

Chapter 6

The Family Leave Act

I. OVERVIEW

6-1 Generally

The New Jersey Family Leave Act¹ (“FLA”) was designed to promote stability and security in the state’s evolving family structures:

The Legislature finds and declares that the number of families in the State in which both parents or a single parent is employed outside of the home has increased dramatically and continues to increase and that due to lack of employment policies to accommodate working parents, many individuals are forced to choose between job security and parenting or providing care for ill family members. The Legislature further finds that it is necessary to promote the economic security of families by guaranteeing jobs to wage earners who choose to take a period of leave upon the birth or placement for adoption of a child or serious health condition of a family member.²

¹ N.J.S.A. 34:11B-1 *et seq.* Division on Civil Rights (DCR) regulations interpreting the FLA are codified at N.J.A.C. 13:14-1.1 to -1.16. Regulations interpreting the Act with respect to employees of state and local governments have been adopted by the Merit System Board and are codified at N.J.A.C. 4A:6-1.21, -1.21A.

² N.J.S.A. 34:11B-2.

The Act was adopted in 1989 and represents the culmination of a comprehensive legislative effort to maintain the integrity of the family unit and promote flexibility and productivity in the work place. The purpose of the legislation is to adjust public and private policy to accommodate the changing needs of the modern family.

D’Alia v. Allied-Signal Corp., 260 N.J. Super. 1, 6 (App. Div. 1992).

Although there is now a federal Family and Medical Leave Act and family leave policies in many other states,³ New Jersey's FLA has been described as "one of the most far-reaching."⁴ It requires public and private employers to provide covered employees up to 12 weeks leave of absence upon the birth or adoption of a child or the serious health condition of a child, parent, spouse, or partner in a civil union couple. In most cases, it guarantees reinstatement to the same or similar position when leave ends. By its terms, the FLA also requires the continuation of certain employee medical benefits during leave, but that provision has been found pre-empted by federal law with respect to plans subject to the Employee Retirement Income Security Act ("ERISA").⁵ However, the Federal Family and Medical Leave Act, which provides largely parallel benefits, requires that coverage under group health plans must be maintained for the duration of such leave and at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.⁶

Both "child" and "parent" are defined broadly under the Act. Child includes biological, adopted, resource family children and stepchildren as well as legal wards, all of whom must be either under 18 years of age or incapable of self care because of a physical or mental impairment.⁷ A parent is defined as anyone who has a parental relationship with a child as defined by law, including adoptive, resource family parents and stepparents, parents-in-law, and those having custody, guardianship, or visitation rights.⁸ Family member means a child, parent, spouse, or one partner in a civil union couple.⁹ A "serious health condition" includes any injury, illness, impairment or mental or physical condition requiring either in-patient care or continuing medical supervision or treatment by a health care provider.¹⁰

³ 42 Pension & Profit Sharing Report, No. 4 (April 26, 1991); Goldstein, *Job-Security v. Caretaking*, New Jersey Lawyer, July-Aug. 1990, at 30.

⁴ Mayer and Beach, *Family Leave Act: Mrs. Cleaver Goes to Work*, 125 N.J.L.J. 879 (April 5, 1990); *Family Leave Law Takes Effect Amid Division*, The Star Ledger of Newark, May 7, 1990, at 1; *N.J. a Leader, Leave Act Confounds Attorneys*, National Law Journal, April 2, 1990, at 3, 32.

⁵ See § 6-7.

⁶ 29 U.S.C. § 2614(c) (2006).

⁷ N.J.S.A. 34:11B-3(a).

⁸ N.J.S.A. 34:11B-3(h).

⁹ N.J.S.A. 34:11B-3(j).

¹⁰ N.J.S.A. 34:11B-3(l); N.J.A.C. 13:14-1.2.

Because family leave provided under the Act is dependent upon the employee's need to care for another, rather than upon his own disability, it is separate and distinct from maternity and other forms of disability leave.¹¹ As a consequence, family leave based upon birth or adoption of a child is available to both men and women. In fact, under the Division on Civil Rights' (DCR) regulations, more than one employee in a family may be entitled to family leave at the same time, even if they are employed by the same employer.¹² Moreover, the Act specifically provides that any rights granted thereunder are in addition to and shall not adversely affect rights provided under the Temporary Disability Benefits Law.¹³

Limitations on the employee rights created by the FLA include notice and verification requirements, restrictions upon moonlighting and non-consecutive leave, and the right to deny leave to certain highly paid employees where substantial and grievous economic injury to business operations would otherwise result.¹⁴

II. COVERAGE

6-2 Employers Subject to FLA

The FLA was phased into effect over a four-year period. On May 4, 1990, it became applicable to employers who employed 100 or more individuals for 20 or more workweeks during the then-current or preceding calendar year. On May 4, 1991, coverage was extended to employers of 75 or more such employees, and on May 4, 1993 coverage was expanded again to include employers of 50 or more such employees.¹⁵

¹¹ N.J.S.A. 34:11B-13; N.J.A.C. 13:14-1.6. Family leave was designed to fill the gap left by the Temporary Disability Benefits Law and expand job protections to men and women who want to take time off to care for a baby after the physical disability associated with pregnancy has ended. *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 7-8 (App. Div. 1992).

¹² N.J.A.C. 13:14-1.12.

¹³ N.J.S.A. 34:11B-13; N.J.A.C. 13:14-1.6(c). For purpose of illustration, the DCR regulations provide that if an employee is receiving temporary disability benefits for a post-partum medical condition, but has exhausted her federal FMLA leave, she is entitled to begin her twelve weeks of leave under the FLA to care for her newly born child even though she is still disabled as defined by the Temporary Disability Benefits Law. N.J.A.C. 13:14-1.6(c). The Temporary Disability Benefits Laws is discussed further in Chapter 10.

¹⁴ N.J.S.A. 34:11B-4(h)(i); N.J.A.C. 13:14-1.9. In an April 1991 poll of 177 executives in attendance at a labor and employment conference, 130 responded to questions about their experience with FLA in its first year. Seventy percent said they had received requests for family leave, and of those, 35 percent said they had received five or more requests for leave. Daily Labor Report, No. 86, May 3, 1991, at A-4.

¹⁵ N.J.S.A. 34:11B-3(f); N.J.A.C. 13:14-1.2. In *Essex Crane Corp. v. Dir., Civil Rights*, 294 N.J. Super. 101 (App. Div. 1996), the court held that the FLA applies to employers with 50 or more

All private employers that employ the requisite number of employees are subject to the Act, including sole proprietorships and joint ventures.¹⁶ The definition of “employer” also includes the state, any political subdivision thereof, and all public offices, agencies, boards or bodies.¹⁷ Employers that are government entities are deemed to be an “employer” under the FLA regardless of the 50-employee requirement applicable to private employers.¹⁸

An individual is “employed” within the scope of the FLA if he is working for compensation, including working under an ongoing contractual relationship in which the employer has retained substantial control over employment opportunities or the terms and conditions of employment.¹⁹ The statute itself is silent as to whether employees working outside of New Jersey must be included in determining applicability of the FLA, but regulations promulgated by the DCR require the inclusion of all employees “who have worked each working day for 20 or more workweeks during the current or immediately preceding calendar year,” regardless of whether they work out-of-state or within the state, and regardless of whether they themselves are eligible for family leave.²⁰ The DCR’s regulations also provide that under certain circumstances, to be determined on a case-by-case basis, employees of the employer’s divisions, subsidiaries and other related entities, must also be included. The four factors listed in the regulation as pertinent to this determination are those traditionally applied in labor law “single employer analyses,” i.e.:

- i. The interrelationship of the employer’s operation;
- ii. The degree of centralized control of labor relations;
- iii. The existence of common management; and/or
- iv. The degree of common ownership or financial control.²¹

employees regardless of the state in which the employees work. Thus, although the employer had less than 12 employees in New Jersey, the employer was still subject to the FLA where it employed a total of 164 persons, albeit in six states. The United States District Court for the District of New Jersey adopted the *Essex Crane Corp.* analysis in *Callari v. Rehau, Inc.*, 14 F. Supp. 2d 620 (D.N.J. 1998).

¹⁶ N.J.S.A. 34:11B-3(f).

¹⁷ N.J.A.C. 13:14-1.2.

¹⁸ N.J.A.C. 13:14-1.3(b).

¹⁹ N.J.S.A. 34:11B-3(d).

²⁰ N.J.A.C. 13:14-1.2, 1.3. The Appellate Division and the United States District Court have found this regulation to be valid. *See* n.15.

²¹ N.J.A.C. 13:14-1.3. The four factors in the FLA regulation are the same factors used in the test developed for jurisdictional purposes by the National Labor Relations Board. Courts have

6-3 Employees Eligible

An employee is covered under the FLA if he has been employed within the state by the same covered employer for at least 12 months, and for at least 1000 base hours,²² during the 12-month period immediately preceding the leave.²³ Thus, many part-time as well as full-time employees are covered.²⁴ The FLA is silent as to what constitutes employment within the state. The DCR's regulations provide that an individual will

looked to that test for guidance in a variety of other contexts in determining whether a corporation may be liable for the employment practices of another corporation as a "single employer." One would expect the single employer cases to provide guidance in application of the FLA regulations. See, e.g., *Chaiffetz v. Robertson Research Holding Ltd.*, 798 F.2d 731, 735 (5th Cir. 1986) (Title VII); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 27 (1st Cir. 1980) (Title VII); *Saulsberry v. Atl. Richfield Co.*, 673 F. Supp. 811, 815 (N.D. Miss. 1987) (Title VII); *Beckwith v. Int'l Mill Servs.*, 617 F. Supp. 187, 189 (E.D. Pa. 1985) (ADEA); *Nation v. Winn-Dixie Stores, Inc.*, 567 F. Supp. 997, 1010-11 (N.D. Ga. 1983) (Title VII); see also *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 888-89 (3d Cir. 1984) (liability for breach of collective bargaining agreement). In *American Bell, Inc. v. Federation of Telephone Workers*, the Third Circuit observed that complete dominance of one corporation by another is a prerequisite to piercing the corporate veil: "[T]here is no policy of federal labor law" that binds a parent by the subsidiary's actions in labor matters "simply because it controls the subsidiary's stock and participates in the subsidiary's management." *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984). "The court may only pierce the veil in 'specific, unusual circumstances,' lest it render the theory of limited liability useless." *Id.* The United States District Court for the District of New Jersey has followed the "integrated employer" test adopted by the Third Circuit in the Title VII context in determining whether the defendant's employees should be combined with those of its parent corporation for purposes of the FMLA's and FLA's 50-employee threshold. *Fischman v. LA-Z-Boy Furniture Galleries of Paramus, Inc.*, Civ. No. 04-749 (DRD), 2005 WL 2000147 (D.N.J. Aug. 17, 2005) (following *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3d Cir. 2003)). Under this test, factors to be considered in determining whether the 50-employee threshold is met include: whether there is a reasonable business justification for splitting the number of employees into multiple business entities; whether the parent directed the alleged discriminatory act in question; and whether operations of companies are so united that nominal employees of one company are treated interchangeably with those of another. *Id.* at *5-7. Applying this test, the district court concluded that the defendant's employees should not be combined with those of its parent corporation and, accordingly, dismissed the plaintiff's FMLA and FLA claims because the 50-employee threshold was not satisfied.

