



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

LABOR RELATIONS DIVISION | PUBLISHED JUNE 2022

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

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## The Healthy Workplaces Act

### *History*

The New Mexico Legislature passed House Bill 20 in 2021, and Governor Michelle Lujan Grisham signed the Healthy Workplaces Act into law. The Labor Relations Division of the NM Department of Workforce Solutions (DWS) is tasked with its implementation and enforcement.

### *The Big Picture*

Starting July 1, 2022, the Healthy Workplaces Act of 2021 (HWA or the Act) is a law requiring all private employers, regardless of size, to allow New Mexico employees to accrue and use **paid sick leave** at a rate of one hour per 30 hours worked. There will be no waiting period after July 1st or the employee's date of hire, whichever comes later, for employees to be able to earn and use paid sick leave pursuant to the Act.

Employees can use accrued sick leave for a variety of reasons, including the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues. Employers who do not allow employees to earn and use paid sick leave in accordance with the Act face potential civil liability.

The Act does not set a limit for how many hours of paid sick leave an individual can earn, although it does cap employee usage of leave at 64 hours per calendar year. Employers may allow a higher yearly usage limit, but the legal requirement is up to 64 hours per year if the employee has accrued the leave. Paid sick leave that has been accrued but not used by an employee can carry or roll over to the next year, up to a maximum of 64 hours. Again, employers are permitted to have a more generous policy with respect to carryover if they wish to.

### *What is Paid Sick Leave?*

"Paid sick leave" or "earned sick leave" means time compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earns during hours worked. This benefit is paid by the employer. In no case will the hourly rate be less than the required minimum wage rate.

### *Waiving Paid Sick Leave*

Employee rights under the Healthy Workplaces Act are non-waivable by contract, including collective bargaining agreements (CBAs).

### *More Generous Provisions Option*

The law presents minimums, but employers can choose to offer more generous accrual, use, and carryover limits. Employers with paid-time-off policies that are more generous than the minimum accrual and usage limits specified in Act are compliant with the Act if employees may use the leave for the same purposes and under the same terms and conditions specified in the Act. The Division will require employers to honor their more generous policies if an employee files a complaint against them. Here is

what a more generous policy would look like:

- **Accrual:** Employees accrue more than one hour per 30 hours worked.
- **Use:** Employees can use more than 64 hours of paid sick leave per year.
- **Carryover:** Employees can carry over more than 64 hours of unused paid sick leave to the next year.

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

All private employers in New Mexico, regardless of size, are covered. This includes fulltime, part-time, seasonal, and temporary employees. This includes individuals performing services in peoples' homes for compensation (unless they are sole proprietors). This also includes employees of charitable, religious, and non-profit organization (as distinguished from people volunteering with such organizations). Corporate officers and company owners may be considered employees under the Act if they perform services for remuneration as set forth in their governing documents such as by-laws, operating agreements, corporate resolutions, etc.

Whether the business is based in New Mexico or out of state, employees performing services in New Mexico must accrue paid sick leave. An employee's residency or length of time of activity in the State is not determinative of whether they are subject to the requirements of the Act. If an employee files a complaint, the Division will also consider the type and volume of business activity conducted in New Mexico and its impact on this State.

How long an employee has been employed, the employee's age, and the employee's immigration status are all irrelevant in determining if the Act applies.

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

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

- Anyone performing services on tribal land. This is true whether the employer is owned or operated by a tribe or tribal member or a non-tribal member. Any business owned or operated by a tribe or tribal member is exempt from the requirements of the Act, even if work is performed off tribal land.
- Independent contractors. Employers should be cautious to not misclassify these workers as contractors to avoid the Act's reach, as the Act includes penalties for doing so.
- Any employee of an employer subject to Title II of the Federal Railway Labor Act.
- An employee as defined in the Federal Railroad Unemployment Insurance Act or the Federal Employers' Liability Act.
- Employees of the United States, or the State of New Mexico, its cities, counties, and agencies.

### ***Applicability to Out-of-State Companies and Remote Workers***

The Healthy Workplaces Act is designed for *employees performing work in New Mexico* to accrue paid sick leave. Regardless of where the business is based, employees performing services in New Mexico must accrue and be allowed to use paid sick leave.

