5(a)].” In other words, the proposed rules already make clear that employers retain the prerogative to discipline employees who fail to use earned sick leave for a “legitimate” purpose. Consequently, no change to the proposed rules is necessary.

80. COMMENT: The commenter objects to the prohibition within proposed N.J.A.C. 12:69-1.7(b) against the use within an earned sick leave program of “no fault” attendance policies, whereby an employee receives a point or a demerit for any absence, no matter the reason, and are subjected to discipline or are foreclosed from a promotional opportunity(ies) after the accumulation of a certain number of points or demerits. The commenter explains that such attendance policies exist in the public sector due to negotiated agreements, or other laws providing for such leave, adding that the prohibition against use of “no fault” attendance policies “burdens municipalities who have established such plans.”

RESPONSE: N.J.S.A. 34:11D-8(b) states in pertinent part that employees or employee representatives may waive the rights or benefits provided under the ESLL during the negotiation of a collective bargaining agreement. Consequently, relative to the commenters concern about the existence of “no fault” attendance policies in collective bargaining agreements, employers will have the ability to negotiate with

unions for the waiver of protections afforded under the ESLL, including the prohibition against use of “no fault” attendance policies. If the employer is able to successfully negotiate such a waiver, then it will be able to continue using such policies. As to the commenters concern about “other laws providing for such leave (in the public sector),” the definition of covered employee at N.J.S.A. 34:11D-1 excludes “a public employee who is provided with sick leave with full pay pursuant to any other law, rule, or regulation of this State.”

81. COMMENT: Relative to proposed N.J.A.C. 12:69-1.6(b), which states that no administrative penalty for a violation of the ESLL or N.J.A.C. 12:69 shall be levied unless the Commissioner provides the alleged violator with notification by certified mail of the violation and the amount of the penalty and an opportunity to request a formal hearing, the commenter suggests that “this regulation should be clarified to reflect the department of the employer the Commissioner must forward certified notification.”

RESPONSE: This is an impractical suggestion in that there would be no way for the Department to establish a uniform rule applicable to every employer throughout the state as to the “department of the employer” to which the notice of violation should be addressed.

82. COMMENT: The commenter takes issue with proposed N.J.A.C. 12:69-1.10, which states that the criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the “ABC test,” and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether an individual is an employee or an independent contractor under the ESLL and N.J.A.C. 12:69. The commenter claims that the ABC

test is “currently being reviewed in New Jersey” and suggests that “the regulations should be amended to that effect.”

RESPONSE: As sole support for his suggestion that the ABC test is “currently being reviewed in New Jersey,” the commenter cites to an unreported Public Employees’ Retirement System (PERS), Board of Trustees case. Whether the ABC test is the appropriate test to determine independent contractor status under the law governing PERS is not relevant here. What is relevant is that N.J.S.A. 34:11D-5 states that any failure of an employer to make available or pay earned sick leave as required by the ESLL, or any other violation of the ESLL, shall be regarded as a failure to meet the wage payment requirements of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq, and that under the holding of the New Jersey Supreme Court in Hargrove v. Sleepy’s, 220 N.J. 289 (2015), the Court ruled that the ABC test derived from the Unemployment Compensation Law, N.J.S.A. 43:21-19(i)(6), governs whether a plaintiff is an employee or an independent contractor under the New Jersey Wage and Hour Law. The Department concedes that it might not be immediately apparent to one reading the ESLL, and N.J.S.A. 34:11D-5 in particular, that joining the ESLL with the New Jersey Wage and Hour Law together as two parts of one overall legislative scheme, would implicate the holding in Hargvoe v. Sleepy’s, supra., which is precisely why the Department proposed N.J.A.C. 12:69-1.10 - to minimize any confusion that might result otherwise.

83. COMMENT: According to the commenter, proposed “N.J.A.C. 12:69-2.1 defines ‘hours worked,’ yet a definition as to temporary workers and those who work

irregular hours should be more clearly defined under these regulations to assist employers in properly calculating such hours."

RESPONSE: All of the time that an employee is required to be at his or her place of work or on duty is counted as hours worked, including where the employee is temporary or his or her hours are "irregular." An hour is an hour, regardless. The definition for "hours worked" that appears within proposed N.J.A.C. 12:69-2.1 adopts by reference the definition for that term contained within the wage and hour rules at N.J.A.C. 12:56-5. Those regulations have been in use for many years and address all of the issues that might arise surrounding hours of work. The Department declines to make a change in the proposed rules.

84. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.3 should indicate that the employer is not obligated to provide an offer to an employee for payout of unused earned sick leave in the final month of the benefit year."

