



THE LEAVE VS. COMPENSATION DEBATE: How the FMLA, NJFLA, NJ SAFE Act, NJTDB, NJWCA, NJFLI and Employer PTO Policies Collide

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INTRODUCTION

Employee leaves of absence pose many challenges for employers. In addition to staffing concerns, they often also give rise to concerns about compliance with applicable law and adherence to employer policies. Depending on the reason for the absence, an employee's leave of absence may trigger certain requirements imposed under federal and state law, as well as under the employer's own policies, which sometimes overlap and even conflict with those laws.

This outline is designed to provide a general overview of the following laws pertaining to employee leaves of absence: the federal Family and Medical Leave Act of 1993, the New Jersey Family Leave Act, the New Jersey Security and Financial Empowerment Act, the New Jersey Temporary Disability Benefits Law, the New Jersey Workers' Compensation Act and the New Jersey Family Leave Insurance Law. This outline will also discuss in broad terms the interplay of these laws with each other and with employer leave of absence policies.

UNDERSTANDING THE BASICS

Family and Medical Leave Act of 1993 (FMLA)

Generally speaking, the FMLA provides leave to certain employees of covered employers for the purpose of caring for themselves or their family members. Specifically, the FMLA covers employers who maintain 50 or more employees on their payroll for 20 or more weeks during the current or preceding calendar year. Public agencies are covered regardless of the number of employees. Special provisions cover federal employees and instructional employees at certain types of schools.

Employers covered by the 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 consecutive) for the covered employer, has worked at least 1,250 hours during the 12 months immediately preceding the leave commencement date, and is employed at a worksite employing 50 or more employees within a 75 mile radius. An employee must meet all three of these conditions in order to be eligible for FMLA leave.

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.¹ A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either: (1) any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such inpatient care; or (2) continuing treatment by a health care provider that includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to: (a) a health condition (including treatment or recovery) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes treatment two or more times by or under the supervision of a health care provider or one treatment by a health care provider with a continuing regimen of treatment; or (b) pregnancy or prenatal care (a visit to the health care provider is not necessary for each absence); or (c) a chronic serious health condition (such as asthma or diabetes) which continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional

¹ FMLA regulations include two types of military family leave which we will not address, as they are outside the scope of this outline. These types of leave are referred to as "qualifying exigency leave military leave" and "military caregiver leave."

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episodes of incapacity (a visit to a health care provider is not necessary for each absence); or (d) a permanent or long-term condition for which treatment may not be effective (such as Alzheimer's, a severe stroke, or terminal cancer) – only supervision by a health care provider is required, rather than active treatment; or (e) any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (such as chemotherapy or radiation treatments for cancer).

The FMLA allows eligible employees to take up to 12 weeks of leave during a 12-month period. Employers may choose one of four methods to measure the 12-month period (the plan year). Employers may measure the plan year by the calendar year, a fixed 12-month period (such as the fiscal year or employee anniversary dates), a 12-month fixed period measured forward from the beginning of an employee's first FMLA leave, or a rolling 12-month period measured backwards from the date on which the employee's requested FMLA leave would commence. Employers need to choose a method of calculating a plan year from among these four options. A fixed-date 12-month period may be easier for employers to administer. However, a fixed-date 12-month period would allow employees to "stack" FMLA leave by taking two 12-week leaves back-to-back, one during the last 12 weeks of a plan year and one during the first 12 weeks of the next plan year. While the rolling 12-month period would prevent stacking, it might prove too cumbersome for some employers to administer.

Depending upon the type of leave, eligible employees may take the leave in one of three ways. They may take FMLA leave in full-week increments (up to 12 consecutive weeks), intermittently, or on a reduced leave schedule. Full-week increment leave may be taken for any FMLA qualifying reason. Intermittent leave or reduced schedule leave may be taken only where medically necessary for a serious health condition of the employee or a sick family member. Employers are not compelled, but may elect, to permit employees to take intermittent or reduced schedule leave where not medically necessary, such as for the birth or placement of a child for adoption or foster care. For an employee who elects to take intermittent or reduced schedule FMLA leave, the employer may require the employee to transfer temporarily to an alternative position so as not to unduly disrupt the employer's operations while the employee is on the reduced or intermittent leave schedule. The alternative position must have equivalent pay and benefits but need not have equivalent duties or responsibilities. Employers may establish the smallest increment of time which may be taken as intermittent or reduced scheduled leave based on the smallest increment of time used to record employee absences for payroll purposes.