For workers temporarily within the geographical boundaries of New Mexico (other than on tribal land), the Division will evaluate on a case-by-case basis once a PSL complaint is filed whether they have sufficient "minimum contacts" with our state to subject them to the requirements of the HWA. The more

business activity an out-of-state employer has going on in New Mexico, the more likely it is that it will be subject to the Act.

Whether remote workers are covered employees under the Act also requires case-by-case analysis. However, in general, the following will be true:

- a. Telecommuters and remote workers who perform services within the geographical boundaries of New Mexico, other than on tribal land, and whose employers are incorporated, registered, based, physically located, or are conducting their stated business in New Mexico (a “New Mexico employer”) **are most likely covered**;
- b. Telecommuters and remote workers who perform services remotely while within the geographical boundaries of New Mexico, other than on tribal land, and whose employers are based or incorporated out of state (an “out-of-state employer”) but do provide significant services in New Mexico or conduct significant business activities in the state, are **probably covered**. The Division will determine coverage on a case-by-case basis after reviewing the facts presented in a PSL complaint. An employer must have “minimum contacts” with our state as defined by law for the Division to have jurisdiction;
- c. Telecommuters and remote workers who perform services remotely while within the geographical boundaries of New Mexico, other than on tribal land, but whose employers are based out of state and do not provide significant services in New Mexico or conduct significant business activities in the state, are **most likely not covered** due to a lack of minimum contacts with our state by the employer;
- d. Telecommuters and remote workers who perform services remotely but do so while physically outside of the geographical boundaries of New Mexico are **not covered** regardless of whether their employers are based in New Mexico or are out-of-state employers with minimum contacts. The work upon which the accrual, usage, and payment of paid sick leave is based must have been performed in New Mexico for the Division to have jurisdiction;
- e. Telecommuters and remote workers who remotely perform some services in New Mexico and other services not in New Mexico, are **probably partially covered** by the Act for the services performed in New Mexico, but only if the employer is also a New Mexico employer or an out-of-state employer with minimum contacts in New Mexico.

### ***What is “a year”?***

Employers can choose how to measure when the year cycle of accrual, use, and carryover begins and ends. There are four options:

- Calendar Year (January 1 to December 31).
- Fixed 12-Month Period, like fiscal year or a year starting on the specific employee’s anniversary date with the company.
- 12 Months Measured Forward starting when an employee first used any earned sick leave.
- 12 Months Measured Backward from the date an employee uses any earned sick leave.

## Benefits to Employers and Employees

At the time this Guide is published, 15 other states and almost 150 countries have enacted laws requiring a form of paid, job-protected time off. Here are some ways employers may benefit from the Healthy Workplaces Act:

- ✓ **Reduced Turnover.** More workforce stability means less advertising, interviewing, and training new hires, which are costly.
- ✓ **Reduced Inefficiency.** Sick employees are less productive; healthy employees can perform at their best.
- ✓ **Reduced Public Health Risk.** One sick employee may portend sick co-workers and customers. The trickle-down effect can carry a large economic burden for an employer.
- ✓ **Reduced Health Care Costs.** Employees taking care of themselves, and their families can mean decreased costs for employers who offer health plans.

## Accrual Requirements

Starting July 1, 2022, or upon hire, whichever is later, covered employees must earn at least one hour of sick leave for every 30 hours worked. Employers can choose whether their employees will accrue paid sick leave on a continuous basis throughout the year or be “frontloaded” the sick leave hours the employee could accrue within the year all at the beginning of the year. Employers can use different accrual structures for different types of employees, but all employees must still earn a minimum of one hour per 30 hours worked. Employer records and policies must carefully reflect these practices.

For leave accrual purposes, employees who are exempt from Federal or State overtime pay requirements are assumed to work 40 hours per week. However, if they normally work fewer than 40 hours a week, their leave accrual is based on their normal work hours per week.