RESPONSE: Proposed N.J.A.C. 12:69-3.3 does not pertain to payout of unused earned sick leave at the conclusion of the benefit year. That is addressed within proposed N.J.A.C. 12:69-3.7, entitled "Payout and carry-over of earned sick leave," which makes clear that the employer is under no obligation to offer payout of earned sick leave in the final month of the benefit year. Incidentally, this is also made clear within the ESLL at N.J.S.A. 34:11D-3(c). Consequently, no change to the proposed rules is necessary.

85. COMMENT: The commenter states:

[Proposed] N.J.A.C. 12:69-3.5(d) allows employees to use hours accrued before October 29, 2018, toward their use of leave on or after February

26, 2019. A close reading of this regulation reveals there is no limit as to how far back, from a timing perspective, an employee may accrue earned sick leave before the effective date of October 29. As drafted, the regulations would permit employees to use accrued hours that were earned before the [ESLL's] passage. Accordingly, the regulations should clarify, at a minimum that an employee shall not be permitted to use hours accrued before May 2, 2018, i.e., the day on which the [ESLL] passed into law.

RESPONSE: N.J.A.C. 12:69-3.5(d) states that where the employee has accrued earned sick leave prior to October 29, 2018, he or she shall be eligible to use that earned sick leave prior to February 26, 2019 (the 120th calendar day after October 29, 2018). This provision refers to sick leave policies or compliant PTO policies that predate the ESLL's effective date and its purpose is to indicate, as it states within N.J.S.A. 34:11D-2(a), that an employee who has accrued leave under such a policy need not wait 120 calendar days from the effective date of the ESLL in order to use that accrued leave. It is not entirely clear what the commenter is suggesting, but suffice it to say, the Department believes that N.J.A.C. 12:69-3.5(d) serves the intended purpose and declines to make any change.

86. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.5(f), which states that 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 to the date the leave is to begin, should be modified to "provide employers with protection for those employees who know they will use paid sick leave in advance of the seven

calendar day period the employee intends to use leave, such that the employer can prepare for such employee's predictable absence." The commenter adds that under the rule, "employees are encouraged to sit on information that would be helpful for employers to prepare in the event of an employee's absence."

RESPONSE: The commenter appears to be suggesting that the Department permit employers to require employees to provide notice of the need to use foreseeable earned sick leave more than seven calendar days in advance of the date the leave is to begin. This is expressly prohibited by the ESLL, which states the following: "[i]f an employee's need to use earned sick leave is foreseeable, an employer 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." (emphasis added). The Department does not have the discretion to promulgate a rule that directly conflicts with a statutory mandate. Consequently, the Department declines to make the change suggested by the commenter.

87. COMMENT: The commenter suggests that the definition of "benefit year" within proposed N.J.A.C. 12:69-2.1 be modified to indicate that it is permissible for employers to use their fiscal year as the benefit year, even though the dates of the fiscal year may vary by a few days from year to year and that the rule should state that an employer who uses its fiscal year as the benefit year need not notify or obtain permission of the Commissioner to continue using the fiscal year even though the precise start and end dates may vary by a few days from year to year.

RESPONSE: The Department is not adopting N.J.A.C. 12:69-3.1(a), which states that the employer shall establish a single benefit year, and is reserving that subsection

for future rulemaking. The Department will take the commenter's suggestion under advisement for possible future action.

88. COMMENT: The commenter objects to the requirement within proposed N.J.A.C. 12:69-3.1(c)(6), that the employer's notification to the Department of a change in benefit year include of a current list of employees with corresponding contact information, including phone number and home address. The commenter asserts that this requirement is "overly cumbersome" and "is an intrusion into the privacy of…employees."

RESPONSE: Under the ESLL, notification of a change in benefit year is provided to the Commissioner so that the Commissioner may determine whether the employer is proposing a change to the benefit year at a time or in a way that would prevent the accrual or use of earned sick leave by an employee. If the Commissioner determines that this standard has been met, he or she is required under the ESLL to impose a benefit year on the employer. In order to make this determination, the Commissioner or his or her designee, may need to contact employees either in writing or by phone in order to inquire about the impact upon them of the change in benefit year. It is for this reason that the Department is requiring that employee contact information be provided with the notification. The Commissioner has only 30 days from the date the notification has been provided by the employer to make a determination. If in order to contact affected employees the Commissioner must first reach out to the employer to obtain employee phone numbers and addresses, valuable time will needlessly be wasted. This is information that the Department knows it will need in order to conduct a thorough investigation of the proposed benefit year change and its anticipated impact.

Consequently, it makes sense to require the information up front as part of the notification. The Department declines to change proposed N.J.A.C. 12:69-3.1(c)(6).

89. COMMENT: Proposed N.J.A.C. 12:69-3.5(h)(2) states that “certain dates” on which the employer may prohibit employees from using foreseeable earned sick leave 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 operation o of the employer. The commenter suggests adding the word “exceptionally” before “high-volume.”