The employee's right to reinstatement at the end of FMLA leave is not absolute. An employer may deny reinstatement to an employee on FMLA leave in three distinct situations. First, a returning employee has no greater right to continued employment than if he or she had been continuously employed. Therefore, under very narrow circumstances, such as in the case of a reduction in force, an employer may eliminate or otherwise alter an employee's position while the employee is on FMLA leave. However, the employer will have the heavy burden of proving that the same action would have been taken even if the employee were not on leave. Second, an employer also may deny reinstatement to a "key employee" if reinstatement of the employee would result in substantial and grievous economic injury to the employer. A "key employee" is a salaried, FMLA eligible employee who is among the highest paid 10% of all the employees within a 75 mile radius. If a "key employee" requests FMLA leave, the employer must allow the leave, but must also give written notice to the employee that reinstatement may be denied. Once the decision to deny reinstatement has been made, the employer must notify the "key employee" immediately and provide the employee with the opportunity to return to work within a reasonable time. Third, an employer may deny reinstatement to an employee if the employee fails to provide the required

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fitness for duty certification or is unable to perform the necessary functions of his or her position at the end of the leave. A fitness for duty certification may be required only if the employee has taken leave due to his or her own serious health condition.

The FMLA contains various provisions concerning the amount of notice that must be given by employees who wish to take FMLA leave, the manner and time frame in which an employer must designate employee leave as FMLA leave, and medical certifications that an employee taking FMLA leave must provide to the employer. Employers must post a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. Employees requesting FMLA leave must give 30 days written notice, if the need for leave is foreseeable. If the need for the FMLA leave is not foreseeable, employees must give notice as soon as is practicable under the circumstances (now defined more narrowly to mean the same day or the next business day). An employer may require medical certification of a serious health condition from the employee's or a family member's health care provider. Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

New Jersey Family Leave Act (NJFLA)

The NJFLA is similar to the FMLA, in that it provides leave to certain employees of covered employers for the purpose of caring for their family members. It does not, however, provide for leave to care for one's own serious health condition – eligible employees may only take NJFLA leave to care for a family member. Specifically, 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 work weeks during the current or immediately preceding calendar year.

With certain limited exceptions, affected employers must grant NJFLA leave to any eligible employee who requests leave for an NJFLA qualifying reason. 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. An employee will be deemed to be working in New Jersey if the employee routinely performs some work in New Jersey and the employee's base of operations is in New Jersey or the place from which such work is directed and controlled is in New Jersey. An employee must meet both of these conditions to be eligible for NJFLA.

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. As under the FMLA, the 24-month period for NJFLA leave may be measured by the calendar year, a fixed 12-month period (such as the fiscal year or employee anniversary dates), a 24-month fixed period measured forward from the beginning of an employee's first NJFLA leave, or a rolling 24-month period measured backwards from the date on which the employee's requested NJFLA leave would commence.



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Eligible employees may take their leave in one of three ways. They may take NJFLA leave in 12 consecutive weeks, intermittently, or on a reduced leave schedule. Employees taking leave to care for a newly born or adopted child must commence the leave within one year of the birth or adoption of the child and must take the leave in consecutive weeks, to a maximum of 12. Leave can be taken on an intermittent or reduced leave schedule for the care of a newly born or placed child only if agreed to by both the employer and employee. Employees taking leave to care for a family member with a serious health condition can take the 12 weeks of family leave on a consecutive, reduced leave, or intermittent basis. Intermittent leave may only be taken when it is medically necessary, and cannot be taken over greater than a 12-month period if the leave is taken in connection with a single serious health condition. However, if the intermittent leave is taken in connection with more than one serious health condition, the intermittent leave must be taken within a consecutive 24-month period. Reduced schedule leave may only be taken once during any consecutive 24-month period, and the reduced leave may not exceed a consecutive 24-week period. When requesting leave on an intermittent or reduced schedule basis, the employee must make a “reasonable effort” to schedule the leave so that it does not “unduly disrupt” the operations of the employer.