### *No Waiting Period*

There is no waiting or probationary period before an employee is entitled to accrue or use paid sick leave. As soon as an employee begins work, they must begin accruing paid sick leave at one hour per 30 hours worked or be frontloaded sick leave.

### *Continuous Accrual versus Frontloaded Leave*

If accrual is on a continuous basis, no matter how long it takes for an employee to reach 30 hours of work—whether it be 2 days or 20 days—once they do, they will earn one hour of paid sick leave.

If frontloading, an employer must grant employees at least 64 hours of earned sick leave for the upcoming year at the start of each year. **Employers may not frontload fewer than 64 hours**, including for part-time employees. In cases where an employee begins work mid-year, employers can frontload a pro rata portion of the 64 hours for use in the remainder of that year.

Employers who frontload must still monitor employee hours worked. If an employee works more than 1,920 hours in a year, that employee must receive the appropriate number of accrued sick leave hours, which would be more than the 64 hours they were frontloaded. Remember, employers can never cap an employee’s accrual.

Employers may not recoup unused frontloaded leave through payroll deductions, even if the employee signs a written agreement authorizing the employer to do so or if the employee is separated before accruing the frontloaded leave.

Businesses can use different accrual structures for different categories of employees, such as frontloading salaried employees and using continuous accrual for part-time employees. But businesses must be sure to keep clear records of hours worked, leave accrued, and leave used for employees in all categories. In all cases, employers must ensure all employees accrue paid sick leave at the rate of at least one hour per 30 hours worked.

### ***“Hours Worked”***

Employees will accrue paid sick leave for hours **actually worked**. This means that employees do not accrue paid sick leave while out of the office on vacation or while using sick leave or any other type of leave.

### ***On Call Employees***

An employee who is required to remain on the employer’s premises or so close to them that they cannot use the time effectively for their own purposes is working while “on call.” This is compensable time and paid sick leave accrues. An employee who is not required to remain at the employer’s premises but must leave word at their home or with company officials where that employee may be reached is not working while on call.

### ***Travel Time***

The “portal-to-portal” exclusion under the Fair Labor Standards Act (FLSA) does not apply in New Mexico. Travel during the workday from job site to job site is generally compensable work time and paid sick leave will accrue for those hours. But normal travel from home to work, or work to home, is not work time and paid sick leave will not accrue.

### ***Overtime***

All employees (except salaried exempt) must accrue paid sick leave for all hours actually worked. This includes overtime hours worked, which accrues at the same minimum rate as regular hours: one hour per 30 hours worked.

### ***Tracking Hours Worked for Salaried Employees***

With respect to salaried, FLSA-exempt employees who work fewer than 40 hours per week, businesses must now keep track of hours worked to calculate how many hours of paid sick leave salaried exempt employee are entitled to accrue. If the salaried exempt employee works more than 40 hours per week, then 40 hours per week will be used to calculate accrued sick leave. The HWA’s recordkeeping and notice requirements apply equally to all classifications of employees.

### ***Transfer and Change in Ownership***

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

When a different employer purchases or acquires a business or takes the place of an existing employer, all employees who remain employed by the successor employer must keep and may use all sick leave accrued with the previous owner.



### ***Cashing or Paying Out Unused Leave***

The Act does not require unused sick leave to be cashed out or paid out to employees upon separation, whether due to termination, resignation, retirement, or any other reason. However, cashing out accrued but unused PTO may be required in some circumstances; accrued or earned leave such as PTO may be payable pursuant to an employer's policy, any applicable CBA, or as otherwise required by law.

### ***Employees Rehired Within 12 Months***

If an employee is rehired within 12 months of the date of separation, all sick leave the employee accrued but did not use must be reinstated. The returning employee may use the restored leave and accrue new sick leave immediately upon returning to work. The Division recommends that employers treat this leave as a continuing potential liability for at least one year. If a departing employee is paid for their unused hours of sick leave or PTO, those hours will be deemed "used" and do not need to be reinstated if the employee is rehired within 12 months of separation.

### ***Leave Buy Back***

If your company policy allows for it and the employee elects to do so, employees can sell back or "cash out" unused leave. The Department would deem the paid-out leave *used* and not subject to the carryover requirement.