RESPONSE: It is not clear what purpose it would serve to add the word “exceptionally” to “high-volume.” The Department believes that “high-volume” is sufficiently descriptive. The Department declines to make the change suggested by the commenter.

90. COMMENT: The commenter urges the Department to increase within proposed N.J.A.C. 12:69-3.6(f), the lookback period for calculating the earned sick leave rate of pay for those paid on a piece-work basis from the seven most recent workdays to the fourteen most recent workdays. The commenter explains his concern that some piece-rate employees may seek to increase the amount of completed jobs in the week immediately preceding a request for sick leave, sacrificing quality for quantity, with the intent to increase the rate of pay they receive during sick leave. Conversely, the commenter states that where the piece-rate worker has a particularly large job in the week immediately preceding the leave, “the rate of compensation for earned sick leave would be $0.”

RESPONSE: The Department does not share the commenter's concerns (for one, the law and rules both indicate that an employee cannot under any circumstance be paid for earned sick leave at a rate less than the state minimum wage; so the commenter's $0 scenario is an impossibility) and prefers to apply the same seven-day lookback to those working on a piece-work basis under proposed N.J.A.C. 12:69-3.6(f), that it does to employees with two or more jobs with the same employer and employees whose rate of pay fluctuates for the same job under proposed N.J.A.C. 12:69-3.6(d); and that it does to tipped employees under proposed N.J.A.C. 12:69-3.6(h).

91. COMMENT: The commenter suggests "a cap of five days off for part-time employees," or in the alternative, "changing the formula for part-time workers from one hour PTO for every 30 hours worked to one hour of PTO for every fifty hours worked.

RESPONSE: The ESLL does not have separate rules regarding accrual or use of earned sick leave for part-time employees. Consequently, the Department does not have the statutory authority to make the changes suggested by the commenter.

92. COMMENT: The commenter objects to proposed N.J.A.C. 12:69-3.6(d), which states that where an employee has two or more different jobs for the same employer or if an employee's rate of pay fluctuates for the same job, the rate of pay for earned sick leave shall be the amount that the employee is regularly paid for each hour of work as determined by adding together the employee's total earnings, exclusive of overtime premium pay, for the seven most recent work days when the employee did not take leave and dividing that sum by the total hours of work during that seven-day period. The commenter states, "[t]he employer should not have to go through such a difficult exercise [to determine the same rate of pay the employee normally earns]," adding, "[i]f

the employer can determine with certainty the same rate of pay as the employee normally earns during the time the employee takes off for the leave, that should be the compensation."

RESPONSE: The Department understands the concern raised by the commenter. However, in order to effectively enforce the ESLL, the Department must establish uniform rules as to issues such as the rate of pay for employees with a fluctuating rate of pay. Although this particular commenter may have an idea as to how it might "determine with certainty the same rate of pay as the employee normally earns" for an employee with a fluctuating rate of pay, many other employers may not. It is the Department's responsibility to provide guidance to all employers.

93. COMMENT: Proposed N.J.A.C. 12:69-1.1(c) states that under a compliant PTO policy 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). The commenter objects to this requirement, stating, "[t]he statute does not mandate this and an employer should be permitted to parse its PTO into groupings (those that can and cannot be used to comply with the law)."

RESPONSE: N.J.S.A. 34:11D-2(b) states, "An employer shall be in compliance with [N.J.S.A. 34:11D-2] if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days, and sick days, and may be used for the purposes of [N.J.S.A. 34:11D-3 in the manner provided by [the ESLL], and is accrued at a rate equal to or greater than the rate described in [N.J.S.A. 34:11D-2]." N.J.S.A. 34:11D-2(b) says nothing about "parsing PTO into groupings." It states that the PTO in a complaint policy must be available for use by employees for all of the

purposes set forth at N.J.S.A. 34:11D-3 and must be accrued at a rate equal to or greater than the rate described in N.J.S.A. 34:11D-2. If the commenter wishes to have two separate leave policies: one that complies with the minimum requirements of the ESLL and another for other purposes and/or that uses a different method for accrual, that is the commenter's prerogative. However, if the commenter intends to comply with the ESLL using one PTO policy, then under the ESLL and N.J.A.C. 12:69, that entire policy must meet each of the requirements of the ESLL.

94. COMMENT: The commenter maintains that proposed N.J.A.C. 12:69-1.1(d) should be "clarified such that it is clear that an employer may reduce other time off if it wants, as the 'justify' language is not clear and to prohibit such action by the employer would fly in the face of otherwise applicable law."

RESPONSE: Proposed N.J.A.C. 12:69-1.1(d) is taken verbatim from N.J.S.A. 34:11D-8(b)(1). No clarification is necessary.

