HOUSE BILL 37
55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY
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AN ACT
RELATING TO EMPLOYMENT; ENACTING THE PAID SICK LEAVE ACT;
REQUIRING ACCRUAL OF PAID SICK LEAVE FOR EMPLOYEES; PROVIDING
REMEDIES FOR VIOLATIONS; REQUIRING RULEMAKING; ESTABLISHING
BURDEN OF PROOF STANDARDS FOR RETALIATION CASES; DECLARING AN
EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Paid Sick Leave Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Paid Sick Leave Act:

A. "child" means an adopted child, a biological
child, a foster child or a stepchild;

B. "division" means the labor relations division of
the workforce solutions department;
C. "domestic partner" means an individual with whom another individual maintains a household and a mutual committed relationship, without a legally recognized marriage;

D. "employ" means to suffer or permit to work; the burden of proof shall be upon the person for whom the work is performed to show independent contractor status by clear and convincing evidence;

E. "employee" means an individual employed by an employer, including an individual employed on a part-time, seasonal or temporary basis, or an individual performing domestic service in a private home for remuneration;

F. "employer" means any individual, partnership, association, corporation, business trust, legal representative or organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to an employee, but does not include the United States; "employer" includes the state or any political subdivision of the state; "employer" includes a person providing remuneration for domestic service in a private home;

G. "family member" means an employee's spouse or domestic partner or a person related to an employee or an employee's spouse or domestic partner as a child or legal ward; an adoptive, biological or foster grandchild, grandparent or parent; a stepgrandchild, stepgrandparent or stepparent; or a
sibling or stepsibling; "family member" also includes a spouse or domestic partner of a family member, an individual to whom the employee stands or stood in loco parentis or any other individual whose close association with the employee or employee's spouse or domestic partner is the equivalent of a family relationship;

H. "paid leave policy" means an employer policy that meets or exceeds the accrual requirements and allows for the same employee use of paid sick leave and under the same conditions as provided in the Paid Sick Leave Act;

I. "paid sick leave" means time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked and is provided by an employer to an employee for the purposes described in the Paid Sick Leave Act;

J. "public health emergency" means a declaration or proclamation issued pursuant to federal, state or local law of an emergency related to a risk or threat to public health; and

K. "year" means a consecutive twelve-month period.

SECTION 3. [NEW MATERIAL] EARNED PAID SICK LEAVE--USES AND ACCRUAL--MINIMUM RATE.--

A. An employer shall provide employees paid sick leave for:

(1) an employee's mental or physical illness, injury or health condition; medical diagnosis, care or
treatment of a mental or physical illness, injury or health
condition; or preventive medical care;

(2) an employee to care for a family member
with a mental or physical illness, injury or health condition;
to care for a family member who needs medical diagnosis, care
or treatment of a mental or physical illness, injury or health
condition; or to care for a family member who needs preventive
medical care; or

(3) an absence necessary due to domestic
abuse, sexual assault or stalking suffered by the employee or
employee's family member; provided that the leave is for the
employee to obtain medical or psychological treatment or other
counseling, relocate, prepare for or participate in legal
proceedings or obtain services or to assist the employee's
family member with any of those activities.

B. Employees shall accrue a minimum of one hour of
paid sick leave for every thirty hours worked; provided that
employers may choose a higher accrual rate or provide for
accrual of all earned paid sick leave at the beginning of a
year.

C. Employees shall not use or accrue more than
fifty-six hours of earned paid sick leave in a year, unless the
employer's paid sick leave policy provides for a higher limit
on use or accrual. Paid sick leave shall begin to accrue on
the date the employee commences work or the effective date of
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the Paid Sick Leave Act, whichever is later. An employer may loan paid sick leave to an employee in advance of accrual by such employee. Employees exempt from overtime requirements under federal and state law shall be assumed to work forty hours in each work week for purposes of paid sick leave accrual, unless their normal work week is less than forty hours. When an overtime-exempt employee's normal work week is less than forty hours, accrual of paid sick leave shall be based on the employee's normal amount of work week hours.