## **Usage Requirements**

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

Employers cannot require employees to use HWA leave, but if the employee chooses to use their earned sick leave, they may do so for any of the following reasons:

- a mental or physical illness, injury, or health condition of the employee or the employee's family member.<sup>1</sup>
- medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of the employee or the employee's family member.
- preventive medical care for the employee or the employee's family member.
- meetings at the employee's child's school or place of care related to the child's health or disability.
- absences necessary due to domestic abuse, sexual assault, or stalking suffered by the employee or a member of the employee's family to:
  - obtain medical or psychological treatment or other counseling
  - relocate
  - prepare for or participate in legal proceedings
  - obtain services or assist family members with the above activities

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

- an employee's spouse or domestic partner;
- a person related to an employee or an employee's spouse or domestic partner as a biological, adopted, or foster child, a stepchild or legal ward, or a child to whom the employee stands in loco parentis;
- a biological, foster, step, or adoptive parent or legal guardian, or a person who stood in loco parentis when the employee was a minor child;
- a grandparent or grandchild;
- a biological, foster, step, or adopted sibling; a spouse or domestic partner of a family member; or
- an individual whose close association with the employee or the employee's spouse or domestic partner is the equivalent of a family relationship.

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

Employers are never permitted to stop an employee's accruals, but employers can limit how many hours employees can use each year, which is 64 hours. Again, this is a minimum, so employers can choose to increase this limit. If necessary, be sure employees are aware that their leave balance might be higher than the number of hours they have available for use.

To illustrate, for an employee who has 70 unused hours at the end of the year, the employer would carryover at least 64 of those hours. If the employer is frontloading, that employee might have a balance of 128 hours—the 64 that rolled over and the 64 newly frontload—on January 1st even though the business will only permit them to use 64 of those in the upcoming year. If another employee only has a balance of 20 unused hours at the end of the year, the employer must carryover all those, then frontload 64 hours, so that employee would start the year with a balance of 84 hours.

### ***Usage Increments***

Employees may use earned sick leave in the smaller of hourly increments or the smallest increment the employer's payroll system uses to account for absences or use of other time. Employees can use their accrued sick leave intermittently in small increments or consecutively.

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

As soon as an employee accrues sick leave or an employer frontloads it, the employee may use the leave immediately.

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

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

## **Sick Leave Pay**

When an employee uses paid sick leave, he or she must be compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earned during hours worked. If an employee works 8:00am-5:00 pm, Monday through Friday, simply pay them their normal hourly rate plus any benefits they would receive for 8 hours and deduct 8 hours from their sick leave balance. But not all situations are this straightforward. Below is some guidance on how to calculate the number of hours an employee is out on sick leave and what to pay them for those hours.

### ***Tipped Employees***

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

### ***Salaried Employees***

When using earned sick leave, salaried exempt employees and salaried non-exempt employees whose hours fluctuate from week to week must receive their regular salary converted to an hourly rate based on 40 hours of work per week.

Example 1: Zoey normally earns an annual salary of \$41,600, which is a weekly salary of \$800 (\$41,600 divided by 52). She would be entitled to \$20 per hour for any earned sick leave used (\$800 divided by 40).

Salaried, FLSA-exempt employees who customarily works more than 40 hours per week are assumed to work 40 hours per week. But if an exempt employee customarily works fewer than 40 hours per week, their standard number of weekly hours should be used instead of 40 hours.

For salaried non-exempt employees whose weekly hours do not fluctuate, do the same calculation but instead of using 40 hours, use the number of hours that employee typically works in a regular work week. Keep in mind that overtime hours must also be factored into an employee's regular and customary work schedule for purposes of calculating hours of sick leave absence.

Note: All sick leave pay to salaried employees under the Act is *in lieu* of and not in addition to their regular salary. Employers do not have to allow salaried employees to double dip when using paid sick leave.

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

Employees paid per task, per piece, or per project must receive the greater of their hourly rate or salary rate converted to an hourly rate, or the higher of the state or local minimum wage.

Commission employees who also have an hourly or salary rate should be paid according to that rate. This must be at least the applicable minimum wage. Employees on commission *only* must receive at least minimum wage.

