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NEW JERSEY PERSONNEL ADMINISTRATORS ASSOCIATION (PAA)

FAMILY LEAVE Highlights and Recent Developments

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I. OVERVIEW OF MAJOR PROVISIONS OF FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA) AND THE FAMILY LEAVE ACT (FLA)

(See accompanying chart)

FMLA : 29 U.S.C. 2601 et seq; 29 C.F.R. 825.100 et seq.

FLA: N.J.S.A. 34:11B-1 et. seq.; N.J.A.C. 13 :14-1.1 et. seq.

See also, **N.J. Civil Union Law**, effective 2/19/2007

N.J.S.A. 37:1-32: “The following list of legal benefits, protections and responsibilities of spouses shall apply in like manner to civil union couples, but shall not be construed to be an exclusive list of such benefits, protections and responsibilities.

(1.) family leave benefits pursuant to P.L.1989, c.261 (C.34:11B-1 et seq.)...”

II. AMENDMENTS TO FMLA UNDER NATIONAL DEFENSE AUTHORIZATION ACT, P.L.110-181 (Jan. 28, 2008)

A. Sec. 102 Par.(a)(3) leave: *An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.*

B. Sec. 102 Par.(a)(1)(E) leave: Provides 12 workweeks of leave during any 12-month period: *Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, 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.* This part of the law is not effective until Sec’y of Labor issues regulations defining “qualifying exigency.”

- (Supplements existing “Paragraph 1” statutory grounds for leave in [A-D] for birth, adoption or foster care, care of spouse, child, parent, or self because of serious health condition.)

C. Combined Leave total.—*During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.* (In other words, the 26 weeks’ leave is not in addition to 12, but rather, includes it.)

D. Definitions:

- “**Active duty**” means *duty under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.*
- “**Contingency operation**” means a *military operation that -*
 - (A) *is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military*

force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

- **“Covered servicemember”** means *a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.*
- **“Outpatient status”** means *the status of a member of the Armed Forces assigned to— (A) a military medical treatment facility as an outpatient; or (B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.*
- **“Next of kin”** means the nearest blood relative of that individual
- **“Serious injury or illness”** means, in case of member of Armed Forces, including National Guard or Reserves, injury or illness incurred in line of duty on active duty that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating.

E. Notice by employee

Foreseeable leave:

- Same as other leaves when for planned medical treatment: 30 days’ notice or as practicable; reasonable effort to schedule leave to not unduly disrupt operations, subject to approval of health care provider.
- When the necessity for leave for a qualifying exigency *under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on active duty, or because of notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide such notice to the employer as is reasonable and practicable*

Unforeseeable leave:

- As soon as practicable, usually within one or two working days.

F. Intermittent leave or leave on reduced schedule

- As with “serious health conditions,” intermittent or reduced leave may be taken for a “serious injury or illness (servicemember)” if medically necessary.
- May be taken for “qualifying exigency” if leave is foreseeable and if supported by a certification if employer requires one.
- Transfer of Employee to Alternative Position: As with intermittent/reduced leave taken for “serious health conditions,” when taken for “serious injury or illness (servicemember)” that is foreseeable based on planned medical

treatment, employer may require employee to transfer temporarily to an available alternative position for which the employee is qualified, that has equivalent pay and benefits; and better accommodates recurring periods of leave.

- **SPECIAL RULE FOR LOCAL EDUCATIONAL AGENCIES (LEA):** Where employee takes leave to care for a servicemember that is medically necessary leave, foreseeable based on planned medical treatment, and employee would be on leave for more than 20% of the total of working days during the period over which the leave would extend, LEA may require either:
 - Employee take leave of certain duration not to exceed the duration of the planned treatment; or
 - Employee transfer to an available alternative position for which he is qualified, has equivalent pay and benefits, that better accommodates recurring periods of leave.

G. Substitution of accrued paid leave—(similar to what exists now for 12 week leave) An eligible employee may elect, or an employer may require, the employee to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided for a “qualifying exigency” (Sec. 102 Par.(a)(1)(E)) for any part of the 12-week period of such leave under such subsection.

Caring for servicemember— An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave for any part of the 26-week period but employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

H. Limits on entitlements of husband and wife under same employer

1. Aggregate 26 weeks to care for servicemember; aggregate 26 weeks for combination of caring for servicemember and leave for birth/adoption/foster care, or sick parent.
2. Aggregate leave includes some that can’t be taken for more than 12 weeks in the aggregate; that limitation continues to apply.