D. Beginning on the sixtieth day after the effective date of the Paid Sick Leave Act, an employee shall be entitled to use accrued paid sick leave.

E. An employer shall allow the use of paid sick leave for the purposes provided in Subsection A of this section upon the request of an employee or an individual acting on the employee's behalf. The request may be made orally, in writing, by electronic means or by any other means acceptable to the employer. When possible, the request shall include the expected duration of the absence. When the use of paid sick leave is foreseeable, such as a scheduled medical appointment or similar matter, the employee shall make a good faith effort to provide notice to the employer in advance of the use of the paid sick leave and shall make a reasonable effort to schedule the use of paid sick leave in a manner that does not unduly disrupt the operations of the employer. Advance notice shall
not be required for paid sick leave due to an emergency, unexpected illness, domestic abuse, sexual assault or stalking.

F. An employer shall not require an employee to find a replacement worker as a condition of using paid sick leave.

G. An employer shall not require an employee to use other paid leave before the employee uses paid sick leave pursuant to the Paid Sick Leave Act.

H. An employer's failure to provide paid sick leave based on the employer's misclassification of the employee as an independent contractor is a violation of the Paid Sick Leave Act.

I. Unused earned paid sick leave shall be carried over to the following year, but employees shall not carry over more than fifty-six hours of paid sick leave in a year, unless the employer's paid sick leave policy provides for more hours to carry over. When an employee is transferred but remains employed by the same employer, when a successor employer replaces the original employer or when an employee separates from employment and is rehired by the same employer within twelve months, the employer shall reinstate all previously accrued and unused earned paid sick leave to the employee, up to a maximum of fifty-six hours, unless the employer chooses to provide more, or unless the employer previously chose to pay out the earned paid sick leave upon transfer or separation.
J. Documentation shall not be required to obtain the use of paid sick leave, except that when an employee uses three or more consecutive work days of paid sick leave, an employer may require the employee to provide reasonable documentation that the paid sick leave was used for a purpose permitted pursuant to this section. Documentation signed by a health care professional indicating that paid sick leave is necessary shall be considered reasonable. If an employer chooses to require documentation from a health care professional, the employer is responsible for reimbursing out-of-pocket medical expenses that the employee incurs in obtaining the documentation if the medical visit is not medically necessary and made solely to obtain documentation for the employer or if such costs are not covered by the employee's or family member's insurance plan. In cases of domestic abuse, sexual assault or stalking, an employee may choose to provide one of the following types of documentation, which shall be considered as reasonable documentation for paid sick leave: a police report, a court-issued document or a signed statement from a clergy member, attorney, advocate, the employee, a family member of the employee, a victims services organization or other person affirming that the paid sick leave was taken for one of the uses in Subsection A of this section. A signed statement pursuant to this subsection may be written in the employee's native language and shall not be required to be in a
particular format or notarized. An employer shall not require that the documentation explain the nature of any medical condition or the details of the domestic abuse, sexual assault or stalking.

K. All information an employer obtains related to the employee's reasons for taking paid sick leave shall be treated as confidential and not be disclosed except with the permission of the employee or for the purpose of validating an insurance disability claim or as required by federal law, the Paid Sick Leave Act or a court order.

SECTION 4. [NEW MATERIAL] SUPPLEMENTAL LEAVE DURING A PUBLIC HEALTH EMERGENCY.--

A. In addition to the accrued paid sick leave provided pursuant to Section 3 of the Paid Sick Leave Act, on the date a public health emergency is declared, an employer shall provide supplemental paid sick leave for absences due to the circumstances listed in Subsection E of this section. Such supplemental paid sick leave shall be provided in the following amounts at a minimum:

(1) eighty hours for an employee who normally works forty or more hours in a week; or

(2) the number of hours the employee works on average in a fourteen-day period for an employee who normally works fewer than forty hours in a week.

B. The supplemental paid sick leave provided
pursuant to Subsection A of this section shall be the entirety of supplemental paid sick leave required under the Paid Sick Leave Act for a public health emergency regardless of whether the public health emergency is subsequently amended, extended or renewed.