²² "Base hours" are "hours o[f] work for which an employee receives compensation," including overtime hours for which the employee is paid additional or overtime compensation, and hours for which the employee receives workers' compensation benefits. N.J.A.C. 13:14-1.2. "Base hours" also include "hours an employee would have worked except for having been in military service." *Id.* "At the option of the employer, base hours may include hours for which the employee receives other types of compensation, such as administrative, personal leave, vacation or sick leave." *Id.*; cf. *McConnell v. State Farm Mut. Ins. Co.*, 61 F. Supp. 2d 356 (D.N.J. 1999) (time spent on paid sick leave unrelated to the employment is not "regular hours of working" and therefore, is not included as base hours).

²³ N.J.S.A. 34:11B-3(e); N.J.A.C. 13:14-1.2. *Renart v. Chartwells*, No. 03-4381, 122 Fed. App'x 559, 560-61, 2004 WL 2850108 at *1-2 (3d Cir. Dec. 13, 2004) (like the federal FMLA, 12-month period of eligibility for leave under the FLA focuses on the date the leave commences, not on the date that the employee is later terminated for exceeding leave entitlement).

²⁴ If the part-time employee works less than five days a week, the number of days of leave to which the employee is entitled is adjusted accordingly. See N.J.A.C. 13:14-1.2. Thus, a part-time employee who normally works four days per week is entitled to up to 48 days of leave. N.J.A.C. 13:14-1.2. This is of particular import when leave is taken non-consecutively, and it is necessary to calculate the leave period in terms of days rather than weeks.

be considered to be employed within the state if either (1) he works in New Jersey; or (2) he “routinely performs some work in New Jersey and [his] base of operations or the place from which such work is directed and controlled is in New Jersey.”²⁵

III. TAKING LEAVE

6-4 Advance Notice of Leave Required

An employee seeking leave must provide advance notice to his employer.²⁶ Where the necessity for leave is foreseeable because of the expected birth or adoption of a child, the employee must provide advance notice of the expected event in a “reasonable” and “practicable” manner.²⁷ The DCR’s regulations require notice in these circumstances no later than 30 days prior to commencement of the leave, except where emergent circumstances warrant shorter notice.²⁸

An employee who takes leave in connection with the serious health condition of a family member must provide his or her employer with notice at least 30 days prior to commencement of the leave, except where emergent circumstances warrant a shorter period of time.²⁹

The Appellate Division has found the notice requirement satisfied even where the employee does not mention the Family Leave Act, so long as the information given is sufficient to alert the employer of the employee’s plan to take time off for a purpose covered by the Act.³⁰

²⁵ N.J.A.C. 13:14-1.2.

²⁶ N.J.S.A. 34:11B-4.

²⁷ N.J.S.A. 34:11B-4(f).

²⁸ N.J.A.C. 13:14-1.5(c)(1); *Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 532 (D.N.J. 2000) (For purposes of determining timeliness of employee notice required by the FLA, a federal court has defined ‘reasonable and practicable’ consistent with ‘as soon as practical’ under 29 C.F.R. § 825.302(b); that is “‘at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.’”)

²⁹ N.J.A.C. 13:14-1.5(d)(1).

³⁰ *D’Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1 (App. Div. 1992). The *D’Alia* court explained:

an employer must grant an employee all of the rights accorded by the statute once the employee apprises it of his or her desire to take a family leave because of (1) the birth or adoption of a child, or (2) the serious health condition of a family member.

Id. at 9; *see also* *Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 532 (D.N.J. 2000) (holding that the FLA “does not impose rigid content requirements on the employee [to give notice] and ‘there are no magic words that must be used.’”); *see also* *Hutchens v. Bd. of Review*, 368 N.J. Super. 9 (App. Div. 2004) (remanding for determination as to whether the employee communicated with her employer that she needed time off to care for her ill parents; if employee so informed the employer, such notice would have been sufficient to qualify the employee for leave pursuant to the FMLA and

Noting the employer's obligations to post notices and use other appropriate means to advise employees of their rights under the Family Leave Act, the court found that it

is incumbent upon the employer to apprise the employee of his or her rights and to effectuate them once the employee requests a leave of absence for any of the reasons provided by the Act.³¹

Thus the court held that the employee in that case provided sufficient notice when she submitted disability forms and advised of her intent to take time off for the birth and care of her child.³²

6-5 Circumstances Warranting Leave

Eligible employees are entitled to a leave of absence for up to 12 weeks in order "to provide care made necessary by reason of" either (1) the birth or placement for adoption of a child; or (2) the serious health condition of a child, parent, spouse, or partner in a civil union couple.³³ All terms are defined broadly. A "child" within the scope of the FLA is a biological, adopted, or foster child, step-child, or legal ward, who is either less than 18 years of age or incapable of self-care because of a physical or mental impairment.³⁴ A "parent" is one who is the

biological parent, adoptive parent, foster parent, step-parent, parent-in-law or legal guardian, having a 'parent-child relationship' with a child as defined by law, or having sole or joint legal or physical custody, care, guardianship or visitation with a child.³⁵

the FLA, and the employee who was terminated as a result of such leave would not be disqualified from receiving unemployment compensation benefits); *cf. Costello v. Pub. Serv. Enter. Group*, Civil No. 05-3344, 2007 WL 2509785, at *13 (D.N.J. Aug 30, 2007) (when employees give their employers insufficient and vague information about their absences from work, the employer may have a duty to inquire as to the true reason for the absence, but "the employer is not required to be clairvoyant").

³¹ *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 10 (App. Div. 1992).

³² *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 10 (App. Div. 1992); *see also Senape v. Middlesex County, Adult Jail Facility*, 95 N.J.A.R.2d (CSV) 297, 299 (1995) (employee's written and oral requests for leave to take care of a family member with a serious health condition were sufficient to raise a claim under the Act).

³³ N.J.S.A. 34:11b-3(i) to (j); N.J.S.A. 34:11b-4.

³⁴ N.J.S.A. 34:11B-3(a). *See* N.J.A.C. 13:14-1.2.

³⁵ N.J.S.A. 34:11B-3(h). The regulations combine the statutory definitions of parent and child, providing that:

'Child,' for the purpose of determining whether an employee is eligible for family leave because of such employee's parental status, means a child as defined in the Act to whom

A “serious health condition” includes any injury, illness, impairment, or physical or mental condition requiring either (1) in-patient care in a hospital, hospice, or residential medical care facility; or (2) continuing medical treatment or continuing medical supervision by a health care provider.³⁶ And, perhaps most controversial, “care” is defined as including, but not limited to:

physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.³⁷

An employer may require that a request for leave be supported by the certification of a duly licensed health care provider or other health care provider determined by the Director of the DCR to be capable of providing adequate certification.³⁸ Where the certification is for the serious health condition of a family member of the employee, it should include (a) the date on which the health condition commenced, (b) the probable duration of the condition, and (c) the medical facts within the provider’s knowledge regarding the condition.³⁹ Where the certification is

such employee is a biological parent, adoptive parent, foster parent, step-parent, or legal guardian, or has a “parent-child relationship” with a child as defined by law, or has sole or joint legal or physical custody, care, guardianship or visitation with a child.

N.J.S.A. 13:14-1.2.

³⁶ N.J.S.A. 34:11b-3(l). The DCR regulations contain the same definition of serious health condition but further clarify the requirement for “continuing medical treatment or continuing supervision by a health care provider.” N.J.A.C. 13:14-1.2. The term for “continuing medical treatment or continuing supervision by a health care provider” is defined in the regulations to include: (1) a period of incapacity of more than three days that also involves treatment two or more times by a health care provider or treatment by a health care provider that results in a regimen of continuing treatment; (2) any period of incapacity for pregnancy or prenatal care; (3) any period of incapacity or treatment for such incapacity caused by a chronic serious health condition; (4) a permanent or long-term period of incapacity due to a condition for which treatment may not be effective (such as Alzheimer’s, severe stroke, or terminal disease), where the individual is under continuing supervision of a health care provider; or (5) any period of absence to receive multiple treatments by a health care provider for restorative surgery after an accident or injury, or for a condition that would likely result in a period of incapacity for more than three consecutive days absent medical intervention or treatment (such as cancer, severe arthritis, or kidney disease). *Id.* This definition is adopted from the FMLA regulations. 38 N.J.R. 4627(a) (Nov. 6, 2006) (citing 29 C.F.R. § 825.114).

³⁷ N.J.A.C. 13:14-1.2. The DCR’s response to a comment on its regulation when proposed suggests an employee would be considered “caring” for a child within the scope of the FLA by visiting her in a hospital and thereby providing emotional support, even though the child was receiving all physical and medical care from the hospital staff. 23 N.J.R. 2864 (Sept. 16, 1991).

³⁸ N.J.S.A. 34:11B-4(e)(1); N.J.A.C. 13:14-1.10(b).

