

Your employee leave policy How state and federal laws won't leave you alone

By Ian D. Meklinsky and Anne Ciesla Bancroft

Employee leaves of absence pose many challenges for employers. In addition to dealing with staffing concerns, employers must reconcile their own policies with the sometimes conflicting and overlapping laws impacting employee leave. When trying to understand how laws apply to a given situation, one should know whether the laws in question are compensation entitlements or unpaid leave entitlements.

In New Jersey, two unpaid leave entitlements apply. These are the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA). Qualifying employees can take time off under these two laws, but their employer is not obliged to pay them.

In contrast, the New Jersey Temporary Disability Benefits law (NJTDB) and New Jersey Workers' Compensation Act (NJWCA) are compensation entitlements. They provide for payment to the employee, rather than for leave from work.



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■ FMLA coverage

Briefly, FMLA covers employers who maintain 50 or more employees on their payroll for 20 or more weeks during the current or preceding calendar year. Employers covered by FMLA must grant FMLA leave to any eligible employee who requests leave for any FMLA qualifying reason. An employee is "eligible" for FMLA leave if the employee has worked at least 12 months (not necessarily consecutively) for the covered employer, has worked at least 1,250 hours during the 12 months immediately preceding the leave date, and is employed at a worksite employing 50 or more employees within a 75-mile radius.

Eligible employees are entitled to take FMLA leave for any of the following qualifying reasons: (1) the birth or adoption of a child or placement of a foster child; (2) the care of a parent, child or spouse with a serious health condition; or (3) the care of the employee's own serious health condition. The FMLA allows eligible employees to take up to 12 weeks of leave during a 12-month period. Employees may take FMLA leave intermittently. Upon the employee's completion of the FMLA, subject to certain limited exceptions, the employer must reinstate the employee.

■ NJFLA coverage

The NJFLA is similar to FMLA in that it provides leave and reinstatement rights to certain employees of covered employers for the purpose of caring for their family members. It does not, however, provide leave to care for one's own serious health condition. The NJFLA covers employers who employ 50 or more employees, whether employed in New Jersey or not, who have worked each working day for 20 or more workweeks during the current or immediately preceding calendar year.

An employee is eligible for NJFLA leave if the employee has worked at least 12 months in New Jersey for the covered employer and has worked at least 1,000 base hours during the immediately preceding 12-month period. Eligible employees are entitled to take NJFLA leave for any of the following qualifying reasons: the birth of a child, the placement for adoption of a child, or the care of a parent, child or spouse with a serious health condition. Eligible employees may take up to 12 weeks of unpaid leave during any 24-month period. The employee has a right to reinstatement from a NJFLA leave, subject to certain exceptions.

■ NJTDB and NJWCA

The NJTDB provides partial replacement of wages while an employee is temporarily disabled and unable to work. The NJWCA allows employees and their dependents to receive no-fault

compensation for accidents and/or illnesses that occur as a result of employment. Although the NJWCA does not require employers to provide leaves of absence for employees who suffer a work-related accident or illness, the NJWCA prohibits termination of an employee in retaliation for filing a workers compensation claim or testifying at a workers compensation hearing.

As a practical matter, employers may find that these laws, when combined with their own paid time off policies, result in certain entitlements running concurrently. The employee may qualify for both leave and compensation during the leave period. In some instances, this could benefit the employer and the employee.

■ Getting both leave and comp

For example, an employee seriously injured while at work may qualify for FMLA leave and also be entitled to receive workers compensation benefits while on that leave. It should be noted this situation cannot arise under the NJFLA, which does not grant an employee leave to care for his or her own medical condition.

Workers compensation and temporary disability programs may also come into play if an employee files a workers compensation claim but the insurance carrier contests the claim. Then the employee may apply for and receive NJTDB benefits, pending resolution of the claim. The employee is prohibited from “double dipping” by receiving both types of benefits in connection with a single claim.

■ Structuring paid time off

Depending on how an employer structures its policies regarding paid time off (PTO), such PTO could run concurrently with leave entitlements under the state and federal medical and family leave laws (FMLA and NJFLA). Employers can require employees to apply their bank of accrued paid time off to leave taken under these laws. Employees also may request to apply some or all of their accrued paid time off to family and medical leave. The employee would benefit by continuing to receive pay while on leave. The employer also could benefit, as this would prevent an employee from exhausting his or her 12 weeks of statutory family and medical leave, then having the right to take additional PTO upon their return to work. There are, however, limitations to the application of accrued paid time off to family and medical leave. For example, in *Soslovery v. Wyoming Valley Health Care System-Hospital*, 396 F. Supp. 2d 534 (M.D.Pa. 2005), the U.S. District Court for the Middle District of Pennsylvania recently held an employer violated FMLA’s provision regarding substitution of paid leave under an employer’s vacation policy by requiring two weeks advance notice of the use of vacation time for an FMLA leave of absence.

Employers also can structure their policies regarding state and federal FMLA and NJFLA policies to require leave entitlements under both statutes run concurrently when applicable. For example, if an employee requests leave for a reason that would qualify under both FMLA and NJFLA, the employer can require both leave entitlements run concurrently *as long as* the employer’s policy so states and employees are notified of the policy before the leave starts. This results in an employee using up his or her leave entitlement under both laws at the same time. However, if the employee takes leave under FMLA for his or her own health condition, such as for a pregnancy-related condition, he or she, if otherwise eligible, still may be entitled to an additional 12 weeks of NJFLA for a qualifying reason under that statute, such as to care for a newborn child.

■ Future developments

In addition to complying with current requirements, employers should keep an eye on future developments as well. Most important, the U.S. Department of Labor is expected to propose new regulations this spring interpreting FMLA. At the very least, the regulations should clarify whether an employer can designate leave as FMLA leave retroactively, as the U.S. Supreme Court permitted in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), even if it failed to do so at the commencement of or during the leave. In addition, bills are pending to amend the FMLA to:

- include nurse practitioners in the definition of health care provider;
- expand coverage to domestic partners, families of those serving in the military, and other relatives, including grandparents;
- expand coverage to employers with less than 50 employees;
- require paid sick leave;
- provide for salary continuation during leave; and
- include leave for parental involvement in schools, domestic violence incidents, and routine medical care.

Legislation is pending in New Jersey that would provide domestic violence leave; include domestic partners in the protections of NJFLA; and require reasonable accommodation of pregnant employees under the New Jersey Law Against Discrimination. While none of these proposals have been enacted, it is clear the future holds an expansion of employment leave rights.

For now, juggling the rights and requirements of the federal and state laws applicable to New Jersey, together with an employer’s own leave policies, is challenging enough. For a more detailed discussion of this topic, log on to foxrothschild.com/pdfs/compensation-IM-042204.pdf. Legal counsel should always be consulted when leave policies are being prepared or reviewed.