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

Per diem employees may use earned sick leave for hours they were scheduled to work or for hours they would have worked absent a need to use earned sick leave.

### ***Indeterminate Shift Lengths***

For per diem employees or employees with indeterminate shift lengths (e.g., employer needs dictate shift length), an employer must base the hours of earned sick leave used upon the hours the employer had a replacement employee for the same shift. If this is not possible, use the same number of hours from when the employee most recently worked the same shift or performed the same tasks.

### ***Fluctuating Work Hours***

If the number of hours an employee works fluctuates from week to week, the employer must use the average number of hours worked by the employee during the preceding two weeks. This average will be the number of hours for which a sick employee must be paid for "one day" of absence.

Example 1: Martha worked 28 hours over 5 days in week one and worked 32 hours over 5 days in week two. Over those two weeks, she worked a total of 10 days and 60 hours. She then took one day off in week three. The employer must calculate the average number of hours worked per day over the past two weeks. Finding it is 6 hours (60 divided by 10), Martha will be paid for 6 hours, and 6 hours will be deducted from her sick leave balance.

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

An employer may not deem an employee's hours to be "cut" to a lower number due to taking earned sick leave. The employer must pay the employee all earned sick leave according to the employee's regularly scheduled hours.

Example 1: Joe is normally scheduled to work 40 hours per week. He tells his employer he will need to take one week off due to surgery. The employer approves the leave but decides to change the schedule by scheduling Joe for 30 hours a week instead of 40. The employer then pays Joe for 30 hours instead of 40 for the week in which he takes HWA leave. This is NOT ALLOWED.

Example 2: Amber works for a company that is in the midst of downsizing and cost-cutting. She has been notified and agrees that her regular hours will be cut from five to three days per week in six weeks. The week before her schedule change is to take place, Amber learns she must take a week of HWA leave the very next week due to a family medical issue. She notifies the employer, who approves the leave. For the week she is off, the employer pays Amber based on a three-day work week rather than a five-day work week. This is permissible because her hours were not cut due to her taking leave but rather were scheduled to be reduced anyway on a date coinciding with her use of paid sick leave.

## Employee Notice to Employer

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

When the need to use earned sick leave is **foreseeable**, the employee must make a reasonable effort to give the employer notice before using the earned sick leave. ("Foreseeable" means an employee is aware of the need to use earned sick leave seven or more days before such use.) The employee must also make a reasonable effort to schedule use of earned sick leave in a way that does not disrupt the operations of the employer. When the need to use earned sick leave is **not foreseeable**, the employee must notify the employer as soon as practicable.

An employer must **never** require an employee to search for or find a replacement worker as a condition of using earned sick leave. Employers are also prohibited from requiring an employee to use other paid leave before using sick leave under the Act.

## Documentation from Employee

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

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

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

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

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

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

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

## Retaliation is Prohibited

If an employee engages in any lawful behavior under the HWA, then an employer takes any of the following actions, that employer may be sued and held civilly liable for monetary damages. Here are some actions that may be considered retaliatory:

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

### *Employee Discipline*

Though the Act does not prescribe a way for an employer to manage an employee they suspect of fraudulently using sick leave, employers have a right to discipline employees according to their own policies, even if those policies include disciplinary measure for employee abuse of paid time off. Employers should use caution when engaging in disciplinary actions to ensure those actions are not being used in a retaliatory manner or in a way that would discourage employees from using sick leave in the future. If a complaint is filed, the Division will make a finding as to whether the discipline was administered legitimately. Remember, counting an absence due to use of sick leave in a way that could lead to an adverse employment action is illegal under the Act.

## Notice to Employees & Employer Recordkeeping

### *Written Notice Upon Hire*

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

- The employee's right to earned sick leave.
- How earned sick leave is accrued and calculated.

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

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

***Paid Sick Leave Poster***

Employers must display a Paid Sick Leave poster in a conspicuous and accessible place in each establishment with employees. For fully remote businesses, the Department will allow for website, email, or some other form of electronic communication or publishing employees can easily access.