³⁹ N.J.S.A. 34:11B-4(e)(1); N.J.A.C. 13:14-1.10(b)(1); see *Conteh v. Francis E. Parker Mem. Home Inc.*, 2011 WL 1459657, at *4 (D.N.J. Apr. 15, 2011) (dismissing FLA claim where plaintiff did not provide employer with a certification issued by a health care provider requesting leave and where complaint did not otherwise allege that employer intimidated, harassed, or discouraged Plaintiff

for the birth or placement of a child, it need only state the date of birth or placement for adoption.⁴⁰

If the employer has reason to doubt a certification as to the health of a family member, it may, at its own expense, require the employee to obtain a second opinion from a health care provider designated or approved by the employer, but not employed by it on a regular basis.⁴¹ If the second opinion is in conflict with the initial certification, the employer may require the employee to obtain a third opinion from a health care provider chosen or approved by both the employer and employee.⁴² The conclusions of this third health care provider are binding upon both parties.⁴³

The DCR's regulations also permit an employer to require the employee to sign a form of certification attesting that he is taking family leave for the birth or adoption of a child, or to care for a family member because of that family member's serious health condition, whichever is applicable.⁴⁴ An employer may not, however, require the employee to sign or otherwise submit a form of certification attesting to any additional facts, including the fact of eligibility for leave.⁴⁵

An employee who refuses to provide such a certification may be denied leave,⁴⁶ and an employee who provides a false certification may be subjected to reasonable disciplinary measures.⁴⁷ The form of certification utilized by an employer must contain a warning of the consequences of providing false information or refusing to sign.⁴⁸

6-5:1 Relation with Other Laws

The DCR has promulgated a regulation designed to help clarify the oftentimes confusing interactions between the FLA and the federal

from exercising his right to leave under the FLA). The provisions of the statute and the regulation are the same. *See Senape v. Middlesex County, Adult Jail Facility*, 95 N.J.A.R.2d (CSV) 297, 299 (1995) (doctor's notes which contained neither the date on which the serious health condition commenced nor its probable duration were inadequate).

⁴⁰ N.J.S.A. 34:11B-4(e)(2); N.J.A.C. 13:14-1.10(b)(2). The provisions of the statute and the regulation are the same.

⁴¹ N.J.S.A. 34:11B-4(e)(2); N.J.A.C. 13:14-1.10(b)(3).

⁴² N.J.S.A. 34:11B-4(e)(2); N.J.A.C. 13:14-1.10(b)(3). The employer must also bear the cost of obtaining the third opinion. *Id.*

⁴³ N.J.A.C. 13:14-1.10(b)(3).

⁴⁴ N.J.A.C. 13:14-1.10(a).

⁴⁵ N.J.A.C. 13:14-1.10(a).

⁴⁶ N.J.A.C. 13:14-1.10(a).

⁴⁷ N.J.A.C. 13:14-1.10(a)(1).

⁴⁸ N.J.A.C. 13:14-1.10(a).

FMLA and other laws. That regulation provides that where an employee requests leave for a reason covered by both the FLA and another law, the leave simultaneously counts against the employee's entitlement under both laws.⁴⁹ The DCR also provides that medical or disability leave granted under other laws, but not granted under the FLA, does not abridge an employee's right to leave or other protections granted by the FLA.⁵⁰ To illustrate this principle and help to clarify certain gray areas involving the FLA and the FMLA, the DCR offers the following examples:

1. If an employee first takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, the employee would be entitled to an additional 12 weeks of leave within 24 months under the [FLA] to care for a seriously ill family member or newly born or adopted child, because the prior disability leave was taken for a purpose not covered by the [FLA].
2. If an employee takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, and a family member becomes seriously ill or a child is born or adopted while he or she is still on FMLA disability leave, the intervening birth, adoption, or serious family illness does not convert the FMLA leave to a leave under the [FLA]. For as long as the employee continues to be eligible for FMLA leave based on his or her own disability, the leave does not simultaneously count against the employee's entitlement under the [FLA].⁵¹

⁴⁹ N.J.A.C. 13:14-1.6(a).

⁵⁰ N.J.A.C. 13:14-1.6(b).

⁵¹ N.J.A.C. 13:14-1.6(b)(1), (2). By way of example, the FLA regulations specifically provide that if an eligible employee is on disability leave for four weeks and is on disability leave following childbirth for an additional six weeks, those 10 weeks that the employee is on disability leave count against the employee's FMLA entitlement only, and the employee retains the full 12-week entitlement under the FLA for the care of the newborn child. N.J.A.C. 13:14-1.6(b)(1); *see also Smith v. Medpointe Healthcare, Inc.*, No. 04-cv-6315(PGS), 2007 WL 556914, at *6 (D.N.J. Feb. 15, 2007) (noting that if an employee takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, and a family member becomes seriously ill or a child is born or adopted while he or she is still on FMLA disability leave, the intervening birth, adoption or serious family illness does not convert the FMLA leave to a leave under the FLA), *aff'd*, 338 Fed. Appx. 230 (3d Cir. Jul. 16, 2009).

6-6 Duration and Timing of Leave

An eligible employee is entitled to 12 weeks of leave in any 24-month period.⁵² Leave based upon the birth or adoption of a child may begin at any time within one year of the date of birth or placement.⁵³ Under certain circumstances, leave based upon either the birth or placement of a child or the serious health condition of a family member may be taken intermittently or pursuant to a reduced leave schedule.

6-6:1 Intermittent Leave

Intermittent leave is leave taken in intervals lasting at least one week but less than 12 weeks.⁵⁴ If the leave is for the birth or adoption of a child who does not suffer from a serious health condition, leave may not be taken on an intermittent basis unless both employer and employee agree.⁵⁵ Where leave is based upon the serious health condition of a family member, however, it may be taken intermittently at the option of the employee if (1) the intermittent leave is medically necessary, (2) the leave is taken within a 12-month period for each episode of a serious health condition, (3) the employee gives the employer prior notice of the leave in a manner that is “reasonable” and “practicable” and (4) the employee makes a reasonable effort to schedule the intermittent leave so as not to disrupt unduly the employer’s operations.⁵⁶ According to the regulations, an intermittent leave disrupts unduly the employer’s operations if it:

would cause the employer measurable harm, economic or otherwise, significantly greater than any measurable harm which would befall the employer if the same employee was granted a consecutive leave.⁵⁷

⁵² N.J.S.A. 34:11B-4. In determining the 24-month period in which the 12 weeks of leave shall be granted, an employer may choose among: (1) the calendar year; (2) any fixed “leave year,” such as a fiscal year or a year starting on an employee’s “anniversary date”; (3) the 24-month period measured forward from the date any employee’s first leave under the Act begins; or (4) a “rolling” 24-month period measured backward from the date an employee uses any leave under the Act. N.J.A.C. 13:14-1.3(c). An employer must notify employees of the alternative chosen and the alternative must be applied consistently and uniformly to all employees. N.J.A.C. 13:14-1.3(d). An employer wishing to change to another alternative must give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. *Id.*

⁵³ N.J.S.A. 34:11B-4(c).

⁵⁴ N.J.S.A. 34:11B-4(a); *see also* N.J.A.C. 13:14-1.2.

⁵⁵ N.J.S.A. 34:11B-4(b).

⁵⁶ N.J.S.A. 34:11B-4(a).

⁵⁷ N.J.A.C. 13:14-1.2.

The burden of proving such a disruption is on the employer.⁵⁸

If intermittent leave is taken with respect to more than one serious health condition episode, it must be taken within a consecutive 24-month period, or until the employee's 12 weeks of leave are used, whichever is sooner.⁵⁹

6-6:2 Reduced Leave Schedule

Employees who take leave for the birth or adoption of a healthy child may, with the agreement of their employer, take a "reduced leave schedule."⁶⁰ Employees who take leave for any other reason are entitled to take a reduced leave schedule at their own option, whether their employer agrees or not.⁶¹

A reduced leave schedule is one which permits an employee to work less than his usual number of hours per workweek, but not less than his usual number of hours per workday, unless the employer and employee agree otherwise.⁶² The fact that leave is taken upon a reduced leave schedule does not lessen the amount of leave to which the employee is entitled.⁶³ However, a reduced leave schedule may not exceed 24 consecutive weeks,⁶⁴ and only one reduced leave may be taken during any 24-month period.⁶⁵ Thus, if less than the full leave period is taken on a reduced schedule, any remaining leave may be taken only on a consecutive or an intermittent basis.⁶⁶

As with intermittent leaves, an employee taking leave on a reduced basis must make reasonable efforts to schedule the leave so as not to disrupt unduly the employer's operations.⁶⁷ When an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable, the employer may transfer the employee to an available alternative position with equivalent pay and benefits during the leave period, so long as the employer does not do so in order to discourage the employee from taking leave or otherwise work a hardship on the employee. When an employee who is taking leave intermittently or on a reduced leave schedule and has

^{58.} N.J.A.C. 13:14-1.2.

^{59.} N.J.A.C. 13:14-1.5(d)(2).

^{60.} N.J.S.A. 34:11B-5.

^{61.} N.J.S.A. 34:11B-5.

^{62.} N.J.S.A. 34:11B-3(k).

^{63.} N.J.S.A. 34:11B-5(b).

^{64.} N.J.S.A. 34:11B-5(a); N.J.A.C. 13:14-1.5(d)(3).

^{65.} N.J.A.C. 13:14-1.5(d)(3).

^{66.} N.J.A.C. 13:14-1.5(d)(3).

^{67.} N.J.S.A. 34:11B-5(b); N.J.A.C. 13:14-1.2.

been transferred to an alternative position is able to return to full-time work, he or she must be placed in the same or equivalent job as the one he or she left when the leave commenced.⁶⁸ The employee must also provide prior notice to the employer of

the care, medical treatment, or continuing supervision by a health care provider necessary due to a serious health condition of a family member, in a manner which is reasonable and practicable.⁶⁹

6-6:3 Payment During Leave

Leave required to be provided under the FLA need not be paid; it may be paid, unpaid, or partially paid.⁷⁰ If an employer provides paid family leave for less than 12 weeks, the additional weeks required to comply with the FLA may be unpaid.⁷¹

Informal guidelines issued by the DCR after the FLA's enactment allowed employers to require employees to exhaust accrued paid leave during family leave, provided only that there was no applicable employment contract or collective bargaining agreement to the contrary.

The DCR's final regulations, in contrast, provide that only employers with an established practice are permitted to require exhaustion. Thus, an employer with a past practice requiring employees to use vacation days and personal days before taking unpaid leave may require employees to do the same with respect to family leave, thus preventing employees from extending their absence from the workplace by taking 12 weeks' family leave followed by several weeks of vacation.⁷² But employers with a different past policy, or even no past policy, are prohibited by the regulations from requiring such exhaustion. The regulations leave it to the employee to decide in each instance whether or not to use vacation or other accrued paid leave as part of his family leave.⁷³

^{68.} N.J.A.C. 13:14-1.5(d)(4).

