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The New Jersey Division on Civil Rights recently amended the regulations that interpret the New Jersey Family Leave Act. By reconciling certain aspects of the state law with the federal Family and Medical Leave Act, these amendments have simplified the family and medical leave obligations of New Jersey employers.

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Navigating Leave Requests: Recent Amendments to the New Jersey Family Leave Act Result in Greater Consistency with the Federal Family and Medical Leave Act

By Bryan M. Churgin and Margo Eberlein

Recently, the New Jersey Division on Civil Rights (the Division) amended the regulations interpreting the New Jersey Family Leave Act (NJ FLA) to clarify the rights and obligations of New Jersey employees and employers concerning family and medical leave. According to the Division, its goal was to simplify compliance for employers who are covered by both the NJ FLA and the federal Family and Medical Leave Act (FMLA) by reconciling certain aspects of the two statutes.

Generally speaking, the FMLA provides eligible employees with up to twelve weeks of unpaid, job-protected leave each year. To qualify for FMLA leave, an employee must have worked at least 1,250 hours over the past twelve months for an employer that employs fifty or more employees within seventy-five miles of the employee's worksite. Employees are permitted to take FMLA leave for the birth and care of a newborn child or the placement with the employee of a child for adoption or foster care, to care for a family member with a serious health condition, or to obtain treatment or care for the employee's own serious health condition.

Under the NJ FLA, an eligible employee may take up to twelve weeks of family leave within a twenty-four month period. Employees who have worked at least 1,000 hours over the past twelve months for an employer that employs fifty or more total employees over a specified time period are eligible for this leave. Unlike the FMLA, eligible employees may not take a leave of absence for their own serious medical condition. Instead, NJ FLA leave is limited to an absence for the birth of a child, the placement of a child for adoption with the employee, or the serious health con-

dition of an employee's family member. The New Jersey Legislature recently expanded the definition of a "family member" for purposes of NJ FLA leave to include a member of a legally recognized civil union.

Although many of the recent changes to the NJ FLA are already encompassed by the FMLA, the amendments clarify, and in some cases expand upon, the circumstances under which NJ FLA leave is permitted and the manner in which the leave is administered.

- The revised regulations require employers to count the hours that an employee would have worked, but for a military leave of absence from work, towards an employee's 1,000 hours for NJ FLA eligibility. This amendment is consistent with how eligibility is determined under the FMLA and effectuates New Jersey's public policy of preventing discrimination against members of the armed services.
- Leave eligibility under the NJ FLA may now be determined using one of the four methods available under the FMLA. Thus, employers can measure eligibility by: a calendar year; a fixed leave year (for example, a fiscal year); a twenty-four month period measured forward from the date an employee's first leave begins; or a rolling twenty-four month period measured backwards from the date an employee uses any NJ FLA leave.
- Under the FMLA, when spouses are employed by the same employer, the employer is permitted to limit them to a combined total of twelve weeks of leave to care for a family member. The amend-

ed NJ FLA regulations depart from this restriction and permit a husband and wife employed by the same employer each to take a leave of absence of up to twelve weeks simultaneously, assuming both are otherwise eligible for the leave.

- The new regulations have increased, from fifteen to thirty days, the amount of notice employees are required to provide before taking leave to care for a family member's serious health condition. This revision should provide employers with additional time to make arrangements for an employee's absence and minimize any disruption to its business operations. Like the FMLA, however, employees are permitted to provide less than thirty days notice of a leave when the need for leave is unforeseen.
- The new regulations amend certain definitions under the NJ FLA. Specifically, providing care for a covered family member now includes "arranging for a change in care" (e.g., placement in a nursing facility). Additionally, the Division revised the definition of a "serious health condition" to include the FMLA's "continuing medical treatment or continuing supervision by a health care provider" requirement for a serious health condition. The NJ FLA definition now lists a number of examples of "continuing medical treatment," such as a period of incapacity that lasts three or more days and involves treatment two or more times by a health care provider, or treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.
- Under the amended regulations, an employee who requests intermittent or reduced family leave may be temporarily transferred to an alternative position (with equivalent pay and benefits) during the leave period, if the alternative position better accommodates the employee's recurring periods of leave. Of course, employers are prohibited from transferring employees to discourage the leave or cause the employee to suffer a hardship. Employers must be aware, however, of the following pitfall before temporarily transferring employees in these situations.

While the NJ FLA permits such a transfer where an employee requests intermittent or reduced leave to care for a family member, or for the planned medical treatment of a family member, the FMLA permits such a transfer only when the leave is for planned medical treatment. Therefore, if an employer transfers an employee who has requested leave solely to care for a family member and it is unrelated to planned medical treatment, the employer is prohibited from charging this leave time concurrently under the FMLA. Alternatively, the employer may choose not to transfer the employee so that it may continue to run the FMLA and NJ FLA leave concurrently.

- The amendments clarify the circumstances under which an employee's time away from work is counted concurrently against his or her FMLA and NJ FLA leave allotments. Specifically, an employee's leave for his or her own medical condition counts only against his or her FMLA leave eligibility and not, for the reasons described above, against the employee's NJ FLA leave entitlement. In this regard, the amendments explain that when an employee takes a leave of absence because of her own pregnancy or child birth-related disability, such leave is counted only against the employee's FMLA leave. Any additional leave that the employee takes to care for her newborn child may be charged concurrently under both the FMLA and the NJ FLA, as available.
- The regulations confirm that employers are required to provide employees with notice of their NJ FLA leave rights. In addition to posting a notice of employees' rights, employers are now required to maintain and provide employees with written guidelines regarding NJ FLA benefits. That information may be provided through an employee handbook or by a fact sheet prepared by the Division.

In light of these new regulations, employers covered by the NJ FLA should review existing personnel policies and ensure that they accurately and thoroughly describe employees' NJ FLA rights. Employers should also review, and, if necessary, revise, their leave policies to conform with these recent amendments.

If an employer decides to change the manner in which leave eligibility is calculated, the regulations require that employees receive sufficient notice of the revised policy before it is implemented. At a minimum, this should include confirming that a NJ FLA poster is conspicuously displayed in the workplace and that all employees have received a copy of the leave policy.

Although the Division has attempted to clarify the NJ FLA regulations with these recent amendments, the potential for a legal misstep is still high. To avoid running afoul of state and federal family and medical leave laws, New Jersey employers should consult with employment counsel to ensure that their leave policies are up to date and reflect the recent amendments before responding to an employee's request for leave under either the FMLA or NJ FLA.

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