Like the FMLA, the NJFLA contains provisions that relate to “key employees.” However, unlike the FMLA, the NJFLA permits employers to deny leave to a “key employee” who is otherwise eligible and requests leave for a qualifying reason. Under this exception, an employer may deny leave if: (1) the employee’s base salary is within the highest paid 5% or the employee is one of the seven highest paid in the employer’s workforce, whichever is greater; (2) the employer can demonstrate that granting the leave would cause a substantial and grievous economic injury to the employer’s operations; and (3) the employer notifies the employee of its intent to deny the leave or deny reinstatement when the employer determines that the denial is necessary. Where the employee is already on leave at the time of notification, the employee must return to work within 10 working days.

An employee returning from NJFLA leave is entitled to be reinstated to the position the employee held immediately prior to taking the NJFLA leave. If that position has been filled, the employer must reinstate the employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment. As with the FMLA, an employee’s right to reinstatement under the NJFLA is not absolute. A returning employee has no greater right to continued employment than if he or she had been continuously employed. Therefore, if the employer implements a reduction in force or lay off and the employee would have lost his or her position had he or she not been on leave, the employee is not entitled to reinstatement to the former or equivalent position. The employee does, however, retain all rights under any applicable layoff and recall system as if the employee had not taken the leave.

As with the FMLA, the NJFLA contains various provisions concerning the amount of notice that must be given by employees who wish to take NJFLA leave, the manner and time frame in which an employer must designate employee leave as NJFLA leave, and medical certifications that an employee taking NJFLA leave must provide to the employer. An employee taking NJFLA leave in order to care for a newly born or adopted child can be required to provide the employer with notice no later than 30 days prior to the start of the leave. An employee taking NJFLA leave to care for a family member with a serious health condition can be required to provide the employer with notice no later than 30 days prior to the start of the leave. However, when emergent circumstances warrant shorter notice, the employer must accept shorter notice. The NJFLA also has a posting requirement similar to that in the FMLA.

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New Jersey Security and Financial Empowerment Act (NJ SAFE Act)

The NJ SAFE Act creates new leave rights for employees who are victims of domestic violence.

The law provides 20 days of protected leave for an employee who was the victim of domestic violence or sexual assault or whose family member was the victim in one 12-month period following the incident of domestic violence or sexual assault. The leave is unpaid, and can be taken intermittently in intervals no less than one day. Each incident of domestic violence or a sexually violent offense is treated as a separate offense for which leave may be required. However, no employee may take more than 20 days leave in the 12-month period.

To be eligible for leave, employees must work for a covered employer, which is an employer who employs 25 or more employees for each working day during each of 20 or more calendar workweeks in the current or immediately preceding calendar year. Eligible employees also must be employed for at least 12 months by a covered employer and cannot have worked less than 1,000 hours in those preceding 12 months

Eligible employees will be entitled to protected leave for the following reasons:

1. seeking medical attention for, or recovering from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee's child, parent, spouse, domestic partner or civil union partner;
2. obtaining services from a victim services organization for the employee or the employee's child, parent, spouse, domestic partner or civil union partner;
3. obtaining psychological or other counseling for the employee or the employee's child, parent, spouse, domestic partner or civil union partner;
4. participating in safety planning, temporarily or permanently relocating, or taking other actions to increase the safety of the employee or the employee's child, parent, spouse, domestic partner or civil union partner from future domestic or sexual violence or to ensure economic security;
5. seeking legal assistance or remedies to ensure the health and safety of the employee or the employee's child, parent, spouse, domestic partner or civil union partner including preparing for or participating in any civil or criminal legal proceeding related to or derived from domestic or sexual violence; or
6. attending, participating in, or preparing for a criminal or civil court proceeding relating to an incident of domestic or sexual violence of which the employee or the employee's child, parent, spouse, domestic partner or civil union partner, was a victim.

Employees may elect or employers may require employees to use any accrued paid vacation, personal, medical or sick leave during the 20 days of leave provided by the NJ SAFE Act.

Leave taken under the NJ SAFE Act, will, where applicable, run concurrently with leave taken under the NJFLA and/or the FMLA.