^{69.} N.J.S.A. 34:11B-5(b).

^{70.} N.J.S.A. 34:11B-4(d).

^{71.} N.J.S.A. 34:11B-4(d).

^{72.} N.J.A.C. 13:14-1.7.

^{73.} The regulation provides in part:

In situations where an employer does not have an established policy in this regard, the employee shall be entitled to utilize any accrued paid leave as part of the family leave. If such an employee determines not to utilize accrued paid leave, the employer shall not require such employee to utilize any accrued paid leave as part of the leave. Where an employer maintains leaves of absence which provide different policies and/or practices

6-7 Continuation of Benefits During Leave

Section 8 of the FLA provides that during the period of family leave, the employer “shall maintain coverage under any group health insurance policy, group subscriber contract or health care plan at the level and under the conditions” coverage would have been provided had the employee not taken leave.⁷⁴ It also requires that all other employment benefits be provided in accordance with the employer’s policy on benefits to employees on temporary leave.⁷⁵ If benefits are normally dependent upon the type of leave taken, the statute requires that they be provided in the same manner as that governing the leave most closely resembling family leave.⁷⁶

In *New Jersey Business & Industry Association v. State*,⁷⁷ the Law Division found § 8(a) of the FLA—requiring continuation of health benefits during leave—pre-empted by the Employee Retirement Income Security Act of 1974⁷⁸ (“ERISA”), insofar as it applies to plans subject to the federal law. The court stressed, however, that § 8(a) would remain in effect with respect to plans not subject to ERISA, such as plans maintained by government employers.⁷⁹ That ruling is in accord with ERISA’s broad pre-emption provisions and United States Supreme Court interpretations of same.

ERISA regulates both employee pension benefit plans and employee welfare benefit plans, the latter being defined as any plan, program or fund designed to provide

medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services....⁸⁰

regarding the use of accrued paid leave, the employer shall treat family leave in the same manner as that other leave of absence which most closely resembles family leave.

N.J.A.C. 13:14-1.7.

⁷⁴ N.J.S.A. 34:11B-8. As discussed, this requirement has been found pre-empted with respect to plans subject to the Employee Retirement Income Security Act. 29 U.S.C. §§ 1001, *et seq.* (2006).

⁷⁵ N.J.S.A. 34:11B-8.

⁷⁶ N.J.S.A. 34:11B-8; *see also* N.J.A.C. 13:14-1.7.

⁷⁷ *N.J. Bus. & Indus. Ass’n v. State*, 249 N.J. Super. 513 (Law Div. 1991).

⁷⁸ 29 U.S.C. §§ 1001 *et seq.*

⁷⁹ *N.J. Bus. & Indus. Ass’n v. State*, 249 N.J. Super. 513, 520-21 (Law Div. 1991).

⁸⁰ 29 U.S.C. § 1002(1) (2006).

Under § 514(a) of ERISA, state laws which “relate to” an employee benefit plan covered by the federal law are expressly pre-empted.⁸¹ A state law is deemed to relate to an employee-benefit plan “if it has a connection with or reference to such a plan.”⁸²

6-8 Employment During Leave

Employees are prohibited from engaging in full-time employment during family leave, unless the employment began before the leave commenced.⁸³ The FLA does not address part-time employment during leave.

The DCR’s regulations provide that employees may commence part-time employment while they are on leave, so long as it does not exceed half the regularly scheduled hours worked for the employer from whom the employee is on leave.⁸⁴ They further provide that an employee may continue part-time employment during leave at the same number of hours for which he was scheduled before leave commenced.⁸⁵ Employers are barred by the regulations from prohibiting part-time employment during family leave.⁸⁶

6-9 Reinstatement

Under the FLA, upon an employee’s return from a leave lasting 12 weeks or less, the employer must restore him to his former position or to one which is comparable in terms of pay, seniority, employment benefits and other terms and conditions of employment.⁸⁷ However, the employee

^{81.} 29 U.S.C. § 1144(a) (2006). Plans maintained “solely for the purpose of complying with applicable workmen’s compensation or unemployment compensation or disability insurance laws” are not pre-empted under the Act. 29 U.S.C. § 1003(b)(3) (2006). Nor are state laws regulating insurance pre-empted. 29 U.S.C. § 1144(b)(2)(A) (2006). However, neither an employee benefit plan covered by the Act nor a trust established under such a plan may be considered an insurance company for purposes of a state law purporting to regulate insurance companies or insurance contracts. 29 U.S.C. § 1144(b)(2)(B) (2006).

^{82.} *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (Maine statute requiring one-time severance payment upon plant closing not pre-empted); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (common law contract claims pre-empted); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (Massachusetts statute requiring insurance policies to provide specified minimum benefits not pre-empted); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (New Jersey statute prohibiting integration of workers’ compensation and pension benefits pre-empted).

^{83.} N.J.S.A. 34:11B-4(g). DCR’s regulations would also prohibit full-time employment that began prior to the leave if it is barred by law. N.J.A.C. 13:14-1.8.

^{84.} N.J.A.C. 13:14-1.8.

^{85.} N.J.A.C. 13:14-1.8.

^{86.} N.J.A.C. 13:14-1.8.

^{87.} N.J.S.A. 34:11B-7; N.J.A.C. 13:14-1.11(a). See generally *Strong v. County of Essex*, No. A-1516-02T3, slip op. at 13-14 (N.J. Super. App. Div. Nov. 5, 2003) (affirming dismissal of plaintiff’s FLA claim

is not entitled to reinstatement if during the leave period he would have lost his position due to a reduction in force or the legitimate operation of a bona fide system of layoff and recall, including one established under a collective bargaining agreement.⁸⁸ All rights under such a layoff and recall system are retained by the employee to the same extent they would have been had he not taken leave.⁸⁹

6-10 Grounds for Denial or Revocation of Leave

As discussed in § 6-5, request for leave may be denied if the employee refuses to sign a certification of the reason for the leave, or provides false certification of same.

Leave may also be denied to certain high level, salaried employees on the basis of the employer's needs and without employee fault. Three statutory prerequisites must be met. First, the employee must be a salaried employee who is among the highest paid 5 percent of the employer's employees or one of the seven highest paid employees of the employer, whichever is larger.⁹⁰ Second, the denial must be "necessary to prevent substantial and grievous economic injury to the employer's operations."⁹¹ And third, the

because plaintiff was restored to her former position of Assistant Prosecutor; rejecting plaintiff's claim that restoration to a different unit in the prosecutor's office constituted improper restoration); *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 11 (App. Div. 1992) (job functions and number of subordinate employees may be among the factors considered in determining whether a position is equivalent); *cf. Colicchio v. Merck & Co.*, 2012 WL 5830403, at *10 (D.N.J. Nov. 16, 2012) (denying summary judgment as to plaintiff's claims of interference with rights protected by the FLA and the FMLA where there were factual disputes over whether the plaintiff was restored to an equivalent position with equivalent terms and conditions of employment). On the other hand, there is no entitlement to reinstatement under the FLA where the employee seeks to return from a leave lasting longer than the 12 weeks available under the statute, even if the leave was approved by the employer. *Lapidoth v. Telcordia Techs., Inc.*, 420 N.J. Super. 411, 417-420 (App. Div. 2011) (affirming dismissal of FMLA and FLA claim, finding that these statutes only guaranteed reinstatement when the employee took a 12-week-or-less leave of absence, and rejecting claim that employer violated these statutes by not reinstating her following one-year leave pursuant to its maternity leave policy).

⁸⁸ N.J.S.A. 34:11B-7; N.J.A.C. 13:14-1.11(b). *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497, 511-12 (3d Cir. 1996) (court determined that there was a genuine issue of fact regarding whether or not the employer actually experienced a reduction in force which thereby precluded the court from applying the reduction in force exception to bar plaintiff's claim); *Leahey v. Singer Sewing Co.*, 302 N.J. Super. 68, 79-81 (Law Div. 1996) (setting forth factors to consider in determining whether an employer experienced a reduction in force which would enable it to rely upon the reduction in force exception in defense of a FLA claim).

⁸⁹ N.J.S.A. 34:11B-7; N.J.A.C. 13:14-1.11(b).

⁹⁰ N.J.S.A. 34:11B-4(h)(1); N.J.A.C. 13:14-1.9. Under DCR's regulations, employees would be ranked according to their "base salary," defined as gross salary excluding overtime and bonuses and including amounts withheld for taxes, FICA and employee health and pension plan contributions. N.J.A.C. 13:14-1.9, -1.2.

The regulations also require that both New Jersey and out-of-state employees be included in the salary ranking. N.J.A.C. 13:14-1.9(a)(1).

⁹¹ N.J.S.A. 34:11B-4(h)(2). The regulations place the burden of proving this on the employer, rewriting

employer must notify the employee of its intent to deny the leave at the time it determines the denial is necessary.⁹² It appears that an employer may utilize this subsection to revoke leave after an employee has already left the work place; the statute provides that an employee who receives notice of his employer's intent to invoke this exception after his leave has commenced must return to work within 10 days.⁹³

The DCR's regulations with respect to this section are particularly significant. They define "substantial and grievous economic injury" as:

economic harm that will befall an employer which is of such a magnitude that it would substantially and adversely affect the employer's operations, considerably beyond the costs which are associated with replacing an employee who has requested family leave.⁹⁴

That definition is substantially broader than one which was in DCR's earlier proposed regulations, and which limited the exception to injuries that would imperil the continued business operations of the employer.⁹⁵

IV. POSTING

6-11 Posting

Employers must post a conspicuous notice apprising employees of their rights and obligations under the Act and use "other appropriate means to keep its employees so informed."⁹⁶ A DCR form notice is reproduced on the next page. The FLA does not specifically set forth what other steps should be taken to keep employees informed. However, the DCR regulations provide that if an employer maintains written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave under the FLA and employee obligations under the FLA must be included in the handbook or other document. If the employer does not have such written guidance, it must provide written guidance to each of its employees concerning all the employees' rights and obligations under the Act.⁹⁷

the second prong of the test to be: "2. The employer can demonstrate that the granting of the leave would cause a substantial and grievous economic injury to the employer's operations." N.J.A.C. 13:14-1.9(a)(2).

⁹² N.J.S.A. 34:11B-4(h)(3); N.J.A.C. 13:14-1.9(a)(3).

⁹³ N.J.S.A. 34:11B-4(i).

