

Management Alert

New Jersey Enacts Paid Family Leave Law

On May 2, 2008, New Jersey Governor Jon Corzine signed the New Jersey Paid Family Leave Insurance Law (A-873; S-786). The new law was heavily debated in both houses of the New Jersey Legislature, garnering strong support from unions but opposition from business and industry groups who expressed concern about the impact of extended absences on productivity and the cost of hiring temporary replacement workers. The law's stated purpose is to "increase workplace productivity and alleviate the enormous and growing stress on working families of balancing the demands of work and family needs." (A-873).

The new law builds on New Jersey's existing temporary disability insurance system, as well as its existing Family Leave law (the New Jersey Family Leave Act, or NJFLA), in order to provide covered workers with "family temporary disability leave benefits" to care for a sick family member, newborn or newly adopted child. Beginning July 1, 2009, workers may collect these temporary benefits for a maximum of six weeks within a twelve-month period. Where the leave is for the care of a sick family member

(as opposed to the care of a newborn or newly adopted child), intermittent leave is available, but must be taken in increments of not less than one day, up to a maximum of 42 days.¹

The new law covers all employers, regardless of their size, who employ at least one employee and are subject to New Jersey's unemployment compensation law. Likewise, any individual who qualifies as an employee under the state unemployment compensation law is a covered worker under the act.

Workers who take leave to care for a sick family member or a newborn or newly adopted child are eligible to receive benefits equal to two-thirds of their salary, up to a maximum benefit of \$524 per week for six weeks. In dollar terms, this is the same benefit available to workers for their own disability under New Jersey's temporary disability insurance system.²

However, the new law does not independently entitle employees to be restored to the job they held prior to

¹ This is unlike intermittent leave under the federal FMLA, which employees may take in the smallest increment tracked by the employer's timekeeping system (typically 10 or 15 minute increments).

² In keeping with the principle that this is a benefits law, not a leave law, eligibility for paid leave benefits is not defined by eligibility for leave under the NJFLA or FMLA, but rather by the eligibility criteria for benefits under New Jersey's temporary disability insurance law.

taking leave, beyond what is already provided by the NJFLA or the federal Family and Medical Leave Act (FMLA). *The new law does not increase, reduce or modify any existing employee entitlements under these acts.* The new law also does not provide any right of action against an employer who refuses to reinstate an employee (although a covered employee who is eligible for FMLA and/or NJFLA would have a cause of action under those laws). Further, the legislation explicitly creates a “safe harbor” for employers with less than 50 employees who refuse to reinstate an employee after the period of family leave benefits has expired. Because these smaller employers are not covered by the NJFLA or the FMLA, their refusal “to reinstate is not a wrongful discharge... and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law.”

Under the NJFLA, leave taken to care for a newborn or newly adopted child must be taken during the first 12 months after the child’s birth or adoptive placement. Employees who take leave for child care are required to give at least 30 days prior notice, unless unforeseeable circumstances prevent prior notice. If the leave is to care for a sick family member, the employee is required to schedule the leave in a way that will result in minimal disruption to operations and, if possible, give 15 days’ prior notice for leave that is not intermittent. Where leave is taken in connection with the serious health condition of a family member, employees may be required to provide a medical certification regarding the condition and the probable duration. The NJFLA does not provide for job-protected leave relating to an employee’s own serious health condition, and the new law likewise does not relate to such leave.

The new law defines a “family member” more broadly than the federal FMLA, in that it includes a child, spouse, domestic partner, civil union partner or parent of a covered individual. A “child” under the new law means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of the covered individual, or child of a civil union partner of the covered individual, who either is less than 19 years old or is 19 or older but incapable of self-care because of mental or physical impairment. A “parent” under the new law includes a biological parent, foster parent, adoptive parent, or stepparent of the eligible employee, or a person who was the employee’s legal guardian when the eligible employee was a child. Importantly, although the NJFLA (unlike the FMLA) permits employees to take leave to care for a parent-in-law, the new law excludes parents-in-law from the definition of “parent” and therefore does not extend any paid benefits for such leave.

As with disability insurance benefits that are paid in connection with a worker’s own injury, an employee claiming family disability benefits under the new law will have a one week waiting period prior to the start of family leave benefits. An employer may require that an employee exhaust up to two weeks of accrued paid leave before receiving family disability benefits under the law, and may also require that the disability benefits period be reduced by the amount of time in which fully paid leave is provided.³

Benefits paid under the law will be funded solely by an employee-only payroll tax that amounts to roughly \$33 per year per employee, or 64 cents per week. Family leave benefits or assessments will not be considered in determining the temporary disability insurance tax rates

³If the employee is required to exhaust accrued paid leave, he or she must be permitted to use the first week’s worth of the fully paid leave during the one-week waiting period that precedes the family disability leave benefits, and this first week will not count against the subsequent six week disability benefits period.

of employers, ensuring that the law has no effect on employer temporary disability insurance tax obligations. Thus, employees and the state are providing the funding, not employers. Payroll assessments on employees will commence on January 1, 2009, and employees will be able to apply for family leave benefits beginning on July 1, 2009.

In general, larger employers can maintain the same leave policies have used to comply with the New Jersey Family Leave Act and the federal FMLA. The key difference is that certain employees who take unpaid leave under either or both of these Acts will be eligible for up to six weeks of benefits through the family leave insurance program. As with the existing mandatory temporary disability insurance program, employers will have the option of using the State-operated family leave insurance plan, or a private plan through self-insurance or an insurance policy, provided that employees are not charged more, the benefits paid are not lower and eligibility is not more restrictive than under the State plan. Private plans may cover temporary disability insurance benefits, family leave benefits, both or neither; the new law requires no change in existing temporary disability insurance private plans.

With this new law, New Jersey becomes the third state to provide employees with partial paid leave to care for a newborn or newly adopted child or an ill family member. The New Jersey program was modeled after the similar program that has been effect in California since 2004, although the California program offers up to \$917 per week. Washington State also recently enacted a similar law that will take effect in 2009.⁴ On an annual basis, 38,000 of the 4.1 million workers in New Jersey are

expected to take advantage of the program, although all workers statewide will pay into the fund.

Employers of all sizes are strongly advised to examine their current leave policies to ensure that they are compliant with their obligations under the new law as well as the NJFLA and the FMLA. New Jersey employers will also need to be prepared for questions from employees about their rights under this law. If you have any questions regarding the New Jersey Paid Family Leave Insurance Law, please contact the Seyfarth Shaw attorney with whom you work or any Labor and Employment attorney on our website, www.seyfarth.com.

⁴Other jurisdictions have recently expanded leave entitlements by requiring employers to provide paid sick leave, including [San Francisco](#) and the [District of Columbia](#).

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