



Navigating today's family leave statutes

By Kathleen M. Connelly

Despite the fact that the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, and federal Family and Medical Leave Act, 29 U.S.C. §2601, have been in existence nearly 20 years, legal practitioners and employers alike struggle with the complicated, overlapping unpaid leave rights accorded to employees under these statutes.

Until recently, small employers with fewer than 50 employees operated in ignorant bliss because they were exempt from NJFLA/FMLA coverage. However, with passage of the New Jersey Paid Family Leave Act, N.J.S.A. 43:21-26, employers large and small must grapple with the expanding leave rights available

to employees in the workplace. Failure to grasp the similarities and differences among these laws may result in an unlawful trampling of employee rights or an unwarranted surrender of employer rights designed to prevent abuse by employees.

Unpaid leave

The NJFLA and its federal counterpart, the FMLA, provide similar but by no means identical leave rights. Both require employers to provide up to 12 weeks unpaid family leave to qualifying employees to care for a "family member" with a serious health condition or to care for a newborn or newly adopted child. The NJFLA provides 12 weeks of leave per 24-month period, while the FMLA provides 12 weeks in any 12-month period. While both

statutes include mother, father, child and spouse within the definition of "family member," the NJFLA expands eligibility by including parent-in-law.

While the NJFLA is purely a family leave law, the FMLA goes one step further by extending a medical-leave entitlement in the event the employee needs leave for his or her own medical condition.

The 12-week leave entitlement under these laws runs cumulatively. Thus, if an employee takes six weeks of leave to care for a newborn child, the employee has six weeks of leave remaining for a second qualifying event, such as caring for an ill family member. Moreover, the leave entitlement under the NJFLA and FMLA run concurrently if

the leave qualifies under both laws. Thus, if 12 weeks of leave is taken to care for an ill family member, the employee has exhausted all leave benefits under both the NJFLA and FMLA.

Conversely, if the leave does not qualify under one of these statutes, the time taken cannot be counted toward the employee's leave entitlement under that law.

As a result, in certain circumstances, employees may be entitled to up to 24 weeks of leave in a 12 or 24-month period. For example, if an employee takes 12 weeks of medical leave to care for himself/herself (a qualifying event only under the FMLA), the time is only counted toward the federal leave act

and the employee's 12-week entitlement under NJFLA is fully intact. Likewise, if an employee takes leave to care for an ill parent-in-law (a qualifying event only under NJFLA), the employee's FMLA leave entitlement remains intact. This "double dip" also comes into play if the employee requesting leave has only met the lower "hours worked" threshold for eligibility under the NJFLA — 1,000 hours in the 12-month period immediately preceding the leave, but is short of the 1,250 hours in the preceding 12 months required by the FMLA. In this situation, none of the leave can be counted toward the leave entitlement under the federal law.

Military service members

The availability of unpaid leave rights was significantly expanded by amendments to the FMLA in January 2008 extending leave rights to employees with family members in the armed services. Eligible employees are now entitled to take up to 26 weeks of "military caregiver leave" during a single 12-month period to care for an injured/ill family member in the Armed Forces. For the purposes of this injured service-member leave, the definition of "family member" includes a spouse, son, daughter, parent and, for the first time, "next of kin." Under this expanded definition, a brother, sister or grandparent may now be entitled to FMLA leave to care for a family member injured in the line of duty. In addition, this leave benefit is available on a per-covered-service-member, per-injury basis. As a result, employees may be able to take more than one period of 26 weeks of leave as long as the second leave is for a different

service-member or to care for the same service-member with a different injury.

In addition, the FMLA amendments also extend 12 weeks of leave entitlement during a 12-month period due to "any qualifying exigency" arising out of the fact that the spouse, or a son, daughter, or parent of the employee has been called up for active duty in the National Guard or Reserves. Families of service-members in the regular

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armed forces are not covered. "Qualifying exigency" includes short notice deployment, activities related to the call to duty, child care/school activities, making financial or legal arrangements, rest and recuperation, and other deployment-related activities. While these circumstances do not qualify under NJFLA/NJPFA, the time taken for exigency leave may not be counted concurrently under the New Jersey family leave laws.

