

LEGISLATIVE UPDATE

David B. Lichtenberg, Esq.
Morris County SHRM – VP Legislative Affairs
Jackson Lewis LLP
(973) 538-6890 (phone)
lichtend@jacksonlewis.com

NEW JERSEY PAID FAMILY LEAVE ACT

Despite intense opposition from the business community, on May 2, 2008, Governor Corzine signed the highly contested paid family leave bill that provides employees up to six weeks of partial wage replacement to care for a newborn or newly adopted child or to care for a sick child, parent or spouse. New Jersey is now the third state, in addition to California and Washington, to offer paid family leave benefits to employees.

Although some may argue that Governor Corzine's signature will put to rest a highly contested issue, in reality, New Jersey employers (especially small employers) must wait to see the eventual impact of this amendment, which likely will not be known until mid-2009, when employees first become eligible to take paid leave.

Employers Covered

The law applies to all private businesses (and state government sector employers) who is a covered employer under the Temporary Disability Benefits Law (N.J.S.A. 43:21-25 et seq.). Therefore, any entity which employs one or more individuals and pays the individual(s) at least \$1,000 in the current or preceding calendar year is covered.

Who is Eligible for Paid Family Leave?

An individual will be covered if he or she is engaged in employment as defined by New Jersey's unemployment compensation law. This means any employee working for a covered employer is covered if the employee meets minimum earning requirements. Currently, an individual must have had at least 20 calendar weeks in covered New Jersey employment in which he or she earned no less than an amount equal to 20 times the minimum wage (currently \$143 per week), or has earned not less than 1,000 times the minimum wage adjusted to the next higher multiple of \$100 (currently \$7,200 per year) in such employment during the "Base Year" period.

Types of Paid Family Leave

A covered individual is eligible for family leave benefits if he or she takes leave from work:

1. to provide care, as defined by the New Jersey Family Leave Act (“NJFLA”), for a family member who has a serious health condition;
2. to be with a child during the first 12 months after the child’s birth if either the individual, or the domestic partner or civil union partner of the individual, is a biological parent of the child; or
3. during the first 12 months after the placement of the child for adoption.

A family member is defined as a child, spouse, domestic partner, civil union partner or parent of a covered individual. The definition of a serious health condition is the same definition as under the NJFLA. Therefore, one can assume the legislature meant family leave benefits to apply under the same circumstances as leave under the NJFLA.

Interestingly, despite the frequent references to the NJFLA, the coverage of family leave benefits does not appear to mirror all leave available under the NJFLA. For instance, it does not appear that family leave benefits are extended to care for an individual’s parent-in-law. Thus, an employee may be eligible for leave under the NJFLA to care for a parent-in-law with a serious health condition but not be eligible for family leave benefits.

Moreover, under the NJFLA, an employee may commence leave for the birth of or the placement a child for adoption any time within one year after the date of birth or placement for adoption. However, the bill limits family leave benefits to the first 12 months following the child’s birth or the placement of the child for adoption.

What are Employees’ Obligations?

An employee must provide 30 days’ notice if leave is sought to be with a child after the birth of that child or the placement of the child for adoption.

An employee must provide the employer prior notice of the leave in a reasonable and practicable manner if the leave is to care for a family member with a serious health condition, unless an emergency or other unforeseen circumstance precludes prior notice. The employee also must make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer. Finally, an employee must provide a medical certification from the health care provider of the family member setting forth:

1. the date on which the serious health condition commenced;
2. the probable duration of the condition;
3. the medical facts regarding the condition;
4. a statement that the condition warrants the individual providing care; and
5. an estimate of the amount of time the individual may need to care for the family member.

Intermittent Leave and Family Leave Benefits

An individual may take intermittent leave to care for a family member who has a serious health condition if:

1. the total time within which the leave is taken does not exceed 12 months;
2. the individual provides not less than 15 days' notice before the first day on which benefits are paid, unless an emergency or other unforeseen circumstance precludes prior notice;
3. the individual makes a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer and, if possible, provide a schedule of the intermittent leave; and
4. the individual submits a medical certification which includes the information set forth above and a statement of the medical necessity for the intermittent leave, the duration of the intermittent leave and, if leave is for planned treatments, the dates of the treatments.

Amount Eligible to Receive

The weekly benefit an employee is eligible to receive is the same as that for which he or she is eligible under TDI. Currently, an employee may receive two-thirds of his or her weekly compensation up to \$524 per week, for up to six weeks, during any 12-month period. If the employee takes intermittent leave, the employee will be eligible to receive up to \$74.85 per day, for up to 42 days, during any 12-month period.

Employees, however, will be subject to a one-week waiting period before being eligible to receive benefits. Importantly, an employer also may require employees take up to two weeks of available sick or vacation pay or other fully-paid leave provided by the employer (such as PTO), prior to being eligible to receive benefits. The period of benefits is reduced by the amount of time in which fully-paid leave is provided. For example, if an employee uses one week of sick time, he or she only will be eligible for a maximum of five weeks of family leave benefits.

When Benefits Begin and Cost to Employees

On January 1, 2009, employees must begin paying an additional tax of 0.09% on the portion of wages, approximately \$27,700, subject to TDI, or \$24.93 per year, about \$0.48 per week. However, in 2010, the tax rate will be increased to 0.12% of wages. Assuming the portion of wages subject to TDI remains at \$27,700, employees will be taxed \$33.24 per year, about \$0.64 per week.