⁹⁴ N.J.A.C. 13:14-1.2.

⁹⁵ 22 N.J.R. 2131 (July 16, 1990).

⁹⁶ N.J.S.A. 34:11-6; N.J.A.C. 13:14-1.14(a).

⁹⁷ N.J.A.C. 13:14-1.14(b). Employers are permitted to duplicate and provide employees a copy

6-11:1 Sample Notice



NJ Office of the Attorney General
CIVIL RIGHTS

FACT SHEET

The New Jersey Family Leave Act

What Rights Do I Have If I Need To Take Time Off From Work To Care For A Close Family Member?

Under the New Jersey Family Leave Act, certain employees are entitled to take leave without losing their jobs as long as the following conditions are met:

Employer - The employer must have at least 50 employees who have been working for at least 20 weeks during the current or previous year. When counting the number of employees, all of the employer's employees, whether located in New Jersey or not, are included.

Employee - The employee who wants to take leave must have worked for that employer for one year and must have worked at least 1,000 hours, including paid overtime hours, during the 12 months immediately prior to taking the leave.

Exception - An employer may deny leave to employees whose base salaries are within the highest 5% of all employees if their absence would have a substantial negative effect on the business. The same is true for the seven most highly paid employees. The employer must provide proper notice to the employee that they fall into this category.

What Circumstances Entitle Me To Take Family Leave?

The New Jersey Family Leave Act permits leave to be taken for:

- The care of a newly born or adopted child, as long as leave begins within one year of the date the child is born to or placed with the employee; or
- The care of a parent, child under 18, spouse, or civil union partner who has a serious health condition requiring in-patient care, continuing medical treatment or medical supervision. The Family Leave Act considers parents to be: in-laws, step-parents, foster parents, adoptive parents or others having a parent-child relationship with an employee.

How Much Leave Am I Entitled To?

Each eligible employee may take up to 12 weeks of continuous leave during a given 24-month period.

When caring for a family member with a serious health condition, an employee may take leave that is not continuous, for example, an intermittent leave or a

reduced work schedule. Sometimes an employer's approval is necessary for this type of arrangement if the leave is taken in connection with the birth or adoption of a child.

What Notice Has To Be Given To The Employer?

An employer is entitled to require the employee to give 30 days notice for leave related to the birth or adoption of a child. In the case of relative's serious health condition, 15 days notice may be required.

If an emergency arises, reasonable notice must still be given, within the confines of the circumstances.

Can I Take Family Leave If I Am Also Entitled To Disability Leave?

New Jersey family leave is separate from any leave an employee may take for his or her own disability.

Is The New Jersey Family Leave Act Identical To The Federal Family And Medical Leave Act?

They are similar, but there are some differences. Some of the differences are:

- Unlike the New Jersey Family Leave Act, federal law does allow an employee to use leave time for his or her own medical condition.
- While the state law provides for 12 weeks of leave in a given 24-month period, federal law provides for 12 weeks of eligible leave within a period of 12 months.
- The New Jersey FLA applies to companies with 50 or more employees nationwide. The federal FMLA applies to all employers with 50 or more employees within 75 miles of each other.

In situations where a leave is provided by both the New Jersey Family Leave Act and the federal Family and Medical Leave Act (i.e., family leave), the employee is entitled to only up to 12 weeks of leave, in a 12 month period to care for a family member or newly born or adopted child.

A leave granted due to the employee's disability is covered only by the federal FMLA and may be followed by an additional leave for the care of a family member under the New Jersey Family Leave Act.

of the New Jersey Family Leave Act Fact Sheet available on the DCR's website, <http://www.nj.gov/oag/dcr/index.html>, to provide such guidance.

What Am I Entitled To When I Return To Work?

The employee is generally entitled to the same position held before the leave.

Exception: If the original position is no longer available when the employee returns, the employer must offer an equivalent position in terms of pay, benefits and status.

Layoff: If a layoff occurred while the employee was on leave, the employee retains the same rights as if no leave had been taken.

Can My Employer Require Proof Of Eligibility As A Condition Of Leave?

The employer is entitled to request verification of the qualifying condition, such as a doctor's certification that a serious health condition exists. In other words, a medical certification may be required, but an employer cannot require an employee to certify that he/she is eligible for family leave. This is the employer's responsibility.

What Should I Do Next?

When the parties are unable to resolve a dispute themselves, the law provides specific relief under the Family Leave Act.

Administrative remedy:

The Department of Law & Public Safety, through its Division on Civil Rights, is responsible for enforcing the Family Leave Act (FLA). If you believe that you have been denied leave to which you are entitled under the FLA or treated unfairly because you have exercised your rights under the FLA, please visit or phone us at the Division on Civil Rights office closest to where you live or where the discrimination occurred. Our addresses and phone numbers are at the end of this fact sheet, or visit us on the web at www.NJCivilRights.gov.

A complaint must be filed with the New Jersey Division on Civil Rights within 180 days of the denial of leave or other adverse employment action. An initial evaluation will be conducted to determine if you state a claim for relief under the FLA. If so, the Division will prepare a complaint for you to sign and then the Division will conduct an investigation into your allegations. If the investigation shows enough evidence to support your complaint (known as probable cause), and your complaint cannot be settled, a hearing will be held in the Office of Administrative Law. You may choose to retain a private attorney to represent you at the hearing, or a lawyer will be provided to prosecute the case on behalf of the New Jersey Division on Civil Rights. At the conclusion of the hearing, the Director of the Division on Civil Rights will make a final decision as to whether unlawful denial of leave or other adverse employment action has been proven and, if so, what remedies should be awarded to the complainant. Other than fees for a private attorney, if applicable, there is no cost to the individual for these services.

Judicial Remedy:

In the alternative, an individual who believes he or she has been denied leave in violation of the FLA or subjected to

other adverse employment action because he/she has exercised their rights under the FLA, may file a complaint and try his or her case in New Jersey Superior Court. Individuals usually hire an attorney to represent them in a Superior Court action. A party cannot file with the Division on Civil Rights and in Superior Court at the same time. A Superior Court action must be filed within two years of the denial of leave or other adverse employment action.

What Remedies Are Available?

A prevailing complainant may be entitled to the leave time that was denied. A complainant may also be entitled to damages for pain, humiliation, and emotional distress caused by the employer's actions; restoration of employee benefits that the complainant would have received but for the employer's actions; out-of-pocket expenses incurred as a result of the denial of leave; and reasonable attorney's fees if the complainant was represented by counsel.

In addition, the Division may impose penalties on the party who violated the FLA of up to \$2,000 for the first violation, and up to \$5,000 for a second or subsequent violation. These penalties are payable to the State, not the complainant. In addition, the Director of the Division on Civil Rights may award the complainant punitive damages in an amount up to \$10,000.

Remember, it's against the law for anyone to retaliate against you because you have exercised your rights under the New Jersey Family Leave Act.



NJ Office of the Attorney General

CIVIL RIGHTS

The Department of Law & Public Safety, through its Division on Civil Rights, is responsible for enforcing the law. To file a complaint, contact or visit the office nearest you:

Atlantic City Regional Office:

1325 Boardwalk, Tennessee Ave. & Boardwalk
Atlantic City, NJ 08401
Phone: (609) 441-3100 • Fax: (609) 441-3578

Camden Regional Office:

One Port Center, 4th Floor, Suite 402
2 Riverside Drive, Camden, NJ 08103
Phone: (856) 614-2550 • Fax: (856) 614-2568

Newark Regional Office:

31 Clinton Street, Newark, NJ 07102
Phone: (973) 648-2700 • Fax: (973) 648-4405

Trenton Regional Office:

140 East Front Street / P.O. Box 090
Trenton, NJ 08625-0090
Phone: (609) 292-4605 • Fax: (609) 984-3812

Visit our web site at www.NJCivilRights.gov

rev. ep. 07.25.11

V. ENFORCEMENT

6-12 Enforcement

Section 9 of the FLA makes it unlawful for an employer to withhold benefits or otherwise interfere with the exercise of employee rights provided thereunder. It also prohibits employers from discharging or otherwise discriminating against an individual for opposing an unlawful practice under the Act, or for instituting, testifying or giving information in connection with charges or proceedings relating to a right provided by the Act.⁹⁸

A penalty of up to \$2,000 for the first offense and up to \$5,000 for each subsequent offense may be recovered in a summary civil action by the Attorney General.⁹⁹

A private cause of action may also be maintained; the aggrieved party may either file an administrative complaint with the DCR or institute a civil action in Superior Court.¹⁰⁰ All remedies provided for in N.J.S.A. 10:5-17 are available under FLA, including compensatory damages and reinstatement with back pay.¹⁰¹

⁹⁸. N.J.S.A. 34:11B-9.

⁹⁹. N.J.S.A. 34:11B-10.

¹⁰⁰. N.J.S.A. 34:11B-11. Complaints filed with the Division on Civil Rights are to be processed in the same manner as those filed under the Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, and N.J.A.C. 13:4. *See* N.J.A.C. 13:14-1.16. The proofs of a wrongful discharge claim under the FLA are the same as those applicable to claims under the LAD. *See DePalma v. Bldg. Inspection Underwriters*, 350 N.J. Super. 195, 213 (App. Div. 2002) (adopting the LAD's *McDonnell Douglas* framework for a wrongful discharge claim under the FLA). The elements of a claim for wrongful discharge under the FLA are (1) the plaintiff was employed by the defendant; (2) the plaintiff was performing satisfactorily; (3) a qualifying member of the plaintiff's family was seriously injured; (4) the plaintiff took or sought to take leave from his or her employment to care for an injured relative; and (5) the plaintiff suffered an adverse employment action as a result. *Id.* These elements are coextensive with those under the FMLA. *Id.* at 213-14; *see also Robbins v. U.S. Foodservice, Inc.*, 2012 WL 3781258, at *5 (D.N.J. Aug. 30, 2012) (noting that due to the similarity of the statutes, courts apply the same standards and framework to claims under both statutes); *Wolpert v. Abbott Labs.*, 2011 WL 4073508, at *12 (D.N.J. Sept. 12, 2011) (same); *Tamayo v. Deloitte & Touche, LLP*, Civ. No. 05-3364(WHW), 2007 WL 135975, at *9 (D.N.J. Jan. 16, 2007).

