



PAYMENT OF UNUSED SICK LEAVE

Legal Background

Payment for unused accumulated sick leave was ruled a legal and required topic of bargaining in *Maywood*, 131 N.J. Super 551 (App. Div. 1974). In *Maywood*, the Court noted while there is no statute providing for such payments, there was also no statutory prohibition, and thus the court reasoned that legislative silence on the subject granted school boards the discretion to compensate employees in this manner. Subsequently, the Public Employment Relations Commission (PERC) has echoed the Court's ruling. See, for example, *Union City Bd. of Educ. V. Union City Educ. Assoc.*, PERC No. 84-79; *Twp. of Edison*, PERC No. 84-89.

In 2010, Governor Christie signed P.L. 2010, c.3 into law. Part of that law restricts members of the Public Employees' Retirement System (PERS) and the Teachers' Pension and Annuity Fund (TPAF) to a maximum \$15,000 sick leave payout upon retirement. This provision applies to those hired after May 21, 2010.¹ Since then, there have been numerous legislative proposals that would, if signed into law, significantly amend N.J.S.A. 18A:30-3.6, to limit payment to unused sick leave for current employees regardless of hire date. Stay tuned to njsba.org and the labor relations web page for the latest updates.

In the decades since the *Maywood* decision the percentage of New Jersey teachers' contracts offering Payment for Unused Sick Leave (PUSL) plans has soared from 25% to virtually all districts. Often Boards agreed to these provision under the belief that implementation would have a positive effect on continuity of instruction by discouraging employees from taking intermittent sick leave.

At the outset it should be noted that regardless of the legality and growth of this benefit, it is still permissible for boards to reject such plans or seek their revocation on philosophical grounds. If you believe that healthy employees should come to work, and sick ones should stay home, and oppose severance bonuses based on the luck of having good health and the integrity to come to work when healthy, that's a perfectly good reason to reject such a demand or to seek its revocation or diminution.

Components

Since payment for unused sick leave is nearly universal in New Jersey teachers' contracts, and valued, especially by veteran teaching staff approaching retirement, it is imperative that the board understand the typical components of these benefits. Being aware of the contractual elements is the starting point to controlling costs and ensuring that any intended purpose is fulfilled (e.g., reduce absenteeism, etc.). The specifics and, consequently, the costs of payment for unused sick leave vary dramatically from plan to plan.

Preliminarily, when writing contract language which grants employees a benefit, there are several general rules which should be remembered. Contract language should always be written in a clear and concise fashion. Beyond this, benefit clauses must contain explicit language which determines and controls boards' financial liability. This is especially important with a benefit such as payment for unused sick leave where the greatest expenditures may occur five, ten or twenty years from the implementation date. Finally, as mentioned earlier, if a specific goal is to be achieved, any payments should depend upon the goal being achieved.

There are a variety of approaches to PUSL. Plans vary from a straightforward fixed rate per day approach to complicated formulas with numerous factors and variables affecting payment. Some PUSL provisions have the potential to require large cash outlays by the district, and several types of cost controls are utilized by boards seeking to limit their maximum financial liability. Components listed below establish the board's control over payment for unused sick leave benefit. The last component, goals, ensures that the board achieves its stated objectives. The *italicized language* represents actual New Jersey contract language.

Date of Eligibility Who is eligible for reimbursement under the plan? Normally, payment for unused sick leave is given at retirement, although a few districts provide payment upon separation or resignation. If payment is made at resignation, it can no longer be justified as a reward for years of service nor as a means to reduce absenteeism. More-over, since it is impossible to predict when employees will leave, it is difficult to budget for payments upon resignation. In fact, even when payment is upon retirement, it is recommended that the clause state that it is retirement per the T.P.A.F. in order to receive immediate pension benefits and should exclude "deferred retirements." This language

¹ Note, NJSBA data indicated that when P.L. 2010, c.3 was passed in 2010 most districts had already negotiated caps well below \$15,000.

precludes employees from receiving payments for leaving the district and “vesting” after 10 or more years of service.