Although employees will begin paying the tax on January 1, 2009, they will not be eligible to receive paid family leave benefits until July 1, 2009. This delay is meant to provide the State time to raise the necessary revenues to fund the benefit.

Plan Options

Employers have the option of using the State-operated plan or a private plan through self-insurance or an

insurance policy. The private plan must provide the same (or better) benefits under the same eligibility requirements and costs to the employee as the State-operated plan.

Job Protection

The bill states that for employers who are not covered under the NJFLA, *i.e.*, those that employ fewer than 50 employees, the failure or refusal to restore an employee to employment following paid family leave will not be a wrongful discharge in violation of a clear mandate of public policy. Furthermore, an employee of such an employer will not have a cause of action against the employer, in tort, or for breach of an implied provision of employment, or under common law, for refusing or failing to restore the employee to employment.

For employers who are covered under the federal Family and Medical Leave Act (“FMLA”) and the NJFLA (50 or more employees), the bill does not grant an employee any entitlement to employment restoration. However, it does not increase, reduce or modify any entitlement of an employee to return to employment or any right to take action under the FMLA and the NJFLA.

UPDATE

New Jersey's Family Leave Insurance law provides eligible employees with up to six weeks of family leave benefits to care for a newborn or newly adopted child, or to care for a child, spouse, domestic partner, civil union partner or parent with a serious health condition. Employees will be eligible to begin receiving family leave benefits on July 1, 2009.

Employers should take steps now to ensure compliance with the FLI law, including:

1. Distribute and post the Family Leave Insurance Poster prepared by the New Jersey Department of Labor and Workforce Development.
2. Determine whether employees will be covered under the state plan or a private plan.
3. State Plan - If the state plan applies, employers must begin deducting employee contributions from their wages effective January 1, 2009.

Private Plan - If an employer elects to provide Family Leave Insurance Benefits under a private plan, the employer must:

- a. obtain approval from the Division of Temporary Disability Insurance; and
 - b. obtain consent from the majority of employees by written election if contributions will be deducted from employees' wages.
4. Prepare a strategy to communicate with employees regarding the new deduction from their wages (if applicable).
 5. Review current policies and procedures to determine whether the employer should include a policy on Family Leave Insurance Benefits or modify existing policies to include reference to such benefits.

STEP ONE:

The New Jersey Department of Labor and Workforce Development has issued its Family Leave Insurance poster. On or before **December 1, 2008**, employers must:

- i. conspicuously post the Family Leave Insurance poster in each workplace; and
- ii. provide a copy of the Family Leave Insurance poster to each employee.

Employers also have a continuing obligation to distribute the Family Leave Insurance poster to employees under the following circumstances:

- i. at the time of an employee's hiring;
- ii. whenever an employee notifies the employer that he or she is taking time off which may qualify the employee for family leave benefits; and
- iii. at any time upon an employee's first request.

(The statute states an employer must provide each employee a copy of the poster not later than 30 days after the poster is issued officially. The poster appeared on the New Jersey Department of Labor and Workforce Development's website on November 6, 2008. However, since the website states employers should post by December 1, 2008, we recommend distributing the poster by December 1, to ensure compliance.)

STEP TWO:

Employers have the option of electing to participate in the state-operated plan or a private plan (through self-insurance or an insurance policy). The election should be made as soon as possible to ensure the employer is compliant under the elected plan.

STEP THREE:

- **State Plan - Payroll Deductions:** Employers electing to participate in the state plan must begin deducting contributions for Family Leave Insurance Benefits from employees' wages on **January 1, 2009**. Employers will be required to deduct an additional tax of 0.09% on the portion of wages subject to the Temporary Disability Benefits Law (which currently is approximately \$27,700). This represents a total deduction of \$24.93 per year or about \$0.48 per week. As with other deductions, the employer must note the deduction for Family Leave Insurance on the employee's paystub or some other notice. In 2010, the tax rate will be increased to 0.12% of wages.
- **Private Plan:** If the employer elects to provide coverage under a private plan, through self-insurance or an insurance policy, the employer must:
 - (i) decide whether employees will be contributing to the plan through payroll deductions and, if so, obtain consent from a majority of employees by written election and ensure such contributions do not exceed those paid under the state plan;
 - (ii) obtain approval of their private plan from the Division of Temporary Disability Insurance, Private Plan Operations; and
 - (iii) provide information regarding the private plan, including the proper forms used in claiming benefits.

STEP FOUR:

Although employers must distribute the Family Leave Insurance poster to all employees and post it in the workplace, we recommend employers take this opportunity to educate employees on the Family Leave

Insurance Law. Employers should discuss the employee contribution to be deducted from employees' wages beginning January 1, 2009, who is eligible for benefits, the amount of benefits employees may be eligible to receive, and certain requirements (e.g., completion of forms) employees must satisfy to be eligible to receive benefits.

STEP FIVE:

Employers are not statutorily required to include a policy regarding Family Leave Insurance benefits in an employee handbook. Nevertheless, employers should review their current policies and procedures (especially leave of absence policies) to determine whether they should be modified to address family leave benefits. Employers also should consider whether to include a policy on Family Leave Insurance Benefits in their handbooks as further guidance for employees and managers on rights and obligations under the Family Leave Insurance Benefits law.