¹⁰¹. N.J.S.A. 34:11B-11. Claims brought under the FLA may be subject to an otherwise valid arbitration agreement. *See Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002) (finding that an arbitration agreement contained in an application for employment was enforceable as to plaintiff's FLA and LAD claims); *see also Hilinski v. Gordon Terminal Serv. Co. of N.J., Inc.*, 265 Fed. App'x 66 (3d Cir. 2008) (district court properly granted employer's motion for summary judgment dismissing unionized employee's claims under the FLA, LAD, and other federal and state law claims, holding that he had waived his right to a judicial forum in favor of arbitration in accordance with the applicable collective bargaining agreement governing his employment). In addition, the findings in a prior arbitration award may be given preclusive effect in a subsequent claim under the FLA. *Robbins v. U.S. Foodservice, Inc.*, 2012 WL 3781258, at *4 (D.N.J. Aug. 30, 2012) (finding that arbitrator's conclusion that plaintiff was terminated for "just cause" stopped plaintiff from relitigating the cause of her termination and foreclosed her retaliatory discharge claims under the

Punitive damages are also available, but they are capped at \$10,000 per person, except in class actions or complaints by the Director of the DCR, where they may not exceed the lesser of \$500,000 or 1 percent of the defendant's net worth.¹⁰² The prevailing party may also recover its reasonable attorney's fees as part of the assessment of costs, except that an employer may not be awarded attorney's fees unless the action was brought in bad faith.¹⁰³

FLA and FMLA as a matter of law).

However, both the Third Circuit and the United States District Court for the District of New Jersey have indicated that such agreements will be construed narrowly. *Nuzzi v. Aupaircare, Inc.*, 341 Fed. Appx. 850, 853 (3d Cir. 2009) (finding that arbitration clause stating that plaintiff agreed to arbitrate "any claims or disputes arising out of, or related to this Agreement" was insufficient to compel arbitration of employee's claims under the FLA or LAD); *Molloy v. Am. Gen. Life Cos.*, No. 05-4547(MLC), 2006 WL 2056848 (D.N.J. July 21, 2006) (denying employer's motion to dismiss or compel arbitration of a terminated employee's claims under a number of statutes, including the FLA, because the employer failed to show that employee affirmatively agreed to arbitrate her claims; the mere fact that the employer had informed the employee of its dispute resolution program, which provided for the arbitration of all disputes involving "legally protected" rights, and that the employee had thereafter continued her employment with the employer, was not sufficient to establish that she had affirmatively agreed to waive her right to seek judicial relief as to her FLA and other claims).

¹⁰² N.J.S.A. 34:11B-11. See *DePalma v. Bldg. Inspection Underwriters*, 350 N.J. Super. 195, 221 (App. Div. 2002) (holding that any punitive damages awarded in a Family Leave Act cause of action are limited by the \$10,000 cap set forth in that Act and that a claimant under the Act cannot avail himself of the higher limit available under the more general Punitive Damages Act). Among the relevant factors which must be considered by the Director of the DCR or the court in assessing punitive damages are (1) the compensatory damages awarded, (2) the amount of the civil penalty imposed, (3) the frequency of violation, (4) the number of persons affected by the violation, (5) the employer's resources and (6) the extent to which the violation was intentional. N.J.S.A. 34:11B-11. For a complete discussion of the remedies available under N.J.S.A. 10:5-17, see Chapter 4, § 4-54.

¹⁰³ N.J.S.A. 34A:11B-12. See *DePalma v. Bldg. Inspection Underwriters*, 350 N.J. Super. 195, 218 (App. Div. 2002) (noting the FLA affords prevailing parties reasonable attorney's fees "making it a 'fee-shifting' statute within the rule and subject to the holding of *Rendine v. Pantzer*, 141 N.J. 292 (1995).").

6-13 Table 1: Comparison of New Jersey Family Leave Act and Federal Family and Medical Leave Act¹⁰⁴

NEW JERSEY FAMILY LEAVE ACT (Citations are to Sections of the Main Volume of This Book)	FAMILY AND MEDICAL LEAVE ACT (Citations are to 29 U.S.C.)
<p>§ 6-2 Employers Subject to FLA</p> <p>As of May 4, 1993, all employers of 50 or more “employees” (individuals working 20 or more workweeks during the current or preceding year)</p> <p>Pursuant to Division on Civil Rights regulations, employees outside of New Jersey are included in this calculation.</p>	<p>§ 2611(4)(A)</p> <p>All employers who:</p> <p>(1) Are engaged in commerce; and</p> <p>(2) Employed 50 or more employees during each of the 20 or more workweeks during the current or preceding year.</p> <p>Included:</p> <ol style="list-style-type: none"> 1. Those who act for the employer 2. Successors of the employer 3. Public agencies

^{104.} The FMLA expressly saves state leave laws which provide greater family or medical leave rights than does the FMLA from pre-emption. 29 U.S.C. § 2651(b). As a result, employees are entitled to leave if the conditions under *either* the FMLA or FLA are met, subject to the requirements of whichever statute applies. If the leave qualifies under both FMLA and FLA, the leave used counts concurrently against the employee’s entitlement under each law. *See* 29 C.F.R. § 825.701; *cf.* N.J.A.C. § 4A:6-1.App. (chart created by state personnel office for its use regarding state employees, comparing FMLA and FLA for relative favorability to employees).

6-13 TABLE 1: COMPARISON OF NEW JERSEY FAMILY LEAVE ACT AND FEDERAL FAMILY AND MEDICAL LEAVE ACT

<p>§ 6-3 Employees Eligible</p> <p>Employed by a covered employer within the state for at least 12 months and for at least 1,000 base hours during the 12 month period immediately preceding leave.</p>	<p>§ 2611(2)</p> <p>Employed by the employer from whom leave is sought (1) for at least 12 months and (2) for at least 1,250 hours during the previous 12-month period.</p> <p>Excluded:</p> <p>Employees at worksites with fewer than 50 employees if the total number of employees of that employer within 75 miles is less than 50.</p>
<p>§ 6-4 Advance Notice of Leave Required</p> <p>Expected birth or adoption</p> <p>* “reasonable” and “practicable” notice (interpreted in DCR regulations as requiring 30 days except in emergencies)</p> <p>Serious health condition</p> <p>* 30 days</p> <p>Emergencies</p> <p>* “reasonable” and “practicable”</p>	<p>§ 2612(e)</p> <p>Expected birth or adoption</p> <p>* not less than 30 days, but if date of birth or placement requires leave to begin earlier, “practicable” notice</p> <p>Serious health condition of the employee or a family member (or a serious illness or injury sustained in the line of active duty in the Armed Forces by a covered service member), that is foreseeable based on planned medical treatment</p> <p>* not less than 30 days, but if date of treatment requires leave to begin earlier, “practicable” notice</p> <p>* employee required to make reasonable effort to schedule treatment so as not to disrupt unduly the employer’s operations, subject to approval of the health care provider</p> <p>In the case of a qualifying exigency arising out of the fact that the spouse, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation, “reasonable and practicable” notice.</p>

<p>§ 6-5 Certification</p> <p>Employee Certification</p> <p>Employees may be required to certify as to the reason for the leave</p> <p>Health Care Certification</p> <p>Employers may require certification from a duly licensed health care provider. If for a serious health condition, it should include:</p> <ol style="list-style-type: none"> 1. date the condition began 2. probable duration 3. medical facts regarding the condition <p>If for birth or adoption, only the expected date of birth or placement need be included.</p> <p>Second Opinion</p> <p>Employer may require second opinion at its own expense. If that conflicts with the original certification, a third and binding opinion may be obtained at employer cost.</p>	<p>§ 2613</p> <p>Health Care Certification</p> <p>Employers may require certification from the health care provider. It is sufficient if it includes the following:</p> <ol style="list-style-type: none"> 1. date the condition began 2. probable duration 3. medical facts regarding the condition 4. when leave is sought for caregiving, a statement that the employee is needed to give care and the amount of time for which he/she is needed 5. when leave is for the employee's health condition, a statement that the employee is unable to perform the function of his/her position 6. when leave is sought on an intermittent or reduced basis, a statement that the reduced schedule is necessary and its expected duration. <p>Second Opinion</p> <p>Employer may require second opinion at its own expense. If that conflicts with the original certification, a third and binding opinion may be obtained at employer cost.</p> <p>Leave Due to a Qualifying Exigency Arising Out of a Family Member's Active Duty Military Service</p> <p>Employer may require certification in support of such leave in a form prescribed by the U.S. Department of Labor.</p>
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6-13 TABLE 1: COMPARISON OF NEW JERSEY FAMILY LEAVE ACT AND FEDERAL FAMILY AND MEDICAL LEAVE ACT

<p>§ 6-5 Circumstances Warranting Leave</p> <p>Birth or adoption of child.</p> <p>Serious health condition of a child, parent, spouse, or partner in a civil union couple.</p> <p>[Note that under the state law, parent-in-law is included in the definition of parent.]</p>	<p>§ 2612(1)</p> <p>Birth of a son or daughter and to care for that son or daughter.</p> <p>Placement of son or daughter with the employee for adoption or foster care.</p> <p>Serious health condition of a spouse, son, daughter or parent for which employee will render care</p> <p>Serious illness or injury of the spouse, child, parent, or next of kin of a service member who has sustained a serious illness or injury in the line of active duty</p> <p>Serious health condition of employee which renders him unable to perform functions of his position.</p> <p>Any qualifying exigency arising out of the fact that the spouse, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.</p>
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<p>§ 6-6 Duration and Timing of Leave</p> <p>12 weeks in any 24-month period</p> <p>Leave for birth or adoption may begin at any time within one year of birth or placement.</p>	<p>§ 2612</p> <p>12 weeks during any 12-month period</p> <p>Up to 26 weeks of leave during a single 12-month period to care for a service member who is the employee's spouse, child, parent or next of kin, and has sustained a serious illness or injury incurred in the line of active duty; the single 12-month period is applied on a per-covered service member, per-injury basis.</p> <p>Leave to care for a covered service member, when combined with any other FMLA leave taken during a single 12-month period, will not exceed a combined total of 26 weeks.</p> <p>Entitlement to leave for birth or adoption expires after 12 months; i.e., it must be concluded in 12 months. 29 C.F.R. § 825.120(a)(2)</p>
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6-13 TABLE 1: COMPARISON OF NEW JERSEY FAMILY LEAVE ACT AND FEDERAL FAMILY AND MEDICAL LEAVE ACT