C. If a public health emergency was declared before and remains in effect on the effective date of the Paid Sick Leave Act, supplemental paid sick leave under this section shall be provided to employees on the effective date of the Paid Sick Leave Act.

D. An employer may count an employee's unused accrued paid sick leave pursuant to Section 3 of the Paid Sick Leave Act toward the supplemental paid sick leave required in Subsection A of this section. An employee may use supplemental paid sick leave under this section until four weeks after the official termination of a public health emergency.

E. Supplemental paid sick leave pursuant to this section shall be available to an employee for absences due to:

(1) care, testing or treatment of the employee or a family member to whom the employee provides care as a consequence of being diagnosed with, experiencing symptoms of or exposure to a person or item with a communicable illness or transmittable condition that is related to a public health emergency;

(2) self-isolation by the employee or a family
member to whom the employee provides care as a consequence of
being diagnosed with, experiencing symptoms of or exposure to a
person or item with a communicable illness or transmittable
condition that is related to a public health emergency;

(3) the pursuit of preventive care for the
employee or a family member to whom the employee provides care
for a communicable illness that is related to a public health
emergency;

(4) compliance with a determination by the
employer or a local, state or federal public official or health
authority having jurisdiction over the location of work for the
employee or a family member to whom the employee provides care
that:

(a) the place of employment must be
closed;

(b) the individual's presence on the job
or in the community would jeopardize the health of others due
to exposure to a communicable illness or transmittable
condition related to a public health emergency; or

(c) the individual is exhibiting
symptoms of a communicable illness or transmittable condition
related to a public health emergency, regardless of whether the
individual has been diagnosed with the communicable illness;

(5) care of a family member when that
individual's:
(a) care provider is unavailable due to a public health emergency; or
(b) school or place of care has been physically closed due to a public health emergency, whether or not the school or place of care is providing instruction or services remotely; or
(6) an inability to work due to a health condition that may increase the risk posed by a communicable illness that is related to a public health emergency.

F. An employee shall notify the employee's employer of the need to use supplemental paid sick leave pursuant to this section as soon as practicable when the need for the leave is foreseeable and the employer's place of business has not been closed.

G. Documentation shall not be required to take supplemental paid sick leave pursuant to this section.

SECTION 5. [NEW MATERIAL] WHEN SEPARATE TRACKING IS NOT REQUIRED--NO ADDITIONAL PAID SICK LEAVE REQUIRED.--

A. An employer with a paid leave policy shall not be required to provide additional or separate paid sick leave or track sick leave separately from paid leave.

B. If an employee covered by a paid leave policy uses all available paid leave for reasons unrelated to paid sick leave, the employer is not required to provide the employee additional paid sick leave.
SECTION 6. [NEW MATERIAL] EXERCISE OF RIGHTS PROTECTED--
RETALIATION PROHIBITED.--

A. An employer shall not take or threaten an adverse action against an employee:

(1) that is reasonably likely to deter an employee from using paid sick leave pursuant to the Paid Sick Leave Act;

(2) because the employee has used or attempted to use paid sick leave pursuant to the Paid Sick Leave Act; or

(3) because the employee has in good faith alleged or has participated in an investigation or proceeding regarding violations of the Paid Sick Leave Act or informed any person of the person's potential rights pursuant to that act.

B. An employer shall not attempt to require an employee to sign a contract or other agreement that would limit or prevent the employee from exercising the employee's rights pursuant to the Paid Sick Leave Act.

C. An attempt by an employer to impose a contract, agreement or policy that limits the accrual or use of paid sick leave pursuant to the Paid Sick Leave Act is a violation of the Paid Sick Leave Act.

D. Counting or tracking the use of paid sick leave in a manner that would subject an employee to discipline, discharge, demotion, non-promotion, less favorable scheduling, reduction of hours, suspension or other adverse employment
action is a violation of the Paid Sick Leave Act.