Employers may require the employee to produce supporting documents of the domestic violence or sexually violent offense which is the basis for the leave. If the employer requires documentation, the employee may provide:

1. a domestic violence restraining order or other documentation of equitable relief issued by a court of competent jurisdiction;
2. a letter or other written documentation from the county or municipal prosecutor documenting the domestic violence or sexually violent offense;

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3. documentation of the conviction of a person for the domestic violence or sexually violent offense;
4. medical documentation of the domestic violence or sexually violent offense;
5. a certification from a certified Domestic Violence Specialist or director of a designated domestic violence agency or Rape Crisis Center, that the employee or employee's child, parent, spouse, domestic partner, or civil union partner is a victim of domestic violence or a sexually violent offense; or
6. other documentation or certification of the domestic violence or sexually violent offense provided by a social worker, member of the clergy, shelter worker, or other professional who has assisted the employee or the employee's child, parent, spouse, domestic partner or civil union partner in dealing with the domestic violence or sexually violent offenses.

The NJ SAFE Act imposes a posting requirement on employers requiring them to display conspicuous notice of its employees' rights and obligations under the statute.

The NJ SAFE Act, as does the FMLA and NJFLA, has an anti-retaliation provision prohibiting employers from discharging, harassing, or otherwise discriminating or retaliating against an employee with respect to compensation, terms, conditions or privileges or employment on the basis that the employee took or requested any leave protected under the NJ SAFE Act.

New Jersey Temporary Disability Benefits Law (NJTDB)

The NJTDB was enacted to protect against wage loss caused by an inability to work because of non-occupational illness or accident, including, temporary disability associated with pregnancy and childbirth. With certain limited exceptions, the NJTDB covers all employers that employ one or more individuals and pay wages of \$1,000 or more in a calendar year. To be eligible for NJTDB benefits, a claimant must have had at least 20 base weeks of New Jersey covered employment or, in the alternative, have earned \$7,250 or more in covered employment during the 52 weeks immediately preceding the week in which the disability begins. For those who qualify, the NJTDB provides partial replacement of wages while the employee is temporarily disabled and unable to work. Each claimant is paid two-thirds (2/3) of his or her average weekly wage up to the maximum amount payable set for that calendar year. The maximum weekly benefit rate is \$637 for 2018. The maximum amount of benefits payable for each period of disability is one-third of the total wages in New Jersey covered employment paid to the worker during the base year, or 26 times the weekly benefit amount, whichever is less. Employers and employees are required to pay disability insurance taxes, which fund the benefits provided under the NJTDB.



Individuals who wish to obtain NJTDB benefits must file claims for benefits within 30 days after the start of disability, or they may lose some or all benefits. Claimants may be required to undergo medical examinations by a state-appointed physician, and employers may request an independent medical examination if there is good cause to suspect that the employee is not disabled.

The NJTDB avoids the situation of “double dipping” by expressly prohibiting employees from receiving NJTDB benefits in addition to any state or federal unemployment compensation or similar benefits, other disability or sickness benefits, paid family leave benefits, or workers’

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compensation benefits (with the exception of benefits payable for permanent disability previously incurred). The NJTDB also provides that NJTDB benefits shall be reduced by the amount paid concurrently under any governmental or private retirement or pension program to which a worker's most recent employer contributed on his or her behalf. Social Security retirement benefits do not, however, reduce NJTDB benefits.

The NJTDB differs from the FMLA and the NJFLA in that it provides an employee with the right to receive compensation while he or she is disabled and unable to work – it does not require the employer to provide leave. An employee who becomes disabled and seeks to take a leave of absence must qualify for the leave under the employer's leave of absence policy, the FMLA, or some other applicable law.

New Jersey Workers' Compensation Act (NJWCA)

The NJWCA allows employees to receive no-fault compensation for accidents and/or illnesses that occur as a result of employment. Essentially, the NJWCA represents a compromise between labor and management resulting in an employer giving up most of its defenses in personal injury actions that arise out of the employment relationship. Employees give up the right to pursue large potential damage awards in exchange for no-fault disability benefits and reasonable and necessary medical care. All employers are required to insure the payment of compensation for employees injured on the job, provided that the employee was not willfully negligent at the time of receiving such injury.

An employee or his or her dependents can receive workers' compensation benefits for an injury or death arising out of and in the course of employment. The employer or its insurance carrier pays for necessary and reasonable medical treatment, loss of wages during the period of rehabilitation and, when documented, benefits for permanent disability. An employer must file a report with the NJ Department of Labor and Workforce Development in accordance with the terms of its insurance policy upon the happening of any accident or the occurrence of any compensable occupational disease in its establishment.

