

Labor & Employment Advisory

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New Jersey Set to Become the Third State with Paid Family Leave

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After years of legislative effort and opposition from employers, both houses of the New Jersey Legislature have now passed a bill under which employees would be entitled to paid "family temporary disability leave." Governor Jon Corzine is expected to sign the bill,¹ making New Jersey the third state, along with California and Washington, to enact such legislation.

The new law will provide short-term disability benefits for up to six weeks to employees who take leave to tend to a newborn or newly adopted child or to care for a seriously ill family member. Employees may begin to utilize benefits on July 1, 2009. All employers who are covered by New Jersey's unemployment compensation laws — which is virtually all employers — will be required to permit their employees to use paid family leave benefits.

Under the new law, an employee will receive benefits of up to two-thirds of his/her pay, up to \$524 per week, just as under New Jersey's existing short-term disability benefits (TDI) program. The benefits under the law are to be funded by a new tax on employees' wages, which would begin on January 1, 2009. The tax is predicted to amount to about \$30 per employee annually. Just as they may under the state's existing TDI program, employers may opt to provide their own paid family leave plan, so long as its benefits and cost to employees are equal to or more favorable than what the state provides.

Nature of the Benefits and Notice to Employers

The new law will allow an employee to take up to six weeks of paid leave during any 12-month period. The employee will be required to submit a claim for benefits to the Division of Temporary Disability Insurance within 30 days of the start of the leave. The leave can be taken for the following reasons and would be subject to the following notice rules:

- **Paid leave may be taken to care for a newborn child or a newly adopted child during the first 12 months after the child is born or adopted.**

Leave taken for this reason must be taken consecutively, not intermittently, unless the employee and the employer agree to a different arrangement. The employee must give the employer 30 days'

¹ As of this writing, according to a report in NJBIZ, a New Jersey business and industry periodical, business lobbyists are still trying to persuade Governor Corzine not to sign the bill. However, he has publicly and consistently supported it.

notice of his/her intent to take leave for this reason. An employee who fails to do so forfeits two weeks of paid benefits. However, if "unforeseeable circumstances" prevent 30 days' notice, the penalty does not apply.

- **Paid leave may be taken to care for a child, spouse, parent or domestic or civil union partner who has a serious health condition.**

A "serious health condition," just as in the New Jersey Family Leave Act, is defined as an illness, injury, impairment or physical or mental condition that requires inpatient care or that requires continuing medical treatment or supervision.

Leave taken for this reason may be taken intermittently, up to a maximum of 42 days, spread over a 12-month period. The employee (1) must try to take the leave in a way that minimizes disruption to the employer, (2) must try to give the employer 15 days' notice, and (3) must try to give the employer a schedule of the leave days.

The employer may permit or require the employee to use up to two weeks of employer-provided paid sick leave, vacation time, or other leave at full pay before the employee can start to draw benefits under the new law. In those situations, the employer can reduce the employee's paid leave by the amount of employer-provided paid leave used. (For example, the employer may require the employee to use his/her two weeks of paid vacation instead of paid leave under the law, in which case the employee is only eligible for four weeks (six weeks minus two weeks) of paid leave under the new law.)

Employer Notice Obligations

After the bill is signed, the New Jersey Commissioner of Labor will issue a form notice of benefit rights. Employers will be required to post and distribute the notice to their employees within 30 days of when the notice is issued. In addition, employers will be required to provide the written notice to (1) any employees hired after the notice is initially distributed, (2) any employee who tells the employer that he/she plans to take time off for a reason covered by the law, and (3) any employee who requests a copy of the notice.

Whenever an employee uses paid family leave, by the ninth day of the leave, the employer must send a notice to the Division of Temporary Disability Insurance and to the employee containing certain personal and compensation information regarding the employee. (The division will create a form for employers to use for this purpose.)

Interaction with Existing Unpaid Family Leave Laws

Because the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA) already give qualified employees the right to take up to 12 weeks of *unpaid* leave for reasons almost identical² to the reasons employees may take *paid* family leave, the new law creates the potential for confusion. It is important to understand that the FMLA and NJFLA apply only to employers with 50 or more employees³ ("large employers"), whereas the new law would cover all employers, large and small. With three potentially applicable family leave laws to worry about, it is best to break down the issues and potential pitfalls by the size of the employer:

Small Employers (less than 50 employees)

In the past, small employers did not have to concern themselves with family leave laws because the FMLA and NJFLA do not apply to them. With the expected enactment of the new paid family leave law, small employers must be educated and informed. They will need to comply with all provisions of the new law

² The definitions of "family member" and "child" in the new law and the NJFLA slightly differ.