Arrival of paid family leave

To further complicate the matter, starting July 1, 2009

in New Jersey, employees are eligible for up to six weeks of paid family leave benefits to care for an ill "family member" or newborn/newly adopted child. The NJPFLA introduces yet another expansion of the definition of "family member" by including domestic and civil union partner, as well as child, spouse and parent. This benefit program is tailored after the state's Temporary Disability Benefits program already in place to provide income protection to employees unable to work on account of serious illness, and is available to all employees without regard to the size of the employer's business.

Employees taking paid family leave will be eligible to receive a maximum amount initially set at \$524 a week. The good news for employers is that benefits are funded through employee payroll taxes with no contribution from employers. This may be of little comfort to employers, however, that will nevertheless face increased administrative costs, expected increases in long-term employee absences, decreased productivity and expenses associated with hiring and/or training substitute employees.

Employees may be required to exhaust their paid family leave benefits concurrently with any qualifying NJFLA/FMLA leave. Of course, if the employee has not met the eligibility requirements of one or both of these statutes (one year/1,000 hours under NJFLA and one year/1,250 hours under FMLA), any time taken for paid family leave cannot be counted toward the 12 weeks of unpaid leave available under NJFLA/FMLA. For example, an

employee taking four weeks of paid family leave benefits to care for a civil union partner cannot have this time counted toward the employee's NJFLA/FMLA leave entitlement because a civil union partner is not a "family member" under the NJFLA/FMLA. Likewise, an employee with six months of service taking five weeks of paid family leave benefits to care for a child will not have this time counted toward the NJFLA/FMLA leave entitlement because the employer has not met the one-year service requirement of these laws.

Substitution of paid time-off benefits

To reduce the impact of employee absences in the workplace, both NJFLA and FMLA permit employers to require employees on leave to use available paid time-off benefits (such as sick, vacation or personal days), concurrently with the leave. Under these circumstances, the leave will be fully paid until the employee exhausts PTO benefits; thereafter, the balance of the leave will be unpaid.

Unfortunately, the employer's ability to require the substitution of PTO banks has been significantly impeded by NJPFLA, which caps the maximum time susceptible to substitution for employees collecting paid family leave benefits at two weeks. Thus, a qualifying employee seeking eight weeks of leave to care for a spouse will concurrently exhaust his full complement of paid family leave benefits (six weeks) and will have four weeks of remaining leave time under the NJFLA/FMLA. If that employee has four weeks of PTO benefits available at the

start of the leave, the employer may require the employee to exhaust two weeks of PTO during the six-week period when he is collecting paid family leave benefits. However, commencing on week seven, the employer may resume the exhaustion requirement and compel the employee to utilize the remaining PTO benefits as permitted under NJFLA/FMLA.

Returning to work

For employers with 50 or more employees, NJFLA, FMLA and NJPFLA require the employer to return the employee to a comparable position at the conclusion of the leave.

However, as a major concession to small employers, the NJPFLA expressly provides that if the employer is not covered by the NJFLA/FMLA, the employee shall not have a claim for wrongful discharge, tort or breach on implied contract if the employee is not reinstated at the conclusion

of the leave. It remains to be seen whether employees can escape the statutory litigation bar by bringing an associational challenge under state or federal discrimination laws.

Profound confusion

These are just some of the quagmires awaiting employers and their legal counsel attempting to juggle employee leave requests under NJFLA, FMLA and NJPFLA. The regulations issued under these three laws address a host of additional issues that come into play with a family/medical leave request, such as employer posting and notice requirements, employee notice requirements, medical certification requirements, and the availability of intermittent and reduced leave. Counsel must keep in mind the U.S. Department of Labor recently overhauled FMLA regulations to impose numerous added notice requirements and other obligations upon

employers. Practitioners who fail to adequately familiarize themselves with all statutory and regulatory requirements before advising clients of their NJFLA, FMLA and NJPFLA rights and responsibilities act at their own peril.

Of course, the key to overcoming the profound confusion resulting from these leave statutes is development of a solid understanding of the interplay between NJFLA, FMLA and NJPFLA. Moreover, employers must be encouraged to develop clear, up-to-date policies advising employees of their rights and responsibilities under the NJFLA/FMLA (if applicable) and the NJPFLA; develop protocols to properly track and classify all family/medical leave time taken by employees; and provide management training on the rights and obligations of the family/medical leave laws.



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