95. COMMENT: Regarding proposed N.J.A.C. 12:69-1.1(f), which states that with respect to employees covered by a collective bargaining agreement in effect on October 29, 2018 (the effective date of the ESLL), no provision of the [ESLL] or [N.J.A.C. 12:69] shall apply until the stated expiration of the collective bargaining agreement," the commenter states, "[e]mployers need clarification on the 'in effect on' language," adding, "[w]hat if the parties continue to operate under the terms of an expired collective bargaining agreement," and "[w]hat if the parties extend the collective bargaining agreement past the October 29, 2018 date by mutual agreement?" The commenter asserts that in these situations, the collective bargaining agreement should be deemed to be "in effect on" October 29, 2018.

RESPONSE: The Department disagrees. N.J.S.A. 34:11D-8(c) states, "[w]ith respect to employees covered by a collective bargaining agreement in effect at the time of the effective date of [the ESLL], no provision of [the ESLL] shall apply until the stated expiration of the collective bargaining agreement." This says nothing of an extended collective bargaining agreement, nor does it speak of operating under the term of an expired collective bargaining agreement. Under the law, if the collective bargaining agreement was not actually in effect on October 29, 2018, then the covered employees are entitled to all of the benefits and protections of the ESLL on October 29, 2018, and if there was a collective bargaining agreement in effect on October 29, 2018, the moment that collective bargaining agreement expires (on the "stated expiration of the collective bargaining agreement") all of the employees covered under the collective bargaining agreement are entitled to all of the benefits and protections of the ESLL (unless, of course, under N.J.S.A. 34:11D-8(b), the employees or employee representatives waive the rights or benefits provided under the ESL during the negotiation of the successor collective bargaining agreement).

96. COMMENT: The employer states regarding N.J.A.C. 12:69-1.7(b), "[t]he 'no penalty' language should be modified to address that it is limited to up to 40 hours of sick time used."

RESPONSE: The words "no penalty" do not appear anywhere within proposed N.J.A.C. 12:69-1.7(b), nor do they appear anywhere within N.J.A.C. 12:69-1.7, which addresses the prohibition against retaliatory personnel actions and discrimination. No change to proposed N.J.A.C. 12:69-1.7 will be made based on the comment.

97. COMMENT: The commenter suggests that within proposed N.J.A.C. 12:69-1.7(c) and (d), the references to “this section” should be replaced with “the Act,” and that within proposed N.J.A.C. 12:69-1.7(e), the remedy of reinstatement and back pay should be removed.

RESPONSE: The Department disagrees and declines to make the changes suggested by the commenter.

98. COMMENT: The commenter asks, “[i]f an out of state employer sends employees to New Jersey on an episodic basis, what are the record keeping requirements for sick leave purposes for those employees,” adding, “[w]hat about the employer that has ‘unlimited” PTO…, what records must be maintained?”

RESPONSE: As indicated in response to an earlier comment, the Department intends to adopt through a separate rulemaking within N.J.A.C. 12:69 a standard for determining coverage under the ESLL for employees who work both within New Jersey and outside of New Jersey. That standard will be the same one that appears within the rules promulgated by the Division on Civil Rights for application to the New Jersey Family Leave Act; namely, that where the employee routinely performs some work in New Jersey and the employee’s base of operations or the place from which such work is directed and controlled is in New Jersey, then the employee is entitled to the rights and protections afforded by the law. Where that aforementioned standard is met with regard to a particular employee, that employee will be considered covered by the ESLL and the employer should with regard to that employee adhere to the recordkeeping requirements of N.J.A.C. 12:69-1.8. It is not entirely clear what the requestor means by an “unlimited” PTO, however, as indicated earlier, where the employer has a PTO policy

where the employee may use the PTO for any reason, then the employer is not required to keep a record of the reason for leave.

99. COMMENT: The commenter suggests relative to N.J.A.C. 12:69-1.8(d), which indicates that any information an employer possesses regarding the health of an employee or any family member of the employee or domestic or sexual violence affecting an employee or employee's family member shall be treated as confidential and not disclosed, except to the affected employee or with the written permission of the affected employee, that "the regulations need to make clear that an employer may share the information internally for purposes of complying with the ESLL as well as for compliance with other laws."

RESPONSE: It goes without saying that when the rule indicates the information should be "treated as confidential," that the employer is permitted to share the information amongst its own employees, as needed to comply with the ESLL and other laws, (for example, amongst multiple employees in the employer's Human Resources office). The rule does not impose any particular procedural requirement on the employer relative to maintenance of the records; it simply states that they should be "treated as confidential." Employers are accustomed to treating employee records regarding health conditions and other sensitive subjects as confidential. The employer should treat these records in that manner. There is no need for clarification within the body of the rule.