An employer may choose to offer an employee a light duty job while the employee is on leave because of a work-related injury or condition and is receiving NJWCA benefits. If the employee could perform the functions of the light duty position offered, declining the offer might result in the employee's loss of any remaining NJWCA benefits. Under the FMLA, however, an employer may not compel light duty for an employee otherwise eligible for FMLA protected leave.

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 the termination of an employee in retaliation for filing a workers' compensation claim or for testifying at a workers' compensation hearing. Employers who desire to terminate an employee out on leave and receiving compensation under the NJWCA must tread carefully and ensure that the reason for the termination can withstand scrutiny. An employer may terminate an employee who is unable to perform the essential duties of the position without violating the NJWCA. Such a termination may, however, trigger concerns about discrimination issues and/or reasonable accommodation issues, depending on the circumstances.

The NJWCA provides the following types of benefits: medical treatment, temporary disability benefits, permanent partial disability benefits, permanent total disability benefits, and death benefits. If an injured worker is disabled for a period of more than seven days, he or she will be eligible to receive temporary total benefits at a rate of 70% their average weekly wage, not to exceed 75% of the Statewide Average Weekly Wage (SAWW) or fall below the minimum rate of

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20% of the SAWW. These benefits are provided during the period when a worker is unable to work and is under active medical care. For 2018, the maximum weekly benefit rate is \$903.

Benefits are usually terminated when the worker is released to return to work in some capacity or if he or she has reached maximum medical improvement (MMI). MMI is a term that is used when additional treatment will no longer improve the medical condition of the injured worker. The worker, in some cases, may be left with either partial permanent injuries or total permanent injuries, for which the NJWCA provides benefits that are paid weekly and are due after the date temporary disability ends.

The NJWCA is similar to the NJTDB (and differs from the FMLA, NJFLA and the NJ SAFE Act) in that it provides an employee with the right to receive compensation while he or she is disabled and unable to work – it does not require the employer to provide leave. An employee who becomes disabled and seeks to take a leave of absence must qualify for the leave under the employer's leave of absence policy, the FMLA, or some other applicable law.

New Jersey Family Leave Insurance Law (NJFLI)

The NJFLI provides paid time off benefits to employees, in both the private and public sectors, to assist their family members who are unable to care for themselves, including newborns and newly adopted children. The Act provides up to six weeks of monetary benefits for an employee who takes leave to provide care certified to be necessary for a family member suffering from a serious health condition; or to be with his or her child during the first 12 months after the child's birth or placement for adoption with the employee's family.

The NJFLI applies to private businesses and state government employers covered under the NJTDB. An entity is covered if it employs one or more individuals and has paid the affected individual at least \$1000 in the current or preceding calendar year. An individual employee is covered if he or she is engaged in employment as defined by New Jersey's Unemployment Compensation Law. Under that standard, an employee must have worked 20 weeks for a covered employer and have earned no less than 20 times the minimum wage.

In the case of the birth or adoption of a child, all paid leave benefits must be for a continuous period of time, unless the employer and employee mutually agree otherwise. The employee must provide the employer with notice no less than 30 days before the leave is scheduled to begin. If such notice is not provided, the amount of benefits may be reduced by two weeks.

In the case of a family member with a serious health condition, the benefits for leave may be taken intermittently when medically necessary if the following conditions are met: (i) the total time within which the leave is taken does not exceed 12 months; (ii) the individual provides the employer with a copy of the appropriate medical certification; (iii) the individual provides the employer with prior notice of no less than 15 days (unless an emergency or other unforeseen circumstances precludes prior notice); and (iv) the individual makes a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer.

The NJFLI also places notice requirements on employers. Covered employers must post conspicuous notice to their employees of their paid leave benefits. Furthermore, employers must provide a copy of the form issued by the Commissioner of the NJ Department of Labor and Workforce Development when an employee is hired, when an employee notifies the employer he or she is taking leave, and when an employee requests notification.

Employees taking continuous leave will be eligible to receive two-thirds (2/3) of their weekly compensation (up to \$681 per week for 2018), for up to six weeks, during any 12-month period.

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Employees taking intermittent leave will be eligible to receive a pro-rated amount, for up to 42 days, during any 12-month period. An employer may require employees to use up to two weeks of paid time off, such as sick or vacation pay, prior to being eligible to receive compensation under the Act. This use of paid time off will be deducted from the employee's paid leave entitlement.