***Quarterly Summaries***

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

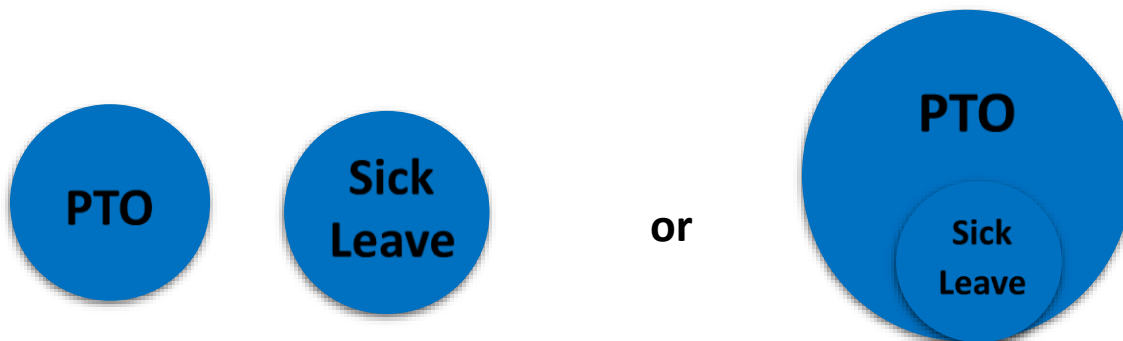
***Recordkeeping***

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

An employer’s willful violation of any requirements listed in this section could result in an assessment of damages of \$250 per violation.

**Single PTO Policies**

It is possible to have a single PTO policy and be compliant with the HWA. However, doing so may not be the best choice for every business. For example, unless an employer knows an employee is requesting leave for a non-HWA purpose, they would not be able to deny an employee’s use of leave based on business needs. Similarly, they would not be able to make pre-approval a requirement of leave use. Remember, whenever a provision of a PTO or other leave policy conflicts with the Act, the Act controls. Employers are free implement policies with greater benefits or employee rights than the Act’s minimums requirements. For example, while the Act does not require employers to pay out unused PTO upon an employee’s separation, an employer’s PTO policy may allow for cashing out, in which case the Division would require employers to follow their policies in this regard.



Employers who choose to use a single PTO policy must ensure their policy tracks all the HWA's terms and conditions. Just offering a more generous accrual rate than the Act requires will not make an employer compliant with the Act. For example, employers must make sure they offer the same or more generous accrual, use, and carryover rates. Employees must be allowed to use the PTO for at least all the purposes provided for in the HWA. Employers cannot institute waiting periods prior to accrual or usage of PTO. Employers must use the HWA's methods for calculating pay for employees who use sick leave. Employers must comply with the recordkeeping requirements of the HWA, display the poster, and inform employees of their HWA rights upon hire. Employers must provide quarterly year-to-date summaries to employees that list hours worked, PTO accrued, and PTO used. Finally, the Division cautions employers with a single PTO policy to make sure employees are aware that if they exhaust their PTO balance for absences not related to the purposes contemplated the Act, such as vacation, they will not have leave available in case of illness.

In sum, unless the PTO is earned on the same basis, can be used under the same conditions, and is subject to the same requirements of the HWA, paid sick leave required by the Act will be **in addition** to any other paid leave than an employer may grant.

### ***Unlimited PTO Policies***

If an employer offers unlimited leave that may be used for all the same purposes and under the same (or more generous) terms and conditions as the Act requires, including those related to notice and documentation, they will be compliant. However, they still must keep track of any time used so if a complaint is filed against them, the Division will be able to determine whether that employee accrued and was allowed to use the mandatory minimum amounts of leave.

## **HWA Interactions with Other Laws**

State law, including the HWA, supersedes Federal law where the protection afforded an employee under the state law offers greater protection to the employee than the federal law. Similarly, to the extent that a municipal or county ordinance provides for greater employee protections than state law, an employer must comply with the provisions most protective to employees.

