

## NEW JERSEY TO EMPLOYERS: “PAY EMPLOYEES FOR LEAVE”

Insights

May 12, 2008

On July 1, 2009, New Jersey will join the short list of two other states – California and Washington – that have enacted laws providing paid leave for employees who miss work to care for family members unable to care for themselves, or to care for newly-born or adopted children.

### **The Scope of the Law**

The law provides for “Family Temporary Disability Leave” and is basically an overlay to the New Jersey Family Leave Act (NJFLA) and the federal Family and Medical Leave Act (FMLA). For employers already covered by the FMLA and the NJFLA, the law does not provide any right to additional time off from work, nor does it affect employees’ existing rights; it only addresses compensation. Paid leave is to run concurrently with leave under the FLMA and NJFLA. But it does cover many more employers, since every employer subject to New Jersey’s Unemployment Compensation Law is covered. That means employers with fewer than 50 employees will be covered by a mandatory leave law for the first time.

The new law provides a total of six weeks leave in any twelve-month period – paid at two-thirds the employee’s regular weekly salary up to a maximum amount of \$524 per week, provided the employee has worked at least 20 weeks or earned a total of at least 1,000 times the minimum wage during the previous year. As is the case under the NJFLA and FMLA, intermittent leave – now paid – will be available up to a total of 42 days in any twelve-month period.

### **The Question of Reinstatement**

The new law does not contain any provision requiring that an employee who has taken Family Temporary Disability Leave be reinstated to the same job, or a similar job to the one held before taking leave. Existing protections under the NJFLA and FMLA already address this for employees whose employers are covered by those

statutes. But because the new law covers small employers not covered by the NJFLA or FMLA, there will be a class of small employers whose employees can take paid Family Temporary Disability Leave but will *not* have job reinstatement protection when they do so. In fact, the law contains specific language seemingly aimed at immunizing small employers from being sued for replacing employees who take Family Temporary Disability Leave.

A recent news release issued by the Governor's office also seems intended to reassure small businesses that they can replace employees who take the new paid leave, stating that the law:

**provides small businesses (50 or fewer employees) with the option to replace employees receiving [Family Temporary Disability Leave] benefits. Small businesses do not have to hold jobs open and provisions in the law allow small businesses to fill a worker's position with a permanent replacement without running the risk of being sued.**

Employee advocates can still be expected to attempt to find ways to challenge any decision by an employer – small or large – that appears to penalize an employee for taking time off under the law. For example, uneven application of a replacement rule could give rise to claims of discrimination. Small employers should be wary of assuming they can immediately replace or refuse to reinstate any employee who takes Family Temporary Disability Leave, and would be well-advised to consult counsel before they do so.

### **Definitions**

Like the NJFLA and the FLMA, the paid leave law depends on a number of key terms and definitions. There are two types of Family Temporary Disability Leave.

Employees may take paid leave to:

- participate in the providing of care ... for a family member of the individual made necessary by a serious health condition of the family member; or
- be with a child during the first 12 months after the child's birth, if the individual, or the domestic partner or civil union partner of the individual, is a biological parent of the child, or the first 12 months after the placement of the child for adoption with the individual.

The law specifically excludes providing paid leave to employees for their own disabilities.

Other key terms under the law, and their definitions:

**Serious Health Condition** means an illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice, or residential medical care facility; or continuing medical treatment or continuing supervision by a health care provider.

**12-Month Period** means, with respect to an employee who establishes a valid claim for disability benefits during a period of family temporary disability leave, the 365 consecutive days that begin with the first day that the employee first establishes the claim.

**Health Care Provider** means any person licensed under federal, state, or local law, or the laws of a foreign nation, to provide health care services; or any other person who has been authorized to provide health care by a licensed health care provider.

**Family Member** means a child, spouse, domestic partner, civil union partner, or parent of a covered individual.

**Child** means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, or a child of a domestic partner of a covered individual, or a child of a civil union partner of the covered individual, who is less than 19 years of age, or who is 19 years of age or older but incapable of self-care because of mental or physical impairment.

**Parent of a Covered Individual** means a biological parent, foster parent, adoptive parent, or stepparent of the eligible employee or a person who was a legal guardian of the eligible employee when the eligible employee was a child.

**Placement for Adoption** means the time when an eligible employee adopts a child or becomes responsible for a child pending adoption by the eligible employee.

As with the NJFLA and FMLA, there are requirements for employees to provide advance notice of taking a paid leave. If the leave is for care of a child after birth or adoption, the employee is required to give 30 days' notice, except when unforeseen circumstances prevent it.

If leave is for the care of a sick family member on a non-intermittent basis, the employee is required to give prior notice "in a reasonable and practicable manner, unless an emergency or other unforeseen circumstance precludes prior notice."

If the leave is for the care of a sick family member on an intermittent basis, the employee is required to give 15 days' notice, again unless unforeseen circumstances prevent such notice.