The NJFLI does not mandate that an employer maintain the employee's position for any period of time. However, the Act does address its interplay with the NJFLA and the FMLA in requiring that these statutory requirements run concurrently. Although the NJFLI does not grant employees a right to reinstatement after their leave or a right to sue their employer for denying reinstatement post-leave, employers should be cautious in denying reinstatement. The NJFLI provides only a partial safe-harbor for employers who fail to reinstate an employee. The NJFLI provides that it does not intend to create any right for an employee to take action against an employer for breach of an employment agreement, in tort, or under common law. However, this safe harbor only applies to those employers with fewer than 50 employees.

Similar to the NJTDB, the NJFLI avoids the situation of "double dipping". The Act's definition of "Family Leave" does not include any period of time in which an employee is paid benefits under the NJTDB because the employee is unable to perform the duties of his or her employment due to the employee's own disability. Accordingly, an employee cannot simultaneously receive paid family leave benefits and any other disability benefits or unemployment compensation.

The NJFLI differs from the FMLA, the NJFLA and the NJ SAFE Act (and is similar to the NJTDB) in that it provides an employee with the right to receive compensation but it does not require the employer to provide leave.

Employer Policies Concerning Paid Time Off (PTO)

Many employers offer their employees paid time off (PTO), whether it is in the form of sick leave, personal days, vacation, or simply a bank of paid leave time to be applied to whatever purpose the employee chooses. There are a host of reasons employers offer PTO to their employees. Some employers offer PTO to remain competitive in attracting the best employees, others offer it to foster employee morale and loyalty, while others may do it for a combination of these, or other, reasons. Offering employees PTO is entirely voluntary in New Jersey – there is no federal or state law that requires employers to offer employees employer-paid sick days, vacation days, or other time off.

Although there is no legal requirement for employers to offer PTO to their employees, employers who choose to offer their employees PTO should clearly communicate their PTO policies to all employees, preferably in writing, and administer their policies fairly and consistently. Failing to clearly communicate PTO policies can create confusion and, more significantly, may result in the imposition of liability upon the employer. By way of example, an employer that has a practice or "unwritten" policy of offering PTO to some, but not all, employees may leave itself open to claims of discrimination by those who are denied PTO. Employers should also be aware that New Jersey's wage and hour law has been interpreted such that accrued but unused PTO may be considered as having been earned by the employee and thus payable to an employee upon termination absent a policy to the contrary. Thus, if an employer offers PTO to its employees but does not have a written policy that addresses whether terminated employees receive payment for their accrued but unused PTO, the employer may become liable for paying that PTO to a terminated employee if its policy is later questioned. For these and many other reasons, employers are wise to ensure that the terms of their PTO policies are clearly explained in employee handbooks or other written materials distributed to all employees.

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Employers may adopt policies in which they supplement the compensation benefits received by employees who are out on leave and receiving NJTDB, NJFLI, or NJWCA benefits. These supplements may be in the form of the application of accrued PTO, or subsidies paid by the employer to the employee. For employees receiving NJTDB or NJFLI benefits, the employer supplement may not, when added to the employee's NJTDB or NJFLI benefits, exceed the employee's normal weekly wage. To the extent that the employer's supplement causes the employee to receive more than his or her normal weekly wage when added to the employee's NJTDB or NJFLI benefits, the NJTDB or NJFLI benefits will be reduced so that the employee does not receive more than his or her normal weekly wage. This mandatory reduction does not apply where the employee is receiving NJWCA benefits.

TYPE OF ENTITLEMENT – LEAVE VS. COMPENSATION

When trying to understand how each law applies to a given situation, and how these various laws interact with each other, it is important to note whether the law in question is a leave entitlement or compensation entitlement. Technically speaking, none of these laws provides for both leave and compensation.

The FMLA, NJFLA and NJ SAFE Act are leave entitlements – in other words, they only allow an employee, in qualifying situations, to a leave of absence. There is no requirement that the leave of absence be paid by the employer (although employers have the option of doing so). In contrast, the NJTDB, NJFLI and NJWCA are compensation entitlements – they provide for payment to the employee, rather than for leave from work. Many employers are surprised to learn that there is no such thing as “workers’ compensation leave” or “temporary disability leave.” Despite these clear distinctions, the practical application of these laws, when combined with employer PTO policies, may result in certain leave entitlements and compensation entitlements running concurrently. In other words, depending on the situation, and on how an employer structures its policies, an employee may find himself or herself in a situation where he or she qualifies for both leave and compensation during the leave, which may benefit the employer as well as the employee depending on the circumstances.