100. COMMENT: The commenter asks "[h]ow does an out of state employer effectively deal with [the notification requirements of N.J.A.C. 12:69-1.9]?" The commenter also asks whether the notification must be provided to employees who are

subject to a collective bargaining agreement as of October 29 or who's collective bargaining agreement expressly waives the provisions of the ESLL.

RESPONSE: Regarding compliance with the notification requirements of proposed N.J.A.C. 12:69 by out of state employers, proposed N.J.A.C. 12:69-1.9(c) and (d) expressly permit an employer to comply with the notification requirements by electronic means; that is, subsections (c) and (d) permit the employer to use an internet site or intranet site that is for exclusive use by its employees and to which all employees have access, for compliance with the posting requirement and permit the use of email to satisfy the distribution requirement. As to employees who are exempt from coverage under the ESLL either because they are covered by a collective bargaining agreement that was in effect at the time of the effective date of the ESLL (and for which the "stated expiration of the collective bargaining agreement" has not yet occurred) or because they or their representatives waived their rights under the ESLL through collective bargaining (as permitted by N.J.S.A. 34:11D-8(b)), obviously the employer would not be required to adhere to the requirements of proposed N.J.A.C. 12:69-1.9 with regard to those exempt employees.

101. COMMENT: The commenter objects to proposed N.J.A.C. 12:69-1.12, regarding the applicability of N.J.S.A. 34:1A-1.11 et seq. Specifically, the commenter states, "[t]here is no statutory authority for the Department to revoke or suspend a license for a violation of the Act," adding, "[t]his must be removed from the regulations."

RESPONSE: N.J.S.A. 34:11D-5 states that any failure of an employer to make available or pay earned sick leave as required by the ESLL, or any other violation of the ESLL, shall be regarded as a failure to meet the wage payment requirements of the

"New Jersey State Wage and Hour Law," N.J.S.A. 34:11-56a et seq. N.J.S.A. 34:1A-1.11 et seq., empowers the Commissioner under certain circumstances to issue a written determination directing any appropriate agency to suspend or revoke the license of an employer for failure to maintain and report records required under State wage, benefit and tax laws, where in connection with such a failure to maintain and report records, the employer fails to pay wages, benefits, taxes or other contributions or assessments required by State wage, benefit and tax laws. N.J.S.A. 34:1A-1.11 defines State wage, benefit and tax laws to include, among other laws, the New Jersey State Wage and Hour Law, N.J.S.A. 34:11-56a et seq. Consequently, proposed N.J.A.C. 12:69-1.12 is entirely appropriate for inclusion within proposed new N.J.A.C. 12:69.

102. COMMENT: The commenter objects to N.J.A.C. 12:69-3.1(e), which states that where a benefit year has been imposed by the Commissioner upon an employer (because the Commissioner has determined that the employer is proposing a change to the benefit year at a time or in a way that would prevent the accrual or use of earned sick leave by an employee), the employer shall not be eligible to submit a subsequent notification of proposed change to the benefit year prior to the date of the earlier notification. The commenter states, "[t]here is no statutory basis" for this.

RESPONSE: N.J.S.A. 34:11B-1 requires the Commissioner to "impose a benefit year on any employer that the Commissioner determines is changing the benefit year at times or in ways that prevent the accrual or use of earned sick leave by an employee." It is axiomatic that if the Commissioner "impose[s]" a benefit year, the employer should not have the opportunity to propose a change to that benefit year (just imposed) until the passage of a year; for what purpose would be served by empowering the

Commissioner to *impose* a benefit year if the employer could within the same year simply proposed to change it back? If this were permitted, then the power of the Commissioner to "impose" a benefit year would essentially be negated. The employer for whom a benefit year has been imposed by the Commissioner was determined by the Commissioner to have proposed a change *at a time or in a way that would have prevented the accrual or use of earned sick leave by an employee*. The Department believes it to be entirely appropriate that such an employer would be required to adhere to the benefit year imposed by the Commissioner, without the opportunity to return to the Commissioner with another requested change for one year.

103. COMMENT: With regard to proposed N.J.A.C. 12:69-3.3(c), the commenter states: "[e]mployers require clarification on the presumption of a 40-hour workweek for exempt employees where the employee is requested to clock in at the beginning of the day and the end of the day solely for security purposes, but is not required to clock in and out for breaks or meal periods."

RESPONSE: Under proposed N.J.A.C. 12:69-3.3(c), the employer is given the option for employees who are exempt under the FLSA or the New Jersey Wage and Hour Law, of either recording actual hours worked or presuming that the employee works 40 hours per week. If the employee is an "exempt" employee, then the employer has these two options for calculating earned sick leave accrual, regardless of whether the employee is requested to clock in and out for security purposes.