Effective July 1, 1982, upon retirement, teachers will receive payment for sick days earned...

or

Any teacher who retires according to the provisions of the Pension and Annuity Fund in order to receive immediate benefits and not merely “deferred retirement” shall receive....

Advance Notice of Retirement Does the clause provide for sufficient notice to enable the board to budget for the payment? It is not unusual for a board to require that the employee give six months or more notice of intent to retire in order to qualify for the plan.

The employee shall notify the Board of his/her intention to retire by January 1, to be eligible for the bonus to be paid on July 1. If the employee notifies the Board after January 1, it will result in payment of the bonus the following year on July 1.

Effective Date of Program What sick leave days are eligible under the plan? If all sick leave days accumulated in the district are eligible for reimbursement, the payout (depending upon the formula utilized) could be considerable for employees with many years of service. Those districts which permit new employees to bring with them sick days accumulated in another district may want to exclude such days from the sick leave payment plan.

...teachers shall be reimbursed for all sick days accumulated in the School District.

or

Accumulation date: the effective starting date for accounting unused sick leave days is July 1, 1981.

Minimum Length of Service/Minimum Age Is there a requirement that employees must have worked a certain number of years in the district? Length of service requirements are intended to exclude individuals who may work many years in one district, resign, work several years in another district and be eligible for sick leave payments from that second district.

Upon retirement from the School District, a teacher ...[who] has taught at least 20 years in the School District...

or

After 30 years of service with the School District, a teacher.....at retirement will be compensated....

Maximum or Minimum Number of Days Is there a cap on the number of sick days which may be counted for payment? As a means to limit the board’s liability for

any given employee, either a percent or number maximum may be established. In addition, the board may insist on a minimum number of accumulated days, which may or may not themselves be reimbursable.

...payment for unused sick leave will be for 50% of the eligible days.

or

...reimbursement will be given for accumulated sick days up to a maximum of 100 days.

or

All days above 25 shall be eligible for reimbursement, with the following limitations...

Reimbursement Formula Are employees to be paid at their daily rate at retirement (or a variation thereof—i.e., some percentage of the daily rate) or a flat dollar amount per day? The NJSBA strongly urges districts not to utilize an employee’s future salary as a means to calculate reimbursement because of the uncertainty in dealing with unknown dollar amounts 5, 10, or 20 years from now. If a flat dollar per day formula is used, a board can easily figure the current and future costs of the payment plan. Such a plan would also provide a tactical advantage in future negotiations because the board could offer to increase the amount per day figure in return for concessions from the union.

The amount shall be computed at the rate of one-half the employee’s daily rate of pay for each day earned.

or

Payment is arrived at by taking the teacher’s present salary at retirement and dividing it by 200, thus finding the per diem rate.

or

...one-third (1/3) day’s salary at their last year’s salary rate for each accumulated day of sick leave. (1/3 day’s salary x 1/200ths of the last year’s salary rate x total days accumulated sick leave.)

or

Teachers shall be paid \$20.00 per accumulated unused sick day.

Maximum Dollar Amount Does the plan establish a ceiling on the amount any employee will receive, or on the total amount the board will spend on this benefit per year? It should be noted that a total annual dollar cap could be difficult to administer if, for instance, there is a \$10,000 cap and five teachers retire, and their individual entitlements under the plan are different from each other, but total more than \$10,000.

An employee will be reimbursed at \$10/day up to a total of \$2,000.

or

The board's maximum liability in any one year cannot exceed \$10,000.

It is important to note that even though a district may not have a hard cap on the payout amount, the other cost controls listed above may serve to limit the boards expenditure is this area. In fact, NJSBA data shows that less than one percent of districts are without any cost limit (i.e. **full** per diem rate paid for **every** accumulated sick day), and those limitless payouts are currently being phased out by grandfathering employees who were hired as of a certain date.