In some situations, statutory leave entitlements can run concurrently with statutory compensation entitlements. A condition that qualifies as a “serious health condition” under the FMLA leave may also qualify as a “disability” or “injury” under either the NJTDB or the NJWCA, respectively. For example, an employee who is seriously injured in a car accident may qualify for FMLA leave to care for those injuries. Those injuries may also render that individual disabled within the meaning of the NJTDB. In that situation, the employee would receive disability benefits under the NJTDB while out on FMLA leave. Similarly, an employee who is seriously injured while at work may qualify for FMLA leave, and may also be entitled to receive workers’ compensation benefits under the NJWCA during that FMLA leave. Employers should note that these situations cannot arise under the NJFLA, which only allows an employee leave to care for the serious health condition of a family member – not his or her own medical condition. For an employee taking NJFLI, the NJFLA and FMLA may both apply as the employee would be taking care of a seriously ill family member and/or taking care of a newborn or newly adopted child.

The NJWCA and the NJTDB may also both come into play where an individual files a workers’ compensation claim and the workers’ compensation insurance carrier contests the claim. In that situation, the individual may apply for and receive NJTDB benefits pending the resolution of his or her workers’ compensation claim petition. A lien would be filed by the Disability Insurance Service to protect its subrogation rights against any subsequent workers’ compensation award. In

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other words, the employee may not “double dip” by receiving both types of benefits (NJTDDB and NJWCA) in connection with a single claim.

Depending on how an employer structures its PTO policy, PTO entitlements may also run concurrently with leave entitlements under the FMLA, the NJFLA and the NJ SAFE Act. The FMLA, the NJFLA and the NJ SAFE Act allow employers to structure their PTO policies to require employees to apply their bank of accrued PTO when taking FMLA or NJFLA leave. Employees may also request to apply some or all accrued PTO to their FMLA, NJFLA or NJ SAFE Act leave. This would have the result of the employee’s PTO entitlement running concurrently with their FMLA, NJFLA or NJ SAFE Act leave. The employee would benefit from this situation by continuing to receive compensation while out on leave. The employer could also benefit, as this would prevent an employee from exhausting his or her 12 weeks of FMLA and/or NJFLA leave (or 20 days under the NJ SAFE Act) and then having the right to additional PTO upon his or her return to work.

There are limitations to the application of accrued PTO to NJFLA leave. Under the NJFLA, employers must treat family leave in the same manner as similar leaves of absence have been treated. If an employer has a policy of requiring employees to exhaust all accrued paid leave during a leave of absence, the employer may require the employee to do so during a family leave. Similarly, if an employer has a policy of allowing employees to take unpaid leaves without first exhausting accrued paid leave while on leave, the employer may not require employees to exhaust accrued paid leave while on family leave. Where the employer has no policy in this regard, employees have the option of applying any accrued paid leave to their family leave.

Employers may also structure their FMLA, NJFLA and NJ SAFE Act, policies to require that leave entitlements under both statutes run concurrently when applicable. For example, where an employee requests leave for a reason that would qualify under both the FMLA, NJFLA and NJ SAFE Act, the employer can require that 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, potentially avoiding the troubling situation created where an employee who, after being out for 12 weeks of FMLA leave to care for his or her own health condition, thereafter announces that he or she will be taking another 12 weeks of NJFLA leave to care for a family member. Finally, an employer may require employees to substitute paid time accrued under other benefit plans for unpaid FMLA, NJFLA and NJ SAFE Act leave time. For example, under the NJFLA employers may require employees to substitute up to two weeks of accrued, unused paid time off such as sick leave or vacation, if specified in the employment policies.