I. Certification

1. “Serious injury or illness” -- employer may require certification of health care provider of sick/injured servicemember.
2. Must be provided in a “timely manner.”
3. Contents of health care provider certification: date condition began, probable duration, appropriate medical facts within the knowledge of the health care provider regarding the condition.
4. Intermittent leave or reduced schedule: for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

5. Doesn't appear to be ability for employer to require a second opinion as with other medical leaves.
6. The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.
7. Employer may require that a request for leave taken for "qualifying exigency" ***under section 102(a)(1)(E) "be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer"***
8. If employee is unable to return to work because of a condition specified in section 102(a)(3), the employer may require a certification issued by the health care provider of the servicemember being cared for by the employee. The employee shall provide, "in a timely manner," a copy of such certification to the employer stating that employee's failure to return is due to continuation, recurrence, or onset of the servicemember's illness or injury.
9. Employer may recover insurance premiums if employee fails to return to work after expiration of the leave entitlement and reason for failure to return is not due to continuation, recurrence, or onset of the servicemember's illness or injury (102(a)(3)), or because of other circumstances beyond employee's control. Employer may require certification from servicemember's health care provider to support reasons for employee's failure to return.

J. Employment Protections

1. Restoration to same or equivalent position with benefits, pay, and other terms and conditions—For LEA, to be made on basis of board policy, practice and collective bargaining agreements.
2. Nothing in FMLA entitles a restored employee to the accrual of any seniority or employment benefits during the leave, or any rights or benefits other than those to which employee would have been entitled, had the employee not taken leave
3. Restoration may be denied to salaried eligible highest paid 10%, if necessary to prevent substantial and grievous economic injury to employer's operations—employer must notify employee as soon as determines such injury would occur.
4. Health benefits: must be maintained under any "group health plan" at level and under same conditions as if employee had not taken leave.
 - Employer may recover premium if employee fails to return to work after expiration of the leave entitlement and the failure is due to continuation, recurrence or onset of serious health condition (incl. servicemember under 102(a)(3)), or because of other circumstances beyond employee's control. Employer may require health care provider's certification that shall be provided "in a timely manner."

5. Employer must post notice prepared by Secretary of DOL, in conspicuous places where notices customarily posted. Willful violations--\$100 fine.

6. Employer may not interfere with or restrain any rights, shall not discharge or otherwise discriminate against anyone for opposing unlawful employer practices, for filing charges or testifying.

K. Special Rules for “local educational agencies”

1. Intermittent/reduced leave (as described above).
2. Periods near the conclusion of an academic term:

A district may require that an employee employed principally in an instructional capacity take leave until end of term with health benefits maintained during the period of involuntary leave if:

- leave begins more than 5 weeks before term ends; leave lasts at least 3 weeks; teacher would return during last 3 weeks of term;*(appears to be for both 102(a)(3) leave and a(1)E leave?)*
- leave except for own illness begins during the 5-week period before term ends; leave lasts more than 2 weeks; teacher would return during last 2 weeks of term *(only for 102(a)(3) leave?)*
- leave except for own illness begins during the 3-week period before the term ends; leave will last more than 5-working days. *(only for 102(a)(3) leave?)*

L. Enforcement

1. Employee may file a complaint with the Department of Labor or file a private lawsuit in Federal or State court. Employer must keep records.
2. If the employer has violated an employee’s FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred (salary, benefits, other), equitable relief as appropriate such as cost of providing care, interest, attorneys’ fees, expert witness fees, and court costs. Liquidated damages also may be awarded of same amount.
3. Statute of limitations: 2 years after the last event constituting the violation; 3 years for willful violations.
4. SPECIAL RULE FOR LEA: No liquidated damages if LEA had reasonable grounds for its belief that it was following the law.

MISCELLANEOUS PROVISIONS NOT AMENDED by military amendments:

- a. [FEDERAL AND STATE ANTIDISCRIMINATION LAWS](#).--Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.
- b. [STATE AND LOCAL LAWS](#).--Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State

or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

- c. **MORE PROTECTIVE.**--Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
- d. **LESS PROTECTIVE.**--The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.
- e. Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

III. PROPOSED FMLA RULE AMENDMENTS—

Incorporate 15 years' experience with the law, to incorporate court rulings, comments received in response to DOL's request for information, and National Defense Authorization Act amendments to FMLA.

(See separate outline, **HIGHLIGHTS OF PROPOSED FMLA REGULATIONS**)

IV. STATE FAMILY TEMPORARY DISABILITY (FTD)(PAID LEAVE)

New Jersey is third state to adopt paid leave for family care-- California and Washington.

- A "covered employer" is any employer who contributes to unemployment compensation. Unlike FLA, covers employers with fewer than 50 employees.
- A "covered employee" is one who is "in employment" as per unemployment comp law, or has been out of employment for less than 2 weeks. Must have within 52 weeks preceding the start of paid family leave, **1)** worked 20 base weeks at minimum wage (20 x \$143/wk) or **2)** earned 1000 times the minimum wage = \$7200/year.
- **Duration of paid leave:** Six weeks, or 42 days on intermittent basis, of FTD for any one period of leave, and per any 12 month period.
- **Maximum total weekly benefits-** the same as under TDI. Currently, an employee may receive two-thirds of his or her weekly compensation up to \$524 per week for up to six weeks, during any 12-month period. (Average weekly benefit in the state estimated to be \$415 in 2009.) For intermittent leave, up to \$74.85 per day for up to 42 days, during any 12-month period. (7 days per week, not 5 as in FLA—and can take in units of 1 day rather than 1 week under FLA)

