

## In This Issue:

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The New Jersey Department of Labor and Workforce Development has issued regulations interpreting the state's newly implemented paid family leave law. The regulations provide guidance on important aspects of family leave insurance benefits under the new leave law. Employee contributions under the new law began on January 1, 2009, and eligible employees can take advantage of paid leave benefits beginning July 1, 2009.

## New Jersey Department of Labor Issues Interpretive Regulations

By William P. McLane and Lindsay N. Schrum

Recently, the New Jersey Department of Labor and Workforce Development (NJ DOL) issued regulations interpreting New Jersey's newly implemented paid family leave law, formally known as the "Family Leave Insurance Law." The new regulations provide guidance on important aspects of family leave insurance ("FLI") benefits.

The new law became effective January 1, 2009, when employee contributions commenced. Eligible employees can take advantage of the law's leave benefits beginning July 1, 2009. The law provides eligible employees with up to six weeks of paid leave during any 12-month period<sup>1</sup> to care for a sick family member or to bond with a newborn or a newly adopted child.

The new regulations address a number of subjects including private plan approvals, employer notice requirements, claim filing and payment procedures, paid leave in lieu of FLI benefits, reduction of benefits under various circumstances and intermittent leave. Below are some highlights of the new NJ DOL regulations.

### Private Plans

Employers with private plans must submit them to the NJ DOL for prior approval. The new private plan approval process mirrors the regulations governing private plan approval for Temporary Disability Insurance Benefits. (N.J.A.C. 12:21-2.1 through 2.28).

The regulations also address how to handle employee contributions to private plans. Specifically, employee contributions to a private plan must be deposited in a trust fund account, which are to be used only for the administration and payment of FLI benefits, and they must not to be part of an employer's assets. Further, employers must make trust fund accounts available for periodic inspection by the NJ DOL Division of Temporary Disability Insurance.

### Employer Notice Requirements

Employers are required to post in an accessible worksite area a printed notification of

covered employees' rights pertaining to FLI benefits. In addition, employers must distribute a written copy to each employee - which may be in electronic form - within 30 days of adoption of the regulations (March 2, 2009), at the time of hiring, whenever the employee provides notice to the employer, or upon the first request of the employee of a need for FLI benefits. Employers can request both the written notification poster and the written copy of the notification from the NJ DOL.

## Claim Filing Procedures

If the leave is to care for a newborn or newly adopted child, an employee must give his or her employer notice of the need for paid family leave at least 30 days prior to the leave. The employee's failure to provide timely notice will result in a reduction of the employee's maximum FLI benefits entitlement, unless the time of the leave is "unforeseeable."

On the other hand, if the leave is to care for a family member with a serious health condition, notice must be given in a "reasonable and practicable manner," unless an emergency or other unforeseen circumstance prevents giving notice. If, however, the employee takes leave intermittently, he or she must provide the employer with at least 15-days notice prior to the first day benefits are paid, although the employee's failure to do so will not result in any repercussions.

An employee seeking FLI benefits must also notify the state within 30 days after the start of the family leave period. The NJ DOL will issue forms (Form FL-1 and FL-2) for employees to use to notify the state.

The NJ DOL will mail the employer a copy of the decision of the claimant's eligibility, which states his or her weekly benefit rate and the probable duration of paid leave. The NJ DOL may also request information from the employer pertaining to a claim for FLI benefits. Employers must respond within 10 days after receiving such a request. Failure to do so may result in penalties.

## Payment Procedures

Payments under the state plan, or an approved private plan, will generally be paid directly to the employee. Payments may be made to the employer, however, where the employer has advanced money to the employee in an amount equal to or greater than the FLI benefit *and* where the employee has consented in writing to such a payment. This arrangement may occur where the employer elects to pay the employee taking leave, either fully or in an amount equal to the FLI benefit, through its normal payroll process, and then have the employee remit his or her FLI check to the employer.

## Paid Leave in Lieu of FLI Benefits

The new regulations also clarify the manner in which employers may permit or require employees to use paid sick leave, vacation time or other paid leave in lieu of FLI benefits. Employers may *require* their employees during a period of family leave to use up to two weeks of paid sick leave, paid vacation time or other leave at full pay. When an employer requires such use of paid leave, it may request that the state or private plan reduce the FLI benefits otherwise payable under the plan.

Employers may also *permit* their employees — during a period of family leave — to use in excess of two weeks of paid sick leave, paid vacation time or other leave at full pay. When an employer permits such use of paid leave, the employee's maximum FLI benefits entitlement during the 12-month period will not be reduced by the number of days at full pay permitted by the employer and used by the employee. Under these circumstances, however, no FLI benefits will be payable during the period that the employee is absent from work using paid sick leave, paid vacation time or other leave at full pay.

## Reduction of Benefits

The new regulations also shed light on how a claimant's payment benefits may be reduced under the state plan. A claimant's maximum FLI benefit entitlement under the state plan for a given 12-month period will be reduced by the number of days of FLI benefits that have

been paid to the employee during that 12-month period under a private plan *or* as an unemployed claimant. Further, the amount of benefits otherwise payable to an employee under the state plan will be reduced by the amount paid concurrently under any governmental or private retirement, pension or permanent disability benefit or allowance program to which the employer contributed on the claimant's behalf if the claimant has already received these payments before his/her receipt of benefits from the state plan.

## Intermittent Leave

The new regulations clarify when an employee is eligible for FLI benefits on an intermittent basis. The regulations distinguish between leave for the purpose of “bonding” with a newborn or newly adopted child from leave to provide care to a family member with a serious health condition. The difference is that intermittent leave for bonding must be taken in periods of at least seven days at a time, whereas intermittent leave to provide care to a family member must be taken in periods of not less than one day.

FLI benefits are available for intermittent leave taken for bonding, if the employee takes the leave in non-consecutive periods of at least seven days at a time, and the employer agrees to the employee's intermittent leave schedule.

For leave to care for a family member, intermittent leave is available if the following conditions are met by the covered individual:

1. He or she can establish that it is medically necessary to take the family leave intermittently;
2. The total intermittent family leave does not exceed a 12-month period;
3. He or she makes a “reasonable effort” to schedule the leave; and
4. Where possible, he/she provides the employer with a regular schedule of the intermittent leave.

### Recommendations

We recommend that employers act swiftly to update policies and ensure compliance with the new law and its regulations by:

- Visiting the NJ DOL website to obtain a copy of the “Notice of Rights” under the new law;
- Updating your workplace postings and ensure they are accessible to all employees;
- If you have not already done so, distributing the “Notice of Rights” to all current employees, to new employees at the time of hire, to employees who request a copy of the notice, and to employees who provide notice of intent to seek FLI benefits;
- Submitting your private plan to the NJ DOL for prior approval;
- Preparing for July 1, 2009 when, by that date, claim forms for employees seeking FLI benefits will be posted on the NJ DOL website; and
- Ensuring that your human resources personnel are aware of the basics of this new law and its regulations.

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<sup>1</sup> “12-month period” means, with respect to an individual who establishes a valid first claim for family leave insurance benefits, the 365 consecutive days that begin with the first day that the individual establishes the claim.