104. COMMENT: The commenter objects to the definition of successorship contained within proposed N.J.A.C. 12:69-3.3(h), asserting that there is no statutory authority for it. The commenter adds, "[i]n fact, based upon the definition provided there

is virtually no set of circumstances – due to the “two or more” factor language as opposed to the generally accept analysis of ‘balancing of the factors’ test – where the Department would not find successorship.”

RESPONSE: N.J.S.A. 34:11D-2(e) requires that when a different employer succeeds or takes the place of an existing employer, all employees of the original employer who remain employed by the successor employer are entitled to all of the earned sick leave they accrued when employed by the original employer, and are entitled to use the earned sick leave previously accrued immediately. The ESLL, however, does not define the term “successor.” Where an agency is empowered to adopt rules to effectuate the purposes of an act, as the Department is empowered to do at N.J.S.A. 34:11D-11 relative to the ESLL, it is understood that the Department may through rulemaking adopt definitions for terms lacking a definition within the law, especially where such definitions are necessary for effective enforcement of the law. In this particular instance, the Department turned to existing labor law – specifically, N.J.S.A. 34:1A-1.13 – for guidance as to the definition of successorship, and the Department adopted that definition verbatim. This is well within the Department’s statutory authority.

105. COMMENT: The commenter asks relative to proposed N.J.A.C. 12:69-3.5(q), which states that an employer may choose increments in which its employees may use earned sick leave, provided that the largest increment of earned sick leave that an employ may be required to use for each shift for which earned sick leave is used shall be the number of hours the employee was scheduled to work during that shift,

“[h]ow does an employer calculate a shift for drivers whose length of hours worked each day varies depending on traffic and loads?”

RESPONSE: Proposed N.J.A.C. 12:69-3.5(q) is taken verbatim from N.J.S.A. 34:11D-2(f), which states that the largest increment the employer may set for use of earned sick leave for each shift is the number of hours the employee was scheduled to work during that shift. The Department has no further guidance for the commenter, other than to say that each employer must use its best judgment in establishing policies so as to ensure compliance with the law and rules. If this means that in a particular industry it does not make sense to set the largest possible permissible increment for use of earned sick leave by employees, then perhaps the employer should set a smaller increment; for example, if the employer establishes that earned sick leave may be taken in increments of 1 hour, or 2 hours, or 30 minutes, then the particular problem identified by the commenter no longer exists, because he no longer must determine what constitutes a shift.

106. COMMENT: The commenter suggests that proposed N.J.A.C. 12:69-3.5(j) should contain a seven-day deadline for an employee to return documentation requested by the employer.

RESPONSE: The ESLL contains no such seven-day deadline. Consequently, the Department declines to make the change suggested by the commenter.

107. COMMENT: The commenter objects to proposed N.J.A.C. 12:69-3.5(k), stating, “there is no statutory support for the ‘presumptively valid’ rule.”

RESPONSE: The Department disagrees and will make no change to the rule.

108. COMMENT: Regarding proposed N.J.A.C. 12:69-3.6(f), which addresses the rate of pay for earned sick leave for an employee who is paid on a piecework basis, the commenter states, “[w]hy can’t the parties use an agreed to rate of pay?”

RESPONSE: As explained in response to earlier comments, the Department is promulgating uniform rules so as to minimize confusion among the regulated community, among workers and among Department employees who are tasked with enforcing the law.

109. COMMENT: The commenter objects to proposed N.J.A.C. 12:69-3.6(e), which addresses the rate of pay for earned sick leave for employees paid on a commission basis. The commenter states, “[i]f an employee continues to earn commissions when they are out then they should not receive a windfall by being paid the minimum wage on those days.”

RESPONSE: The Department does not believe that employees who are paid by commission should be effectively excluded from the ESLL’s rights and protections simply because of their method of pay. The Department also does not consider it a “windfall” for such employees to be paid the state minimum wage for up to a maximum of 40 hours over the course of an entire year when they need to miss work for any of the reasons set forth at N.J.S.A. 34:11D-3.

110. COMMENT: Regarding proposed N.J.A.C. 12:69-3.6(h), which addresses the rate of pay for earned sick leave for tipped employees, the commenter asks” what is the accepted means to agree to the ‘agreed hourly wage?’”

RESPONSE: Proposed N.J.A.C. 12:69-3.6(h) was taken virtually verbatim from the Department’s wage and hour rules regarding the payment of overtime pay to tipped

employees. The phrase “agreed hourly wage” has been in use in that realm for many years and would have the same meaning and import when used within proposed N.J.A.C. 12:69-3.6(h).

111. COMMENT: The commenter describes the following scenario: “A hair dresser who doesn’t have much of a clientele, say $300 a week that he/she brings in and gets 50% of this making their take home pay $150. Now if we average this out at an hourly rate this comes out to $3.75 per hour. Now this stylist wants a day off. And now we would be required by law to pay them the state minimum wage which is far more than what their average pay would be if divided hourly.” The commenter essentially objects to proposed N.J.A.C. 12:69-3.6(e), which imposes the minimum wage as the rate of pay for earned sick leave under the scenario described, and characterizes the proposed rule as unfair to the employer.