SECTION 7. [NEW MATERIAL] EMPLOYEE NOTICES--

RECORDKEEPING.--

A. On or before the thirtieth day after the effective date of the Paid Sick Leave Act, the workforce solutions department shall post on its website a summary notice to employees in English and Spanish of each provision of the Paid Sick Leave Act.

B. On or before the fourteenth day after the workforce solutions department has posted a notice pursuant to Subsection A of this section, an employer that:

(1) maintains a physical workplace shall provide a copy of the notice to each current employee and shall provide a copy of the notice to each subsequent employee on that employee's first day of work and shall post the notice in a conspicuous place in each establishment where employees are employed;

(2) does not maintain a physical workplace shall send a copy of the notice to each current employee and shall send a copy of the notice to each subsequent employee on that employee's first day of work via an electronic communication or post the notice on a web-based platform generally accessible to the employer's employees; and

(3) has an employee who works remotely through personal electronic connection or a web-based platform shall...
electronically send a copy of the notice to the employee or conspicuously post a copy of the notice on the web-based platform used by the employee.

C. An employer shall maintain accurate records of the paid sick leave accrued and used by an employee for four years. The records shall be made available to the division upon the division's request. Upon the request of an employee, an employer shall inform the employee of the amount of paid sick leave available to, accrued by or used by the employee.

D. An employer's failure to maintain records of the amount of paid sick leave available to, accrued by or used by an employee is a violation of the Paid Sick Leave Act. In the absence of such records, the division, a court or a jury may rely on accurate and contemporaneously maintained records of the employee's work time to determine the amount of paid sick leave accrued and used or on the employee's reasonable estimates of hours worked if no such records are available.

E. Employers that offer paid leave policies may comply with the recording requirements of this section by tracking and recording the equivalent amount of paid leave provided and used by an employee. Employers shall not be required to track or provide paid sick leave separately from other forms of paid leave.

SECTION 8. [NEW MATERIAL] COMPLAINTS AND INVESTIGATIONS--DIVISION DUTIES--RULES--CONFIDENTIALITY OF COMPLAINTS.--

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A. A person or an entity that has a member who has been affected by a violation of the Paid Sick Leave Act may file a complaint with the division.

B. The division shall investigate a violation that it identifies or a complaint of a violation of the Paid Sick Leave Act. The division shall institute or cause to be instituted a civil action for a violation of the Paid Sick Leave Act.

C. The division shall promulgate rules for the implementation and administration of the Paid Sick Leave Act. The rules shall include a system:

   (1) to receive complaints regarding violations of the Paid Sick Leave Act. This system shall provide for the use of multiple means of communicating complaints; and

   (2) for communications with employees and employers about investigations of complaints.

D. The division shall begin an investigation within thirty calendar days of receiving a complaint of a violation of the Paid Sick Leave Act and shall provide status reports on the progress of the investigation to the complainant and the employer in intervals of no greater than ninety days until the investigation is completed. When an investigation is completed, the division shall notify the complainant and the employer of the result.

E. In conducting an investigation regarding
potential violations of the Paid Sick Leave Act:

(1) the division shall endeavor to maintain
the confidentiality of the complainant and the affected
employee to the extent allowed by law;

(2) the division may review the records
regarding all of the employees at a given work location or for
a particular employer; and

(3) with the authorization of the employee or
person reporting the violation, the division may disclose the
name and identifying information as necessary to investigate
the complaint or enforce the Paid Sick Leave Act or for other
purposes that the division establishes by rule.

F. When conducting an investigation regarding a
potential violation of the Paid Sick Leave Act, the division
shall use the burdens of proof required for civil actions
pursuant to Section 9 of the Paid Sick Leave Act.

G. When the division determines that an employer
has misclassified an employee as an independent contractor,
the division shall notify the taxation and revenue department,
the unemployment insurance division of the workforce solutions
department, the workers' compensation administration and the
federal internal revenue service.