- Jan 09—employees begin to contribute; assessment per employee is approximately \$30-33. per year.
- July 09—employee entitlements begin.
- **Employer must provide information to Division of Temporary Disability Insurance:** By the 9th day of the leave the employer must send a notice to Division of TDI with information regarding employee’s personal and wage information on forms provided by the Division.
- **If employee is entitled to FLA or FMLA leave, employee must take paid FTD concurrently with these.**
- **Employee has no independent right of restoration to job under the FTD law.** However, the law does not increase, reduce or modify any entitlement of an employee to return to employment or any right to take action under the FMLA and the NJFLA.
- **Coverage is similar but not identical to FLA:** Despite frequent references to the FLA, the coverage of family leave benefits does not mirror all leave available under the FLA. (*e.g.*, parent-in-law; commencement of leave for birth/adoption). Note also that it covers employers with fewer than 50 employees. Also, FLA leave is based on workweeks; but FTD is based on weeks (so that the entitlement is for 6x7=42 days intermittent leave). Intermittent leave under FLA is in units of at least 1 week; FTD is in units of days.
 - FTD is to (1) **“provide care”(as per FLA) for “family member”** of employee made necessary by family member’s “serious health condition” (illness, injury, impairment, physical or mental condition, that requires inpatient care in hospital, hospice or residential medical care facility; or continuing medical treatment or continuing supervision by “health care provider” (as per FLA); or (2) **to be with child** during first 12 months of “child’s” birth if one parent or civil/domestic partner is biological parent; or 12 months after placement for adoption. **Does not include time person is on TDI for own disability.**

k) "Child" means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of the covered individual, or child of a civil union partner of the covered individual, who is less than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment.

(n) "Family member" means a child, spouse, domestic partner, civil union partner or "parent" (foster, adoptive, step, or legal guardian when a child) of a covered individual.

- **Collective bargaining implications:** *Nothing in ... (this bill) shall be construed as nullifying any provision of an existing collective bargaining agreement or employer policy, or preventing any new provision of a collective bargaining agreement or employer policy, which provides employees more generous leave or gives employees greater rights to select which kind of leave is used or select the order in which the different kinds of leave are used.*
- **Use of sick and other time:**
 - One week waiting period before benefits start to be paid—then the employee is entitled to 6 weeks FTD. There is no waiting period if paid FTD takes place immediately after TDI.
 - Employer may permit or require employee to use available sick (law specifically cites to the 18A sick leave statute), vacation or other paid leave at full pay, before receiving FTD benefits (and may count that to reduce the 6 week entitlement to pay). However, employer may not require employee use more than 2 weeks of leave at full pay. If employee is required to take paid leave for the full 2 weeks, the employer must allow one week's paid leave to be used during the one-week waiting period.
 - Once an employee completes the third week of leave (including the waiting period) then FTD benefits are payable for leave in the 1st week.
- **Alternative plan:** Employers may opt to provide their own paid family leave plan, so long as its benefits and cost to employees are equal to or more favorable than what the state provides.
- **Employee's obligations:**
 - Notice to employer:
For birth or adoption—30 days' notice.
For care of family member: Prior notice in reasonable and practicable manner, unless emergency or unforeseen circumstance precludes prior notice
 - Scheduling of leave: Employee must make a reasonable effort to schedule leave to not to unduly disrupt operations.
 - Provide medical certification to employer : same content as for FLA (date condition began; probable duration, medical facts known by health provider regarding condition) as well as statement that condition warrants the individual providing care; estimate of amount of time needed.
 - Intermittent leave: When medically necessary to care for family member with serious health condition; only with employer agreement for birth/placement. Prior notice of 15 days unless emergency; medical certification must also state medical necessity for intermittent leave and if for planned treatments, duration of

treatments; leave must take place within 12 months; must make reasonable effort to schedule so not to disrupt operations; prior to starting intermittent leave if possible provide employer with “regular schedule” on which leave will be taken. Submit claim to Division of Temporary Disability Insurance: The employee will be required to submit a claim for benefits within 30 days of the start of the leave. Employee must provide DOL upon request, a certification of family member’s health condition, duration, and other facts (when leave is for serious health condition of family member).

- **Posting of rights.** Employer must “conspicuously” post notification where accessible to all employees in a form to be issued in regulation. The employer must provide each employee a copy :
 - (1) within 30 days after the form is issued by regulation;
 - (2) at the time hiring;
 - (3) whenever the employee notifies the employer that the employee is taking time off for circumstances under which the employee is eligible for benefits pursuant to this section; and
 - (4) at any time upon the first request of the employee.
- Employee appeal process is same as for TD benefits law.
- False statements by employer to prevent or reduce the benefits to any person— \$250, \$500 fines, failure to pay fine results in civil action by DOL. Intent to defraud, proceeding in municipal or Superior Court for up to \$1000 and/or up to 90 days’ jail. Similar penalties for employees who make false statements or fail to disclose information.