<p>§ 6-6:1 Intermittent Leave</p> <p>Intermittent leave is taken in intervals of at least one week but less than 12 weeks.</p> <p>Absent agreement between employer and employee, available only for serious medical conditions and only if:</p> <ul style="list-style-type: none"> * medically necessary * taken within a 12-month period for each health condition * employee gives “reasonable” and “practicable” notice * employee makes reasonable effort not to disrupt unduly the employer’s operations. 	<p>§ 2612(b)</p> <p>Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason. 29 C.F.R. § 825.202(a).</p> <ul style="list-style-type: none"> * Not available for healthy births or adoptions unless the employer agrees * Available where medically necessary for a serious health condition of a parent, son, or daughter, for the employee’s own serious health condition, or a serious injury or illness of a covered service member * Also available when necessary because of a qualifying exigency arising out of active duty military service * Should not result in a reduction of the total amount of leave available * Where medical need for intermittent leave is foreseeable, employee may be required to transfer temporarily into an alternative position
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<p>§ 6-6:2 Reduced Leave Schedule</p> <p>Reduced schedule leave permits the employee to work fewer hours per week, but not fewer hours per workday (unless employer and employee agree otherwise).</p> <ul style="list-style-type: none"> * Not available for healthy births or adoptions unless the employer agrees * Reduced leave schedule may not exceed 24 consecutive weeks * Only one reduced leave may be taken during any 24-month period 	<p>§ 2611(9); § 2612(b)</p> <p>Reduced leave under FMLA includes any leave schedule that reduces the usual number of hours per workweek, or hours per workday of an employee. 29 C.F.R. § 825.202(a).</p> <ul style="list-style-type: none"> * Not available for healthy births or adoptions unless the employer agrees * Available for serious medical conditions where medically necessary * Also available when necessary because of a qualifying exigency arising out of active duty military service * Should not result in a reduction of the total amount of leave available * Where medical need for reduced leave is foreseeable, employee may be required to transfer temporarily into an alternative position.
<p>§ 6-6:3 Payment During Leave</p> <p>Leave may be paid or unpaid.</p>	<p>§ 2612(c)</p> <p>Leave may be paid or unpaid.</p>
<p>§ 6-7 Continuation of Benefits During Leave</p> <p>Section 8 of the FLA requires the continuation of benefits during leave. It was found pre-empted by ERISA with respect to benefit plans subject to that statute.</p>	<p>§ 2614(c)</p> <p>Coverage under group health plans must be maintained. However, if the employer fails to return from leave, the cost of benefits must be repaid, unless the failure is due to circumstances beyond the employee's control, such as continued illness.</p>

6-13 TABLE 1: COMPARISON OF NEW JERSEY FAMILY LEAVE ACT AND FEDERAL FAMILY AND MEDICAL LEAVE ACT

<p>§ 6-8 Employment During Leave</p> <p>Full-time employment is prohibited.</p> <p>* DCR regulations state that certain part-time employment is permitted.</p>	<p>29 C.F.R. § 825.216(e)</p> <p>If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer that does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained.</p>
<p>§ 6-9 Reinstatement</p> <p>Upon return from family leave the employee normally must be reinstated to his or her former position or a position that is “comparable” in terms of pay, seniority, benefits, and other terms and conditions of employment.</p> <p>Reinstatement is not required when a reduction in force has occurred.</p>	<p>§ 2614(a); § 2614(b)</p> <p>Upon return from family leave, the employee normally must be reinstated to his former position or an “equivalent” position with equivalent employment benefits, pay, and other terms and conditions of employment.</p> <p>Reinstatement may be denied to certain highly paid employees if:</p> <ul style="list-style-type: none"> * necessary to prevent substantial and grievous economic injury to the employer’s operations; * the employer notifies the employee of its intent to deny restoration at the time it determines that such injury will occur; and * in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice. <p>Reinstatement is not required when the employee would have been laid off during the leave. 29 C.F.R. § 825.216(a).</p>

<p>§ 6-10 Grounds for Denial or Revocation of Leave</p> <p>Leave may be denied if:</p> <ul style="list-style-type: none"> * Employee refuses to certify reason for leave * Employee falsely certifies reason for leave * Employee is high level and essential <ul style="list-style-type: none"> --among highest paid 5% or one of 7 highest paid --denial of leave is necessary to prevent substantial and grievous economic injury to the employer's operations --employer must notify employee of its intent when the decision to deny leave is made 	<p>The FMLA does not restrict key employees' ability to take leave.</p>
<p>§ 6-12 Enforcement</p> <p>Penalties</p> <p>Up to \$2,000 for the first offense and up to \$5,000 for each subsequent offense.</p> <p>Damages in private actions:</p> <p>All equitable remedies and compensatory damages available under the LAD in proceeding in the DCR.</p> <p>Punitive Damages:</p> <p>Up to \$10,000 per person. In class actions or complaints by the Director of the Division on Civil Rights, up to the lesser of \$500,000 or 1 percent of the defendant's net worth.</p>	<p>§ 2617</p> <p>Damages equal to wages, salary, employment benefits, or other compensation denied or lost; or</p> <p>If no such losses have been sustained, any actual losses (such as the cost of providing care up to a sum equal to the employee's pay for 12 weeks)</p> <p>-plus-</p> <p>Interest</p> <p>-plus-</p> <p>Liquidated damages unless the employer proves it acted in good faith with a reasonable belief it was not violating the law</p> <p>-plus-</p> <p>Appropriate equitable relief.</p>

VI. NEW JERSEY PAID FAMILY LEAVE LAW

6-14 Summary and Scope

The New Jersey Paid Family Leave Law (“PFL”) was enacted into law on May 2, 2008, as part of New Jersey’s Temporary Disability Insurance Law.¹⁰⁵ This law allows employees to collect up to six weeks of benefits in order to compensate for wage loss because of the need for covered individuals to take leave to care for a family member with a serious health condition or care for or bond with a newborn or newly adopted child during the first 12 months after the child’s birth or placement with the covered individual for adoption.¹⁰⁶ Employers may cover their employees under the PFL under an approved private plan, the State Plan, or family leave insurance benefits during unemployment, if the period of leave begins more than 14 days after the last day of work.¹⁰⁷

The PFL applies to all employers subject to New Jersey unemployment compensation laws, regardless of size.¹⁰⁸ To be eligible for the PFL benefits, the employee must be “employed” as defined by the New Jersey unemployment compensation law, meaning he/she has worked at least 20 weeks in covered employment or earned at least 1,000 times the New Jersey minimum wage during the prior year (currently \$7.25 per hour).¹⁰⁹

Benefits became payable under the PFL on July 1, 2009.¹¹⁰ The weekly benefit rate is calculated as two-thirds of the employee’s weekly wage up to a maximum of \$524 per week which will be annually adjusted for inflation.¹¹¹ The program is funded by a payroll tax contributed to the State Disability Benefits Fund or from private plans established by employers and approved by the Department of Labor and Workforce Development.¹¹² For the 2009 calendar year, employees are taxed at .09%

^{105.} P.L. 2008, ch. 17 (codified at N.J.S.A. 43:21-26 *et seq.*). Regulations implementing the PFL are found at N.J.A.C. 12:21.

^{106.} N.J.S.A. 43:21-27(o), -38, -39.

^{107.} N.J.S.A. 43:21-32, -37; N.J.A.C. 12:21-1.6, -1.7.

^{108.} N.J.S.A. 43:21-27(a)(1).

^{109.} N.J.S.A. 43:21-27(b)(1); N.J.S.A. 43:21-4(e)(4). However, a covered individual who is employed by the State of New Jersey, including Rutgers, The State University or the New Jersey Institute of Technology, or by any governmental entity or instrumentality which elects to become a “covered employer” under the PFL, shall not be eligible to receive benefits until he/she has exhausted all available accumulated sick leave. N.J.S.A. 43:21-27(b)(1).

^{110.} N.J.S.A. 43:21-27(g)(2).

^{111.} N.J.S.A. 43:21-40; N.J.A.C. 12:15-1.2(b).

^{112.} N.J.S.A. 43:21-7; N.J.A.C. 12:15-1.1(b).

of wages annually up to an annual limit of \$28,900. In 2010, the percentage will increase to .12% of wages up to the \$28,900 annual limit.¹¹³

An eligible employee is entitled to receive benefits for the period in which he or she takes leave to care for a “family member” who has a “serious health condition” or to care for or bond with a newborn or newly adopted child.¹¹⁴ The law defines “family member” as a child, spouse, parent, domestic partner or civil union partner or any child of such partners, regardless of where, geographically, the family member is located.¹¹⁵ “Child” includes any biological, adopted, foster, step, legal ward or child of a domestic partner or civil union partner, under the age of 19 (or over 19 but only if he/she is incapable of self care because of mental or physical impairment).¹¹⁶ “Parent” means any biological, foster, adoptive, step-parent or legal guardian from the time the covered employee was a child.¹¹⁷ “Care” means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for change in care, assistance with essential daily living matters and personal attendant services.¹¹⁸ “Serious health condition” means any illness, injury, impairment or physical or mental condition which requires inpatient care in a hospital, hospice or residential medical facility or continuing medical treatment or supervision by a health care provider.¹¹⁹

6-15 Intersection with FLA and FMLA

Unlike the FLA and the Family and Medical Leave Act, the PFL does not provide any job protection nor does it require the employer to reinstate an employee that has taken the leave.¹²⁰ Moreover, the PFL benefits program does not confer upon employees any leave entitlement, but rather, establishes a monetary benefit for which employees may or may not file a claim.¹²¹ The PFL does not alter any leave entitlement under the FLA, the federal Family and Medical Leave Act, any other

^{113.} N.J.S.A. 43:21-7(d)(1)(G)(ii).

^{114.} N.J.S.A. 43:21-27(o); N.J.A.C. 12:21-1.2.

^{115.} N.J.S.A. 43:21-27(n); N.J.A.C. 12:21-1.2.

^{116.} N.J.S.A. 43:21-27(k); N.J.A.C. 12:21-1.2.

^{117.} N.J.S.A. 43:21-27(q); N.J.A.C. 12:21-1.2.

^{118.} N.J.A.C. 12:15-1.1A; N.J.A.C. 12:21-1.2.

^{119.} N.J.S.A. 43:21-27(s); N.J.A.C. 12:21-1.2.

^{120.} N.J.A.C. 12:21-1.1(c).