Establish Goals If the board and/or the union's intent is to reduce absenteeism, this goal should be embodied, in some fashion, in the sick leave payment plan. There are numerous means to try to ensure that the plan has the intended effect. In the first example, an end of the year payment, not tied to either retirement or resignation (and thus prohibitively expensive to most districts), is awarded to teachers who use four sick days or less:

After the conclusion of each school year, and not later than July 31, the Board will provide the following bonuses to full-time unit members to encourage improved staff attendance:

Total Number of Sick Days Used During the Prior School Year	Amount to be Compensated
No days used	\$200.00
One day used	\$175.00
Two days used	\$150.00
Three days used	\$100.00
Four days used	\$ 50.00

Note annual attendance bonuses are the exception rather than the rule. The general consensus has been that such plans will not encourage heavy users to mend their ways. If these plans are agreed to, reimbursement under these annual plans should preclude reimbursement for these days at retirement?

Although rare, in the past there have been examples requiring that absenteeism be reduced in order for the plan to remain in effect or in order for the plan to be implemented:

If the rate of absenteeism in the School District has not been reduced 20% from the 1991-92 level (250 days), this provision shall be considered null and void as of June 30, 1993.

or

If sick leave and personal leave usage for all unit employees averages 6.0 days or less in 1992-93, then as of September 1, 1993, the

Board shall pay for accumulated sick leave at retirement in the amount of \$20.00 per day up to a Board maximum cost of \$2,000.00 per employee.

Leave days granted by the Board for extended sick leave over and above accumulated sick leave and extended sick leaves which include ten (10) or more hospital days are excluded from the 6.0 days average.

Grandfathering

Given the ubiquity of payment for unused sick leave provisions in New Jersey school contracts, its perceived value to veteran teaching staff approaching retirement (who are usually politically important in the local association), and the need for mutual agreement to modify current provisions, it may not be possible for Boards to make all the changes they would like to these provisions in one bargaining cycle.

Consequently, an increasing number of districts have negotiated tiered caps depending upon the date of hire (separate from the \$15,000 cap required under *P.L. 2010, c.3.*) For example, a district may not have a cap on those hired prior to 7/1/05, but those hired after that date are capped at \$10,000. Or, all employees may have a cap, but those amounts are different based upon the date of hire. Movement to this type of arrangement will effectively phase out the higher cap over time.

When conducting comparative research on PUSL plans, careful attention to the various conditions and limitations, including caps and other cost control measures, will provide a more meaningful comparison than just an analysis of the payment amount per day or the number of days payable.

Early Retirement

There is one last important consideration. Incentives that tend to encourage early retirements have been viewed as going beyond the board's authority to set or negotiate compensation. Example of this would be tying the payment to age or payments that decline with additional years of services. In 1979, the Supreme Court, in *Fair Lawn, 79 N.J. 579 (1979)*, reiterated that payment for unused sick leave was a legal and required topic for negotiations, but found that such plans could not be used as an incentive to spur early retirement. More specifically, the Court ruled on a plan whose value was dependent upon the employee's age. Employees retiring at an earlier age received a larger payment. Under these circumstances, the Court found the plan illegal because it would undermine the fiscal solvency of the pension and annuity system by encouraging early retirement. In fact, due to the potential deleterious effects on the state's retirements systems, the Teachers' Pension and Annuity Fund (TPAF) and Public

Employees Retirements System (PERS), the Divisions of Pensions and Benefits has advised that local boards of education (or other local employers) are not authorized to offer early retirement incentive programs unless they have been specifically authorized by state law. *See also, State v. State Supervisory Employees Association, 78 N.J. 54 (1978)* (“Public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pension”).

Summary

Within the legal relevant legal framework, Boards can use the component approached laid out above to analyze and to improve the existing payments for unused sick leave contractual provision. As local associations will undoubtedly defend the *status quo* (or even make proposals to enrich this benefit), boards can counter-propose language which can effectively control costs and increase the predictability of the plan.