## **OTHER IMPORTANT PROVISIONS OF THE NEW LAW**

### *Initial Exclusion Period*

There is an initial one-week "exclusion period" during which payments are not made. This means that payments for a period of Family Temporary Disability Leave start on the first day after the first one-week period following the commencement of the family member's temporary disability. No benefits are payable for the first week of each period of Family Temporary Disability Leave unless benefits are eventually payable for three consecutive weeks. In that case, benefits retroactively become payable for the first week.

With respect to intermittent paid Family Temporary Disability Leave, "if benefits become payable on any day after the first three weeks in which leave is taken, then benefits shall also be payable with respect to any leave taken during the first one-week period in which leave is taken."

There is also some interaction between individual disability leave and Family Temporary Disability Leave. If an individual takes Family Temporary Disability Leave immediately after the individual has a period of disability for his or her own disability, payments continue uninterrupted when the individual disability period ends and the Family Temporary Disability Leave period begins.

### *Certification and Examinations*

Employees must provide a certification by a health care provider to support a Family Temporary Disability Leave to care for a sick family member. The Division of Temporary Disability Insurance may request the family member to submit to an examination by a health care provider selected by the Division. The examinations can be no more frequent than weekly and at no cost to the employee. Refusal by the family member to attend an examination will disqualify the employee from all benefits for that Family Temporary Disability Leave period, except for those benefits already paid.

### *Paid Benefits Incident to Birth or Adoption*

Benefits for a period of Family Temporary Disability Leave with respect to the birth or adoption of a child are only paid for a single continuous period of time, although the employer may permit an employee to receive benefits during non-consecutive weeks "in a manner mutually agreed to" by the employer and employee and

disclosed to the Division of Temporary Disability Insurance by the employer. Paid leave for the birth or adoption of a child must be taken within a year of the date of birth or placement for adoption.

### *Funding*

The paid benefits under the bill are to be funded by an additional tax on employees – not employers – to be paid into a Family Temporary Disability Leave Account within the state's Temporary Disability Insurance Fund. The additional tax is assessed on that portion of an employee's wages that are subject to New Jersey's temporary disability insurance tax.

The rate for 2009 would be .09 percent and would increase to .12 percent in 2010. Deductions from workers' pay to pay for Family Temporary Disability Leave will commence on January 1, 2009, six months before the July 1, 2009 date that benefits are actually available. The maximum annual employee contribution for 2009 will be \$25, increasing to \$33 in 2010.

### *Availability of Private Plans*

As with individual temporary disability benefits, employers may also provide Family Temporary Disability Leave benefits under a private plan, so long as the private plan is at least as generous in terms of benefits as the state plan. Additionally, nothing in the law prohibits an employer from providing more generous benefits or from providing supplemental benefits to all or some of its employees.

### *Exhaustion of Sick Leave, Vacation or PTO*

An employer may require employees to use up to two weeks of any paid sick leave, vacation time or other leave, such as PTO (paid time off), at full pay, during a period of Family Temporary Disability Leave, thereby reducing the number of days of Family Temporary Disability Leave benefits paid under the bill. This can apply to the initial one-week exclusion period.

### *Forms Required*

There are forms associated with the new law which must be completed by both the employer and the employee. Not later than the ninth day of the Family Temporary Disability Leave period the employer is to issue to the employee and the Division of Temporary Disability Insurance a completed form (provided by the Division) which contains the employee's name, address, social security number, wage information; any sick pay, vacation pay or other fully-paid time off provided by the employer during the Family Temporary Disability Leave period; and the name, address, and division identity number of the employer.

No later than 30 days after the commencement of the Family Temporary Disability Leave period, the employee must submit an information form provided by the Division. After the forms are received from both the employer and the employee, the Division shall render a decision. Nonetheless, with respect to leave to care for a sick family member, benefits may be paid for periods not exceeding three weeks pending receipt of a health certification.

### *Giving Notice*

As with the NJFLA and FMLA, there are requirements for employees to provide advance notice of taking a paid leave. If the leave is for care of a child after birth or adoption, the employee is required to give 30 days' notice, except when unforeseen circumstances prevent it.

If leave is for the care of a sick family member on a non-intermittent basis, the employee is required to give prior notice "in a reasonable and practicable manner, unless an emergency or other unforeseen circumstance precludes prior notice."

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### *Employer Notification Requirements*

Employers are required to "conspicuously post" a notification of the new law in a form approved by the Division of Temporary Disability Insurance. Additionally, an employer must provide each employee with a copy of the approved notification.

### **Looking Ahead**

Many provisions of the law are somewhat confusing and may end up being tested in court. Our advice is that New Jersey employers should begin today carefully reviewing their leave policies to ensure compliance with the new law. For help contact in doing that, or if you have any questions contact any attorney in the New Jersey office of Fisher Phillips LLP at 908.516.1050.

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*This Legal Alert provides an overview of important aspects of a specific statute. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*