^{121.} N.J.A.C. 12:21-1.1(b), (c).

statutory leave program, a collective bargaining agreement or an individual employer policy.¹²²

6-16 Posting Requirements for Employers

Employers are required to post notices, in a place or places in the workplace accessible to all employees, and in a form prescribed by the New Jersey Department of Labor and Workforce Development, of each covered employee's rights regarding benefits payable under the PFL. Effective December 15, 2008, employers are required provide a written copy of the notification to (1) all existing employees, (2) all new hires subsequent to December 15, 2008, (3) any employee who notifies the employer that he/she is taking time off under the PFL, or (4) at any time, upon the first request of the employee.¹²⁴

6-17 Private Plan Requirements

A covered employer may elect to provide a private plan for the payment of PFL benefits in lieu of the benefits under the state plan.¹²⁵ If it does so, all employees of the employer must be covered by one or more private plans, without restrictions or exclusions, except that, subject to the approval of the Division of Temporary Disability Insurance of the Department of Labor and Workforce Development, a private plan may exclude employees of a separate unit, craft, organization, plant, department, or establishment, or other class or classes of employees.¹²⁶ The Division may not approve the exclusion of a class or classes of employees determined by the age, sex or race of the employees or by the wages paid such employees, if, in the opinion of the Division, such exclusion would result in a substantial selection of risk adverse to the state plan.¹²⁷ Employees excluded from a private plan shall be covered under the state plan and the employer shall be liable for the deduction and payment of employee contributions.¹²⁸

^{122.} N.J.S.A. 43:21-39.1(d); N.J.A.C. 12:21-1.1(e).

^{123.} N.J.S.A. 43:21-39.1(g); N.J.A.C. 12:21-1.8(a). A copy of the required notification poster may be obtained upon request by the employer to the Department of Labor and Workforce Development at the following address: Department of Labor and Workforce Development, Office of Constituent Relations, P.O. Box 110, Trenton, New Jersey 08625-0110. N.J.A.C. 12:21-1.8(d).

^{124.} N.J.S.A. 43:21-39.1(g); N.J.A.C. 12:21-1.8(b).

^{125.} N.J.S.A. 43:21-32; N.J.A.C. 12:21-2.1 to -2.34.

^{126.} N.J.A.C. 12:21-2.1(a).

^{127.} N.J.A.C. 12:21-2.1(a).

^{128.} N.J.A.C. 12:21-2.1(b).

All proposed private plans must be submitted for review and approval by the Division of Temporary Disability Insurance.¹²⁹ In order to secure approval, each private plan shall provide to its covered employees rights at least equal to those set forth under the state plan, including eligibility requirements that are no more restrictive and benefits no less favorable than those applicable under the state plan.¹³⁰

If employees are required to contribute to the cost of a private plan, a majority of the employees to be covered by the plan must agree by election to the establishment of the plan, and approval of a private plan shall be conditioned upon evidence that the employer has conducted the election and has obtained consent of the majority of covered employees.¹³¹

6-18 State Plan Requirements

Employees are eligible for benefits under the state plan after a one week waiting period.¹³² If the benefit payments extend for more than three weeks, then the benefits for the waiting period will be paid retroactively.¹³³ However, if the employee is on leave for a personal disability and then files a claim for PFL leave, there is no waiting period between the two.¹³⁴

An employee may not take more than six weeks of leave in any twelve-month period, or more than 42 days of leave taken during any 12-month period on an intermittent basis.¹³⁵ The twelve-month period is the 365 consecutive days that begin to run on the first day that the individual first establishes the claim.¹³⁶

An employer can require the employee to use up to two weeks of sick, vacation or other employer-provided paid leave before the new benefits are payable.¹³⁷ Any such leave days taken by the employee will reduce the PFL leave days for which the employee is eligible.¹³⁸ If the employer requires the individual to use the employer-provided leave at full pay,

¹²⁹ N.J.A.C. 12:21-2.1(c).

¹³⁰ N.J.A.C. 12:21-2.9(a). Covered employees' rights under the State Plan are discussed at § 6-18.

¹³¹ N.J.S.A. 43:21-33; N.J.A.C. 12:21-2.11, -2.12.

¹³² N.J.S.A. 43:21-39(a); N.J.A.C. 12:21-1.2, -3.4.

¹³³ N.J.S.A. 43:21-39(a); N.J.A.C. 12:21-1.2.

¹³⁴ N.J.S.A. 43:21-39(a)(3); N.J.A.C. 12:21-1.2.

¹³⁵ N.J.S.A. 43:21-39(b)(2), (b)(3).

¹³⁶ N.J.S.A. 43:21-27(t); N.J.A.C. 12:21-1.2.

¹³⁷ N.J.S.A. 43:21-39.1(c); N.J.A.C. 12:21-3.5.

¹³⁸ N.J.S.A. 43:21-39.1(c); N.J.A.C. 12:21-3.5.

then the employee can use any available paid leave time in the one-week waiting period.¹³⁹

When an employee takes leave to care for a family member with a serious health condition, the six week leave can be taken as a single continuous period or intermittently when medically necessary.¹⁴⁰ When an employee takes leave to care for a newborn or newly adopted child, the leave must be taken within twelve months of birth or adoption and may only be taken as one continuous period unless the employer agrees otherwise.¹⁴¹

If the employee takes leave to care for a family member with a serious health condition, the employee must submit a certification from the family member's health provider.¹⁴² When taking leave for the care of a sick family member, benefits can be paid for up to three weeks pending the submission of the certification.¹⁴³ A claim will not be denied by the state for failure to follow procedures if the state determines that the notice and certification is supplied as soon as reasonably possible.¹⁴⁴

In the case of continuous leave taken to care for a family member with a serious health condition, the employee must provide notice to the employer in a "reasonable and practical manner" unless there are any emergency or unforeseen circumstances.¹⁴⁵ The employee also shall make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer.¹⁴⁶

In the case of intermittent leave, the employee must provide at least fifteen (15) days notice to the employer unless the need for the leave is unforeseeable.¹⁴⁷ Again, the employee must make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer and, if possible, provide a regular schedule of when the leave will be taken.¹⁴⁸

When taking leave to care for or bond with a newborn or newly adopted child, the employee must provide thirty days notice to the employer prior

¹³⁹ N.J.S.A. 43:21-39.1(c).

¹⁴⁰ N.J.S.A. 43:21-39.2(a); N.J.A.C. 12:21-3.10.

¹⁴¹ N.J.S.A. 43:21-39.3(a); N.J.A.C. 12:21-3.10(a).

¹⁴² N.J.S.A. 43:21-39.2(b).

¹⁴³ N.J.S.A. 43:21-39.1(f).

¹⁴⁴ N.J.S.A. 43:21-39.1(f).

¹⁴⁵ N.J.S.A. 43:21-39.2(a); N.J.A.C. 12:21-3.7(c).

¹⁴⁶ N.J.S.A. 43:21-39.2(a).

¹⁴⁷ N.J.S.A. 43:21-39.2(a); N.J.A.C. 12:21-3.7(e).

¹⁴⁸ N.J.S.A. 43:21-39.2(a); N.J.A.C. 12:21-3.10(b)(3), (4).

to beginning the leave.¹⁴⁹ If the employee fails to provide sufficient notice, he/she will forgo two weeks of paid benefits.¹⁵⁰ This limitation is not applicable if the leave is unforeseeable or the time of the leave changes for unforeseeable reasons.¹⁵¹

6-19 Fraud Prevention and Penalties

No later than the ninth day after the leave begins, the employer must issue to the employee and the New Jersey Division of Temporary Disability Insurance printed notices on forms prescribed by the Division, containing the name, address, and Social Security number of the individual, and other wage information to allow the Division to determine the individual's eligibility for benefits.¹⁵² Moreover, within 10 days after the mailing of a request for information with respect to a period of family leave, an employer shall furnish the Division with any information requested or known to the employer that may bear on the employee's eligibility for benefits.¹⁵³

When an employee takes leave to care for a family member with a serious health condition, the Department of Labor and Workforce Development (if the employee is covered by the state plan) or the applicable private plan (if the employee is covered by such a plan) may request that the family member be examined by a health care provider designated by the Department or private plan, at its expense.¹⁵⁴ The examination cannot be more frequent than once a week and is required to be in a reasonable time and place.¹⁵⁵ If the family member refuses to cooperate with the Department's or the private plan's request for examination, the employee will be disqualified from benefits but not retroactively for any benefits already paid.¹⁵⁶

An employee taking family temporary disability leave or an employer from whom the employee is taking the leave shall have the right to challenge a determination of eligibility using the same procedures

¹⁴⁹ N.J.S.A. 43:21-39.3(b); N.J.A.C. 12:21-3.7(a).

¹⁵⁰ N.J.S.A. 43:21-39.3(b); N.J.A.C. 12:21-3.7(b).

¹⁵¹ N.J.S.A. 43:21-39.3(b); N.J.A.C. 12:21-3.7(b).

¹⁵² N.J.S.A. 43:21-39.1(f).

¹⁵³ N.J.A.C. 12:21-3.9(b). The failure of the employer to respond to a request for information within the prescribed time period may subject the employer to penalties provided under N.J.S.A. 43:21-55(b), N.J.A.C. 12:21-3.9(c).

¹⁵⁴ N.J.S.A. 43:21-39.2(c); N.J.A.C. 12:21-2.4, -3.1.

¹⁵⁵ N.J.S.A. 43:21-39.2(c); N.J.A.C. 12:21-2.4, -3.1.

¹⁵⁶ N.J.S.A. 43:21-39.2(c); N.J.A.C. 12:21-2.4, -3.1.

as those available to a challenge to a temporary disability insurance determination.¹⁵⁷

Any claimant, employer, or other person who makes a false statement in an effort to obtain or prevent the obtaining of benefits will be subject to a civil fine of \$250 per statement.¹⁵⁸ Willful violators will be subject to a civil fine of \$500 per false statement.¹⁵⁹ Violators with intent to defraud the Department of Labor and Workforce Development will be subject to a criminal fine of up to \$1,000 and imprisonment of up to 90 days, or both.¹⁶⁰

^{157.} N.J.S.A. 43:21-39.1(e); N.J.A.C. 12:21-2.6, -3.13, -3.14.

^{158.} N.J.S.A. 43:21-55(a), (b).

^{159.} N.J.S.A. 43:21-55(c).

^{160.} N.J.S.A. 43:21-55(d).