### ***Concurrent Leave***

HWA leave may be used if the employee is on unpaid leave, such as FMLA leave, provided the reason is permissible under the Act. Also, if an employer makes other paid leave available to employees beyond what is required by the Act (such as vacation or PTO), that employer may not require an employee to use that other paid leave before taking any available HWA leave. On the other hand, the Act does not obligate an employer to allow an employee to take HWA leave concurrently with other paid leave, a double-dip situation.

## **Collective Bargaining Agreements**

The earned sick leave required by the Act is in addition to any paid time off provided by an employer pursuant to a collective bargaining agreement (CBA) unless employees may use the paid time off for the same purposes and under the same terms and conditions specified in the Act. Ultimately, CBA requirements related to paid sick leave must be consistent with the Act and meet the mandatory minimums. But a CBA can grant more generous amounts of leave accrual, usage, and carryover than

required by the Act. CBA provisions that are inconsistent with the HWA will not be enforced by LRD and may not operate as a defense to a complaint brought under the HWA.

## Employer Responsibilities

Employers should do at least the follow to ensure their paid sick leave program complies with the law:

- Give **notice** documents to all employees about their rights and responsibilities under the Act. Employers can use the downloadable poster available online to fulfill this requirement as they hire new staff.
- Display the paid sick leave **poster**. These are downloadable online and available by July 2022 for free at all Workforce Connections offices around New Mexico. Visit <https://www.dws.state.nm.us/Office-Locations> for a list of locations. The posters are available from the Department in English, Spanish, Navajo, and Vietnamese.
- Provide employees with accurate, year-to-date written **summaries** of their hours worked, sick leave earned, and sick leave used at least once per calendar quarter. Employers who provide this information on employee paystubs will be compliant with this requirement.
- Retain **records** with information about each employee’s hours worked, sick leave earned, and sick leave used for at least 48 months from the date the record was created.
- Ensure company policies and employee handbooks reflect the provisions of the Act.

## Enforcement of the Healthy Workplaces Act

### *LRD Investigations*

The Labor Relations Division is the part of the Department of Workforce Solutions that administers and enforces state labor laws, regulating many things such as payment of wages, employment of children, discrimination, employment of minors, and prevailing wage.

The LRD is also designated as the state authority charged with enforcing the Healthy Workplaces Act. The LRD adopted rules and regulations and will receive and investigate complaints to ensure employees’ rights under the Act are enforced. The Division’s investigations may include gathering evidence from whatever sources are available and asking for position statements from the employers in response to complaints filed by employees. The LRD can also arrange mediation between the parties to try to resolve the case by settlement without the need for further action. If mediation fails to resolve the complaint, the LRD will then issue an administrative decision either in favor of the employee or the employer.

### *Filing a Complaint*

Employees may file complaints starting on July 1, 2022, by contacting the LRD to get a Paid Sick Leave complaint form. The form may be submitted in person, via mail, via email, or via fax. The form will be available online at [www.dws.state.nm.us/NMPaidSickLeave](http://www.dws.state.nm.us/NMPaidSickLeave). The form is available in English and Spanish. Individuals needing help filling out the form or needing the form translated can get free help via telephone: (505) 841-4400. Complaints must be filed with the LRD within three years of when the alleged violation occurred.



### ***Civil Actions***

The LRD may, in its discretion, file a civil action against noncompliant employers who refuse to rectify their violations. The state Attorney General's office or any person or entity with members affected by violations of the Act may also file a civil action on their own or with a private attorney. Individuals wishing to pursue a private right of action ARE NOT REQUIRED to first file a complaint with the Division before filing a lawsuit. The LRD may also facilitate settlements between employers and employees to resolve complaints and collect wrongfully denied earned sick leave and damages.

### ***Employer Liability***

An employer in violation of the Healthy Workplaces Act will be liable to the affected employee for monetary damages, interest, fees, and other relief specified in the Act. An employer may be held liable for damages for each occurrence of each type of violation and amount of sick leave wrongfully denied. An employer that retaliates against an employee may be ordered to rescind disciplinary action taken or reinstate a terminated employee, along with paying monetary damages. Any employer in violation of the Act may also be ordered to pay the costs and expenses of suit and reasonable attorney fees.

## **More Information**

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