RESPONSE: The hair dresser/employee in the commenter’s scenario is entitled under the State Wage and Hour Law, N.J.S.A. 34:11-56a et seq., to be paid for all hours worked at the state minimum wage rate. Consequently, the employer in the scenario is violating the State Wage and Hour Law by paying the hair dresser at rate less than the state minimum wage rate (by the commenter’s account, at $3.75 per hour). Since the employee in the scenario is entitled to be paid the state minimum wage for hours worked, it is fair that he or she should be paid the minimum wage rate for earned sick leave.

112. COMMENT: With regard to proposed N.J.A.C. 12:69-1.7(a), the commenter states that the prohibition against discipline and/or presumption of retaliation/discrimination must not apply to the enforcement of PTO policies regarding

leave taken for reasons other than those set forth within the ESLL. The commenter adds that if an employee uses unauthorized personal days or vacation days, an employer must have the ability to properly discipline employees.

RESPONSE: N.J.S.A. 34:11D-2(b) provides employers the option of complying with the ESLL through a PTO policy. In the event that an employer seeks to comply with the law in this manner, rather than establishing a separate earned sick leave policy, then the PTO policy must comply with all of the requirements of the ESLL for all of the days covered under the policy.

113. COMMENT: The commenter remarks relative to proposed N.J.A.C. 12:69-1.7(b), that an employer must be able to discipline an employee for misuse of a PTO policy for reasons unrelated to the ESLL, adding that where an employee fails to provide advance notice of foreseeable earned sick leave, an employer should be able to issue appropriate discipline under its policies.

RESPONSE: The ESLL, at N.J.S.A. 34:11D-3(c), expressly states that nothing in the Act shall be deemed to prohibit an employer from taking disciplinary action against an employee who uses earned sick leave for purposes other than those identified in the ESLL. The ESLL prohibits an employer from counting earned sick leave taken as an absence that may result in the employee being subject to discipline, discharge, demotion, suspension, a loss or reduction of pay, or any other adverse action.

114. COMMENT: Regarding the definition of “employee” that appears within proposed N.J.A.C. 12:69-2.1, the commenter suggests that the Department should adopt a minimum number of hours worked in a year in New Jersey in order to be considered a covered employee, adding, “[w]ithout such a requirement, the law will

impose an administrative burden on employers with employees that have a limited connection to New Jersey.

RESPONSE: As indicated in response to an earlier comment, for the purpose of determining whether an employee who works both within New Jersey and outside of New Jersey is entitled to earned sick leave under the ESLL the Department intends to apply the test applied by the Division on Civil Rights in its enforcement of the New Jersey Family Leave Act; namely, if the employee routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey, then the employee will be entitled to receive earned sick leave under the ESLL. As also indicated earlier, the Department will be adopting this standard through a separate rulemaking.

115. COMMENT: The commenter indicates that the definition of "per diem health care worker" appears to have been incorrectly formatted, "such that the conditions listed under sections i., ii, and iii appear to only apply to individuals falling under paragraph 3 of the definition, [whereas], the statutory definition of per diem health care employee clearly states that sections I, ii, and iii apply to all individuals covered by paragraphs 1, 2 and 3 of the definition."

RESPONSE: The commenter is correct. This appears to have been a publishing error that will be corrected on adoption.

116. COMMENT: The commenter suggests that the proposed rules be amended to contain a "safe harbor" provision relative to the change in benefit year notification requirement under which employers who have delayed a change in their benefit year until the release of final regulations may change their benefit year after the release of

final regulations without being required to submit the documentation set forth within proposed N.J.A.C. 12:69-3.1(c)(6).

RESPONSE: As indicated in response to an earlier comment, the Department is not adopting proposed N.J.A.C. 12:69-3.1(a) and is reserving that subsection for future rulemaking. On adoption, the Department is also changing other language within proposed N.J.A.C. 12:3.1 so as to make it neutral on the issue of benefit year. The Department cannot at this time adopt the "safe harbor" provision suggested by the commenter, but will take it under advisement for the purpose of anticipated future rulemaking.

117. COMMENT: The commenter suggests that the rules should provide employees with the option of being paid out upon transfer, especially when an employee changes job titles. The commenter asserts that this would benefit employees by providing them with more flexibility and options. For example, explains the commenter, a full-time employee who chooses to become a per diem employee may prefer to be paid out for any accrued but unused earned sick leave, rather than keep the time in an earned sick leave bank, when he or she will likely have little opportunity to use the earned sick leave.