BENEFITS DURING LEAVE

Under the FMLA, employers must maintain health coverage under any existing group health plan for employees on leave who were covered under the plan before their leave began. Employees on leave are subject to the same obligations and changes in coverage as if the employees were not on leave. This means that employees on leave must continue to pay any employee contribution to the health plan premium. If the employee is substituting paid leave for unpaid leave, the contribution can continue to be paid as usual, presumably by payroll deduction. If the employee is on unpaid leave, he or she still is responsible for premium payments. The employer should establish a method for employees on leave to make premium payments. Subject to additional COBRA requirements, an employer’s responsibility to maintain group health coverage for an employee on FMLA leave will cease in only four situations: (1) the employee states unequivocally his or her intent not to return to work; (2) the employee fails to return from FMLA leave; (3) the

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employee chooses not to maintain coverage while on FMLA leave; or (4) the employee fails to pay the employee's portion of the health plan premium payment within 30 days of the due date. If the employee's health coverage was terminated while the employee was on leave (either through the employee's choice or failure to pay the employee's portion of the health plan premium payments), coverage must be reinstated upon the employee's return to work. Reinstatement must be on the same terms as prior to taking leave, without any qualifying period, physical examinations, or exclusions for preexisting conditions.

The NJFLA also requires employers to maintain group health coverage for employees on NJFLA leave at the same level and under the same conditions had the employee not gone on leave. However, the requirement to provide health coverage under the NJFLA has been successfully challenged in court because of the preemptive effect of ERISA. Under a 1991 New Jersey state court decision, employers who maintain employee welfare benefits plans regulated under ERISA are not required to comply with the NJFLA requirement of maintaining existing group health coverage for employees on NJFLA leave. Notwithstanding this ERISA preemption, all employers must provide employees on NJFLA leave with any other employment benefits that are provided under the employer's policy with regard to temporary leaves of absence.

PREGNANCY AND CHILDBIRTH

Perhaps the situation that gives employers the most difficulty is determining what laws apply, and what benefits must be given, to a pregnant employee who requests leave. Employees out on leave because of pregnancy (before they deliver) may qualify for FMLA leave, if their pregnancy-related condition qualifies as a serious health condition under the FMLA. Once they deliver, they arguably qualify for both FMLA leave, to care for themselves during their recovery from delivery, and NJFLA leave, to care for their newborn child/children. How an employer designates the leave taken and calculates the amount of leave to be given depends on a variety of factors.

If an employee goes out on pre-delivery leave and her condition qualifies for FMLA leave, her 12 weeks of FMLA leave entitlement starts to run on the date her leave begins. If she were out on leave for more than 12 weeks before she delivers, her FMLA leave would expire before her delivery date. Some employers would consider it appropriate to terminate her employment at that time if she is unable to return to work. However, termination could give rise to a claim that the employee was discriminated against for exercising her rights under the FMLA, which is prohibited under the express terms of the FMLA. Termination could also give rise to a claim under the anti-discrimination statutes that prohibit discrimination on the basis of disability or gender (the Americans With Disabilities Act, the New Jersey Law Against Discrimination, or Title VII of the Civil Rights Act). Accordingly, many employers in this situation choose to allow the employee to continue her unpaid leave.

Once an employee delivers, technically her leave at that point could qualify as both FMLA and NJFLA leave – because she would be caring for both herself, which qualifies under the FMLA, and her newborn child/ren, which qualifies under both statutes. Some employers might deem the employee's FMLA and NJFLA leave to be running concurrently at that point (assuming they have policies that provide for concurrent leave). Concurrent designation at that point might be



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problematic, however, because, under the NJTDB, a woman is presumed to be disabled for four weeks before and six weeks after a normal delivery, longer (eight weeks) for cesarean sections or pregnancies or deliveries with complications. An argument could be made that for the first six weeks after delivery, the employee was caring for herself and not for her newborn child/ren, and, accordingly, her NJFLA leave, which only applies to caring for a family member, had not begun to run. For this reason, many employers designate the first six weeks of leave after a normal delivery (longer for cesarean sections (eight weeks) or complicated deliveries) as FMLA leave only. After those first six or eight weeks, the FMLA leave continues to run until it expires, and the NJFLA starts to run (concurrently with the FMLA) and extends for 12 weeks. This situation is addressed in the NJFLA regulations and a review of those is strongly recommended on this issue.

The NJFLI adds another twist to the above scenario. Under the NJFLI, “family leave” does not include any period of time in which an employee is paid under the NJTDB. Therefore, the NJFLI does not begin to run until an employee’s NJTDB benefits expire- six or eight weeks after childbirth. The interplay of the NJTDB and the NJFLI makes an employee generally eligible for 12 weeks of compensation post-childbirth (six weeks under the NJTDB followed by six weeks under the NJFLI).

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