³ Precisely, 50 or more employees *for 20 or more full calendar weeks in the current or prior calendar year.*

and will be required to allow their employees to take up to six weeks of paid leave under appropriate circumstances, just as large employers must. However, the new law expressly does not give an employee the right to be returned to his/her job after the leave. Nor does it give an employee the right to sue if the employer refuses to restore his/her job.

Large Employers (50 or more employees)

Large employers are already familiar with family leave because the FMLA and NJFLA apply to them. An employee's paid leave under the new law would run concurrently with his/her unpaid FMLA and/or NJFLA time, *if* the employee were eligible for unpaid leave. Thus, as an employee's FMLA and/or NJFLA leave runs, so, too, would his/her paid family leave. Practically speaking, this could mean that the first six weeks of an eligible employee's leave would be paid under the new law, and if the leave continued beyond that, up to the 12-week FMLA and NJFLA cap, the leave would be unpaid.

All that seems simple. However, things may get confusing if the employee is not yet eligible for FMLA and/or NJFLA leave when the leave is sought. The FMLA and NJFLA have minimum length and amount of employment requirements.⁴ The new law, however, has no such requirements. Therefore, there will inevitably be situations in which an employee is eligible under the new law to take *paid* family leave of up to six weeks even though he/she is *not* eligible to take *unpaid* FMLA and/or NJFLA leave. Technically speaking, in those situations, the employee will have no right to job restoration, just like employees of small employers who take paid family leave. However, employers should tread lightly in this area to avoid a trap.

Consider a full-time employee who starts working for her employer on January 1, 2009. On December 15, 2009, 11½ months into her employment, she begins a leave to care for her mother, who is in the hospital. Before the end of the year (before she has worked 12 months), she would not be eligible for unpaid FMLA and/or NJFLA leave. However, she would be eligible for paid family leave under the new law. The temptation might be to assume this employee would have no right to job restoration at the end of her leave. However, if and when her leave continued beyond her one-year anniversary (on January 1, 2010), she would become FMLA- and NJFLA-eligible, her leave may be deemed leave under those laws and, most importantly, she *would* now be entitled to have her job restored and could sue the employer if it was not.

The interaction of the new law with the FMLA and NJFLA not only will create confusion in the right to job restoration, it will complicate leave calculation. While the new law says that paid and unpaid leave run concurrently, large employers must bear in mind that in some instances, as in the example above, the FMLA and/or NJFLA leave would only begin to run with the paid family leave when that employee became eligible for FMLA and/or NJFLA leave. Continuing the example above, even though the employee would have only four weeks of paid family leave left as of January 1, 2010 (because she used two weeks in December), she would have a full 12 weeks of FMLA and/or NJFLA leave left, because that leave will have only just begun to run. Thus, she would be entitled to take a total of about 14 weeks of leave — more than an employee of a large employer would be entitled to before the new law was passed. The end result is that even though the new law will limit paid leave to six weeks, and the FMLA and NJFLA limit unpaid leave to 12 weeks, by operating in concert in situations like this, an employee may be entitled to more than 12 weeks of leave for the same underlying cause.

Implications

New Jersey's new paid family leave law will have significant implications for New Jersey employers that should be considered now, before the law takes effect in 2009. First and most obviously, employers must be well-versed in the law to ensure that they comply with it. Second, some unlucky employers will inevitably contend with dubious leave claims. Third, human resources personnel, or those who occupy that role at smaller employers, will have a new layer of administrative responsibility, first in setting up their

⁴ Under the FMLA, the employee must have worked for the employer for at least 12 months and must have worked at least 1,250 hours in the last 12 months. The NJFLA has the same 12-month requirement, but the employee need only have worked at least 1,000 hours in the last 12 months.

paid family leave processes and then in recognizing when employees qualify for leave and monitoring that leave alongside other types of leave. Lastly, and perhaps most importantly, employers, and especially small employers, must be ready to adapt and ensure coverage when employees are on leave.

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