RESPONSE: The ESLL states that employees who are transferred are to retain their accrued earned sick leave; however, it also provides the employer the option of offering a payout to employees during the final month of the benefit year. Consequently, if the employer is concerned that the transferred employee should have the opportunity to cash out his or her accrued earned sick leave, the employer need simply offer a payout to the employee in the final month of that benefit year. Although perhaps

deferred by several months (unless the transfer occurs in the final month of the benefit year), this affords the same benefit to the transferred employee that is sought by the commenter.

118. COMMENT: The commenter observes that neither the ESLL, nor the proposed new rules, provide a time limit by which employers shall pay employees for unused accrued earned sick leave when a payout offer has been made by the employer and accepted by the employee during the final month of the benefit year.

RESPONSE: The commenter is technically correct. However, since N.J.S.A. 34:11D-5 states that any failure of an employer to make available *or pay* earned sick leave as required by the ESLL, shall be regarded as a "failure to meet the wage payment requirements" of the New Jersey Wage and Hour Law, the employer is arguably required to pay employees for earned sick leave, including a payout of unused earned sick leave at the end of the benefit year, in accordance with N.J.S.A. 34:11-4.2 (Time and mode of payment; paydays). In any event, the Department will take the commenter's observation and concern under advisement and, if appropriate, will address it as part of the subsequent rulemaking referred to earlier in this notice.

The following individuals testified at the November 13, 2018 public hearing:

1. Eric DeGesero.

2. Lu Ann Aversa.

3. Adam Blecker.

4. Jim McCracken.

5. Richard Travaglini.

6. Larry Banks and Tony Perry.

7. Sandra Mishkin and Christine Modica.

8. Dena Mottola Jaborska.

9. James McDonnell.

10. Sheila Reynertson.

11. Renee Koubiadis.

12. Cheryl Blackwell.

13. Yarrow William-Cole.

14. Nicole Morella.

15. Maureen Shea.

16. Bridgette Duvane.

COMMENT: Most of those who testified submitted written comments, either individually or through the organizations they represent, that are identical or substantially similar to their testimony during the public hearing. Those written comments are summarized above. The testimony of the few who did not submit written comments are substantially similar to the written comments submitted by others, which are also summarized above.

RESPONSE: The Department's responses to the comments received during the public hearing are identical to its responses to the written comments summarized above.

Federal Standards Statement

The adopted new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to

the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*:

12:69-1.5 Interest

(a) (No change from proposal).

(b) Where applicable, interest deemed owed to an employee shall be calculated at the annual rate set forth in New Jersey Court Rules, *[N.J.S.A.]* ***Rule*** 4:42-11.

12:69-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

. . .

"Benefit year" means the period of 12 consecutive months established by an employer in which *[all employees]* ***an employee*** shall accrue and use earned sick leave.

. . .

"Employer" means any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, or other entity that employs employees in New Jersey, including a temporary help service firm. ***In the case of a temporary help service firm placing an employee with client firms, earned sick leave shall accrue**

on the basis of the total time worked on assignment with the temporary help service firm, not separately for each client firm to which the employee is assigned* The term “employer” does not include a public employer that is required to provide its employees with sick leave with full pay pursuant to any other law, rule, or regulation of New Jersey.

12:69-3.1 Benefit year: establishment; notification to Commissioner of proposed change; imposition by the Commissioner

(a) *[The employer shall establish a single benefit year for all employees]* ***(Reserved)***.

(b) *[Once the employer has established a single benefit year for all employees under (a) above, in]* ***In*** the event the employer proposes to change the benefit year, the employer shall provide notice to the Commissioner at least 30 days prior to the proposed change.

(c) through (h) (No change from proposal).

12:69-3.3 Earned sick leave; accrual

(a) through (f) (No change from proposal).

(g) Where an employee is terminated, laid-off, furloughed, or otherwise separated from employment with the employer and where the employee is reinstated or rehired ***to that employment*** in New Jersey within six months of the separation, any unused earned sick leave accrued by the employee prior to the separation shall be returned to the employee upon rehire or reinstatement.

(h) (No change from proposal).

12:69-3.5 Earned sick leave; use

(a) (No change from proposal).

(b) Except under (d) or (e) below, an employee shall not be eligible to use earned sick leave until *[February 26, 2019 (the 120th calendar day after October 29, 2018), or]* the 120th calendar day after the employee commences employment *[,whichever is later]*.

(c) (No change from proposal).

(d) Where the employee has accrued earned sick leave prior to October 29, 2018, *[he or she shall be eligible to use that earned sick leave prior to February 26, 2019 (the 120th calendar day after October 29, 2018)]* ***the 120-calendar-day waiting period for use of earned sick leave set forth in (b) above shall not apply.***

(e) through (s) (No change from proposal).

***(t) The employer shall not be required to permit the employee to use more than 40 hours of earned sick leave in any benefit year.**