SECTION 9. [NEW MATERIAL] CIVIL ACTIONS--TIME LIMITS--
BURDENS OF PROOF.--

A. A civil action may be filed in a court of
competent jurisdiction for a violation of the Paid Sick Leave Act within three years from the date the alleged violation occurred; provided that the time limit to file a civil action established by this subsection shall be tolled during an investigation by the division of the violation or related violations by the same employer. An investigation by the division shall not be required to file a civil action, and a lack of an investigation by the division shall not act as a bar to a civil action brought by a complainant pursuant to the Paid Sick Leave Act.

B. The division, the office of the attorney general or a person or entity that has a member who has been affected by a violation of the Paid Sick Leave Act may bring a civil action for a violation of the Paid Sick Leave Act.

C. A civil action to enforce any provision of the Paid Sick Leave Act may be filed without first filing an administrative complaint with the division and may:

(1) encompass all violations that occurred as part of a continuing course of conduct, regardless of the date on which the violations occurred;

(2) be pursued by an employee on behalf of the employee or be pursued by an employee of behalf of other employees similarly situated; or

(3) be pursued by an agent or representative designated by an employee.
D. It shall not be a defense to any action brought pursuant to this section that the complaint was brought by or in regard to the employment of a worker who does not have evidence of having a legal presence in the United States.

E. The parties in a civil action regarding retaliation by an employer shall be subject to the following burdens of proof:

(1) when an employee presents a prima facie showing of retaliation, the employer shall then have the burden to establish a legitimate, non-retaliatory reason for the adverse employment action;

(2) when an employer meets the burden of proof required by Paragraph (1) of this subsection, the employee shall then have the burden to establish that the reason cited by the employer was not the reason for the adverse employment action; and

(3) when it is established that the adverse employment action was motivated by a combination of both lawful and unlawful reasons, the employer shall have the burden to demonstrate that the action would have been taken even in the absence of the unlawful reason.

SECTION 10. [NEW MATERIAL] EMPLOYER LIABILITY.--

A. An employer that violates the Paid Sick Leave Act shall be liable to the affected employee:

(1) for an instance of paid sick leave taken
by an employee but unlawfully not compensated by the employer, in an amount equal to three times the wages that should have been paid or one thousand dollars ($1,000), whichever is greater;

   (2) for an instance of paid sick leave requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned on searching for or finding a replacement worker, in an amount equal to actual damages or one thousand dollars ($1,000), whichever is greater;

   (3) for each instance of retaliation prohibited by the Paid Sick Leave Act excepting discharge from employment, in an amount equal to actual damages, including back pay, wages or benefits lost, an additional amount of five hundred dollars ($500) and equitable relief such as rescission of disciplinary measures taken by the employer or other relief as determined by a court of law;

   (4) for each instance of prohibited discharge from employment, in an amount equal to actual damages, including back pay, wages or benefits lost, an additional amount of one thousand dollars ($1,000) and reinstatement or other equitable relief as determined by a court of law;

   (5) for each willful notice or recordkeeping violation, five hundred dollars ($500); and

   (6) for each misclassification of an employee
as an independent contractor, actual damages or one thousand dollars ($1,000), whichever is greater.

   B. A plaintiff prevailing in a legal action brought pursuant to the Paid Sick Leave Act shall recover all appropriate legal or equitable relief, the costs and expenses of suit and reasonable attorney fees. In an action brought by the division or the attorney general, any damages recovered shall be payable to the individual employees who experienced the violation.

SECTION 11. [NEW MATERIAL] RELATIONSHIP TO OTHER REQUIREMENTS.--

   A. The Paid Sick Leave Act establishes minimum standards for paid sick leave and shall not be construed as creating or imposing any requirement in conflict with, preempting or otherwise limiting other laws or employer contracts or policies that provide greater rights to paid time off, paid leave or paid sick leave.

   B. The Paid Sick Leave Act shall not be construed to diminish or impair the rights or obligations of an employee or employer under any valid contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous paid sick leave to an employee than required by that act.

SECTION 12. SEVERABILITY.--If any part or application of the Paid Sick Leave Act is held invalid, the remainder or its
application to other situations or persons shall not be affected.

SECTION 13. EMERGENCY.--It is necessary for the public peace, health and safety that this act take effect immediately.

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