

Legislation Enhances New Jersey Employees' Leave Rights

Labor & Employment Alert

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New Jersey has significantly expanded employers' obligations to provide job-protected leaves of absence to their employees, as well as the benefits available to employees while on leave. On February 19, 2019, New Jersey Governor Phil Murphy signed a comprehensive bill that revised these obligations under three New Jersey laws and broadened employers' liability for failing to inform employees of their leave eligibility or to timely process benefits-related documents. Many of the changes took effect immediately, but some are scheduled to take effect over time.

Broader Leave Entitlement Under the New Jersey Family Leave Act

Prior to the signed bill, the New Jersey Family Leave Act ("NJFLA") required employers to provide up to 12 weeks of job-protected unpaid leave in a 24-month period due to (a) the birth or adoption of a child or (b) the serious health condition of a "family member." The signed bill amended the NJFLA, with immediate effect, to expand the definition of "family member" to include more than just the employee's child, parent, spouse or civil union partner. Now, employees may also take time off to care for a seriously ill or injured parent-in-law, sibling, grandparent, grandchild, domestic partner, any individual related by blood and "any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship." It is unclear how the employee is required to show that the individual has such a "close association."

In addition to being provided with leave for births and adoptions, employees may now take family leave under the NJFLA when a child is placed into foster care with the employee, thus making the NJFLA consistent with the federal Family and Medical Leave Act ("FMLA") on that point.

However, in a break from the overlap between the NJFLA and the FMLA, the minimum number of employees needed for NJFLA coverage will decrease effective July 1, 2019, from at least 50 employees to at least 30 employees. Given that, many smaller employers that are not required to provide leaves of absence under the FMLA will need to consider their leave obligations under the NJFLA starting this summer.

Under the NJFLA, employers were already required to allow employees to take leave in the form of a reduced leave schedule to care for a family member with a serious health condition. The signed bill increases the maximum duration of a reduced leave schedule from 24 consecutive weeks to 12 consecutive months for

any one period of leave. For example, an employer might be required to allow an employee to take every Friday off for a full year to care for a family member.

Also, the NJFLA previously did not allow employees to take intermittent leave due to the birth or adoption of a child, unless the employer agreed. Now, employees welcoming a new child by birth, adoption or foster care are entitled to take intermittent leave as long as they provide at least 15 days' prior written notice unless an emergency or "other unforeseen circumstance" precludes notice. Employees are also required to make "a reasonable effort" to schedule leave "so as not to unduly disrupt" operations, but the extent of the employee's obligation is unclear.

Expansion of Leaves of Absence Under the SAFE Act

The signed bill increases employers' obligations under the New Jersey Safety and Financial Empowerment ("SAFE") Act. The SAFE Act already provides employees with up to 20 days of leave in a 12-month period due to qualifying reasons relating to domestic violence or a sexually violent offense suffered by the employee or a family member. The signed bill broadens the definition of "family member" to match the expanded definition governing the NJFLA. Employees may also elect to use paid family leave insurance benefits under the New Jersey Family Leave Insurance ("NJFLI") law during the period of leave under the SAFE Act.

Enhanced Benefits and Protections Under the NJFLI Law

Prior to the signed bill, the NJFLI law provided up to six weeks of paid family leave insurance benefits – paid through the New Jersey Division of Temporary Disability and Family Leave Insurance or an employer's approved private plan – to employees who are not working due to birth, adoption or care of a family member. However, on July 1, 2020, the period of NJFLI benefits will double to 12 weeks. If the leave is taken on an intermittent basis, the maximum benefits will increase to 56 days from 42 days.

Regarding the rate of benefits under the NJFLI law, employees currently can receive two-thirds of their average weekly wage, up to a maximum of \$633, which is 53% of the statewide average wage (currently \$1,203.43). As of July 1, 2020, the rate will increase to 85% of the employee's average weekly wage, up to a maximum of 70% of the statewide average wage. Governor Murphy's office reports that the maximum possible NJFLI benefit will increase to \$860 per week in 2020.

Like the NJFLA and SAFE Act, the NJFLI law has been amended with immediate effect to use the new expansive definition of "family member" discussed above. Furthermore, employers can no longer require an employee to use up to two weeks of paid time off in lieu of NJFLI benefits, but employees may elect to use paid time off in lieu of seeking NJFLI benefits.

Significantly, prior to the recent legislative amendments, the NJFLI law was, in the words of the New Jersey Department of Labor and Workforce Development, only "a partial wage-replacement program" and "[d]id not guarantee employer-approved time off or job protection." The newly signed bill, however, now expressly includes an anti-retaliation provision prohibiting an employer from discharging or otherwise discriminating or retaliating against employees because they requested or took NJFLI benefits, including by "refusing to restore the employee following a period of leave." As a corollary to the new prohibition on discrimination and retaliation, the amendments also create a private right of action and provide a broad array of relief to a prevailing employee, including lost wages, reinstatement and reasonable attorney's fees, plus tort remedies, which could include punitive damages. Finally, employers (and their agents) who fail to provide any required notification or disclosure to the government or to the employee required by the NJFLI law (e.g., a disclosure of information required by the Division of Temporary Disability and Family Leave Insurance for the processing of a benefits claim) may be subject to a fine of \$250.

Update Policies and Conduct Careful Analysis

Given the numerous important changes brought on by the amendments to the NJFLA, SAFE Act and NJFLI law, employers with New Jersey employees should review and update their handbook provisions or leave of absence policies, including, for example, by expanding the definition of “family members.” Employers covered by both the NJFLA and the FMLA also need to conduct a careful analysis when an employee requests leave to determine whether the sought-after leave is covered by both laws or just one. For example, the FMLA does not grant an employee leave to care for seriously ill siblings or grandparents, but the NJFLA now does. Moreover, New Jersey employers could face liability for denying a requested leave based on the mistaken belief that an employee already used all available leave, when the prior leave exhausted only one category of statutorily required leave. And smaller employers (i.e., those having between 30 and 49 employees) who were previously exempt from providing either FMLA or NJFLA leave must prepare for the obligation to grant job-protected NJFLA leave to employees starting July 1, 2019.